



COURT MARTIAL

Citation: *R v Royes*, 2013 CM 4033

Date: 20131212

Docket: 201339

Standing Court Martial

Canadian Forces Base Wainwright
Denwood, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal D.D. Royes, Accused

Presiding: Lieutenant-Colonel J.G. Perron, M.J.

RESTRICTION ON PUBLICATION

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant or any other witness shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

[1] The accused, Master Corporal Royes, is charged with one count of sexual assault. It is alleged that he committed a sexual assault on a female private in his room at Canadian Forces Base (CFB) Wainwright on 12 February 2012. The court has made an order prohibiting the publication of any information that could identify the complainant or any witnesses. The court will refer to the complainant as N.K. and to each witness by their initials in its decision. Before this court provides its analysis of the evidence and of the charges, it is appropriate to deal with the presumption of

innocence and the standard of proof beyond a reasonable doubt. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[2] It is fair to say that the presumption of innocence is probably the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as with cases dealt with under Canadian criminal law, every person charged with an offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[3] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[4] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term, "beyond a reasonable doubt," has been used for a very long time. It is part of our history and traditions of justice.

[5] The Supreme Court of Canada has proposed a model chart on reasonable doubt. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice, it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

[6] In *R. v. Starr*, [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court held that:

... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

[7] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Master Corporal Royes, beyond a reasonable doubt. To put it in perspective, if the court is convinced, or would have been convinced, that the accused is probably or likely guilty, then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[8] Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did. It could be documents, photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

[9] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[10] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe, a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably, more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[11] The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant, or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts?

[12] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well taint a witness's entire testimony.

[13] The court is not required to accept the testimony of any witness, except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason rather to disbelieve it.

[14] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R. v. W. (D.)*, [1991] 1 S.C.R. 742. This test goes as follows:

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 you 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 by that evidence of the guilt of the accused.

[15] In *R. v. J.H.S.*, 2008 SCC 30 paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R. v. H.(C.W.)* (1991), 68 C.C.C.(3d) 146 British Columbia Court of Appeal where Wood J.A. suggested the following additional instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely: If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit.

[16] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court. The evidence before this court martial is composed essentially of the following: judicial notice of the facts and issues under Rule 15 of the Military Rules of Evidence; the testimony of N.K., the complainant, Corporal P, Corporal S, Corporal F and Corporal Sc for the prosecution. Master Corporal Royes and Dr R testified for the defence. Dr R testified as an expert witness.

[17] The particulars of the charge read as follows: "In that he, on or about 12 February 2012, at or near Canadian Forces Base Wainwright, Alberta, did commit a sexual assault on N.K." The prosecution had to prove the following essential elements of this offence beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Master Corporal Royes applied force to N.K.;
- (c) that Master Corporal Royes intentionally applied force;
- (d) that N.K. did not consent to the force that Master Corporal Royes applied;
- (e) that Master Corporal Royes knew that N.K. did not consent to the force that Master Corporal Royes applied; and
- (f) that the force Master Corporal Royes applied took place in the circumstances of a sexual nature.

[18] Firstly, I will briefly review the evidence that is not disputed in this trial. Master Corporal Royes met N.K. at a bar in the city of Wainwright during night of 11 and 12 February 2012. He, N.K. and two corporals drove from the bar to the base. Master Corporal Royes brought N.K. to his room in the Yukon Lodge because she was too intoxicated to inform them of her room number. Master Corporal Royes testified he had sexual intercourse with N.K. during the morning of 12 February 2012 in his room at

CFB Wainwright. He also testified that he touched her breasts approximately two hours later because he wanted to have sex with her again.

[19] Is Master Corporal Royes the offender? The court finds the prosecution has proven beyond a reasonable doubt that Master Corporal Royes is the offender and that the alleged offence occurred on 12 February 2012 at CFB Wainwright, Alberta.

[20] Did Master Corporal Royes apply force to N.K.? Force includes any physical contact with another person, even a gentle touch. The contact may be direct, for example, touching a person with a hand or other part of the body, or indirect, for example, touching a person with an object. It is abundantly clear from the testimony of N.K. and of Master Corporal Royes that he did apply force to N.K. when he was having sexual intercourse with her and when he touched her breasts.

[21] Did Master Corporal Royes intentionally apply force? It is also abundantly clear from the testimony of Master Corporal Royes that he did intentionally apply force to N.K. when he was having sexual intercourse with her and when he touched her breasts.

[22] Did the force Master Corporal Royes apply take place in the circumstances of a sexual nature? Sexual assault is an assault as defined by the *Criminal Code* and where the sexual integrity of the victim is violated. Again, it is quite evident from the testimony of N.K. and of Master Corporal Royes that the force Master Corporal Royes applied took place in the circumstances of a sexual nature since he had sexual intercourse with her and he touched her breasts for a sexual purpose.

[23] The prosecution asserts that the evidence clearly indicates that, when she was in Master Corporal Royes' room, N.K. was inebriated and unconscious and did not have the capacity to consent to the sexual activity with the accused. The prosecution argues there is no air of reality to Master Corporal Royes' version of the events. Counsel for the accused states that Master Corporal Royes is a credible witness and that his evidence demonstrates that N.K. was sober enough and conscious enough to initiate the sexual relations with the accused and that she was a willing participant throughout the sexual intercourse. He also states that the prosecution must prove beyond a reasonable doubt that N.K. was unable to consent.

[24] The main issues in this trial are whether the prosecution has proven beyond a reasonable doubt that N.K. was incapable of consenting to the sexual activity (see subparagraph 273.1(2)(b) of the *Criminal Code*) and that Master Corporal Royes could not have an honest but mistaken belief that N.K. had consented. The questions at the heart of our case are whether N.K. consented to having sexual intercourse with Master Corporal Royes and whether Master Corporal Royes knew that N.K. did not consent to having sexual intercourse with him.

[25] I will now review the evidence of the accused and of the prosecution as it relates to the events and the sexual activity of the night and morning of 12 February 2012.

[26] Master Corporal Royes testified that he went to JD's, a bar in Wainwright, with his friend, Corporal F, to have a drink and hang out. They arrived at the bar at approximately 0100 hours on 12 February 2012. He was to meet a female friend, Amanda, at the bar. He was approached by N.K. as soon as he arrived. She told him she wanted to dance with his friend the dentist. He told her his friend was not a dentist but was named Yves. He testified the dentist on base was a black man and had the same built as Yves. He introduced Yves, Corporal F, to N.K. and they danced. He then spoke with the bar's bouncers near the door.

[27] N.K. approached Master Corporal Royes again and asked him if Yves was a nice guy. He asked her if she wanted to take him home and she answered maybe. He described her as being clear and precise during his conversations with her and being conscious and aware of her surroundings. She went to dance with Yves but he did not observe them dancing.

[28] N.K. asked him to accompany her in Corporal F's car. They were to drop Corporal S, at his room and then she was to go with Yves to spend some time with him. Yves was then to bring him back to JD's to see his friend Amanda. N.K. walked normally to the car. They drove onto the base and were stopped by the military police. N.K. vomited on her jacket after the military police had left the car. He described her as having her chin on her chest and sitting straight when she vomited. He stated it was now obvious she would not be going with Yves.

[29] He stated he offered his room to N.K. since he was planning to stay with Amanda that night and that she accepted his offer by mumbling, "Yes". He had asked her her room number but she had only mumbled the answer. She was drunk and was mumbling. He gave her a hand so she could get out of the car.

[30] They took the elevator to go to his room. He helped her take off her jacket. He gave her shorts and a t-shirt because she was filthy and he did not want her to sleep in the filth. He turned his back to her while she changed. He gave her a garbage can and told her to try not to be sick. He went to Corporal F and texted Amanda. He told Corporal F to give him five minutes. He did not receive a text from Amada and went back to his room. N.K. had vomited on his bed. She stood up while he changed the bed. She was drunk and had vomited twice between 0200 and 0230 hours. She went back to bed and to sleep. He had put her clothes in one pile and the dirty linen in another pile on the floor.

[31] He took off his shirt and pants and put on shorts and a t-shirt and socks and lay on his stomach on the other side of the bed to go to sleep. His bed is a queen sized bed and Master Corporal Royes measures six feet and weighed approximately 220 to 225 pounds. She rolled over and vomited on his right arm. He got a towel and cleaned himself. He told her to vomit in the garbage can and she was awake when he said that to her. She went to sleep. He received a text from Amanda. He went to sleep and he was not drunk at that time. He did not remember if the light was on or off.

[32] He woke up after 0800 hours and could remember it was after 0800 hours because he has a microwave oven and an alarm clock in his room. He knew it was sometime after 0800 hours. N.K. had her hand in his underwear and she was massaging his penis. She was about nine to ten inches away from him. She was lying on her left side and was using her right hand. He was on his left side. He did not know how long she had been doing this. He moved closer to her and she moved closer to him. He thought she was interested in having sex. She was looking at him; she pushed herself closer to him when he is touching her buttocks. He put his finger in her vagina and she was moaning. There was not much conversation at that point. He believed she wanted to have sex and he was excited. She removed her shorts and underwear and he removed his shorts and underwear.

[33] He asked her if she wanted doggie style and she replied no. He did not ask about a condom because he has had a vasectomy. N.K. did not ask him to wear a condom. He explained that she had his penis in her hand and that it was clear he was not wearing a condom. They had sex in the missionary position. He did not put his weight on her. She was moaning and groaning. She would hold her legs up and move down the bed so she would not hit her head on the head board. He would ask her to move and they would move down the bed. He asked N.K. where she wanted him to ejaculate and she answered, "Not inside me." He stated she knew he was not wearing a condom. He ejaculated on her stomach.

[34] He grabbed a towel and wiped the semen from her stomach. He explained he did this because it was "his place and she does not know where things are". The sexual intercourse would have lasted at least 20 minutes. They sat up, snuggled and had a 30-minute conversation. They would have been arm-in-arm and her head would have been on his left shoulder. She would have told him about her component transfer to the Regular Force and that she wanted another contract. He told her to speak to the CSM, who was another Newfoundlander about her contract. They spoke of another private who was bi-sexual. He asked her what she had been drinking and she said that Chickypoo was pouring her drinks the night before. She also said that Corporal P thought he was going to get some. She seemed normal at that time and was not slurring her speech.

[35] She asked him to keep their sexual encounter between them and they shook hands on it. They went to sleep cuddling in each other's arms. He woke up after 1000 hours because his left arm had fallen asleep because N.K. was lying on it. He tried to remove his arm and N.K. awoke. Her eyes were opened. He told her, "Hey" and she replied, "Hey". She leaned into him in a comfortable position. He rubbed her arm and she pushed her body into him. She pushed her buttocks closer to him.

[36] She looked at him and she looked relaxed. He touched and massaged her breast to see if she was interested in sex because they had had sex earlier. She was naked and she pushed her buttocks on him. He massaged her breast. She was enjoying it until he touched her nipple. She was rubbing his leg with her leg. She said, "Can't you tell they

are sensitive?" Her voice was not stern but a voice that is saying, "Do not leave me but leave my nipples". She had never said do not touch my nipples. He touched her buttocks to see if she was interested in sex since she was snuggling to him. Her voice was clear and concise. He did ask her if she wanted to have sex. She sat up. He said, "I guess you don't want seconds?" She said no and, "I guess I should be going".

[37] He stated he did not have an erection at that time as much as he wanted to have sex. He did not prod her with his penis and he did not put his finger in her vagina. They did not have any sexual contact after she sat up. He told her he would do her laundry with his and she told him she would deal with it. He told her to hang out while he would do his laundry but she wanted her clothes. She picked up her clothes and put them on. She had no difficulty putting on her clothes. He could understand all her words and she was not under the influence of alcohol. She wanted to go wait in his car while he put his clothes in the wash. He showed her his car from his window and she went to the car while he put his laundry in the machine. He took her to her building. He told her she had vomited in Corporal F's car and she told him to offer her apologies to Corporal F. He said that he did not drug her; that it was not his style and that he did not have to do that.

[38] During his cross-examination, he stated he had been in building 625 before 12 February. N.K. lived in building 625 at the time of the alleged sexual assault. When asked if he noticed women posted to Wainwright he answered that he notices people on the base and that "you stand out when you are a minority". He agreed that women were a minority in Wainwright. He stated that N.K. was alright looking and that he would have sex with someone alright looking. He confirmed she was part of Western Area Training Centre (WATC) but not of his chain of command.

[39] He enjoyed her company and he admired her personality when he first met N.K. He thought she was friendly. He stated he had no sexual or romantic interest in her before 12 February. He never asked her how long she had been a member of the Canadian Forces. He had talked about her contract and her component transfer the night of 12 February and before that night but not about where she had served before.

[40] He stated they enjoyed flirting together if the telephone texts between them were deemed flirty. He never told her he liked her ass or that she had a black girl ass. He agreed he could have texted "more sex, that's my secret" to N.K. and he did not know if she had responded to that text. He could not confirm or deny that he would have sent her a text saying she did not have enough cardio on the weekend. He agreed he had sent a text about getting rid of 2-minute men before 12 February and he agreed a 2-minute man was a man who achieved orgasm quickly.

[41] He did not know if N.K. had an orgasm on 12 February. He would never ask her to have sex with him. It would not make sense. He did not want to have sex with her. He was not looking for an opportunity to have sex with her. He stated "we had sex which she initiated". When told it would be embarrassing to have sex with someone not awake, he replied it would be if it had happened.

[42] Also during cross-examination, he testified that he was to take a cab to go see Amanda, but Amanda went to JD's that night. She lives ten to fifteen minutes in Wainwright from JD's. He estimated it took ten to fifteen minutes to drive from JD's to the base. He did not cancel his plans with Amanda when he decided to go to the base with Corporal F. Corporal F was supposed to bring him back to meet Amanda at the bar or to her residence. He saw Amanda at the bar and told her he was dropping M. at his residence and then would return to the bar. Amanda was at the bar with friends when he left. He agreed the only reason he went with them to the base was because N.K. had asked him to accompany her. He did not believe she was intoxicated and he was not worried about her, but he said that when a friend asks him to go, he goes and thought it was for her peace of mind. He also knew that Corporal F and N.K. were supposed to hang out together after Corporal F had brought Corporal S to his room.

[43] He stated that Corporal F had testified that he had received a text from Tracy after Corporal F had decided he would not hang out with N.K. Corporal F changed his plans because N.K. had vomited. He would have received this text at approximately 0230 hours. He did not see the phone or know of Tracy's text but relied on what Corporal F had said in court.

[44] He only asked where N.K. lived after she had vomited and he estimated it was approximately ten to fifteen minutes after they had left JD's. He was not worried about her when they left the bar. She was coherent and she walked to the car. He stated he had seen it happen before that a person would be coherent and then incoherent within fifteen minutes. He offered his room to N.K. He assisted her out of the car. She was not stumbling but she was walking with his assistance. She would have stumbled without his assistance. He helped her onto the elevator.

[45] He did not provide her a glass of water when he first had her change to go to bed. It would have taken a couple of minutes to put her to bed. He did not take any toiletries before leaving his room to go spend the night with Amanda and he explained that Amanda was not a girlfriend but a girl he was seeing. He had spent many nights there and he would brush his teeth when he would return to his room.

[46] He knew last call at J.D.'s was 0200 hours and people were kicked out at 0230 hours. He thought he would have enough time to return to meet Amanda. He went back to Corporal F and he texted Amanda asking her if she was at the bar or at her home. He had not anticipated it would take so long. He had anticipated it would have taken five to ten minutes to bring Corporal S to his room. He waited approximately ten minutes with Corporal F. Amanda had not yet responded and he told Corporal F to leave. He went back to his room. He could not be sure of how long it had taken to put N.K. to bed since it had happened almost two years ago. He estimated it took less than five minutes to take N.K. from Corporal F's car and to his room.

[47] He did not bring N.K. to the military police to be put in the drunk tank because he did not want her to suffer the consequences of that. He did not bring her to the duty sergeant because it is not the duty sergeant's responsibility to take care of drunks. He

knew building 625 was always opened. He could have gone there but he did not know her room number and he did not have her key. He did not want to search in her pockets or her purse for her room keys because he does not look in women's purses. He did not know if the duty sergeant would have known N.K.'s room number. He knew building 625 had regular keys and not magnetic keys like the Yukon Lodge.

[48] N.K. had thrown up when he returned to his room. He provided her with a shirt and shorts and she probably changed when he changed the sheets. She went back to sleep on her side. Amanda answered his text and he told her he could not go because N.K. was sick and he had to take care of her. He assumed she was drunk and she had thrown up.

[49] He did not offer N.K. any water during their 30-minute conversation and answered that she did not ask for water and she could have gotten some when she went to use the washroom. She came back from the washroom straight back into my arms and they talked. She was not stumbling when going to the washroom and she was not slurring her words. He never kissed her because she had vomited the night before.

[50] During his re-examination, he said it would not make any sense that he would ask for sex after he had shared many intimate details concerning his sex life, such as the number of women he had slept with. This was the type of conversation he would have with a woman that was one of the boys and not someone he would want to sleep with.

[51] Corporal F is a friend of Master Corporal Royes. He drove Master Corporal Royes to JD's at approximately 0100 hours. He described N.K. as a nice looking girl. He left JD's between 0200 and 0230 hours to drive Corporal S to his room on base with Master Corporal Royes and N.K. He did not drink that evening. He likes to dance. N.K. vomited in his car and it smelled for a couple of days. He wanted to get together with her after leaving JD's until she vomited in his car. He did not tell Master Corporal Royes of his plan but he could have given him the impression it was his intention.

[52] N.K. was intoxicated at JD's. She kept drinking at the bar all night and she was more intoxicated at the end although he did state she was not that bad and that he was not an expert on intoxication. She needed help to walk when she left his car. He described her condition as not that good since she had vomited. She could not respond to questions by Corporal S because she was mumbling. They could not find out where she lived. Master Corporal Royes and Corporal S took her to the Yukon Lodge. Master Corporal Royes came back and told him "Good to go". He went to get his friend Tracy.

[53] Corporal S was at a social gathering at Corporal P's residence with N.K. and other people. He lived at the Yukon Lodge. They would have left the house by taxi at approximately 2300 hours to go to JD's. He was tipsy at that point. He had three, four or five drinks at JD's and would have left the bar between 0230 and 0300 hours. The bar was almost closing and it closed at 03:00. Corporal F was driving. Corporal S described himself as drunk at that time.

[54] He described N.K. as fairly drunk; she was not able to talk; she was kind of passed out; and she vomited soon after they had gotten on the base. She had her head down; she was not responding to them; and did not appear completely conscious. He stated she was passed out for part of the drive to the base. They asked her where she lived and she was not answering them. Master Corporal Royes helped N.K. get out of the car. He did not assist Master Corporal Royes in helping N.K. and he did not see her as they walked to the building.

[55] Corporal S's room was on the second floor of the Yukon Lodge and Master Corporal Royes' room was on the third floor. Master Corporal Royes said she could sleep in his bed. It was Master Corporal Royes' idea and Corporal S did not hear N.K. say anything about that.

[56] During his cross-examination, Corporal S stated she was not asleep in the car; she appeared awake with her head down. He saw her dancing and talking to people at JD's and she seemed intoxicated to some degree. She was not incoherent at JD's, she was dancing and having fun. He could not remember if she had danced with Corporal P and Corporal F. During his re-examination, he confirmed she was coherent at the bar but was not answering them when she was in the car.

[57] Corporal P had friends come to his house on base to watch movies and have drinks. N.K. was present. He was drinking a lot and had passed out. He was awoken around midnight to go to JD's. All went to JD's except Jeff Martins. He was very intoxicated. He continued drinking at JD's and danced by himself. No one else in his group was dancing. He was not on the dance floor at all times. He was at JD's when it closed at 0230 hours. He walked home and was picked up by a friend. All were still at the bar when he left JD's.

[58] He asked N.K. if she wanted to take a taxi back to the base and she replied no. He asked her if she had money for a taxi and she replied yes. He had a romantic interest in her and he thought she had one in him. He did not know her very well.

[59] During his cross-examination, he could not say for sure where the drinks were at his house on 11 February. He did not remember if he danced with N.K. at JD's. He did not remember talking with N.K. at JD's. He remembered seeing N.K. dancing with black men.

[60] Corporal Sc is a member of the CFB Wainwright military police platoon. He stopped Corporal F's car on 12 February. He did not take any notes since it was a routine traffic stop. He stopped him because he had failed to maintain his lane and he was crossing over. He spoke to the driver and found there was no sobriety problem with the driver. The stop might have taken 15 to 20 minutes.

[61] He noticed a female in the car who appeared intoxicated. Her head was down; she did not seem coherent. She looked dazed when she looked up; he said she had a "thousand-yard stare". She did not seem to know what was going on.

[62] During his cross-examination, he agreed the stop might have been less than 15 to 20 minutes since he did not have notes and was relying on his memory almost two years later. He agreed she was not passed out. "Incoherent" refers to speech and he did not speak to her.

[63] N.K. was posted to the WATC at CFB Wainwright in September 2011. Master Corporal Royes, although a member of WATC, was not in her chain of command. She considered him a friend. She resided in a room in building 625 at CFB Wainwright. Master Corporal Royes had a room at the Yukon Lodge and the only time she ever went to his room was on the night of 11 to 12 February 2012. She would see Master Corporal Royes a few times a week but not on the weekends. She had friendly communications with Master Corporal Royes and he talked of his sexual exploits in his text messages to her. She did not remember the exact text messages.

[64] She went to Corporal P's residence on 11 February to watch movies and socialize with friends. She did not know Corporal P's rank. Jeff Martins, Corporal S, Derek, Justin DeWitt and Kelsey were present at that social gathering. She arrived at approximately 1730 hours. She drank iced tea with vanilla liqueur and then switched to iced tea with peach liqueur. She thinks she had five drinks at the house but admits it is an estimate.

[65] They left to go to JD's at approximately 2330 hours by cab and arrived approximately 15 minutes later. She drank at JD's and danced with Corporals P and F. She drank Blue Rev which is alcohol mixed with an energy drink. She thinks he had three or four but was not sure. She saw Master Corporal Royes at the bar and went to talk to him about dancing with his friend because he was a good dancer.

[66] Her last memory at the bar was going back to her table with her friends and having a drink. She estimated this would be at approximately 0100 hours. Her next memory is being in bed with Master Corporal Royes in his room. She does not remember leaving the bar.

[67] She felt his penis in her vagina, saw him ejaculate on her stomach and saw he was not wearing a condom. They were both naked. He was kneeling over her. He wiped the semen from her stomach. She might have lost consciousness but she lost her memory again. She asked, "What is going on" but she was not sure if it was at that time or the next time she regains her memory. She does not remember if he answered. She woke up again and he was fondling her breasts. He then put his fingers around her vaginal area and he tried to put his penis in her vagina.

[68] She kept moving her legs so he would not be able to put his penis in her. She said no, sat up and said she wanted to go to her room. She did state her memory is fuzzy. She asked for her clothes because she did not know where they were. Her clothes were in a pile of laundry on the floor.

[69] She was lying on her left side and he was behind her. She did not want him to touch her breasts and her vagina. She did not want him to touch her at that point and that is why she was moving her legs. She was confused and did not know what was going on. Master Corporal Royes told her to take a shower in his room and that he would wash her clothes but she refused. She felt sick, confused, dazed and dizzy. Master Corporal Royes offered her a ride to her room and she accepted because she did not think she could walk to her room. The car ride to her room is approximately three minutes. During the drive, he told her she had vomited in Corporal F's car and she asked him to offer Corporal F her apologies. He also told her she would have to do his laundry one day because he took care of her. She laughed at that comment.

[70] Upon arriving at her room, she felt wretched and lay down. She tried to take a shower but could not wash her hair and had to go lay down in bed. She realized what had happened and cried. She called Jeff Martin to find out what had happened the previous night because, although he had not gone to JD's, he was a friend and the other people with her at the bar were Master Corporal Royes' friends. Jeff Martin called some people and called her back with the information. She called another friend, Eric Brand, and he told her to go to the Wainwright hospital. She went by taxi to the hospital in Wainwright, arrived at approximately 1700 to 1800 hours and was seen by Dr Brilz. She had not eaten that day and had had only water. She vomited twice at the hospital. She stated she asked for the rape kit and was told she would get the rape kit if she pressed charges. She was still confused and did not want to make such a life-altering decision while having an unclear mind. She was given Gravol and ginger ale. She was at the hospital for a few hours.

[71] The next day she spoke to her sister at approximately 1600 hours. Her sister is a nurse and she told her which medication she should receive to prevent sexually transmitted infections (STIs). She went to the hospital on 13 or 14 February and showed them the text she had received from her sister. She received that medication at that time.

[72] She reported to sick parade on 13 February. She saw a social worker and a padre. She decided to press charges and was interviewed by the military police. She tried to go back to work, worked for half a day, but could not do it because she was too upset. She left Wainwright on compassionate leave on 14 or 15 February and returned on 6 March 2012 to finalize her contract and gather her effects. She left Wainwright on 9 March 2012. She would have taken a three-year extension to her Class B terms of service had it not been for the alleged sexual assault. She did not want to stay in Wainwright because she did not feel safe.

[73] She stated she was never sexually attracted to Master Corporal Royes. She always insisted her partners wear condoms because they prevent STIs. She takes birth control pills to prevent pregnancy. She only has sex without a condom if it is with a long-term boyfriend. She referred to a relationship that would have lasted 18 to 24 months and that they would take STI tests to ensure they are free of infections. She did not have a boyfriend on 12 February 2012.

[74] She stated it felt like her body was awake before her mind on 12 February. She did not want to have sex with Master Corporal Royes. She said, What is going on? after he wiped the semen from her stomach. It was approximately one minute between the ejaculation and the wiping. She did not say no because she was very dazed and confused. She also said it was possibly due to self-preservation because Master Corporal Royes is a very strong man.

[75] During her cross-examination, she confirmed that on two previous occasions she had had to ask friends what had happened during brief periods of time the previous evening when she had been drinking. She explained that she had had a partial blackout, which meant she could not remember a short period of time such as five minutes. She had not felt it was a problem because she had been in a safe place with safe people. She did not drink that much that often and she chose friends with which to drink. She described trusted friends as her friends in St-John's that she has known for ten years.

[76] She poured her drinks at Corporal P's residence. She did not know the alcohol content of vanilla liqueur or peach liqueur. She was not measuring the alcohol. She stated she controlled her intake of alcohol and would not rely on Corporal P or Jeff Martin since they were not her babysitters. She could have had more than five drinks at Corporal P's residence; more or less, she had no idea.

[77] She did not recall taking a drink from anyone at JD's. She thought she had three or four drinks at JD's. She was drunk when she arrived at JD's. She believed she remained at the same level of drunkenness at JD's. She thought she was drunk but in control of herself. Her last recollection at JD's was going to the table and having a drink. It was not the first drink but could have been the second, third or fourth.

[78] She did not recall Master Corporal Royes asking her if she wanted to go home with Corporal F or making any decision to go home with Corporal F or anyone else. She did not recall Corporal P telling her he was leaving and asking her if she was leaving. She did not recall asking Master Corporal Royes to come in Corporal F's car. Corporal S was sitting at their table most of the night but she did not recall when he left. She did not recall that she was in Corporal F's car along with Master Corporal Royes and Corporal S. She did not remember the ride from JD's to the base, being stopped by the MP and vomiting in the car.

[79] Her room number was written on her key which was in her pocket. She stated she had no sexual interest in Master Corporal Royes. She had discussed a private working in the dry cleaning business and a private in pornographic films in the past with Master Corporal Royes. She stated their friendship went out the window when she woke up with his penis in her vagina. She did not remember making eye contact with Master Corporal Royes when he was touching her breasts. She did not recall saying her breasts were sensitive. She did not remember Master Corporal Royes asking for more sex when she sat up.

[80] Master Corporal Royes pointed to his car from his room. The drive to her room was approximately three minutes and it takes approximately 15 minutes to walk that distance. She did not remember cuddling in his arms and falling asleep in his arms. She did not remember making a decision to have sex without a condom. Finally, she stated she vomited in her room and twice at the hospital on 12 February.

[81] This completes the overall review of the evidence. A trial such as this one turns on the assessment of the credibility of the witnesses. A trial judge may assess evidence "through the lens of common sense and everyday experience, in the same manner as juries are instructed to do by trial judges." (see *R. v. H.C.* 2009 ONCA 56 at paragraph 64). An assessment of credibility involves the evaluation of the honesty of a witness but also the reliability of the evidence of that witness. Credibility is a function of the veracity of the witness and reliability pertains to the accuracy of the evidence. The assessment of credibility may not be a purely intellectual exercise. Assessing credibility is not a science (see *R v Gagnon* 2006 SCC 17 at paragraph 20 and *R. v. R.E.M* 2008 SCC 51 at paragraph 48). Numerous factors are involved. Some factors may defy verbalization (see *R. v. R.E.M.*) at paragraph 49. Paragraph 50 of the *R. v. R.E.M* decision reads as follows:

What constitutes sufficient reasons on issues of credibility may be deduced from *Dinardo*, [which is *R v Dinardo* 2008 SCC 24] where Charron J. held that findings on credibility must be made with regard to the other evidence in the case (para. 23). This may require at least some reference to the contradictory evidence. However, as *Dinardo* makes clear, what is required is that the reasons show that the judge has seized the substance of the issue. "In a case that turns on credibility ... the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt" (para. 23). Charron J. went on to dispel the suggestion that the trial judge is required to enter into a detailed account of the conflicting evidence

[82] Did N.K. consent to the force that Master Corporal Royes applied? The *Criminal Code* provides a meaning for consent at section 273.1. It reads as follows:

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.

- (2) No consent is obtained, for the purposes of sections 271, 272 and 273, where
- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
 - (b) the complainant is incapable of consenting to the activity;
 - (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
 - (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or

- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

(3) Nothing in subsection (2) shall be construed as limiting the circumstances in which no consent is obtained.

[83] In *R v J.A.* 2011 SCC 28, Chief Justice McLachlin for the majority wrote the following at paragraphs 36 and 37 on the issue of consent:

[36] Section 273.1(2)(b) provides that no consent is obtained if “the complainant is incapable of consenting to the activity”. Parliament was concerned that sexual acts might be perpetrated on persons who do not have the mental capacity to give meaningful consent. This might be because of mental impairment. It also might arise from unconsciousness: see *R. v. Esau* ... *R. v. Humphrey* ... It follows that Parliament intended consent to mean the conscious consent of an operating mind.

[37] The provisions of the *Criminal Code* that relate to the *mens rea* of sexual assault confirm that individuals must be conscious throughout the sexual activity. Before considering these provisions, however, it is important to keep in mind the differences between the meaning of consent under the *actus reus* and under the *mens rea*: *Ewanchuk*, at paras. 48-49. Under the *mens rea* defence, the issue is whether the accused believed that the complainant *communicated consent*. Conversely, the only question for the *actus reus* is whether the complainant was subjectively consenting in her mind. The complainant is not required to *express* her lack of consent or her revocation of consent for the *actus reus* to be established. [Emphasis in original]

[84] To decide whether N.K. consented to having sexual intercourse the court must consider her state of mind. The court must consider all the evidence, including the circumstances surrounding Master Corporal Royes' physical contact with N.K., to decide whether N.K. consented to having sexual intercourse and to the touching of a sexual nature. The court must take into account any words or gestures, whether by Master Corporal Royes or N.K., and any other indication of N.K.'s state of mind at the time.

[85] Just because N.K. submitted or did not resist does not mean that N.K. consented to what Master Corporal Royes did. Consent requires N.K.'s voluntary agreement to let the physical contact occur. The Alberta Court of Appeal stated the following on the topic of intoxication and consent at paragraph 7 of its *R v Haraldson*, 2012, ABCA 147 decision:

The *Criminal Code* explicitly provides that there can be no consent if the complainant is incapable of consenting to the activity Capacity to consent to sexual activity requires something more than the capacity to execute baseline physical functions. The question is the degree to which intoxication negates comprehension or volition. A drunk complainant may retain the capacity to consent: *R. v. R.(J)* (2006), 40 C.R. (6th) 97 (Ont. S.C.J.) at paras. 17-19, 43. Mere drunkenness is not the equivalent of incapacity: *R. v. Jensen*. (1996), 106 C.C.C. (3d) 430 (Ont. C.A.). Nor is alcohol-induced imprudent decision making, memory loss, loss of inhibition or self control: *R. v. Merritt*, [2004] O.J. No. 1295 (Ont. S.C.J.). A drunken consent is still a valid consent. Where the line is crossed into incapacity may be difficult to determine at

times. Expert evidence may assist and even be necessary, in some cases (*R. v. Faulkne*, (1997), 120 C.C.C. (3d) 377 (Ont. C.A.)), though it is not required as a matter of law ...

[86] If one follows Master Corporal Royes' testimony, the first part of the evening before the sexual activity is as follows: it is the end of the evening and Amanda is at the bar. Master Corporal Royes is supposed to leave the bar with Amanda to spend the night with her. N.K. asks Master Corporal Royes to accompany her when Corporal F is driving Corporal S to his room at the Yukon Lodge. Corporal F is then supposed to spend some time with N.K. N.K. had told Master Corporal Royes "maybe" when he asked her if she wanted to take Corporal F home. So Master Corporal Royes was aware N.K. might be interested in Corporal F. Master Corporal Royes testified she did not appear intoxicated and he was not worried about her. He then would have left the bar where he had met Amanda to accompany N.K. to the base because N.K., a friend, had asked him and he did this for her peace of mind. Master Corporal Royes stated it was obvious N.K. would not be going with Yves after she had vomited in the car. He then offered his room to N.K. since he was going to see Amanda and N.K. accepted his offer.

[87] Corporal F, the person who was supposed to drive Master Corporal Royes to the bar or to Amanda's residence, did not mention Amanda in his testimony and was not questioned about Amanda. Yet, this is an important portion of Master Corporal Royes' testimony since he testifies his plans were to spend the night with Amanda after spending some time at JD's. He offers this evidence to demonstrate he had no interest in spending the night with N.K. Although there is no need for corroboration of this evidence, the fact that the plan of driving Master Corporal Royes to see Amanda is not mentioned by anyone else and its importance in this case does raise many questions as to the veracity of this evidence.

[88] Master Corporal Royes testified he had not cancelled his plans with Amanda when he decided to go to the base with Corporal F. Amanda was at the bar with friends when he left. He had not anticipated it would take so long. He had anticipated it would have taken five to ten minutes to bring Corporal S to his room. He knew the last call at JD's was 0200 hours and people were kicked out at 0230 hours. He thought he would have had enough time to return to meet Amanda at the bar. But during his cross-examination, he estimated it took ten to fifteen minutes to drive from JD's to the base. So at best, it would have taken at least 20 minutes and possibly 30 minutes and not the five to ten minutes to return to the bar.

[89] Master Corporal Royes asked where N.K. lived after she had vomited in the car. He asked her what was her room number but she had only mumbled the answer. She was drunk. It was his decision for her to stay in his room. He offered his room; she mumbled yes. He gave her a hand so she could get out of the car. She was not stumbling but needed to walk with his assistance. She would have stumbled without his assistance.

[90] Corporal F testified N.K. could not respond to questions by Corporal S because she was mumbling. They could not find out where she lived. Corporal S testified they

asked her where she lived and she was not answering them. It was Master Corporal Royes' idea that N.K. sleep in his room and Corporal S did not hear N.K. say anything about that.

[91] It would thus appear from Master Corporal Royes' testimony that N.K. could only mumble an incoherent answer when asked about her room number but that she could mumble a coherent enough yes to the offer of his room, yet Corporals F and S could only hear incoherent mumbling from N.K.

[92] Master Corporal Royes testified he left his room after putting N.K. to bed, went to Corporal F and texted Amanda. He told Corporal F to give him five minutes. He would have waited approximately ten minutes with Corporal F. Amanda had not yet responded and he told Corporal F to leave. He then received a text from Amanda when he was in his room but answered he was taking care of N.K. Corporal F testified Master Corporal Royes and Corporal S took N.K. to the Yukon Lodge. Master Corporal Royes came back and told him to leave, or "Good to go".

[93] During his cross-examination, Master Corporal Royes agreed he could have gone to building 625, but he stated he did not know her room number and he did not have her key. He knew building 625 was always opened. He knew building 625 had regular keys and not magnetic keys like the Yukon Lodge. He did not want to search in her pockets or her purse for her room keys because he does not look in women's purses.

[94] It appears that Master Corporal Royes knew a lot about building 625 except N.K.'s room number or how to find it. He seems to have reservations about looking in the pockets or the purse of a drunken female soldier to find her room keys while in the presence of other soldiers but he does not seem to have any reservations about bringing a drunken female soldier to his room.

[95] The court finds it hard to believe he would have left Amanda to go on a 20 to 30 minute drive only because N.K. would have asked him and to ensure her peace of mind. According to Master Corporal Royes, she was supposed to spend some time with Corporal F and that also seems to have been Corporal F's intention. Master Corporal Royes was not worried about her. There is no evidence before the court that would indicate she expressed any concerns when she left the bar. Master Corporal Royes' testimony concerning Amanda and his reason to go in Corporal F's car make no sense. His statement that N.K. answered a mumbled yes to the offer of his room is very suspect when compared to the testimony of Corporals F and S.

[96] During his cross-examination, Master Corporal Royes stated that Corporal F had received a text from Tracy after Corporal F had decided he would not hang out with N.K. Corporal F changed his plans because N.K. had vomited. He would have received this text at approximately 0230 hours. He did not see the phone or know of Tracy's text but relied on what Corporal F had said in court to state that.

[97] Master Corporal Royes was asked during his cross-examination if he had given N.K. a glass of water when he first took her to his room and he answered no. Master Corporal Royes first mentioned N.K. using his washroom when he was asked during his cross-examination to explain why he had not offered N.K. any water when they were having their 30-minute conversation after the sexual intercourse. He answered that she had not asked for some and that she could have gotten some water when she used the washroom. He did not mention this use of the washroom when examined in chief and the question of whether N.K. had used the washroom was not put to her during her cross-examination.

[98] His explanation for not offering N.K. water is suspect. N.K. using the washroom while they would have been having a conversation is not a minor detail and it should normally have been part of the main testimony and not something that is brought forth to answer a question that could put Master Corporal Royes under a bad light. He tries to deflect any blame of not offering water to N.K., thus being an uncaring person, by stating she did not ask for it or could have gotten some herself when she went to the bathroom. This type of answer is also consistent with his answer concerning the wiping of the semen when he said she did not know where the towels were in his room. Would it have been her responsibility to wipe the semen if she had known the locations of the towels? Defence counsel has tried to portray Master Corporal Royes as a caring fellow soldier who was trying to help N.K. by letting her sleep in his room. The court finds this testimony shows him in a different light.

[99] The court does not believe Master Corporal Royes. His testimony is filled with internal inconsistencies and external inconsistencies with the testimony of Corporals F and S and it raises serious doubts as to Master Corporal Royes' credibility. His testimony concerning Amanda and the reason he did not look for N.K.'s keys makes no sense. He consistently tried to offer evidence that cast him in a positive light and he used the testimony of Corporal F to support his version of events.

[100] Having said this, it does not mean that Master Corporal Royes committed sexual assault because he had sex with N.K. A lack of credibility on the part of the accused does not equate to proof of his guilt beyond a reasonable doubt. The court must now ask itself if the evidence of the accused creates a reasonable doubt in the mind of the court. To answer this question, the court must direct its mind to whether Master Corporal Royes' evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt (see *R. v. Dinardo* 2008 SCC 24 at paragraph 23).

[101] Master Corporal Royes described two separate consensual sexual activities. It would appear from his evidence that on both occasions they would have been laying on their left side and that N.K. would have had her back to him for most of the time since his explanations indicate she was pressing her buttocks on him both times. He also explained he offered doggie style because of the position she was in at the time. He admits there was not much talking before the sexual intercourse other than her answer, no, to doggie style and he relied on her moaning and physical reaction to understand she wanted to have sex. They then would have cuddled, she would have gone to the

washroom and come back into his arms and they would have continued to talk for a total of approximately 30 minutes in bed before falling asleep in each others' arms. Approximately two hours later, after some affectionate touching, she would have used a voice that conveyed a message not to touch her nipples but keep touching me and then would have sat up and said she did not want any sex and wanted to leave immediately. She did not want to take a shower in his room or have him wash her clothes. She put on her clothes and left the room. She preferred to wait in his car while he put his clothes in the washing machine instead of staying with him. Master Corporal Royes testified she had no difficulty putting on her clothes, that her speech was fine and that she was not under the influence of alcohol.

[102] N.K. testified her last memory at JD's was going to her table and having a drink. She then remembered feeling Master Corporal Royes' penis in her vagina and seeing him ejaculate on her stomach and wipe the semen with a towel. She thought she asked, "What is going on," and then her next memory is feeling Master Corporal Royes massaging her breasts.

[103] N.K. felt wretched on 12 February 2012 and vomited in her room and twice at the hospital later that day. She accepted Master Corporal Royes' offer of the ride because she did not think she could walk that far and she was confused. She went to the Wainwright hospital on 12 February because she thought she had been sexually assaulted. She did not proceed with the "rape kit" because she had been told she would have to press charges if she did and she did not want to make such life-altering decisions in her present state of mind. She felt too confused and sick.

[104] Most of Master Corporal Royes' version of events cannot be refuted by N.K. because she has no recollection of the night other than when she momentarily regained consciousness during the sexual intercourse. She could not confirm or deny the vast majority of the suggestions put to her by defence counsel.

[105] Master Corporal Royes thought N.K. was alright looking and he agreed with the prosecutor that he could have sex with alright looking women. He had engaged in sexually suggestive conversations with N.K. mostly through telephone texting. Although defence counsel cross-examined N.K. extensively on who had sent the "2-minute man" and "more sex, that's my secret" messages, it is clear from Master Corporal Royes' testimony that he did send a text to N.K. about getting rid of 2-minute men and that he could have sent the other message. He was not sure if she had responded to those texts. He agreed they enjoyed flirting if those type of text messages were deemed flirty.

[106] He shared intimate details with her concerning the women he had slept with and he testified she did the same concerning the men she slept with. He stated he would never do that with a woman with whom he wanted to have sex but would only do that with a women considered one of the boys. Thus, according to his testimony, he treated her like one of the boys at certain times but would also send her sexually suggestive texts at other times and engage in sex with her because she had initiated the sex.

[107] He was rubbing her breasts to see if she was interested in sex because they had had sex earlier. She was pressing herself upon him. She was rubbing his leg with her leg. He would not have had an erection at that time as much as he wanted to have sex. The court finds it difficult to believe that Master Corporal Royes was not aroused by this situation since he himself testified he wanted to have sex again.

[108] N.K. had vomited three times before she had fallen asleep in Master Corporal Royes' room, once in the car and twice in his room. He testified during his cross-examination that he never kissed her because she had vomited the previous night but he did not seem preoccupied whether she needed water or not. Also, they, he and she, would have enjoyed approximately 20 minutes of sexual intercourse followed by 30 minutes of friendly conversation before falling asleep in each others arms and she seemed in good health.

[109] The manner in which N.K. expressed her decision not to have sex the second time and to immediately leave Master Corporal Royes' room, her physical condition when she went to sleep in his room and her physical condition on 12 February compared to Master Corporal Royes' description of her condition during the morning of 12 February bring into question Master Corporal Royes' version of events that night. The court does not believe Master Corporal Royes' version of events for the night of 12 February and his version of events does not raise a reasonable doubt in the court's mind.

[110] The court must now turn its attention to the third step of the analysis and determine whether, on the basis of the evidence which the court accepts, the court is convinced beyond a reasonable doubt by that evidence of the guilt of Master Corporal Royes.

[111] Dr R testified for the defence as an expert witness. The court qualified Dr R as an expert in the following field: the effects of alcohol and other drugs on human beings, particularly with respect to memory, information processing and decision making.

[112] As with other witnesses, the court may give the expert's testimony as much or as little weight as it thinks it deserves. Just because an expert has given an opinion does not require the court to accept it. The court must consider the expert's education, training and experience, the reasons given for the opinion, the suitability of the methods used and the rest of the evidence in the case when it decides how much or little to rely on the opinion. Where the expert's opinion is not contested and the primary facts on which it is based are not in dispute, there may not be any good reason to reach a contrary conclusion on the issue.

[113] Dr R was asked to assume certain facts. What an expert assumes or relies on as a fact for the purpose of offering his or her opinion may be the same or different from what the court finds as facts from the evidence introduced in this case. How much or little the court relies on the expert's opinion is for the court to decide, but the closer the

facts assumed or relied on by the expert are to the facts as the court finds them to be, the more helpful the expert's opinions may be to the court. To the extent the expert relies on facts that the court does not find supported by the evidence, the court may find the expert's opinion less helpful.

[114] Dr R stated women were more susceptible to blackouts because women have a higher blood alcohol concentration than men for the same amount of alcohol consumed. The amount one drinks and the rate of consumption will have an effect on the possibility of a blackout. A blackout may occur at 140 milligrams of alcohol in the blood and likely at 200 milligrams of alcohol in the blood. A blackout does not equate to unconsciousness and a person may have a conversation and not remember that conversation. A person could complete a complex task while in a blackout. There are two types of blackout: fragmentary and en bloc. A person would remember parts of the period of blackout during a fragmentary blackout. The mind would try to fill in the blanks created by the fragmentary blackout and this is called confabulation. It could be what the person thinks happened or what people told the person. An en bloc blackout starts at a specific point and ends at a specific point in time. Men and women eliminate alcohol at the same rate, being from 10 to 20 milligrams per hour.

[115] Dr R was presented a scenario by defence counsel identical to the facts of our case. He could not comment on the level of intoxication of the female person of that scenario at any time during the evening of 11 February and the morning of 12 February. It appeared to him that the person in the fact scenario had experienced a blackout. He stated a person could initiate sexual intercourse and not remember that because of the blackout. He stated it would appear the blackout had ended when the person would have said no and sat up. He also stated the blackout was a profound blackout and could be continuing to some extent in the afternoon if the person was still very groggy in the afternoon. He stated a person is profoundly intoxicated when a person vomits. A person needs to form a cohesive narrative to explain his or her behaviour and might find it difficult to accept what they might do when they were intoxicated.

[116] During cross-examination, he indicated an intoxicated person would be less able to communicate his or her needs and wishes but could also go ahead with bad ideas. Alcohol decreases the brain's control of mental and motor functions. It is difficult to confabulate when one suffers from an en bloc blackout.

[117] An en bloc blackout's termination point is not necessarily when waking up after having slept, but he also stated a person must sleep before a blackout ends is a generalisation that is correct. He agreed that a person who has experienced blackouts can have a blackout lasting several hours.

[118] When provided with a fact scenario resembling the facts of this case concerning N.K. while she was in the car, he answered the person would be highly intoxicated. Following an objection, he stated he could not give an exact description of the level of drunkenness but could say she was drunk. He also mentioned there were no scales for drunkenness and that she was drunk.

[119] It is not rare for a woman to have an en bloc blackout and he stated that ten per cent of university students that were part of a study on blackouts had one in the previous year. He stated it was not uncommon. He said it was not unusual to fall asleep after having consumed a lot of alcohol. A blackout usually ends when a person has a true memory. It would be possible to have a conversation concerning familiar topics such as mutual friends.

[120] N.K. testified she has no memory of what happened at JD's after having a drink at her table at approximately 0100 hours. She would have danced with Corporal P and Corporal F and would have spoken with Master Corporal Royes. She does not remember leaving the bar or being in Corporal F's car. It does appear from the testimony of Corporal F, Corporal S, and Master Corporal Royes that she could dance, walk and engage in a conversation until she arrived at the car. She became incoherent, semi-conscious and was unable to walk by herself once she was in the car.

[121] Having considered the descriptions of N.K. when she was in the car, the court does not believe Master Corporal Royes' testimony that she could change herself and wait for him while standing up by herself while he was changing the bed in the short period of time following their arrival at his room. She was semi-conscious and mumbling incoherent answers and needed assistance to walk when she left the car.

[122] The evidence of Corporal F and Corporal S is considered credible and reliable by the court. Their evidence, and the evidence of Master Corporal Royes clearly tells the court that N.K. was intoxicated to the point of vomiting, was not responding to questions and had trouble walking when she left the car to go to Master Corporal Royes' room. She was clearly extremely drunk. She vomited 3 more times on 12 February and felt weak and wretched all day. She still was groggy and could not think clearly when she was interviewed by the military police on 13 February.

[123] N.K. testified that she did not consent to engage in any form of sexual activity with Master Corporal Royes. She testified she had no interest in Master Corporal Royes and that she always insisted that a man wear a condom when having sex with her unless she was in a long term relationship. She testified she has no recollection of events at the room of Master Corporal Royes other than feeling his penis in her vagina, seeing him ejaculate and wipe the semen with a towel, saying "What is going on?", and then waking up to find him touching her breasts and vaginal area.

[124] N.K. called two friends on 12 February: one friend, Jeff, so he could call around and find out what had happened the previous evening at the bar; and one friend, Eric, to find out the protocol concerning going to a hospital during the weekend. She explained why she called these persons and not those present at the bar. Although she stated Eric had figured it out, there is nothing in her testimony or in the evidence that would cast doubt on this portion of her evidence.

[125] She did answer, "Yes does not mean yes when you are too intoxicated to walk" when it was suggested to her during her cross-examination that one makes bad decisions when intoxicated and that she could have made the decision to have sex without a condom but not remember it. She was not questioned further on that answer. She also said she did not remember choosing to sleep with Master Corporal Royes and to have sex with him. The court does not find this answer brings into doubt her evidence when it is viewed with her complete evidence.

[126] Although she did not think she had been drugged when she went to the hospital on 12 February she mentioned to the military police on 13 February that she could have been drugged or had suffered from alcohol poisoning. She testified that she was told at the hospital that she could have been drugged. She now believes she has been drugged and explained she has come to that conclusion since having received counselling. She appears to believe she had to have been drugged to lose consciousness as she did and that it could not only be caused by the alcohol.

[127] Much was said about the possibility of N.K. having been drugged, but there is no evidence before this court on this very issue. As such, the court cannot take this possibility into account and it has no bearing on the analysis and the decision of the court. The court finds this evidence as well as N.K.'s belief on the matter to be irrelevant to the key issues before the court.

[128] Although Dr R could provide the court with evidence concerning the effect of alcohol on individuals and the effects of blackouts in general, the court finds his evidence is of little use to it when determining the key questions in this case. He could not comment on the exact level of intoxication of N.K. or of a person identical to N.K. because he did not have the necessary information to do so. He could not, also, comment specifically on the blackout she would have experienced.

[129] This case is not one that can be determined primarily by the use of expert evidence but is one that is decided on the facts accepted by the court. There is not a set rule on how a complainant will behave after an alleged sexual assault. In deciding whether a complainant acted after the alleged assault in a manner consistent with her or his version of events, a court must consider the complainant's state of mind at the time, the complainant's age and level of maturity, the complainant's sense of confidence and composure, and the relationship between the complainant and the accused.

[130] The court has stated it does not believe Master Corporal Royes' version of events. The evidence does indicate he was the main instigator of sexual texts with N.K. and that she did not participate much in those exchanges. She had no romantic interest in Master Corporal Royes and she was interested in dancing with Corporal F that night.

[131] She had had long term boyfriends and had had sexual intercourse with other men before. N.K. was adamant that she always demands the use of condoms when having sexual intercourse except when she involved in a long term and stable relationship. Although the court does not know exactly how much alcohol N.K.

consumed before the hours of approximately 1800 hours to 0100 hours, the court knows N.K. had drunk approximately five drinks at Corporal P's residence and approximately four drinks at JD's.

[132] N.K. did think she had been sexually assaulted during the day of 12 February but was still too dazed and confused to make the decision to press charges although she did go to the hospital because she thought she had been sexually assaulted. She was still dazed on 13 February when she was interviewed by the military police. She called her sister, a nurse, to assist her concerning her fear of STIs. The court found her to be straightforward in her answers to both the prosecutor and to defence counsel. She did not try to provide answers to questions and she did not try to explain events for which she did not have any recollection. The court finds N.K.'s testimony to be consistent with itself and with the external evidence. She does not recall events after approximately 0100 until she awoke in Master Corporal Royes' room. This testimony is consistent with the testimony of Dr R concerning blackouts and the general effect of alcohol on individuals.

[133] Her physical state the night of 11 to 12 February, her behaviour in Master Corporal Royes' room on the morning of 12 February, her physical, mental and emotional states in the days after the sexual intercourse as well as her decision not to remain in Wainwright and accept the three-year extension to her Class B terms of service make her testimony that she was unconscious and thus unable to consent to sexual intercourse and to the sexual touching believable and believed by the court.

[134] Although N.K. is not a completely reliable witness because of her period of blackout, she is deemed a credible witness. While the court agrees that a person under the influence of alcohol can make very bad decisions that he or she would not make while being sober, the court concludes the evidence does not lead it to believe that N.K. made this type of decision on 12 February.

[135] The court finds the evidence proves beyond a reasonable doubt that N.K. did not consent to the sexual intercourse and to the sexual touching before she sat up and said no.

[136] Did Master Corporal Royes know that N.K. did not consent to the force that Master Corporal Royes applied? The prosecution must prove beyond a reasonable doubt that Master Corporal Royes was aware that N.K. did not consent to the physical contact that Master Corporal Royes applied. To prove that Master Corporal Royes was aware of N.K.'s lack of consent, the prosecution must prove one of the following:

- (a) that Master Corporal Royes actually knew that N.K. did not consent;
- (b) that Master Corporal Royes knew there was a risk that N.K. did not consent and that that Master Corporal Royes proceeded in the face of that risk;

- (c) that Master Corporal Royes was aware of indications that N.K. did not consent, but deliberately chose to ignore them because that Master Corporal Royes did not want to know the truth.

[137] Counsel for Master Corporal Royes argued that N.K. had consented to sexual intercourse because she had initiated the sexual activity. He also argued Master Corporal Royes was unaware that N.K. did not consent when he touched her breasts and vaginal area.

[138] A belief is a state of mind, in this case, Master Corporal Royes' state of mind. To determine whether Master Corporal Royes honestly believed that N.K. consented to the physical contact in question, the court must consider all the circumstances surrounding that activity. The court must take into account any words or gestures, whether by Master Corporal Royes or N.K., and any other indication of Master Corporal Royes' state of mind at the time.

[139] Master Corporal Royes' belief that N.K. consented to the sexual activity must be an honest belief. There is no honest belief if Master Corporal Royes saw a risk that N.K. would not consent to the physical contact, but went ahead anyway despite that risk. Similarly, there can be no honest belief if Master Corporal Royes was aware of indications that N.K. did not consent, but deliberately chose to ignore them because Master Corporal Royes did not want to know the truth. Nor can there be an honest belief in N.K.'s consent to the physical contact unless Master Corporal Royes took reasonable steps in the circumstances known to him at the time to find out whether N.K. consented.

[140] Master Corporal Royes' belief must be honest, but it does not have to be reasonable. However, the court must consider whether there were reasonable grounds for Master Corporal Royes' belief. The presence or absence of reasonable grounds may help the court decide whether Master Corporal Royes' belief was honest.

[141] The court must look at all the circumstances in deciding this issue. It cannot focus on only one and ignore the rest. The court must consider all the evidence, including anything said or done in the circumstances. Common sense always has a place in such evaluation of the evidence.

[142] Master Corporal Royes does not have to prove that he honestly believed that N.K. consented to the physical contact. The prosecution must prove beyond a reasonable doubt that Master Corporal Royes had no such belief.

[143] The court has already stated it does not believe Master Corporal Royes. The evidence accepted by the court proves beyond a reasonable doubt that N.K. was falling into unconsciousness when she left the car. The court accepts N.K.'s evidence that she was unconscious as she described it. The courts finds the evidence proves beyond a reasonable doubt that Master Corporal Royes actually knew that N.K. did not consent

when he had sexual intercourse with her and when he was touching her breasts and vaginal area because she was unconscious at those time and unable to give her consent.

FOR THESE REASONS, THE COURT

[144] **FINDS** Master Corporal Royes guilty of charge No. 1.

Counsel:

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