COURT MARTIAL

Citation: *R. v. Thornton*, 2022 CM 4017

Date: 20221124
Docket: 202201

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

His Majesty the King

- and –

Corporal N. Thornton, Accused

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

Restriction on Publication: By court order, pursuant to subsection 183.5(2) of the *National Defence Act*, directs that any information which could identify anyone described in these proceedings as a victim or witness shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

Introduction

[1] Corporal (Cpl) Nicholas Thornton is facing one charge under section 130 of the *National Defence Act (NDA)*, alleging that on 1 November 2020, at Canadian Forces Base (CFB) Meaford, Ontario, he did commit a sexual assault on A.L. contrary to section 271 of the *Criminal Code*.

Evidence

[2] The sexual assault is alleged to have occurred during the night of 31 October to 1 November 2020, following a party attended by the accused, A.L., and several other persons at CFB Meaford. The prosecution called four witnesses to prove its case. First, A.L., testified as to what she remembered from the evening and the night in question, as well as her actions and conversations the following day. L.E. was the second witness for the prosecution. She testified about her interactions with A.L., G.P. and Cpl Thornton during the evening, the night, and the following day, including her observations of A.L.'s level of consciousness and impairment by alcohol and/or drugs. G.P. also testified for the prosecution about his observations and interactions with both Cpl

Thornton and A.L. that evening. The final witness called for the prosecution was M.M. from the Ontario's Centre of Forensic Sciences who testified as an expert to share with the Court her conclusion relating to the analysis of the substance and DNA found on the underwear worn by A.L. in the evening and the night of the alleged assault and of whether the DNA found on the underwear matched the DNA of the accused.

[3] Documents were also received in evidence, including a picture and reports authored by M.M., as well as an exchange of text messages involving Cpl Thornton and L.E. Importantly, a document listing several facts agreed to by the parties, including a number of admissions by the accused, was entered as an exhibit at the outset of the proceedings.

[4] The defence did not call any evidence.

Facts

[5] The factual narrative of events can be summarized at this stage of my decision. I will come back to specific aspects of the evidence later in my analysis.

[6] The context for the alleged sexual assault is festivities which commenced between 6 and 7 p.m. on Halloween night, 31 October 2020, at CFB Meaford. A group of Canadian Armed Forces (CAF) colleagues who were known to each other for their employment as staff members on base decided to meet for drinks. A group of four to six persons first converged in the vicinity of the staff accommodation building or "shacks" consisting of interconnected pods equipped with a kitchen/lounge area and linked to adjoining rooms by corridors. The group initially included Cpl Thornton, his friend, L.E., who had commuted from nearby Owen Sound for the occasion, A.L., G.P. and one or two others. They first began drinking at the mess on base while socializing, some playing pool for about one hour. The group of colleagues then met at one of the pods, described as the "party pod" for more drinking and some food. The group grew gradually to reach about ten persons at its peak. Music was played and some danced.

[7] A.L. brought a bottle of tequila from her room to the nearby party pod which she made shots from, shared with her colleagues, as well as other drinks. She became increasingly intoxicated, and her level of impairment became noticeable to other attendees. At one point in the evening, A.L. left to get some fresh air. She came back to the party appearing quite dizzy after having consumed marihuana in the company of Cpl Thornton and G.P. She sat on a chair and was attended to by L.E., who shortly thereafter decided that A.L. was "done for the night" and should be taken to her room nearby. After a laborious transit due to the unsteadiness of A.L., up a few stairs through a corridor and down a few more stairs, L.E. and G.P. had some difficulties finding the key to unlock the door to A.L.'s room. A.L. informed L.E. of the location of her key which was eventually found in her wallet at the party pod. The door of the room was opened and A.L. was dragged in by L.E. who could not convince A.L. to get up on her bed. Instead A.L. apparently passed out on the floor of the room. A.L. was left there by L.E. between midnight and 12:30 a.m. L.E. then checked on her at around 1 a.m. and again between 2 and 2:30 a.m. On both occasions A.L. was still where she had been left, on the floor of her room, and in the same position.

[8] L.E. had previously arranged to sleep in A.L's room, in her room-mate's bed who had left the base in the course of the evening to spend the night at her boyfriend's place. L.E. decided to go to bed between 3 and 3:30 a.m. as the party was dwindling down. She proceeded to A.L.'s room, opened the door, only to hear Cpl Thornton asking her to wait, as he needed to get dressed. After a moment's hesitation, L.E. opened the door anyway. She saw Cpl Thornton pull up his pants from his knees. She also saw A.L., now on her bed, naked from the waist down. L.E. was distraught at what she saw. She asked Cpl Thornton to leave and wait for her outside as she needed to talk to him. She assessed that A.L. was still sleeping and placed a blanket on her. L.E. left the room and confronted Cpl Thornton outside regarding what she had just seen and how it looked. She was angry and could not recall verbatim what Cpl Thornton told her other than him mentioning that things got flirty between him and A.L. and that there had been consensual sexual activity between the two. L.E. went back to A.L.'s room, to bed, next to the bed where A.L. was still sleeping.

[9] A.L. testified that she has a memory of a dark figure who was hovering on top of her and whose arms touched her legs or thighs as she was lying on her back on her mattress. She could not describe the figure, did not see a face nor heard words or noises being emitted by the figure. She did not associate the figure with Cpl Thornton but testified that it looked bulky. In cross-examination, A.L. testified that she did not remember being touched by the dark figure, although she had stated to police a few days after the events that she did not feel any other touching of her body other than the mattress under herself as she was lying down, legs slightly opened. She also agreed with a previous statement to police to the effect that when she saw the dark figure, she was not sure if she was awake. She stated in cross-examination that she did not know if the dark, bulky figure was a dream or if it was real.

[10] What A.L. remembers clearly however, is waking up at about 4 a.m. with her underwear and pants lowered below her knees, which was a surprise to her. While still in bed, she raised her body and lifted her underwear and pants in place before getting out of bed and heading to the bathroom. While urinating, she said she felt a stinging sensation which she interpreted as meaning she may have been having sex. She also saw a dry, white stain on her thigh which she thought could be semen. She went to the party pod where she recovered the boots she had been wearing the previous evening. She proceeded back to her room and went back to sleep. As both occupants of the room were starting to wake up a few hours later, L.E. told A.L. what she had witnessed upon returning to the room between 3 and 3:30 a.m. and that it looked like A.L. had "hooked up" with Cpl Thornton. This was very disturbing for A.L. as she did not remember having sex with anyone.

[11] Later that day, A.L. confronted Cpl Thornton as he was smoking outside. She said to him "we need to talk" and asked, "what happened last night?" Cpl Thornton responded that he did not remember as he was "pretty drunk". A.L. told him that L.E. said that they were "hooking up". He replied that he did not remember any of that. She then asked if he had "pulled out" as she was not on birth control. Cpl Thornton replied that he must have because it was his practice since having had "a scare" when he was

seventeen years old. G.P. also saw Cpl Thornton the next day, after Cpl Thornton had been told he had assaulted A.L. Cpl Thornton told G.P. that he did not remember the events. Later in the week, L.E. communicated with a person she knew from the military police and A.L. formulated the complaint that led to the charge in this case.

[12] A.L. provided the underwear she wore that night to the investigators. Following analysis by staff under the supervision of M.M. at the Centre for Forensic Sciences in Toronto, semen was detected on the front of the underwear and a DNA profile could be extracted. A DNA warrant was obtained and the DNA from the semen on the underwear was confirmed as matching the DNA of Cpl Thornton. M.M. explained that semen was not necessarily deposited directly on the underwear but could have been on another surface which came in subsequent contact with the underwear.

Position of the parties

[13] The elements of identity, date and place of the alleged offence have been admitted. The defence also admits that the underwear eventually provided to and analyzed by the Centre for Forensic Sciences were those worn by A.L. the night of the events.

[14] The prosecution submits that it has adduced sufficient evidence to allow the Court to infer that Cpl Thornton sexually assaulted A.L. as she lied asleep, hence unconscious, by penetrating her and eventually ejaculating in or on her or both as he was pulling out, shortly before L.E. entered the room to surprise him as A.L. was still asleep. It is argued that the assault may also have occurred when A.L. was partially conscious as it is argued that the evidence is sufficient to infer that the dark figure A.L. observed was indeed Cpl Thornton having intercourse with her while she was incapacitated and could not understand that she had a choice to participate in the activity or not.

[15] The defence contests two elements of the *actus reus* of the offence of sexual assault. First, although the defence concedes, on the basis of the conclusions of the forensic analysis of the semen found on A.L.'s underwear, that a sexual act involving ejaculation by the accused occurred in A.L.'s room, it submits that it has not been proven beyond a reasonable doubt that A.L. was touched during that act. Second, even if the Court was to find that touching occurred, the defence submits that the evidence heard is insufficient to allow the Court to infer that A.L. did not consent to the touching either because she was unconscious or incapacitated at the time of the touching.

[16] The prosecution alleges that the *mens rea* of the offence was proven by the intentional nature of the application of force by the accused, knowing that A.L. had not affirmatively communicated her voluntary agreement or being reckless or wilfully blind in this regard, notably given that Cpl Thornton knew or should have known of A.L.'s unconsciousness or incapacity to consent or was reckless in that regard. The defence replies that the knowledge by the accused of A.L.'s impairment, allegedly incompatible with a capacity to consent, dated back to shortly before midnight. Given that he could not have been in her room for another two hours, A.L. may have woken up and may have become sufficiently sober to consent to sexual activity, even if she did not

remember it the next day. It is understood that this argument generates the same effect as the argument relating to the proof beyond reasonable doubt of the absence of consent at the *actus reus* stage: the defence submits that the evidence is insufficient to allow the court to infer that the touching by Cpl Thornton occurred at the same time as the unconsciousness or incapacity of A.L.

Analysis

What is at issue?

[17] Based on the evidence and the submissions of counsel, I conclude that I need to rule on two issues associated with two elements of the *actus reus* of the offence of sexual assault. I need to decide whether the prosecution has met its burden of presenting evidence which convinces me, beyond reasonable doubt, first, that Cpl Thornton voluntarily applied force, meaning even a touch, to A.L., directly or indirectly and, second, that A.L. did not, in fact, consent to the touching in her own mind, an element which relates to the mental state of A.L. and the absence of consent.

[18] If I am convinced beyond a reasonable doubt that the prosecution has met its burden to prove these two elements, I can arrive at the conclusion that the *mens rea* has also been proven and find the accused guilty of the offence of sexual assault.

[19] I note that the third element of the *actus reus* has been essentially admitted given the submission of the defence to the effect that, in light of the results of the analysis of the underwear worn by A.L. on the night in question, it has been proven that Cpl Thornton ejaculated on or near the underwear, hence that any touching occurred in circumstances of a sexual nature.

[20] It is apparent from counsel's submissions that the evidence does not include any direct observation nor admission going to the issue of what exact interaction of a sexual nature occurred between Cpl Thornton and A.L. in her room in the early hours of 1 November 2020 and in what state of capacity or consciousness A.L. was at that specific time. Therefore, in order to make a determination on what is at issue in this case, the Court needs to rely on circumstantial evidence and draw inferences, keeping in mind the applicable burden and standard of proof to arrive at a conclusion about the guilt of the accused.

[21] Consequently, I believe it would be useful to discuss notions of proof beyond reasonable doubt and how it impacts the inferences that can be drawn from circumstantial evidence. This will allow the proper framework to be set for the analysis of the positions of the parties, in light of the evidence or absence of evidence, before concluding on whether the prosecution has proven the guilt of the accused beyond reasonable doubt.

Proof beyond reasonable doubt and circumstantial evidence

[22] Before going any further, I wish to state that there should be no doubt that A.L. has every right to be concerned about what she was told happened to her, in light of her

consumption of alcohol and marihuana the previous night, the fact that she does not remember the sexual activity which occurred and, most importantly, that she does not remember consenting to it. A.L. testified courageously that she was concerned, confused, scared and nervous the next day. It is perfectly understandable. Prosecution witnesses, especially L.E., were also shaken by events. As L.E. implied, this did not look good. I agree with that assessment. However, something that does not look good does not mean that someone is guilty of a crime. The State cannot punish for crimes, including depriving someone of their liberty, on the basis of a situation which does not look good. It can only do so, if warranted, following a declaration of guilt by an independent and impartial tribunal in the course of a trial.

[23] This is the process that has been followed here. A criminal trial is not an inquiry designed to determine all that happened the night of the incident. It is a process which must follow a number of rules both governing the procedure to be followed and the possible substantive outcomes.

[24] One important rule is the presumption of innocence, to the effect that an accused person is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden of proof beyond reasonable doubt rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent. In this case, defence counsel declined to present a defence and consequently Cpl Thornton did not testify. The defence submits in argument that the prosecution has failed to prove its case beyond reasonable doubt, an entirely legitimate position to take in our system of justice where an accused cannot be forced to testify and submit himself to questions as to what he remembers exactly of the events alleged in the charge.

[25] This trial then is simply about whether the prosecution has been able to prove the offence charged beyond a reasonable doubt, nothing more, but nothing less.

[26] In this case though, as explained above, the proof of two elements of the offence depends solely or largely on circumstantial evidence. It is therefore helpful for me to review the rules applicable to the nature of circumstantial evidence and the relationship between proof by circumstantial evidence and the requirement of proof beyond reasonable doubt.

[27] A key case explaining the law to be applied in these situations is the decision of the Supreme Court of Canada in *R. v. Villaroman*, 2016 SCC 33, where Cromwell J., for a unanimous bench, explains and clarifies several issues regarding the treatment of circumstantial evidence where the guilt of an accused must be proven beyond a reasonable doubt. The first explanation is particularly applicable to this case, and it concerns the philosophical underpinnings of the jury instructions concerning circumstantial evidence, elaborated in England in the *Hodge's Case* (1838), 2 Lewin 227, 168 E.R. 1136. At paragraph 26, Cromwell J. explains:

> There is a special concern inherent in the inferential reasoning from circumstantial evidence. The concern is that the jury may

> unconsciously "fill in the blanks" or bridge gaps in the evidence to support the inference that the Crown invites it to draw.

What triers of fact must prevent against in circumstantial cases therefore is the danger of jumping to unwarranted conclusions.

[28] When the concern about circumstantial evidence is understood in this way, one can see the relationship between the proper use of circumstantial evidence and the requirement for proof beyond reasonable doubt. Indeed, reasonable doubt is a state of mind—the degree of persuasion that entitles and requires triers of fact to find an accused guilty—how sure they must be of guilt in order to convict. The law on the meaning of "beyond a reasonable doubt" was set by the Supreme Court of Canada in *R. v. Lifchus* [1997] 3 S.C.R. 320. At paragraph 36 the Court explains that a reasonable doubt is a doubt based on "reason and common sense"; it is not "imaginary or frivolous"; "it does not involve proof to an absolute certainty"; and "it is logically connected to the evidence or absence of evidence". The law on the proper use of circumstantial evidence, in contrast, alerts triers of fact to the dangers of the path of reasoning involved in drawing inferences from circumstantial evidence. The inferences that may be drawn must be considered in light of all of the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense.

[29] At paragraphs 35 and 36 of *Villaroman*, Cromwell J. confirms that in assessing circumstantial evidence, inferences consistent with innocence do not have to arise from proven facts. A reasonable doubt, or theory alternative to guilt, is not rendered speculative by the mere fact that it arises from a lack of evidence. Indeed, "a reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence": (*Lifchus* paragraph 30) [My emphasis.] A certain gap in the evidence may result in inferences other than guilt. But those inferences must be reasonable given the evidence and the absence of evidence. If there are reasonable inferences other than guilt, the prosecution's evidence does not meet the standard of proof beyond a reasonable doubt.

[30] When assessing circumstantial evidence, triers of fact should consider other reasonable possibilities which are inconsistent with guilt. The prosecution thus may need to negate these reasonable possibilities, but certainly does not need to negate every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused. Other reasonable possibilities must be based on logic and experience applied to the evidence or the absence of evidence, not on speculation.

[31] As recognized by Cromwell J. at paragraph 38 of *Villaroman*:

> [T]he line between a "plausible theory" and "speculations" is not always easy to draw. [The test] is whether the circumstantial evidence, viewed logically and in light of human experience, is reasonably capable of supporting an inference other than that the accused is guilty.

Quoting from an Alberta Court of Appeal case in *R. v. Dipnarine*, 2014 ABCA 328, Cromwell J. opines that "the trier of fact should not act on alternative interpretations of

the circumstances that it considers to be unreasonable"; and that alternative inferences must be reasonable, not just possible."

[32] It is with these important principles in mind that I must engage in the analysis of the evidence considering the inferences that I am requested to make.

First issue: has the voluntary application of force been proven beyond a reasonable doubt?

[33] The first issue to be resolved is whether Cpl Thornton ever touched A.L. in her room in the early hours of 1 November 2020. The defence concedes that sexual activity took place in that room, as evidenced by semen found on A.L.'s underwear, with DNA matching the accused. In the same breath, the defence argues that the exact nature of the sexual activity has not been determined. It argues that even if the sexual activity included ejaculation by Cpl Thornton, it could well be that Cpl Thornton ejaculated on the mattress or on the floor of the room some distance from A.L. and that his semen subsequently got in contact with A.L.'s underwear, the location of which being the subject of discrepancies in the evidence. Indeed, L.E. testified in chief that A.L. was naked from the waist down on the bed and that she did not see A.L.'s pants nor underwear anywhere. In cross-examination, she acknowledged telling police a few days after the events that she saw A.L.'s pants and underwear on the floor near the end of the bed. However, at the time of her cross-examination she could no longer recall seeing that. This contrasted with A.L.'s testimony to the effect that she had to pull her pants and underwear up from below her knees when she wanted to leave her bed at approximately 4 a.m.

[34] Based on the testimony of M.M. on the transfer of a substance such as semen from one surface to another, the defence submits that I can be left with a reasonable doubt on the essential element of voluntary application of force or touching. The defence argues that it has raised alternative explanations for the presence of semen on A.L.'s underwear which do not involve Cpl Thornton ejaculating on A.L. or on the clothing she was wearing. These include mutual or solo masturbation by Cpl Thornton at some distance from A.L. with ejaculation not intended to or not resulting in contact with her or the clothes she was wearing. As these alternative explanations find support in the evidence or absence of evidence, the defence argues that the Court can find that they support reasonable inferences incompatible with guilt on the essential element of voluntary application of force or touching.

[35] For its part, the prosecution argues that the most likely sexual activity which occurred between A.L. and Cpl Thornton is vaginal penetration with withdrawal at the moment of ejaculation, resulting in semen landing on A.L.'s body and/or underwear or partial ejaculation inside and outside of A.L.'s vagina resulting in semen depositing on her underwear both by direct contact and/or by gravity subsequently.

[36] With respect, I agree with the defence that it is difficult for me to conclude beyond reasonable doubt that vaginal penetration occurred. I am not persuaded by the evidence which the prosecution suggests points to an inference of penetration. More specifically, the stinging sensation while urinating, without more detail or medical

evidence, is unconvincing. The location of the semen as evidenced by the picture of the underwear is incompatible with internal ejaculation which is further rendered improbable by the negative result of the vaginal swab, albeit in due consideration of the fact that the swab was taken several days after the alleged assault. The prosecution also submits that the memory of A.L. about a dark figure is compatible with vaginal intercourse where Cpl Thornton would be on top of his victim. However, the evidence of A.L. is inconclusive about whether the dark figure touched, let alone penetrated her. Her description of a dark, bulky figure is also incompatible with Cpl Thornton's build: he was not wearing bulky clothes nor a costume that evening and night. Most importantly, A.L. stated that she is not certain if the dark figure is real or a dream. In these circumstances it is difficult to rely on the evidence of the dark figure and I will not.

[37] Even if I do not need to be convinced by each piece of evidence assessed individually, it remains that the sum of the evidence which the prosecution submits supports an inference that Cpl Thornton engaged in vaginal intercourse with A.L. is insufficient for that purpose, especially given the standard of proof beyond reasonable doubt that I must apply in a criminal trial.

[38] That being said, I do not need to be convinced beyond reasonable doubt that penetration occurred before I can find that the element of touching has been met.

[39] The evidence of A.L. indicates that when she checked herself in the bathroom mirror shortly after getting up at approximately 4 a.m., she saw a white stain which looked like semen on her thigh. The semen could *possibly* have gotten on her thigh by transfer from the floor or mattress to her underwear and then to her thigh. However, how likely is this?

[40] The main evidentiary source for the defence's alternative explanation on the presence of semen which does not result from touching is L.E.'s testimony to the effect that first, A.L. was naked from the waist down and second, she did not see underwear anywhere including around A.L.'s knees, with the acknowledgement that she told police a few days after the events that the underwear was on the floor. However, in light of the three different versions given by L.E. on the issue of the location of A.L.'s underwear and pants, (chronologically: "on the floor" to police, "did not see them" in examination-in-chief and "now I don't remember" in cross-examination) the most logical way to deal with that evidence is to dismiss L.E.'s testimony on that issue as unreliable. A.L. is in a much better position to accurately recall where her underwear was when she woke up at approximately 4 a.m. She testified convincingly to the effect that she was surprised to realize her underwear and pants were at her knees and explained how she lifted her body to slide them back to their proper place before proceeding out of her bed to the bathroom. A.L. is credible and reliable and I believe her. That is the evidence I accept.

[41] Having accepted that evidence, I conclude that when Cpl Thornton ejaculated, he directed his semen either directly on A.L.'s skin, to her thigh or directly on the underwear she had then just below her knees, constituting the clothing she was wearing. Either way, this act constitutes a direct or indirect voluntary application of force to A.L.

[42] This conclusion conforms to what Cpl Thornton stated in answering a question from A.L. the next day, generally about whether she should be concerned about being pregnant. Cpl Thornton said words to the effect that it is in his practice of pulling out before ejaculating so that he does not have the kind of scare he had when he was seventeen.

[43] I find that this element of the offence, the touching, has been proven beyond reasonable doubt. I wish to specify that I have reached this conclusion without giving any weight to the decision of *R. v. Campbell*, 2003 CanLII 2340, submitted by the prosecution, as this is a *certiorari* application to quash a committal to stand trial, where the "beyond a reasonable doubt" standard of proof does not apply.

[44] In reaching this conclusion, I am finding that the alternative explanations proposed by the defence for the presence of semen on A.L.'s underwear which would not involve touching are, although possible, so unlikely as to be unreasonable.

[45] I conclude therefore that the prosecution has met its burden of presenting evidence which convinces me, beyond reasonable doubt, that Cpl Thornton voluntarily applied force to A.L. I now need to move to the second issue.

Second issue: has non-consent to the touching been proven beyond a reasonable doubt?

[46] Consent is concerned with the subjective state of mind of A.L. at the time of the sexual activity with Cpl Thornton. However, A.L. has no memory of the sexual activity in question. This is not unusual in cases when persons consume intoxicants such as alcohol or drugs. It is worth mentioning that a person who chooses to consume is just as worthy of the protection of the law than a person who is sober.

[47] Cpl Thornton was also intoxicated and claimed in conversations with A.L., L.E. and G.P. the next day that he did not remember what had happened the previous night. However, L.E. testified that when she confronted Cpl Thornton during the one-sided conversation immediately after she had surprised him in A.L.'s room, he admitted that he did engage in consensual sexual activity with A.L.

[48] In the absence of direct evidence from A.L. to the effect that she did not consent, I must rely on circumstantial evidence to determine the absence of consent, an essential element that the prosecution must prove beyond reasonable doubt. It is worth restating that in assessing the circumstantial evidence, I must apply the legal presumption that Cpl Thornton is presumed innocent of the accusation that he faces.

[49] As subjective consent requires A.L. to formulate a conscious agreement in her own mind to engage in the sexual activity in question, it follows that A.L. must be capable of forming such an agreement. The broad issue of capacity to consent has been the object of much evidence at trial, especially as it pertains to evidence of indicia of intoxication or perceived impairment of A.L., by virtue of her consumption of alcohol and drugs. That evidence was elicited by the prosecution, along with evidence that A.L.

was asleep or unresponsive, hence unconscious at times during the evening and the night. It is self-evident that a person who is unconscious or insensate lacks the capacity to enter into a voluntary agreement to engage in sexual activity. The *Criminal Code* now makes that clear in subsection 273.1(2) which lists non-limiting circumstances in which no consent is obtained, including being unconscious or otherwise incapable of consenting to sexual activity for any reason.

[50] The Supreme Court of Canada has discussed the issue of incapacity to consent to sexual activity in the case of *R. v. G.F.*, 2021 SCC 20. Justice Karakatsanis, for five other justices on this issue, wrote that incapacity deprives a complainant or victim of the ability to formulate a voluntary agreement to the sexual activity in question, preventing subjective consent. Justice Karakatsanis authoritatively sets out the test for capacity to consent to sexual activity, limiting it to the capacity to understand the physical act itself, its sexual nature, the identity of one's partner, and that one can choose whether or not to engage in it. All four factors need to be understood. If the prosecution proves the absence of any single factor beyond a reasonable doubt, then the absence of consent is established. In *G.F.*, Karakatsanis J. rejected an argument that the complainant's claim of incapacity was belied by her thorough recollection of the sexual activity. Whether the complainant has a memory of events or not does not answer the incapacity question one way or another. The question is not whether the complainant remembered the assault, retained her motor skills, or was able to walk or talk. The question is whether the complainant understood the sexual activity in question and that she could refuse to participate.

[51] In replying to the prosecution's arguments relating to the application of these factors to the circumstances of this case, the defence conceded that the Court heard evidence suggestive of either unconsciousness or incapacity due to intoxication on the part of A.L. at times during the evening and the night. However, the defence argues that what matters is whether unconsciousness or incapacity was proven at the material time i.e., when sexual activity would have occurred. The main argument of the defence on consent therefore is that although A.L. appeared intoxicated and unconscious at specific times during the evening and night, the evidence of intoxication or unconsciousness at the relevant time of sexual activity is insufficient to ground a finding to the effect that A.L. was unable to consent.

[52] It is true that the inferences that the prosecution asks the Court to make are based on time. The prosecution refers to evidence pointing to non-capacity to consent to sexual activity at time A and asks me to infer that non-capacity would have continued until time B, the likely time of sexual activity. I am similarly asked to infer that A.L. was unconscious at time X and at time Z, hence that she would have been unconscious at time Y, the time of sexual activity. I agree with the defence's argument to the effect that timings are fundamental to the conclusion I need to make on the strength of the circumstantial evidence and the inferences stemming from it, as well as the reasonable character of any alternate explanation provided by the defence.

[53] Consequently, I will review some important timings on the evidence:

(a) A.L. consumed alcohol at the mess and at the party, including shots from a 26-ounce bottle of tequila she brings and shares with others. At one point in the evening, probably after 10 p.m., she appears to G.P. as being intoxicated.

(b) At one point she goes outside for some fresh air, sees Cpl Thornton and G.P. smoke marihuana from a bong and decides to try, inhaling one puff prepared for her. She then comes back to the party, stumbling in the pod in a visibly impaired state between 11 and 11:30 p.m.

(c) A.L. is attended to by L.E. who provides water that A.L. is unwilling to swallow, playing difficult as a joke, while being still responsive. A short time later, L.E. decides that A.L. is "done for the night" and obtains assistance to carry her to her room, up some stairs then down a corridor to more stairs coming down. As L.E. obtains help from G.P., A.L. falls down the five or six steps leading to a corridor near her room. She is then taken to the door in front of her room, but it is locked. L.E. asks A.L. where her key is. A.L. answers, not without difficulties, and L.E. proceeds back to the party pod where she finds the key in one of the three places A.L. has indicated it could be found. At about midnight, A.L. is taken to her room. She is dragged in and is not helping herself, appearing to be sleeping. L.E. cannot convince A.L. to get on her bed and, not confident she could get her up there, decides to leave her face down on the floor with the light on.

(d) L.E. goes back to the room to check on A.L. for a first time, at approximately 1 a.m. A.L. is at the same place and in the same position as she had previously been left, apparently still sleeping. L.E. leaves to get back to the party where she socializes with others, including Cpl Thornton.

(e) Between 2 and 2:30 a.m., L.E. comes back to the room to check on A.L. for a second time. A.L. is still in the same position as she was left approximately two hours earlier, apparently still sleeping. L.E. leaves to go back to the party. However, this time Cpl Thornton is not around. L.E. goes to look for him, hoping to get a cigarette. She cannot find him, so she goes back to the party where a rap off is taking place, a fun, memorable activity. Eventually, L.E. decides it is time to go to bed. She heads up to A.L.'s room between 3 and 3:30 a.m. She has not seen Cpl Thornton for one to one and a half hours at that time, but this is about to change as when she cracks opens the door to the room, she hears Cpl Thornton ask her to wait so he can get dressed. After a moment's hesitation, L.E. opens the door anyway. She sees Cpl Thornton pull up his pants from his knees. She also sees A.L., now on her back on her bed, exposed from the waist down, apparently still sleeping. L.E. places a blanket on A.L. before leaving the room.

(f) At approximately 4 a.m., A.L. wakes up, pulls her pants and underwear up from her knees and goes to the bathroom. Afterwards, she goes to the party pod where she recovers the boots she had been wearing the previous evening. She proceeds back to her room and goes back to sleep.

[54] A few important points can be taken from these facts and timings. First, the latest observation of A.L.'s level of intoxication or perceived impairment which could support a conclusion about her capacity to consent to sexual activity while conscious is at around midnight when she provides information about the location of her room key. Second, A.L. falls unconscious after being dragged to the floor near her bed just after midnight or at the latest 00:30 a.m. She is then observed sleeping at the same place and in the same position at approximately 1 a.m. and between 2 and 2:30 a.m. respectively. Third, when L.E. enters A.L.'s room between 3 and 3:30 a.m. the sexual activity is over. Cpl Thornton has ejaculated some time earlier and is trying to pull his pants up while A.L. fails to wake up and is apparently sleeping, but this time on her back on her bed. Fourth, at approximately 4 a.m., A.L. wakes up, pulls her pants up, goes to the bathroom to urinate and checks herself in the mirror. She then proceeds to the party pod where she retrieves some of her belongings, her boots, before going back to sleep in her room.

[55] Based on the evidence, I conclude that the window for the sexual activity to have occurred is between sometime after 2 a.m. and some time between 3 and 3:30 a.m. The sexual activity would therefore have occurred between one and a half to two and half hours after the last observation of A.L. in a conscious but allegedly incapacitated state, incapable of consenting to sexual activity according to the prosecution. A.L. would have been sleeping for a significant period of that period as she was left on the floor of her room between midnight and 12:30 a.m. then observed in the same position at around 1:00 a.m. and again between 2 and 2:30 a.m.

[56] That period supports an inference that the defence is asking me to make, namely that during that time, A.L. may well have slept off the effects, both of the alcohol but especially of the drug which she consumed in small quantity, although it appears to have had the strongest effect on her, increasing significantly her perceived level of impairment as witnessed by L.E. and G.P. It is well known that the effects of alcohol and drugs wear off over time. A.L. was last observed being incoherent at midnight or shortly thereafter.

[57] Even at that time, the evidence does not point to an obvious lack of capacity to consent to sexual activity. A.L. was able to perceive the questions asked by L.E. as to the need to provide information on the location of her room key. She provided that information in sufficient details to allow the key to be found, in the middle pocket of her wallet, left somewhere in the party pod. That level of communication reveals that A.L. was not insensate at around midnight. She displayed a level cognitive capacity to understand what was asked of her, think of places where her key could be and provide options to L.E., one of which turning out to be accurate. This raises some doubts about her capacity to consent to sexual activity at the time. I am not convinced on the evidence that A.L. possessed the capacity which would allow her to appreciate the

nature and quality of a physical act, its sexual nature, the identity of her partner, and that she can choose whether or not to engage in it. However, that is not the test: the prosecution must prove the absence of any single factor beyond a reasonable doubt to establish non consent. Any doubt in that regard must benefit the accused.

[58] In any event, I do not have to rule on the capacity of A.L. to consent to sexual activity at around midnight. The issue is A.L.'s capacity to consent at the time the actual sexual activity would have occurred, one and half hours to two and a half hours later. At that time, after much sleep, I cannot infer that A.L. would have been in the same state of intoxication or impairment in the absence of any evidence to that effect or to the effect that further consumption of intoxicants occurred. As stated earlier, the evidence does not point to an obvious lack of capacity to consent at around midnight. Given that sexual activity would have taken place much later, at a time where no evidence relating to the cognitive abilities of A.L. is available, it is impossible to conclude beyond a reasonable doubt that A.L. was incapable of consenting at that later time.

[59] There remains the issue of consciousness. The prosecution asks me to infer that the sexual activity would have been taking place immediately before L.E. entered A.L.'s room. If that is the case and in light of the evidence that A.L. did not wake up even after the entry of L.E. in her room and the words she exchanged with Cpl Thornton, I am asked to infer that A.L. would have remained in a state of sleep or unconsciousness from around midnight to the time she testified waking up at around 4 a.m., when she went to the bathroom.

[60] The circumstances which support the inference suggested by the prosecution as it pertains to the timing of the sexual activity being just before the arrival of L.E. in the room include the fact that Cpl Thornton had no pants on and was awake when L.E. opened the door as well as A.L.'s memory of a dark figure over her and then of something warm being placed on her, suggesting that the first memory is of Cpl Thornton hovering over her during intercourse and the second is the result of L.E. placing a blanket to cover her, both of these events having occurred in close temporal proximity.

[61] With respect, I cannot make these inferences as they do not match the evidence. First, as explained previously, the dark figure's stature does not correspond to the physical stature of Cpl Thornton and may have been a dream as per A.L.'s testimony. Second, A.L. stated that the warmth on her was her next memory after the dark figure but she was never asked nor did she imply that one event occurred immediately after the other. Finally, the fact that Cpl Thornton may have been without pants as L.E. entered the room is just as compatible with the possibility that he may have fallen asleep after the sexual activity had taken place hence was still sleeping when L.E. opened the room's door, an inference that is furthermore supported by other evidence as I will explain in a moment. Consequently, I am unable to infer as suggested by the prosecution that the sexual activity occurred immediately before the entry of L.E. into the room.

[62] The fact that sexual activity may have occurred earlier than the moment when L.E. entered into the room makes the inference of continuous sleep more difficult to accept. Indeed, the prosecution invites me to infer that given A.L. was sleeping at 2 a.m. and again sleeping between 3 and 3:30 a.m., after L.E. had entered her room, she must have been sleeping, hence been unconscious, throughout the intervening period, during which the sexual activity would have occurred. A.L. was therefore incapable of forming a conscious agreement in her own mind to engage in the sexual activity in question.

[63] The difficulty with the requested inference is that it is contrary to the evidence supporting a strong inference that A.L. was awake at some point in the intervening period. The following facts are revealing in that regard:

(a) First and foremost is the fact that between 2 and 3 to 3:30 a.m. A.L. was no longer face down on the floor but rather on her back on the mattress of the bed. L.E. explained in her testimony why she chose to leave A.L. on the floor of the room when her encouragement for A.L. to get on the bed fell on deaf ears. I can certainly appreciate that L.E. had no other choice than to leave A.L. on the floor as it would have been very difficult to get her on the bed, even if L.E., as a member of the military police providing physical security on base is trained in handling personnel who may not be collaborating. It is impossible for me to picture a person of the size of Cpl Thornton being able to place A.L. on her bed without A.L. helping herself. For that, she must have been conscious.

(b) Second, I am concerned by the fact that A.L. admitted that the makeup she had applied to her face prior to the party was gone and that she had observed that a towel was on her bed when she woke up at about 4 a.m. This suggests that not only did she move from the floor to her bed but also that she may have been doing something else compatible with a conscious awaken state in the interval.

[64] The prosecution points to the fact that A.L. did not move when L.E. entered her room between 3 and 3:30 a.m. and discussed briefly with Cpl Thornton, if only to ask him to leave and wait for her outside. This is in contrast to Cpl Thornton who, if he was sleeping, woke up very quickly indeed. It is suggested that this fact reveals both that A.L. was in a continuous state of sleep and that Cpl Thornton was not sleeping and had very recently been engaging in sexual activity before the arrival of L.E. into the room.

[65] As for the first of these inferences, at the risk of running into conjecture, I believe it is established that A.L. was likely more intoxicated than Cpl Thornton when she went to bed, hence may have been sleeping more deeply, as she slept for many hours after first getting to her room. That does not mean she was incapable of waking up: she was up thirty to sixty minutes approximately after L.E. entered her room, to use the bathroom and recover effects from the party pod at approximately 4 a.m.

[66] As for the second inference, I do not accept that Cpl Thornton was wide awake when L.E. came into the room. Indeed, the door was opened in two steps, allowing Cpl

Thornton to wake up before grabbing his pants and being seen with pants at knee level when L.E. walked in the room after a moment's hesitation. Also, the presence of sheets on the floor reveals that Cpl Thornton may well have been sleeping when surprised by the arrival of L.E. in the room.

[67] Finally, it is hard to reconcile the theory of sexual activity immediately before the door was opened with the evidence heard to the effect that no noise was heard by L.E. as she approached the room between 3 and 3:30 a.m., despite the fact that noise is easily heard around these rooms. This gives credence to the inference that Cpl Thornton may well have been sleeping, hence silent post-sexual activity when L.E. approached the room. This inference is much more likely than the inference of active sexual activity, especially penetration, which would have been ongoing immediately before L.E. entered the room as the prosecution suggests.

[68] It is also difficult for me to imagine why, if Cpl Thornton had the intent suggested by the prosecution, he would bother carrying an unconscious A.L. to her bed before assaulting her. This could have been much more readily with A.L. remaining on the floor.

[69] The defence has suggested an alternative narrative which is arguably inconsistent with guilt to explain what has occurred. The defence suggests that Cpl Thornton went in the room to check on A.L. after 2 a.m., that she was awake or woke up, that a discussion ensued leading to flirting and consensual sexual activity between the two. That once finished the two fell asleep on the bed naked from the waist down under a set of sheets until L.E. came in, at which point the sheets were thrown onto the floor by Cpl Thornton, as he needed to get up quickly and cover himself as L.E. entered.

[70] The defence presents its narrative as a reasonable possibility. I agree. The alternative narrative presented by defence is supported by the circumstantial evidence. Viewed logically and in light of human experience, it is reasonably capable of supporting an inference other than that the accused is guilty. This does not mean that I agree and find that A.L. consented to the sexual activity in question. It simply means that the defence has been able to present an alternative explanation that is reasonable and incompatible with guilt. That is all that the law requires to entitle the accused to the benefit of the doubt.

[71] I am obliged to conclude, therefore, that the prosecution has failed to meet its burden of presenting evidence which convinces me, beyond reasonable doubt that A.L. did not consent to the sexual touching.

Conclusion

[72] I am left in doubt about whether A.L. consented to the touching of a sexual nature applied to her by Cpl Thornton, specifically as it pertains to her level of consciousness and capacity to consent. As a result of these doubts, I am unable to conclude that the prosecution has discharged its burden of proving the offence beyond reasonable doubt. Consequently, it is my duty to acquit.

FOR THESE REASONS, THE COURT:

[73] **FINDS** Cpl Thornton not guilty of charge 1.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J. Besner and Major L. Langlois

Major F. Ferguson, Defence Counsel Services, Counsel for Cpl N. Thornton