COURT MARTIAL

Citation: *R. v. Christmas*, 2025 CM 7006

Date: 20250619
Docket: 202424

Standing Court Martial

Victoria Park Armouries
Sydney, Nova Scotia, Canada

Between:

His Majesty the King

- and -

Corporal K.L. Christmas

Before: Colonel S.S. Strickey, M.J.

Restriction on publication: Pursuant to paragraph 183.5(1)(b) of the *National Defence Act*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as "A.H.", shall not be published in any document or broadcast or transmitted in any way.

FINDING

(Orally)

Overview of the case

[1] Corporal (Cpl) Kendra Christmas is charged with three offences: one charge contrary to section 130 of the *National Defence Act* (*NDA*), that is to say, sexual assault, contrary to section 271 of the *Criminal Code*; one charge contrary to section 93 of the *NDA*, behaved in a disgraceful manner; and, third, one charge contrary to section 97 of the *NDA*, drunkenness. The particulars of the charges read as follows:

"FIRST CHARGE Section 130 of the *National Defence Act*	**AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*** Particulars: In that she, on or about 17 March 2019, at the Truro Armouries, Truro, Nova Scotia, did commit sexual assault on A.H.
SECOND CHARGE Section 93 of the *National Defence Act*	**BEHAVED IN A DISGRACEFUL MANNER** Particulars: In that she, on or about 17 March 2019, at the Truro Armouries, Truro, Nova Scotia, did touch the genitals of A.H. without his consent
THIRD CHARGE Section 97 of the *National Defence Act*	**DRUNKENNESS** Particulars: In that she, on or about 17 March 2019, at the Truro Armouries, Truro, Nova Scotia, was drunk."

[2] This is a case where the stories of the complainant and accused diverge significantly. The complainant, A.H., is a reservist. On 17 March 2019, he was attending a Heavy Machine Gun (HMG) course in Truro, Nova Scotia at the Truro Armouries. On the course, candidates were assigned two rooms on the second floor of Building 2 for sleeping: the larger platoon classroom, where A.H. was sleeping, and a smaller section classroom.

[3] During the early morning hours of 17 March 2019, A.H. stated that he was awoken in his cot by a female with long blonde hair on top of him who was licking and kissing his face. A.H did not know this person. The person asked A.H. "for a vape". A.H. stated that he wiggled out of his sleeping bag and tried to identify the person, who eventually mumbled, "Kendra".

[4] Given the person's apparent drunken state, A.H. believed the person to be on the HMG course and determined their sleeping quarters was the smaller section classroom. A.H. attempted to guide her into the section classroom. In assisting the person to the section classroom, the complainant stated that she pushed him against a wall and touched his genitals. The complainant then stated that he immediately slapped away her hand and shoved her into the section classroom. The complainant then went back to the platoon classroom. Upon discovering what he believed to be the shoes of the person, A.H. then went back to the section classroom where, he was met by a fellow candidate

then Private (Pte) Ashford. A.H. testified that he and Pte Ashford went into the section classroom where he found the person sleeping in Pte Ashford's cot. He then advised Pte Ashford to sleep in the mess downstairs. The complainant then went back to his cot. According to his evidence, all of this transpired between approximately 0300 to 0500 hours in the morning of 17 March 2019.

[5] The accused testified that she also was a candidate on the HMG course. She admits to drinking with other candidates on the Saturday evening (16 March 2019) at the Engine Room, a bar located in Truro, Nova Scotia. She testified that she drank four beers and then consumed what she believed to be an alcoholic drink with whisky in it; known as a "whisky sour" during the evening in question. At that point, she has no recollection of anything taking place until the time she woke up the following morning. In the early morning hours of Tuesday 19 March 2019, she discovered numerous bruises on her body.

[6] At trial, there were three witnesses who testified for the prosecution: the complainant A.H.; Sailor 1st Class (S1), (then Master Corporal) (MCpl) Matthews; Master Warrant Officer (MWO) Samson; and S1 (then Pte) Ashford. Two witnesses testified for the defence: the accused, Cpl Christmas; and an expert witness, Dr Marco Sivilotti.

[7] Additional evidence entered at trial included a series of photos of bruising (Exhibit 3) and Dr Sivilotti's expert report (Exhibit 4). Pursuant to Military Rules of Evidence (MRE) 15 and 16, at the request of the defence, I took judicial notice of three documents: N.S. Reg. 365/2007 (Liquor Licensing Regulations); N.S. Reg. 62/2006 (Order in Council 2006-197 dated 24 April 2006); and a National Research Council of Canada webpage for the sunrise/sunset for Truro, Nova Scotia on 16 March 2019.

Position of the parties

Defence

[8] The defence theory of the case has three aspects. First, the defence states that on the evening of 16 March 2019, Cpl Christmas attended the Engine Room and was drugged with a sedative hypnotic such as Gamma-Hydroxybutyric Acid (GHB) without her knowledge; therefore, she did not have the required *mens rea* for the offences charged as she relies upon the defence of involuntary intoxication.

[9] The defence contends that the testimony of Dr Sivilotti supports the defence of involuntary intoxication in contrasting the effects of alcohol and other sedative hypnotics such as GHB. Importantly, when the expert witness was asked to calculate the blood alcohol level (BAC) of the accused based on her testimony, she would have had to drink a significant amount of alcohol to reach the level of amnesia she reported.

[10] Second, the defence contends that the prosecution has not proven Cpl Christmas' identity beyond a reasonable doubt. Cpl Christmas and A.H. were unknown

to each other. The alleged incident took place in the middle of the night, where the lighting was poor. The complainant wore glasses. The complainant could only identify the person as "someone with blonde hair" and "blue eyes". There were other women on the course, one of whom had blonde hair. Cpl Christmas has green eyes. The accused was told that Cpl Christmas was the accused, but the complainant did not positively identify her.

[11] Third, the defence submits that the prosecution has not proven beyond a reasonable doubt, the elements of the three charges, based on the evidence presented. The defence questions the credibility of the complainant as there are numerous inconsistencies with his testimony. In addition, the other witnesses called by the prosecution did not serve to support the testimony of the complainant and had little utility to the prosecution's case. Finally, while the accused mentioned other Canadian Armed Forces (CAF) members were witnesses to certain events, the prosecution failed to call those witnesses.

Prosecution

[12] The prosecution contends this is a straightforward case; during the early morning hours of 17 March 2019, the complainant was awoken in his sleeping bag by the accused. The accused was lying on top of him and had licked or kissed him. She was clearly intoxicated. The complainant then moved away from the accused and attempted to assist her to the section classroom. The accused needed assistance to walk as she was intoxicated. When travelling to the section classroom, the accused became belligerent and frustrated with the complainant. Just prior to entering the section classroom, the accused pushed the complainant against the wall and, in a cupping motion, touched the genitals of the complainant. The complainant was sleeping during the initial kissing and/or licking incident; therefore, he could not consent. The complainant also did not consent to the accused cupping or touching his genitals. The prosecution contends that the evidence clearly amounts to sexual assault, disgraceful conduct and drunkenness.

[13] The prosecution further submits that there is no merit to the two issues put forth by the defence. In relation to the defence of involuntary intoxication, the testimony of the accused is not credible. While she testified that she only had four beers and one "whisky sour", her memory is extremely poor regarding any other details surrounding the events at the Engine Room up to the point where she states she cannot remember anything. In addition, the testimony of the expert witness has limited weight as he was provided various scenarios by the defence; none of which was proven in evidence.

[14] As for the issue with identity, the prosecution states that the identity of Cpl Christmas was proven beyond a reasonable doubt. During the incident, the complainant had ample time to observe the accused given the prolonged interaction. In addition, the accused provided her first name "Kendra" to A.H. when he was trying to identify her. Further, Pte Ashford identified the accused sleeping in his cot in the section classroom; MCpl Matthews identified the accused at the Engine Room; and MWO Samson

identified the accused as a member on the HMG course and interacted with her later in the morning of 17 March 2019.

Issues to be resolved

[15] Along with the burden on the prosecution to prove all the elements of the three charges beyond a reasonable doubt, there are three issues in this case. First, defence counsel has put forth a defence of involuntary intoxication in that the "whisky sour" drink was spiked with a drug causing, among other things, amnesia. Therefore, the defence contends, the accused did not have the required intent, *mens rea*, to commit the offences charged.

[16] Second, the defence further submits there is reasonable doubt that the accused was the person in question, and the prosecution has not proven the accused's identity beyond a reasonable doubt for the three charges.

[17] Finally, the third issue turns on the credibility and reliability of the witnesses. Regarding the first charge, I must determine whether the prosecution has proven beyond a reasonable doubt that the accused committed a sexual assault on A.H. For the second charge, I must decide if the prosecution has proven beyond a reasonable doubt that the accused touched the genitals of A.H. without his consent. Finally, I must decide if the prosecution has proven beyond a reasonable doubt the elements of the drunkenness charge.

[18] The Court must therefore decide whether the prosecution has proven beyond a reasonable doubt all of the elements of each charge, including the identity of the accused as the person who committed the offence. In doing so, I must assess the credibility and reliability of the witnesses. Should I find that the prosecution proved beyond a reasonable doubt that Cpl Christmas committed the offence(s), I must decide if I accept the defence of involuntary intoxication.

Matters not in issue

[19] During closing arguments, defence counsel conceded that the time, date and location of the charges have been made out beyond a reasonable doubt.

Evidence put forth in this court martial

Prosecution witnesses

Testimony of the complainant

[20] In his examination-in-chief, A.H. testified he is a member of the Nova Scotia Highlanders (1 NSH(N)). At the date of the incident in question, he was seventeen years old. On Friday 15 March 2019, he arrived at the Truro Armouries (armouries) in Truro,

Nova Scotia to attend the HMG course. There was a course brief, and then A.H. went to bed. The next morning, Saturday 16 March 2019, was the beginning of the course.

[21] A.H. stated that the candidates on the course had the option of either going back to their residence at the end of the day or sleeping at the armouries. There were two locations in Building 2 of the armouries available to set up sleeping arrangements: the platoon classroom and the section classroom. Both these classrooms were located on the second floor of Building 2. The platoon classroom housed most of the candidates who chose to sleep at the armouries; approximately twelve people. The section classroom housed the "overflow"; approximately four to five people. A.H. stated that the distance between the platoon classroom and section classroom is approximately ten paces. The sleeping arrangements were mixed male and female. Candidates slept on cots provided by the CAF; and they were instructed to bring their own sleeping kit such as sleeping bags.

[22] A.H. testified he was sleeping in the larger platoon classroom that housed "at least" a dozen people. In the morning, the cots were disassembled or "torn down". The candidates did not necessarily sleep in the same place every night but generally slept in the same room.

[23] A.H. stated that on the evening of Saturday16 March 2019, he went to sleep at approximately 2300 hours. There were several other candidates that were "going out" to celebrate St. Patrick's Day. A.H. did not join his classmates as he was only seventeen years old at the time and could not legally attend any drinking establishments. He did not consume any alcohol or other substances that evening.

[24] At approximately 0300 hours on Sunday 17 March 2019, A.H. testified that he was woken up by someone "licking his face" when he was in his sleeping bag. He was "not conscious yet" and thought he may have drooled on himself. He wiped his face and "hit somebody". That shook him awake. He noticed a classmate, Cpl Murphy, and yelled to him.

[25] A.H. was "pinned in his sleeping bag" and trying to wiggle out of it while someone was on top of him. He noticed his face was wet with saliva. The person asked A.H. about a vape and tried to kiss him.

[26] The room was not lit particularly well. He testified that he could see long blonde hair. He did not know the person on top of him. He asked for her name and while she was not very coherent, she stated her name was "Kendra". He described that she had a "drunken stutter". Her breath smelled of rubbing alcohol.

[27] A.H. stated that he woke up Cpl Murphy. A.H. eventually got out of his sleeping bag. The person then "passed out" in A.H.'s cot. Although A.H had no idea who this person was at the time (as he stated that it could have been a person in the military or a civilian who wandered into the armouries), he eventually concluded that the person was on the HMG course as there was a "blonde haired member" on the course. Based on this

assumption, he then decided to move “Kendra”, who was passed out on his cot, to the “section” classroom.

[28] A.H. testified that he attempted to “baby carry” the person off the cot. At that moment, the person woke up. A.H. then sat the person up on the cot. The person required assistance. A.H. then tried to further identify the person and asked what her name was and “where they are supposed to be”. According to A.H., she did not reply, only a “mumble”.

[29] A.H. once again got the person up off the cot, but she required assistance. He testified that he wanted to get the person out of the room as he wanted to go back to bed. He guided the person down the hallway. A.H. testified that the person did not want to go back to the section classroom. He continued to guide her down the hallway but she was getting aggravated stating “you are pissing me off” and “fuck you”. At this point, A.H. was getting aggravated.

[30] A.H. then told the Court that he was “lightly” pinned against the wall with the person’s left hand while her right hand was grasping his genitals. More specifically, he stated the person pushed his left shoulder against the wall and “pinned” him against the wall. A.H. did not “fight back” because they were drunk. This is when the person grabbed him with her right hand “in a cupping motion underneath”. A.H. then stated, at that moment, he defended himself and got “a little more aggressive” and swatted at their hand and pushed the person into the section classroom and closed the door.

[31] A.H. then went back to his cot in the platoon classroom. There he found what he believed were the person’s running shoes. He grabbed them and went to the section classroom; before he arrived, he was met by Pte Ashford who advised A.H. that Cpl Christmas was in his cot. A.H. testified this is the point when he found out that “Kendra” was Cpl Christmas. A.H. and Pte Ashford went back into the section classroom where they found Cpl Christmas “passed out,” “with no pants on” in Pte Ashford’s cot. A.H. then told Pte Ashford to “grab his kit and sleep downstairs in the mess”.

[32] A.H. witnessed Pte Ashford grab his sleeping gear. After he covered Cpl Christmas with a ranger blanket, he left the section classroom and returned to the platoon classroom to go to bed.

[33] The following day, A.H. stated that MCpl Hamilton, a course candidate but higher in rank than A.H. and Cpl Christmas, brought these members from the drill hall into the hallway where Cpl Christmas apologized and gave A.H. a “hug”. A.H. stated that he was uncomfortable with the situation as MCpl Hamilton was a member of the course but was superior in rank to him. Cpl Christmas stated that she “forgot everything” and “did not know what they did the night before”.

[34] A.H. testified that he did not consent to the actual or attempted kissing/licking of his face nor touching of his genitals.

[35] In cross-examination, defence counsel challenged the complainant on the identity of the accused on various issues including: that he did not know the accused at the time of the incident; and possible eyesight challenges and the lack of light in the room. Defence counsel also queried the complainant on various inconsistencies related to his testimony and the statements given to the chain of command in March 2019 with the statement given to the Canadian Forces National Investigation Service (CFNIS) in May 2019. The complainant was also asked if the alleged touching or "cupping" outside of the section classroom was a result of the fact the accused was drunk and accidentally touched his genitals.

Testimony of S1 (Pte) Ashford

[36] At the time of the alleged incident, S1 Ashford was a Pte in 1 NSH(N). He attended the HMG course. He testified that he knew Cpl Christmas from the course. Pte Ashford's sleeping arrangements were in the section classroom with approximately six to eight people. He stated that Cpl Redding was next to him and Cpl Christmas was also located there.

[37] In the early morning hours of 17 March 2019, Pte Ashford testified that he was awoken by Cpl Christmas who asked him for a vape. The accused seemed confused. He stated that he could see it was Cpl Christmas as "she's on course with me" and identified her in the courtroom.

[38] Pte Ashford stated that A.H. came into the room. At this point, Cpl Christmas began undressing and got into Pte Ashford's cot. Pte Ashford grabbed his sleeping bag as he thought it was best that Cpl Christmas get to sleep given her apparent intoxication. He stated that it was his idea to go to the mess to sleep.

[39] On cross-examination, defence counsel challenged Pte Ashford on, among other things, when A.H. entered the section classroom and his observations in the interaction the following day between A.H. and Cpl Christmas.

Testimony of S1 (MCpl) Matthews

[40] S1 Matthews (then MCpl) was a member of 2nd Battalion, The Nova Scotia Highlanders (2 NS Highrs) (now the Cape Breton Highlanders (CB Highrs)) in 2019. He knew Cpl Christmas as their units served together. He knew her from "years and years ago". He was also on the HMG course.

[41] MCpl Matthews testified that he attended the Engine Room on 16 March 2019. He travelled there from the Truro Armouries, a trip lasting about ten minutes on foot. He arrived at the Engine Room at approximately 2100 to 2200 hours and stayed approximately two to three hours. He spent most of the time in an area around the pool tables. MCpl Matthews stated that he had "no more" than four "Keith's" beers as he had to be "in control" as his girlfriend was there and he had to "look after her".

[42] MCpl Matthews recalls seeing Cpl Christmas at the Engine Room. He could not give an accurate time when she arrived. He stated that "she was hanging out with all of us . . . I don't remember what she had to drink but I remember she was drinking". He also testified that she was "intoxicated like the rest of us" and talking and moving around the bar. He opined that "you could tell that she was not sober". MCpl Matthews recalls that Cpl Christmas was also around the pool tables. He left the Engine Room at 0100 hours the morning of 17 March 2019. He believes that Cpl Christmas was at the Engine Room when he left.

[43] On cross-examination, defence counsel queried MCpl Matthews if he had any concerns for Cpl Christmas at the Engine Room given his rank of MCpl at the time.

Testimony of MWO Samson

[44] MWO Samson was posted to the 1 NSH(N) in 2019 and was the course warrant officer for the HMG course. He recalled at least two, possibly three, women on the course. He recalled that Cpl Christmas had long hair and another candidate, Cpl Harrison, was tall with brown hair.

[45] MWO Samson testified that once candidates were dismissed for the day, they "are on their own time" and free to go and to do "what they felt like doing". He recalls giving a briefing to the candidates on alcohol consumption and that they "cannot get intoxicated" because of weapons training the next morning. He recalls briefing the candidates on Friday 15 March 2019, and to his knowledge, no candidates were absent during the briefing.

[46] On Sunday morning 17 March 2019, at approximately 0700 to 0730 hours, he was getting the troops prepared for training. He was advised that Cpl Christmas remained in her sleeping quarters. He went to see her and, in his view, "could tell that she had a few drinks the night before" and "had a tough time getting ready". He testified that she had red eyes and seemed confused and moving slowly, "not understanding the urgency of the situation." MWO Samson testified that he could smell alcohol on her breath when she was talking to him about 1 meter away.

[47] On cross-examination, defence counsel questioned MWO Samson as to when and how he was advised of the alleged incident and if he had any safety concerns for Cpl Christmas undergoing training that day.

Defence witnesses

Testimony of the accused

[48] In examination-in-chief, Cpl Christmas testified that during the time in question, she was a heavy drinker; consuming approximately twelve to twenty-four drinks (mostly beer) on the weekends and throughout the week.

[49] She attended the HMG course in March 2019. She stated that the course was comprised of a majority of 1 NSH(N) along with a group from her unit, the CB Highrs. The CB Highrs group travelled to Truro in a van. She does not recall who was in the van with her.

[50] She recalls two other women on the course; a "Richards" who has blonde hair and "pale" skin and "Harrison" who had darker hair (black) and "fair" skin. She testified that there were two rooms where the candidates were sleeping and that her sleeping area was in the smaller section classroom. She recalls that on the second evening of the course, 16 March 2019, they were authorized to leave the armouries.

[51] She recalls the purpose of going out that evening was to celebrate St. Patrick's Day. She testified that she remembers going to the bathroom, straightening her hair, and getting dressed to go out. Her intention was to consume alcohol but not get drunk. She travelled to the Engine Room with several other candidates in a panel van. She cannot recall anyone that was in the van nor the route nor the time they arrived. Up to that point, she had never been to the Engine Room.

[52] At the Engine Room, she noticed some people by the pool table. Cpl Christmas testified that during the evening she drank beer. There were pitchers of beer on the table that were green, and that was the first time that she saw green beer. She was handed a glass and recalls the glass had the "Alexander Keith's" logo.

[53] Cpl Christmas testified that she had four beers. She poured the beer into the glass and used the same glass to drink the beer. At some point during the evening, she walked up to an area where people were playing pool. She did not recall any of the people playing pool as most of the people were "civilians." She recalled seeing MCpl Matthews and his girlfriend during the evening. She stated that she was not drunk but "feeling a bit buzzed." She assessed her sobriety at five out of ten as she could socialize a little more but was not drunk.

[54] She was then approached and challenged to a game of pool by someone she did not know named Zach Jones. They agreed the loser would buy the winner a drink. They played pool and Cpl Christmas won the game. Upon Jones losing the game, he gave her a drink, more specifically a "whisky sour". Cpl Christmas did not recall what time during the evening this took place. She did not see the drink being poured nor where it came from. She believed the main alcoholic ingredient of the drink was whisky but did not know the amount of alcohol in the drink. Cpl Christmas recalls drinking the whisky sour but does not know if she finished it. She has no memory of the remainder of the evening until she woke up the next morning. She does not know how she returned to the armouries.

[55] She testified that when she woke up the following morning at the armouries, she was confused and tired, the "lights were on" and "everyone was getting their stuff". She

could not remember what happened the night before, but she just focused on getting ready for the day.

[56] Upon waking up that morning, she stated that there was some vomit on the floor. She recalls Cpl Redding instructed her to clean it up. In terms of her perceived sobriety at that time, she assessed herself at a one out of ten. She was tired but had no issues with balance, walking, speech or comprehension. She does not recall being formed up but recalls participating in weapons classes.

[57] She then recalls a strange feeling that people were avoiding her. She later discovered that there was an alleged incident involving the complainant that happened the evening before.

[58] She stated that she approached the complainant and they discussed what happened. Cpl Christmas testified that upon hearing this recollection of events from A.H., she was shocked. She apologized to the complainant and asked permission to give him a hug. The complainant allowed Cpl Christmas to hug him. According to Cpl Christmas, MCpl Hamilton was not present during this exchange. Cpl Christmas stated that following this discussion with the complainant, they continued with training.

[59] On 19 March 2019, Cpl Christmas was advised of a Performance Review Board (PRB). She does not recall many details of the PRB other than the commanding officer and others were present. She was removed from the course and ordered to return to unit (RTU).

[60] The night before the PRB, in the early hours of 19 March 2019, she was sleeping in a room separate from the other candidates. It was at this point that she discovered bruising on her body. Cpl Christmas stated that she had no idea how these bruises appeared.

[61] On cross-examination, prosecution queried Cpl Christmas on details surrounding the approximate timings of events before arriving and at the Engine Room along with questions related to her alcohol consumption that evening and the bruising that she noticed on 19 March 2019.

Dr Marco Sivilotti

[62] A *voir dire* was conducted to qualify Dr Marco Sivilotti pursuant to MRE 81 and the two-stage test confirmed by the Supreme Court of Canada (SCC) in *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23, [2015] 2 S.C.R. 182. Following the *voir dire*, I found that the evidence of Dr Sivilotti is admissible, and the scope of his expertise is limited to the areas outlined in the Notice of Expert Evidence (VD1-3); medical toxicology and emergency medicine.

[63] Dr Sivilotti explained the impacts of alcohol and other sedative hypnotics such as GHB on the body, particularly the brain as the “target organ” of these drugs. He

explained how sedative hypnotics, in particular, alcohol, impact the function of the human body in terms of inhibition, level of alertness, judgement, coordination and memory and how these impacts are related to dosing and timing. He then explained how the body absorbs and eliminates alcohol and how exposure to alcohol impacts the functions of the body.

[64] The expert witness then compared the pharmacokinetics of alcohol with other sedative hypnotics such as GHB including its rapid onset, peak and offset when compared to alcohol consumption. In his expert opinion in emergency medicine, Dr Sivilotti provided examples of patients who were administered GHB without their knowledge and how they presented to the emergency room (ER); usually with a gap in memory. In a typical scenario, Dr Sivilotti explained that a person may arrive at the ER in the morning with complete amnesia where they only remember having drinks at a bar and wake up a number of hours later. He also testified in comparing GHB to alcohol, where GHB "patients" move from inebriation, intoxication and unconsciousness much quicker than alcohol as the drug is absorbed and eliminated in the body quickly.

[65] Dr Sivilotti then discussed some general concepts related to people presenting with amnesia by alcohol use and GHB use respectively. He discussed the general BAC to produce what laypeople would refer to as a "blackout" or complete amnesia and the impact that a person's tolerance plays on the progression of behaviour. As GHB relates to complete amnesia, the expert stated that this drug is more likely to induce this state.

[66] The expert produced a report that was entered into evidence (Exhibit 4). The expert reviewed the report that outlined some background facts of the accused along with scenarios related to the amount of drinks consumed by a person and the time period in which those drinks were consumed. Dr Sivilotti discussed various scenarios with a view to provide approximate BAC levels for the accused with a focus on the possible BAC and how it could produce complete amnesia.

[67] Finally, Dr Sivilotti provided an opinion on various photographs entered as evidence (Exhibit 3) related to the bruising of the accused. In general, he opined that the bruising observed in the photos were no more than ten days old.

[68] On cross-examination, Dr Sivilotti was questioned on the various scenarios on calculating BAC and the effects of GHB.

Presumption of innocence and reasonable doubt

[69] Cpl Christmas enters these court martial proceedings presumed innocent. That presumption of innocence remains throughout the court martial until such time as the prosecution has, on all the admissible evidence, satisfied the Court beyond a reasonable doubt that she is guilty of the charges before the Court.

[70] 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.

[71] In essence, this means that even if Cpl Christmas is probably guilty or likely guilty, that would not be sufficient. If the prosecution fails to satisfy me of her guilt beyond a reasonable doubt, I must give her the benefit of the doubt and acquit her.

[72] 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 Cpl Christmas guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charges set out in the charge sheet. (see *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, paragraph 242)

The W.(D.)Analysis

[73] It is important to keep in mind that the reasonable doubt standard applies to the assessment of credibility in a criminal trial. In a case such as this one, this is a challenging task given that the trier of fact is presented with only one version of events from the complainant and a total lack of memory on the part of the accused.

[74] In *R. v. W.(D.),* [1991] 1 S.C.R. 742 at page 757 to 758, the SCC set forth a formula where the accused's evidence contradicts the evidence of a prosecution witness:

> A trial judge might well instruct the jury on the question of credibility along these lines:
>
> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt of the guilt of the accused.

[75] The SCC qualified this *W.(D.)* instruction with an additional prong, in recognition that a trier of fact "may believe some, none, or all the testimony of any witness, including that of the accused" (*R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30). The *W.(D.)* instruction emphasizes that "the burden of proof never shifts from the Crown to prove every element of the offence beyond a reasonable doubt." (see *J.H.S.* at paragraph 9). The trier of fact must not decide whether they accept one or another conflicting testimonial account as a credibility context (*J.H.S.* at paragraph 13). As noted by the Court Martial Appeal Court of Canada (CMAC) in *R. v. Euler,* 2022 CMAC 5 at paragraph 5, corroboration is not required.

[76] The term "credibility assessment" is often used as a shorthand for the assessment of two qualities of a witness' testimony: their credibility and reliability (see *R. v. G.F.*, 2021 SCC 20 at paragraph 82). The Ontario Court of Appeal offered an overview of this distinction in *R. v. H.C.*, 2009 ONCA 56:

> [41] Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
>
> i. observe;
>
> ii. recall; and
>
> iii. recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R v. Morrisey* (1995), 1995 CanLii 3498 (ONCA), 22 O.R. (3d) 514, at 526 (C.A.).

[77] In *R. v. Kruk*, 2024 SCC 7 at paragraph 81, the SCC elaborated on the challenges involved in assessing a witness's credibility and reliability:

> The trial judge, while remaining grounded in the totality of the evidence, is obliged to evaluate the testimony of each witness and to make determinations that are entirely personal and particular to that individual. Credibility and reliability assessments are also context-specific and multifactorial: they do not operate along fixed lines and are "more of an 'art than a science'" (*S. (R.D.)*, at para. 128; *R. v. Gagnon*, 2006 SCC 17, [2006] 1 S.C.R. 621)(footnote omitted). With respect to credibility in particular, while coherent reasons are crucial, it is often difficult for trial judges to precisely articulate the reasons why they believed or disbelieved a witness due to "the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events" (*Gagnon*, at para. 20; see also *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3, at para. 28; *R. v. G.F.*, 2021 SCC 20, [2021] 1 S.C.R. 801, at para. 81). The task is further complicated by the trial judge's ability to accept some, all, or none of a witness's testimony.

[78] The SCC further stated the following as it relates to credibility assessments and reasonable doubt at paragraph 62:

> [62] Reasonable doubt applies to credibility assessments such that if the evidence the Crown adduced does not rise to the level required of a criminal conviction, an accused cannot be found guilty simply because they are disbelieved (see *W.(D.)*). Some elements of the totality of the evidence may give rise to a reasonable doubt, even where much – or all – of the accused's evidence is disbelieved. Any aspect of the accepted evidence, or the absence of evidence, may ground a reasonable doubt. Moreover, where the trier of fact does not know whether to believe the accused's testimony, or does not know who to believe, the accused is entitled to an acquittal (citations omitted).

Addressing myths and stereotypes

[79] In *Kruk* at paragraph 37, the SCC addressed myths and stereotypes about sexual assault complainants:

> [37] Myths and stereotypes about sexual assault complainants capture widely held ideas and beliefs that are not empirically true – such as the now discredited notions that sexual offences are usually committed by strangers to the victim or that false allegations for such crimes are more likely then for other offences. Myths, in particular, convey traditional stories and worldviews about what, in the eyes of some, constitutes "real" sexual violence and what does not. Some myths involve the wholesale discrediting of women's truthfulness and reliability, while other conceptualize an idealized victim and her features and actions before, during and after and assault. Historically, all such myths and stereotypes were reflected in evidentiary rules that only governed the testimony of sexual assault complainants and invariability worked to demean and diminish their status in court.

[80] As trial judge, I must be vigilant in asking myself whether the application of factors informing my assessment of credibility in this case relies upon myth-based or stereotypical thinking, notably in relation to what kinds of complainant behaviour are 'expected' or 'normal'. Importantly, the SCC in *Kruk* stated at paragraphs 44 and 66 that while "myths and stereotypes are no longer meant to play any role in mounting a defence", it is important to ensure that the doctrine of myths and stereotypes "remain appropriately constrained to its proper scope." To that end, in conducting my credibility assessment in this case, I have been mindful of the myths and stereotypes outlined by the SCC in *Kruk.*

Charges before the court martial

[81] In a court martial, the prosecution bears the burden of proving guilt beyond a reasonable doubt. This is the criminal standard of proof, and it applies to the prosecution's onus to prove each element of the charges in question and to disprove any available defenses.

Charge one – section 130 (pursuant to section 271 Criminal Code)

[82] The first charge is an offence punishable under section 130 of the *NDA*, which is to say, sexual assault, contrary to section 271 of the *Criminal Code*.

[83] Subsection 130(1) of the *NDA* states:

> **130 (1)** An act or omission
>
> > **(a)** that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or
> >
> > [. . .]
>
> is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

[84] The general offence of assault is found in 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;
> >
> > [. . .]
>
> **Application**
>
> **(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.

[85] 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;

[86] The definition of consent is found in subsection 273.1(1) of 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.

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

> **Consent**
>
> **(3)** For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> > **(a)** the application of force to the complainant or to a person other than the complainant;
> >
> > **(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;
> >
> > **(c)** fraud; or
> >
> > **(d)** the exercise of authority.

[88] For charge one, the prosecution has the burden of proving the identity of the accused, along with the date, time and place of the offence.

[89] The *actus reus* of sexual assault comprises three elements: (i) touching; (ii) the sexual nature of the contact; and (iii) the absence of consent (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330 at paragraph 25; *R. v. J.A.*, 2011 SCC 28 at paragraph 23; *R. v. Barton*, 2019 SCC 33 at paragraph 87; *R. v. G.F.*, 2021 SCC 20 at paragraph 25).

[90] The *mens rea* of sexual assault comprises two elements: (i) intention to touch; and (ii) knowledge of, or willful blindness or recklessness as to, a lack of consent on the part of the person touched (*Ewanchuk*, at paragraph 42; *J.A.*, at paragraph 24; *Barton* (SCC), at paragraph 87; *G.F.*, at paragraph 25; *R. v. Kirkpatrick*, 2022 SCC 33, at paragraph 28).

[91] The elements of this charge were set forth by the CMAC in *R. v. Cadieux*, 2019 CM 2011 citing the SCC in *Ewanchuk* and *R. v. Chase*, [1987] 2 S.C.R. 293:

> [13] In addition to proving the routine elements of the offence, such as time, date, place, identity of the accused and identity of the complainant, the Crown must prove: (1) Cpl Cadieux applied force against the complainant; (2) Cpl Cadieux applied the force intentionally; (3) the complainant did not consent to the application of force; (4) Cpl Cadieux knew the complainant did not consent to the force that he applied; and, (5) the force Cpl Cadieux applied was of a sexual nature (*R. v. Ewanchuk*, [1999] 1 S.C.R. 330, 169 D.L.R. (4th) 193 at paras.25, 41, 46-49*; R. v. Chase*, [1987] 2 S.C.R. 293, 45 D.L.R. (4th) 98).

Charge two – disgraceful conduct (section 93 NDA)

[92] The second charge on the charge sheet is disgraceful conduct contrary to section 93 of the *NDA*:

> **93** 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.

[93] As with charge one, the prosecution has the burden of proving the identity of the accused, along with the date, time and place of the offence.

[94] Courts martial often use the phrase "shockingly unacceptable" to describe disgraceful conduct (see *R. v. Reid*, 2022 CM 2003). As noted at paragraphs 44 to 49 in *R. v. Clancy*, 2019 CM 2033:

> [44] A finding that the alleged conduct constituted disgraceful conduct requires an assessment of the accused's conduct in its context.
>
> [45] As the Court Martial Appeal Court of Canada (CMAC) decided in R. v. Bannister, 2019 CMAC 2, in most cases, the military judge's expertise will usually be all that is needed to draw the necessary inferences. At paragraph 16, the CMAC summarized some of the challenges faced in the past:
>
> > [16] In *R. v. Boyle*, 2010 CMAC 8, 417 N.R. 237 [*Boyle*], at paragraph 15, the court suggested that the "[…] law of disgraceful conduct is not well-settled". But the court did not go on to provide guidance as to what the appropriate test

> was to establish disgraceful conduct under s. 93 of the *NDA*. Since *Boyle*, military judges have been divided on whether accusations under s. 93 of the *NDA* should be assessed by applying a "harm-based test" or whether a reasonable person would find the conduct "shockingly unacceptable". In my view, it serves no useful purpose to parse words and create separate silos. Harm and unacceptability inform one another as to whether an incident is disgraceful. Context counts.

[46] In *Bannister*, the CMAC confirmed that the determination as to whether the actions of the accused were disgraceful must be determined on an objective standard. In deciding whether the alleged proven conduct under section 93 of the *NDA* is disgraceful, the military judge must consider the perspective of a reasonable person with military experience and general service knowledge, before becoming convinced beyond a reasonable doubt that the actions of the accused were disgraceful in the context of the military community.

[47] At paragraph 18, the CMAC stated, "A court martial must consider the context of the events in any incident, using its experience and general service knowledge to assess that incident." At paragraph 22, the CMAC also clarified the following:

> [22] Ultimately, what is required is a contextual assessment of the incidents from the perspective of the Canadian Armed Forces [CAF] and the military community. In some incidents, the contextual assessment must also involve consideration as to the manner by which the incidents might be viewed in the non-military community. As stated earlier, s. 93 criminalizes actions that would not constitute crimes in non-military settings. The severity of the offence is reflected in the maximum penalty, which is imprisonment for a term not exceeding five years. That punishment alone suggests that the offences targeted are ones that do more than raise a level of discomfort, insult, or somewhat offend those in the military community. The term "shockingly unacceptable*"*, the use of which I have noted above, captures some incidents that could attract a charge under s. 93, but is only part of a contextual assessment.

[48] In addition, the CMAC provided the following guidance:

> [25] In addition to "shockingly unacceptable*",* there are many other descriptions that capture the essence of what is meant by the term disgraceful. In some cases, any reasonable person might consider an incident as being disgraceful, saying, "I know disgraceful when I see it*".* However, the application of an objective standard can never be that simple.
>
> [26] Whether incidents are disgraceful are not to be determined by considering harm as a separate issue. That is to say, there are not two separate silos, one for "shockingly unacceptable" conduct and one for consequences related to "harm or risk of harm*".* Whether something is shockingly unacceptable can be informed by the nature of the harm. The more severe the harm or risk of harm, the more likely something is to bring disgrace to the CAF. Conversely, the more shockingly unacceptable an incident is in light of CAF operational and military community norms, the less is required on the scale of harm assessment.
>
> [27] I offer an example as to how context can inform the inquiry. It is unacceptable, though not necessarily shockingly so, for a person to point an unloaded revolver at another and pull the trigger, even after it has been checked to ensure that it is not loaded. It would, however, be shockingly unacceptable to take that same revolver, insert one live round, point it and pull its trigger in a

> Russian roulette fashion. That incident is not to be judged based on whether the gun fired. Rather, it is to be judged based on the risk of harm combined with the other surrounding circumstances. It can be either the "harm" or "the risk of harm" that informs the assessment as to whether the action was shockingly unacceptable/disgraceful in the context of an s. 93 of the *NDA* charge.

Charge three – drunkenness (section 97 NDA)

[95] Cpl Christmas is also charged with drunkenness contrary to section 97 of the *NDA* which reads as follows:

> **97 (1)** Drunkenness is an offence and every person convicted thereof is liable to imprisonment for less than two years or to less punishment, except that, where the offence is committed by a non-commissioned member who is not on active service or on duty or who has not been warned for duty, no punishment of imprisonment, and no punishment of detention for a term in excess of ninety days shall be imposed.
>
> **(2)** For the purposes of subsection (1), the offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug,
>
> > **(a)**is unfit to be entrusted with any duty that the person is or may be required to perform; or
> >
> > **(b)**behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[96] As with charges one and two, the prosecution has the burden of proving the identity of the accused, along with the date, time and place of the offence.

[97] The CMAC in *Cadieux*, at paragraph 28, outlined the additional elements of the offence:

> [28] It is incumbent upon the Crown to prove beyond a reasonable doubt that, owing to the influence of alcohol or a drug, the accused is unfit to be entrusted with any duty that the accused is or may be required to perform, behaves in a disorderly manner, or behaves in a manner likely to bring discredit on Her Majesty's service.

[98] Citing the trial decision in *R. v. Cadieux*, 2019 CM 2011 at paragraph 200, the trial judge outlined the test cited by Pelletier, M.J. in *R. v. Sloan*, 2014 CM 4004. This test was cited with approval by the CMAC in its *Cadieux* decision noted earlier:

> [200] Based on the facts, Corporal Cadieux was not expected to be called to perform any duty that day. Hence, the relevant paragraph was [section] 97(2)(b) of *NDA* which requires the prosecution to prove that Corporal Cadieux behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service. The appropriate test is set out in *R. v. Sloan*, 2014 CM 4004. As stated by Pelletier M.J., at paragraphs 14 to 15:
>
> > [14] The offence of drunkenness is not aimed at sanctioning the consumption of alcohol or a drug. It is meant to address fitness for duty or behaviour that is disorderly or discredits Her Majesty's service. It reflects the fact that no member of the military is exempted from the obligation to show respect to anyone, let alone refrain from violence despite any level of intoxication.

[99] The CMAC also clarified that the "causal link between drunkenness and the state of being hungover is simply too direct for any other approach":

> [33] It is common knowledge that excessive drunkenness may lead to a state of being "hungover". Conduct which otherwise meets the definition of drunkenness cannot, in my view, be disregarded because it might arise from the state of being hungover. The causal link between drunkenness and the state of being hungover is simply too direct for any other approach. Although I do not base my conclusion on this appeal on the unfitness for duty component of subsection 97(2), it is evident that some degree of being "hungover" may result in one being unfit for duty. In my view, such situations would clearly arise "owing to the influence of alcohol" (see *Simard* at para. 3).

[100] The court marital decision in *Cadieux* also outlined the definition of "disorderly" and what the prosecution is required to provide that the accused behaved in a "disorderly manner":

> [207] In addition to the test set out by Pelletier M.J. in the case of *Sloan*, and upon review of the definition of "disorderly" as well as the definitions of the affiliated terms set out in the [Concise Oxford English Dictionary] COED, I have no trouble concluding that in order for the prosecution to prove that a member has behaved in a disorderly manner, that it must prove that the specific conduct, owing to the influence of alcohol or a drug, the member was either difficult to control or he or she violated the laws, protocols or standards expected of him or her in the circumstances.

Assessing witness credibility

The accused – Cpl Christmas

[101] Cpl Christmas testified in her own defence. She related, in her own words, the events at the Engine Room. She was able to describe, in detail, the number of drinks that she consumed at the Engine Room (four beers and all or part of a "whisky sour") until the time that she had no recollection of the events until the following morning. She was adamant that she only consumed five drinks that evening and while she was "buzzed", she was not intoxicated.

[102] The cross-examination of Cpl Christmas was pointed and focused on her lack of ability to recall information outside of the detailed testimony surrounding how much she drank at the Engine Room and her encounter with Jones. She was not able to explain in detail any timings related to what time she left for the Engine Room, when she arrived at the bar or how long she was at the bar (up to the point she drank the whisky sour and has no memory). In addition, while she recalled seeing MCpl Matthews and his girlfriend at the bar, she offered little detail as to what she was doing and whom she was socializing with that evening. Considering her testimony that she does not remember anything following the ingestion of some or all of the whisky sour, I have concerns with her testimony, given the contrast of remembering very specific details surrounding how many drinks she had that evening, with the inability to remember other events until such time she stated that she drank the whisky sour.

[103] After listening and watching the direct and cross-examination of Cpl Christmas, I accept her testimony that she drank alcohol the evening of 16 March 2019. However, I have a challenge reconciling her version of events (see generally *Kruk* at paragraph 81). I've turned my mind to the factors that go to the believability of the evidence in the factual context of this case (see *G.F.*, at paragraph 82). She is able, in detail, to describe herself drinking exactly four beers and the situation at the pool table where she was given the drink by Jones. However, she has no recollection of much information during her evening at the Engine Room up to the point where she consumed some or part of the whisky sour. On cross-examination, she was unable to recall general information about the evening: the approximate time of dinner; the time she arrived at the Engine Room, who specifically was at the Engine Room other than "a group of people that I walked in with"; who bought the pitchers of beer; who placed the pitchers of beer on the table; the approximate time that she drank the beers that evening; and the approximate time she was at the Engine Room before drinking the whisky sour.

[104] Having considered the totality of the accused's evidence, I do not find her testimony regarding her consumption of alcohol credible. From my perspective, the lack of detail surrounding events from the time she left the armouries until the time she consumed the whisky sour is concerning; especially considering the ability to recall in detail how she could only have drank four beers and part or all of a whisky sour during the evening in question.

[105] There are also external inconsistencies with her testimony when compared to the testimony of MCpl Matthews, who stated that the accused was "intoxicated like the rest of us" and "you could tell she was not sober". This testimony is contrasted with that of the accused, who stated that she only had four beers and a portion of a "whisky sour". She assessed her sobriety that evening as a "five out of ten" with a "buzz" and admitted on cross-examination "that [. . .] I know I wasn't sober, so that's why I say I was buzzed because I could socialize". This is compared with her testimony on both direct and cross-examination that she was a heavy drinker at the time and frequently drank twelve to twenty-four drinks, usually beers, in a session.

[106] In terms of the defence's contention that the accused was "drugged" such that something was placed in the whisky sour, the credibility of the accused is very difficult to assess as she stated on both direct and cross-examination that she has no recollection of any events from the time she drank the whisky sour until she awoke the next morning.

[107] As the SCC notes at paragraphs 71 and 73 of *Kruk*, triers of fact must resort to common sense when assessing the credibility and reliability of testimonial evidence. It is by applying common sense and generalizing based on my accumulated knowledge about human behaviour that a trial judge assesses whether a narrative is plausible or inherently improbable. In the circumstances of this case, the inconsistencies of the accused's testimony detrimentally impact her credibility. Simply put, I question the plausibility of the witness's evidence.

Pte Ashford/MCpl Matthews/MWO Samson

[108] All three witnesses testified in a straightforward manner. They answered all the questions to the best of their abilities. Understandably, given the time elapsed since the alleged offences, they could not recall some details. They were honest and forthright about matters that they could not remember. I find that all three are credible witnesses.

The complainant – A.H.

[109] The complainant A.H. testified in a straightforward manner and answered all the questions to the best of their ability. A.H. clearly takes pride in his service to the CAF and, despite this incident six years ago, continues to serve and has recently pursued leadership training. As displayed in his testimony, it was challenging and difficult to testify in court, and I note his courage in doing so. I have no doubt that A.H., should he choose to do so, will continue to serve in the CAF with honour.

[110] On examination-in-chief, A.H. testified with confidence surrounding the details of the alleged incident. He was able to recall the orientation of the Truro Armouries and the location of the platoon and section classrooms, respectively. He could remember the alleged incident; waking up with "somebody licking at my face, like kissing my face, when I was in my sleeping bag." He then proceeded to provide details of waking up a classmate, Cpl Murphy, and attempting to identify the person in his cot who identified herself as "Kendra". He outlined the process of getting her out of his cot and guiding her to the section classroom, and eventually Cpl Christmas pinning him against a wall with her left hand and her right hand "grasping his genitals". The incident happened "so fast", A.H. stated that he pushed her into the section classroom and closed the door.

[111] A.H. was equally clear when explaining on direct examination that he then returned to the platoon classroom where he found (what he believed to be) Cpl Christmas' running shoes by his cot. He then was on his way to the section classroom where he testified that Pte Ashford approached him and said that Cpl Christmas was in his cot. A.H. stated that he and Pte Ashford went back into the section classroom and that is when they found Cpl Christmas with no pants on in Pte Ashford's cot. A.H. stated that "Pte Ashford was looking to me for advice", so he told Pte Ashford to grab his kit and sleep downstairs in the mess. A.H. covered Cpl Christmas with a "ranger blanket", left the room with Pte Ashford and then A.H. returned to the platoon classroom to go to sleep.

[112] My confidence in the reliability of A.H.'s testimony was shaken by several inconsistencies on cross-examination. These inconsistencies varied from slight inconsistencies to significant ones. Taken as a whole, the reliability of A.H.'s testimony causes me concern when considering the prosecution's burden of proof to prove the offences charged beyond a reasonable doubt for charges one and two.

[113] First, there is a concern about the recollection of time by A.H. During cross-examination, A.H. was challenged about the approximate timeline of events. This began

with a question when A.H. first realized the approximate time when he was awoken in his sleeping bag:

> "Q. How did you know it was 3 a.m., were you looking at your watch?
> A. I believe so, yes.
>
> Q. You believe so, you are not sure? A. Not sure, can't remember that."

[114] A.H. then outlined that the alleged incident took place over a timeline of approximately two hours; between 0300 to 0500 hours on the morning of 17 March 2019. On cross-examination, A.H. had difficulty explaining this timeline considering the specific questions that separated the incident into segments as it appeared the two-hour timeline was much longer than how long the events took place. In this regard, A.H. appeared confused and understandably had difficulties recalling events from approximately six years ago. Cross-examination then turned to when A.H. believed that the incident concluded. A.H. stated it was 0500 hours as he looked at his watch. Defence counsel pointed out that A.H. did not previously provide this information to the police, to which A.H. replied that he does not remember anyone asking him this question. After a review of the CFNIS transcript of May 2019, A.H. conceded that his recollection in the statement and his response on cross-examination was inconsistent as he did not look at his watch. In concluding this line of questioning, A.H. was asked the following:

> "Q. So you are assuming that this is more accurate, what you told the police in May of 2019? You don't know that it's more accurate because you have memory issues? A. I don't have memory issues, but it is hard to remember.
>
> Q. Right, you are having a hard time recalling? A. Yes, yeah."

[115] Taken as a whole, it appears clear that given the timeframe from the alleged incident in March 2019 to the court martial in May 2025, A.H. had significant challenges reconstructing an approximate timeline of events. More specifically, on two occasions during cross-examination, he testified to looking at his watch to verify the time but, on both occasions, he conceded that he was mistaken. Questions related to the alleged timeline were not addressed by the prosecution on re-examination.

[116] My second concern relates to the complainant's reliability of the statements provided to the unit in March 2019 just following the incident contrasted with the statement provided to the CFNIS in May 2019. At the beginning of cross-examination, A.H, was clear that when he provided these respective statements, he was accurate as possible and did not want to leave anything out:

> "Q. You didn't want—you are very careful with your words, from what I can hear you are very careful with your language? A. I just would like to be professional when I gave these statements because I take the Army

> professionally and that's who was asking me. So I didn't want to, I wanted to cross all my T's and dot my I's as I've been trained to do so.
>
> Q. You wanted to be accurate, though, you told me earlier? A. Absolutely.
>
> Q. You wanted to be complete? A. Sure."

[117] Later in cross-examination, A.H. stated that the first mention there was an actual touching of his genitals was in the May 2019 statement to the CFNIS. In the March 2019 statement, A.H. stated that Cpl Christmas pushed him against the wall, attempted, again, to kiss him and reached for his genitals. A.H. then explained that in March 2019, he was embarrassed as he was speaking with a member of the unit that he never met before. This statement was contrasted with that to the CFNIS, where he was speaking with a member of the police that he could trust. On re-examination, A.H. clarified making the March 2019 statement:

> "Q. You talked earlier today referring to what you wrote in this statement about not wanting to get anybody in trouble? A. Yes, sir. Ma'am.
>
> Q. Can you clarify what you meant by that? A. At this point it was just a statement for a disciplinary investigation and I felt that there wasn't like, there wasn't any need to take it out of the unit if you know what I mean, like yes this happened, here's my particulars, and this is what happened, but I didn't think we'd be here."

[118] On further re-examination, A.H. explained how he felt during the March 2019 statement for the disciplinary investigation:

> "Q. So (A.H.) we were talking about the two statements that you provided, the first one on 18 March 2019 when you were with 2Lt MacKenzie and then the second one on 2 May 2019 when you talked to Sergeant Spina, right. Can you compare for us how you felt during each of those meetings that you had? A. The first meeting I felt that the officer was just some Army 2Lt, 2Lt is kind of a private no hook, or a private hooked.
>
> Q. A private, I'm sorry? A. It's like the equivalent of a brand new private, they just got qualified, so I didn't really at the time, I didn't really know what this guy was or what he did, but then when I was talking to Sergeant Spina, he was an investigator as he told me and he showed me his badge and he had all the equipment set up, the camera, the recorder and the person who writes the notes and so I just felt like the first one it was just an Army, what's it called, just a formality that you have to go through with the military and then the second one was a brand new thing I've never seen before and it kind of made me feel more like it was formal.

> Q. Did what you observed when you had that meeting with Sergeant Spina, the things that you just described, the video recorder set up, the badge, the other things that you mentioned, did that affect how you felt about the meeting? A. I again, the 2Lt is just a formality with the Army and I didn't really take them seriously, but when somebody showed up with a recorder in a suit with a badge, it, you know, brought my heels together in a position of attention and this is formal, it felt like it was real, the other before was just in the back of the Truro Armouries and a computer, it just felt like I had to do it because I had to do it and then when Sergeant Spina investigated me, it was real. It made me feel like I could tell him everything, what actually happened and made me feel at ease so I could tell him everything."

[119] There is no question that testifying about this incident was difficult for A.H. They were credible when explaining the challenges in providing the statement in a disciplinary investigation to a member of the chain of command. On re-examination, A.H. testified that he had confidence in the CFNIS investigation and, using their words, made them feel at ease to provide a statement.

[120] A.H., both in his testimony and in his demeanour, displayed that he is a very proud soldier and takes this responsibility seriously. The challenge that I am left with as the trial judge in this case is reconciling A.H.'s clear and unequivocal statement at the beginning of cross-examination that he "would like to be professional" and "takes the Army professionally and that's who was asking me" and that he was accurate, complete and "dotting his I's and crossing his T's" when giving his statement in March 2019. This testimony is contrasted with his re-examination where he significantly downplays the March 2019 statement and that he did not take the officer taking the statement seriously. The end result is that there are two versions of the facts from A.H.'s recollection: the March 2019 statement where he stated the accused reached for his genitals with the May 2019 statement where he stated the accused touched his genitals.

[121] My third concern relates to A.H.'s inability to accurately recall what occurred after the alleged sexual assault when A.H. returned to the platoon classroom, found what he believed were Cpl Christmas' running shoes and then returned to the section classroom.

[122] On cross-examination, upon finding Cpl Christmas' shoes, he went back to the section classroom when he was approached by Pte Ashford, around the platoon classroom, and they both went to the section classroom together. A.H. was clear that Pte Ashford was not in his cot and that Cpl Christmas was in a cot on her own. She was not on top of anyone. A.H. recalled having a similar conversation with Sergeant Spina of the CFNIS in May 2019.

[123] A.H. then reviewed the CFNIS transcript. It stated upon going into the section classroom to return Cpl Christmas' sneakers, she was on top of someone in the cot. At this stage, defence counsel queried A.H. if this reference was to Pte Ashford, to which A.H. quickly replied it was MCpl Redding. Then after further reviewing the CFNIS

statement showing that A.H stated that Cpl Christmas was on top of Pte Ashford, A.H. then conceded that his memory on this point was not reliable.

[124] It is understandable that six years following the alleged incident, witnesses could forget certain details or be unclear in recalling others. However, A.H.'s memory on a critical aspect of the narrative is absent and as the trier of fact, concerning. A.H. was clear in his testimony and in his observed demeanour that Pte Ashford met him before they entered the section classroom together. He testified on cross-examination that Cpl Christmas was on a cot, alone. When contrasted with his CFNIS statement in May 2019, this version of events is different. In addition, in attempting to recall the events after having their memory refreshed, A.H. spontaneously stated that MCpl Redding was on the cot and then, having reviewed that section of the CFNIS statement showing that Pte Ashford was on the cot, A.H. conceded his memory was not reliable on this point. These issues were not addressed on re-examination.

[125] A.H.'s testimony on cross-examination can also be contrasted with the testimony of Pte Ashford. Pte Ashford stated on direct examination that Cpl Christmas woke him up asking for a vape, began undressing and started to get into his cot. Pte Ashford eventually got up and around that time, A.H. and, he believes another male, entered the section classroom. In addition, while A.H. stated that Pte Ashford was seeking direction and A.H. directed Pte Ashford to sleep in the mess, Pte Ashford testified that the decision to sleep in the mess was his.

[126] There were also some issues related to when A.H sensed, what he believed to be, Cpl Christmas kissing or licking him when he was sleeping. On direct examination, he testified that he awoke to someone kissing or licking his face. On cross-examination, he stated that he woke up with something wet on his face and wiped his face and "hit somebody". He conceded that he made an inference that he was licked as he was sleeping as his face was wet and did not know if he was licked as it possibly could have been drool.

[127] Finally, there are also some concerns with A.H.'s testimony that Cpl Christmas may have touched his genitals accidentally given her level of intoxication. On cross-examination, the complainant recalled a cupping action on his genitals and stated that when he felt a touch on his genitals, he swatted her hand away. He then conceded that it was possible that she was so drunk that the touching could have been accidental, such that her hand dropped because she was so drunk and could not control her body. On re-examination, he clarified that he remembers being "cupped" and he believed it to be deliberate but he then appeared to offer some support to the possibility that she may have accidentally touched him because she was drunk.

[128] I note there are some inconsistencies that were given little to no weight in making my assessment of credibility. For instance, the confusion that A.H. displayed in mixing-up what hand was touching his genitals in cross-examination was, in my view an honest mistake that was corrected in re-examination. There was also use of the word "we" in A.H.'s statement to the CFNIS that could have suggested he was either

consulting or working with someone else during the evening in question; this was clarified by the complainant that this was a mistake. Finally, the issue of whether he "yelled" to Cpl Murphy or "screamed" at Cpl Murphy to wake him up was not, in my view, a significant issue.

[129] In *Euler*, the CMAC at paragraph 13 outlines that "evidence can be credible without being sufficiently reliable to meet the standard of proof beyond a reasonable doubt". I believe that A.H is credible and is not trying to mislead the court. However, as he admits, six years have passed since the incident. In its totality, I find that the cumulative effect of the inconsistencies in their testimony undermine the reliability of the evidence provided by A.H. regarding charges one and two.

Applying the W.(D.) formula to the charges

Charge one – section 130 (contrary to section 271 Criminal Code – sexual assault)

[130] In applying the *W.(D.)* test to the facts of this case, the first question is whether I believe the evidence of Cpl Christmas. Having assessed the evidence as a whole and the credibility assessment of the accused's evidence discussed earlier in my decision, I do not believe the evidence of the accused that she was involuntarily intoxicated on or about 17 March 2019. I now must move to the second prong of the *W.(D.*) test.

[131] With regards to the second prong of the *W.(D.)* test; even if I do not believe the testimony of the accused but are left in reasonable doubt by it, I must acquit. Cpl Christmas admits to consuming alcohol at the Engine Room the evening of 16 March 2019. As I noted in my credibility assessment, she offered little detail surrounding the events at the Engine Room other than specifically drinking four beers and the encounter with Jones followed by ingesting the whisky sour. There was no further evidence put forward by her as she testified that she has no memory until she woke up the next morning at the armouries. I've also considered the evidence of bruising discovered on Tuesday 19 March 2019, along with the expert testimony of Dr Sivilotti. There is no evidence linking the events of 16 and 17 March 2019 with the bruising discovered on 19 March 2019. The expert admitted that these bruises could have been up to ten days old. In sum, I have thoroughly considered the evidence and have concluded that I am not left in reasonable doubt by the testimony of the accused.

[132] This brings me to the third prong of the *W.(D.)* test; although I am not left in doubt by the evidence of the accused, I must ask myself whether, based on the evidence that I do accept, if I am convinced beyond a reasonable doubt of the guilt of the accused for charge one.

[133] As stated in *R. v. Euler*, 2021 CM 5019 at paragraph 82:

> [O]ffences of a sexual nature generally happen when no one else is around but the accused and the victim. [. . .]. This is why most of the evidence for these cases are mainly tried upon the credibility of witnesses.

[134] In this case, I find the testimony of the complainant to be credible; he testified to the best of his recollection the events related to charge one. However, in reviewing the totality of his evidence, I am left with a significant number of unanswered questions related to reliability as noted earlier in my decision.

[135] My colleague Pelletier, M.J. in *R. v. Buenacruz*, 2017 CM 4014 at paragraph 27 outlined the challenges of credibility assessments:

> [27] As highlighted by the prosecutor during submissions, with the assistance of the reasons of the Saskatchewan Court of Appeal in *R. v. Baxter*, 2013 SKCA 52, the assessment of credibility turns on a myriad of considerations, some personal to the trial judge's impressions born out of experience, logic and an intuitive sense of the matter. The Supreme Court of Canada (SCC) said in *R. v. R.E.M.*, 2008 SCC 51, that "it may be difficult for a trial judge, 'to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events." Indeed, "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization."

[136] In *R. v. Euler*, 2022 CMAC 5 at paragraph 13, the CMAC provided guidance to trial judges that evidence can be credible without being sufficiently reliable to meet the standard of proof beyond a reasonable doubt:

> [13] I would also point out that evidence can be credible without being sufficiently reliable to meet the standard of proof beyond a reasonable doubt: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at p. 526, 97 C.C.C. (3d) 193. The Supreme Court has observed that the term "credibility" is often used in a broader sense which includes reliability: *R. v. G.F.*, 2021 SCC 20, 459 DLR (4th) 375, at para.82. However, that will not be the case where the trial judge's language demonstrates implicitly or explicitly that credibility is, in the circumstances of the case, distinct from the accuracy or reliability of the evidence.

[137] This is the case here. Ultimately, my task in this case is not to choose between versions of what happened at the Truro Armouries in the early morning hours of 17 March 2019. I am cognizant that the defence does not have to prove anything. In relation to the first charge, I have reliability concerns with the complainant's evidence and I assess this concern as sufficient to generate a reasonable doubt as to whether the prosecution has met its burden to prove this charge. As a result, I have no choice but to find Cpl Christmas not guilty of the first charge.

[138] Given the facts are based on my concerns with the reliability of the complainant's testimony and that these concerns have generated a reasonable doubt whether the prosecution has met its burden for this charge, there is no requirement for me to address the issues of involuntary intoxication nor identity put forth by the defence.

Second charge – section 93 NDA (disgraceful conduct)

[139] As with charge one, the prosecution has the burden of proving the identity of the accused, along with the date, time and place of the offence. Defence counsel have

conceded that the date, time and place of the offence are not in issue but have argued that the prosecution has not proven the accused's identity beyond a reasonable doubt.

[140] In applying the *W.(D.)* test to the facts of this case, the first question is whether I believe the evidence of Cpl Christmas. Having assessed the evidence as a whole and the credibility assessment of the accused's evidence discussed earlier in my decision, I do not believe the evidence of the accused that she was involuntarily intoxicated on or about 17 March 2019. I now must move to the second prong of the *W.(D.*) test.

[141] With regards to the second prong of the *W.(D.)* test; even if I do not believe the testimony of the accused but are left in reasonable doubt by it, I must acquit. As mentioned in my assessment for charge one, Cpl Christmas admits to consuming alcohol at the Engine Room the evening of 16 March. As I noted in my credibility assessment, she offered little detail surrounding the events at the Engine Room other than her specifically remembering drinking four beers and the encounter with Jones followed by ingesting the whisky sour. There was no further evidence put forward by her as she testified that she has no memory until she woke up the next morning at the armouries. I've also considered the evidence of bruising discovered on Tuesday 19 March 2019 along with the expert testimony of Dr Sivilotti. There is no evidence linking the events of 16 and 17 March 2019 with the bruising discovered 19 March 2019. The expert admitted that these bruises could have been up to ten days old. In sum, I have thoroughly considered the evidence and have concluded that I am not left in reasonable doubt by the testimony of the accused.

[142] This brings me to the third prong of the *W.(D.)* test; although I am not left in doubt by the evidence of the accused, I must ask myself whether, based on the evidence that I do accept, I am convinced beyond a reasonable doubt of the guilt of the accused for charge two.

[143] My *W.(D.)* analysis for this prong mirrors that of charge one. I find the testimony of the complainant to be credible; however, in reviewing the totality of his evidence, I am left with several unanswered questions related to reliability. I assess this concern as sufficient to generate a reasonable doubt as to whether the prosecution has met its burden to prove this charge. As a result, I have no choice but to find Cpl Christmas not guilty of the second charge.

[144] Similar to the first charge, there is no requirement for me to address the issues of involuntary intoxication nor identity put forth by the defence for charge two.

Third charge – section 90 (drunkenness)

[145] Identity was an issue brought forward by the defence. On this point, they cited *R. v. A. (F.),* 2004 CarswellOnt 1055 and *R. v. Hibbert*, 2002 SCC 39.

[146] In *Hibbert*, the defence highlighted at paragraph 50 where the SCC warns against the dangers of eyewitness identification, "I think it is important to remember

that the danger associated with eyewitness in-court identification is that it is deceptively credible, largely because it is honest and sincere". In *A. (F.),* the Ontario Court of Appeal also cautions about the in-dock identification of the accused (at paragraph 47).

[147] In addition to these cases, I have considered additional case law including *R. v. Nikolovski,* [1996] 3 S.C.R.1197; *R. v. Burke*, [1996] 1 S.C.R. 474, *R. v. Atfield*, 1983 ABCA 44; *R. v. Bao*, 2019 ONCA 458; *R. v. KO*, 2024 ABCJ 95 and *R. v. E.A.*, 2023 PESC 34.

[148] In *Nikolovski*, the SCC outlines some important factors when a person is identifying an accused (at paragraph 19):

> The courts have long recognized the frailties of identification evidence given by independent, honest and well-meaning eyewitnesses. This recognized frailty served to emphasize the essential need to cross-examine eyewitnesses. So many factors come into play with the human identification witness. As a minimum it must be determined whether the witness was physically in a position to see the accused and, if so, whether that witness had sound vision, good hearing, intelligence and the ability to communicate what was seen and heard. Did the witness have the ability to understand and recount what had been perceived? Did the witness have a sound memory? What was the effect of fear or excitement on the ability of the witness to perceive clearly and to later recount the events accurately? Did the witness have a bias or at least a biased perception of the event of the parties involved?

[149] As aptly stated by the Nova Scotia Court of Appeal in *R. v. Downey*, 2018 NSCA 33 at paragraph 57 citing *R. v. Atfield*, 1983 ABCA 44 at paragraph 3:

> [57] Our law recognizes the inherent dangers of identification evidence, especially where the witness appears both honest and convincing. Consequently, fact finders (whether trial judges or juries) must be satisfied as to both the credibility and reliability of the eyewitness testimony. As the Alberta Court of Appeal observed in *R. v. Atfield*, 1983 ABCA 33 at para 3:
>
> > [3] The authorities have long recognized that the danger of mistaken visual identification lies in the fact that the identification comes from witnesses who are honest and convinced, they are convincing, and have been responsible for many cases of miscarriages of justice through mistaken identity. The accuracy of this type of evidence cannot be determined by the usual tests of credibility of witnesses, but must be tested by a close scrutiny of other evidence. In cases where the criminal act is not contested and the identity of the accused as the perpetrator the only issue, identification is determinative of guilt or innocence; its accuracy becomes the focal issue at trial and must itself be put on trial, so to speak. As is said in Turnbull, the jury (or the judge sitting alone) must be satisfied of both the honesty of the witness and the correctness of the identification. Honesty is determined by the jury (or judge sitting alone) by observing and hearing the witness, but correctness of identification must be found from evidence of circumstances in which it has been made or in other supporting evidence. If the accuracy of the identification is left in doubt because the circumstances surrounding the identification are unfavorable, or supporting evidence is lacking or weak, honesty of the witness will not suffice to raise the case to the requisite standard of proof and a conviction so founded is

> unsatisfactory and unsafe will be set aside. It should always be remembered that in the famous Adolph Beck case, twenty seemingly honest witnesses mistakenly identified Beck as the wrongdoer.

[150] O'Gorman, J., in the case of *KO,* succinctly outlines the issue of identity at paragraph 3:

> Identity is a question of fact, and there must be sufficient evidence for the Court to logically and reasonably draw the inference that the accused is the relevant person. There is no one determinative method to prove identity. When identification is a crucial issue, the Court must be alert to the frailties of identification evidence and the possibility that an honest and confident witness may nonetheless be mistaken in their identification. Nevertheless, where a witness has had prior contact with the person, the term "recognition" evidence rather than "identification" evidence is generally considered a more accurate description of the issue. The cumulative effect of all the evidence must always be considered.

[151] In the circumstances of this charge, the accused's identity is proven beyond a reasonable doubt. First, the accused testified that she attended the Engine Room on 16 March 2019. Second, while I found issues with the reliability of A.H.'s testimony for charges one and two, I accept his evidence that he was able to identify Cpl Christmas for this charge based on his proximity to her during the early morning hours of 17 March 2019, the fact that she identified herself as "Kendra" and that she identified herself to A.H. the following day. Third, MCpl Matthews, who has served with the accused previously and has known her for several years, testified that Cpl Christmas was at the Engine Room. Fourth, Pte Ashford, who knew Cpl Christmas as a candidate on the course, testified that in the early hours of 17 March 2019, the accused woke him up, asked him for a vape and then began to get into his cot. Lastly, MWO Samson testified that he spoke with Cpl Christmas later that morning at the armouries. Taken as a whole, I have no doubt the prosecution has proven Cpl Christmas' identity on this charge beyond a reasonable doubt. Defence has conceded the date, time and place of the offence. The Court therefore finds that the prosecution has proven these elements beyond a reasonable doubt.

[152] I now turn to the *W.(D.)* analysis. My reasoning regarding prongs number one and number two are similar to my assessments for charges one and two. With regards to the third prong, I must ask myself whether, based on the evidence that I do accept, if I am convinced beyond a reasonable doubt of the guilt of the accused for charge three.

[153] In my view, the prosecution has proven beyond a reasonable doubt that Cpl Christmas was "owing to the influence of alcohol". While I have noted my concerns with the accused's credibility, I accept her evidence that she drank alcohol at the Engine Room on or about 16 March 2019. The fact that she was "owing to the influence of alcohol" was further reinforced by four witnesses. A.H. testified that Cpl Christmas woke him up, had the odour of rubbing alcohol, slurred speech and difficulty maintaining her balance. MCpl Matthews testified to observing Cpl Christmas at the Engine Room where she was "intoxicated like the rest of us" and, in his view, she was not sober. Pte Ashford testified that Cpl Christmas woke him up, took his cot forcing

him to sleep in the mess because, in his view, she needed sleep based on her apparent intoxication. MWO Samson testified that the following morning, he could smell alcohol on her breath, she had red eyes, was confused and moving slowly. In considering this evidence, I am satisfied beyond a reasonable doubt the prosecution has proven that Cpl Christmas was owing to the influence of alcohol on or about 17 March 2019.

[154] Further, as noted by the CMAC in *Cadieux* at paragraph 27, "[. . .]being intoxicated from alcohol or a drug is not, in and of itself, an offence under the *NDA*[. . .]. Drunkenness, as an offence defined in the *NDA*, is proven only where one of the means set out in subsection 97(2) is established beyond a reasonable doubt."

[155] To that end, the prosecution must also prove beyond a reasonable doubt that Cpl Christmas was, owing to the influence of alcohol or a drug, was "unfit to be entrusted with any duty that [she was] or may be required to perform; or [she] behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service."

[156] In a case cited by the prosecution, in *R. v. Simard*, 2002 CMAC 6 at paragraph 6, the CMAC reaffirmed the finding of the trial judge that evidence of the appellant throwing a glass over the side of a bridge would lead to a conclusion that the appellant was guilty of drunkenness by behaving in a disorderly manner.

[157] In this case, applying the standard set forth at paragraph 200 in the court martial decision of *Cadieux*, I have no trouble concluding that the prosecution has proven beyond a reasonable doubt that Cpl Christmas' specific conduct, owing to the influence of alcohol or a drug, behaved in a disorderly manner. Using the words of my colleague Pelletier, M.J. in *Sloan*, her behaviour " . . . reflects the fact that no member of the military is exempted from the obligation to show respect to anyone, [. . .]".

[158] Despite my concerns with A.H's reliability with regard to charges one and two, for charge three, I accept his evidence that he was awoken by the accused, who had the odor of rubbing alcohol, had slurred speech, was belligerent to him and had difficulty maintaining her balance to the degree that A.H. was required to assist her back to the section classroom. There is also evidence from Pte Ashford that Cpl Christmas woke him up in the early morning hours of 17 March 2019 as he was sleeping in his cot. Cpl Christmas began undressing and got into his cot. Pte Ashford was then forced to take his sleeping bag and sleep in the mess as he thought it was best that Cpl Christmas get some sleep given her apparent intoxication.

[159] In sum, for a Cpl in the CAF "owing to the influence of alcohol" to awaken one teammate in the middle of the night in a state that required assistance in moving her to the section classroom and having to deal with her belligerence, then for her to awaken another teammate of a lower rank, begin undressing and take that teammates cot forcing them to find another place to sleep all within the context of being within an armouries, housing candidates for a military course, in my view, satisfies the element of "behaving in a disorderly manner".

[160] Therefore, the prosecution has proven the third charge of drunkenness beyond a reasonable doubt.

Concluding Remarks

[161] The assessment of credibility in a criminal trial is often the most challenging judicial task in sexual assault cases where the trier of fact is presented with two versions of events at issue and little or no other evidence (see *Kruk* at paragraph 81).

[162] As the trial judge, I may believe the accused is probably guilty or likely guilty of charge one and charge two but that is not sufficient. In this case, I must give the benefit of the doubt to the accused because the prosecution has failed to satisfy me of the accused's guilt beyond a reasonable doubt (see *Lifchus* at paragraph 39) for charges one and two. I have no such doubt of the accused's guilt as it relates to charge three.

FOR THESE REASONS, THE COURT:

[163] **FINDS** Cpl Christmas not guilty of the first and second charge.

[164] **FINDS** Cpl Christmas guilty of the third charge.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J.M. Besner, Lieutenant(N) E. Carley and Major M.D. Ferron

Lieutenant-Colonel A.H Bolik and Major C.M. Da Cruz, Defence Counsel Services, Counsel for Corporal K.L. Christmas