COURT MARTIAL

Citation: *R. v. Sutherland*, 2022 CM 5011

Date: 20220603
Docket: 202130

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal W.C. Sutherland, Accused

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

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in these proceedings as the complainant, including the person referred to in the charge sheet as "V.R.", shall not be published in any document or broadcast or transmitted in any way.

DECISION ON FINDING

(Orally)

I. Introduction

[1] Master Corporal Sutherland, you were charged with having committed one offence punishable under section 130 of the *National Defence Act* (*NDA*), that is to say sexual assault contrary to section 271 of the *Criminal Code*. The charge alleges that on or about 22 April 2020, aboard Her Majesty's Canadian Ship (HMCS) *Fredericton*, you sexually assaulted the complainant, V.R. The alleged sexual assault would have occurred in the junior ranks mess while the ship was alongside in Souda Bay, Greece.

The trial took place in Halifax, Nova Scotia. The Court heard evidence presented by both parties. My reasons for the finding are as follows.

Background

[2] From 18 January to 28 July 2020, HMCS *Fredericton* deployed in support of Operation (Op) REASSURANCE in Central and Eastern Europe. Approximately 234 crewmates were onboard, which included an air detachment (det) composed of six officers, two non-commissioned officers (NCOs) and eleven non-commissioned members (NCMs) who all wear their distinctive flight suits when serving aboard ship.

[3] The air det moved onboard in December 2019. You were one of the eleven NCMs posted onboard. Air det members are considered members of the ship's crew. Thus, they have meals and socialize with the rest of the naval crew in their respective mess according to their ranks.

[4] There are three messes onboard ship: an officers' mess, a chiefs' and petty officers' mess and a junior ranks' mess for master sailor/master corporal and below. There is no mixed mess, and only with approbation can someone from another mess visit a mess that they do not belong too. Thus, such a visit is fairly uncommon. Also referred to as the "Cave", the junior ranks mess, which I will refer to as the mess, is a large "L" shaped room assigned exclusively for master sailor/master corporal and below and designed for them to eat, socialize, and watch TV. Alcoholic beverages can be purchased and consumed at the bar of the mess when it is opened. The bar is operated by personnel on duty. The rectangular shape bar counter where drinks are served can accommodate up to six seated patrons, as there are only six stools located at each extremity of the bar counter.

[5] Because of the COVID-19 pandemic, 18 March 2020 was the last time the crew was allowed to visit foreign ports. After that date, the ship's crew was effectively confined onboard. However, some of the visited ports allowed the ship to authorize crewmates to disembark on the jetty, but others were more restrictive and only permitted the ship to have their personnel ashore, when necessary, for example to dispose of the ship's garbage in local containers on the jetty. This also meant that no one, other than the ship's crewmates, was allowed onboard with a few exceptions of a small rotation of six personnel, a rotation that may have taken place while the ship was alongside the jetty in Souda Bay. There was also reduced maintenance due to COVID which had the effect of limiting new personnel arriving onboard. The six members that may have come onboard during this port visit were unlikely aircrew and would have had to wear masks for a fourteen-day period.

[6] On 21 April 2020, HMCS *Fredericton* was docked in Souda Bay, Greece for about ten days in order to resupply and give the crew some rest. After docking at the jetty, the crew was required to perform their respective duties throughout the day. After hands-fall-in, the ship was called secure around 1600 or 1700 hours. Because the crew

was not allowed to travel nor disembark to visit the port, some crewmates decided to socialize in their mess after supper.

[7] The complainant was posted to HMCS *Fredericton* in 2018 and was serving onboard as a cook. In the scope of her duties, she would have a daily brief interaction with each crew member when she was serving meals through a window of the galley to crew members forming a line. Once a crew member appeared at the window, they would order and receive their meal. They would be within reaching distance from the complainant. She did not serve the meal lines for officers but served every other crewmate. As cooks were working shifts and those shifts would rotate, the time of the day she was serving meals varied from day to day.

[8] On 21 April 2020, the complainant had finished her night shift at 0530 hours and went to bed. When the ship was called secure that day, Sailor 1st Class (S1) Kester had supper and started drinking beer in the mess to the point that he was highly intoxicated. S1 Miner-Turner, a steward, also drank alcohol that evening, socializing at the mess and occasionally going on the flight deck to smoke. They both knew the complainant.

[9] The complainant was trying to adjust to day schedule for her next shift. Unable to sleep, she got up around 0100 hours on 22 April 2020 and went to the mess. There were some personnel present in the mess, cleaning up, as the bar had just closed. The complainant sat at the far right of the bar counter. She did not consume any alcoholic beverages. It was not disputed that a male approached the complainant and touched her without her consent. The defence conceded that the touching was sexual in nature. The incident lasted approximately five minutes before S1 Kester intervened. The allegations were reported to the chain of command the next day.

[10] On 29 April 2020, a helicopter deployed on the ship crashed and six shipmates perished. All aircrew personnel deployed on the ship at the time were repatriated to Canada shortly thereafter. This tragedy had some impact on these trial proceedings in a way that will be later explained in this decision.

[11] The issue of this case turns on whether you are the person who committed the sexual assault on V.R. at the mess. The determination of this case, therefore, boils down to the credibility and reliability of the witnesses, particularly yours and the complainant's.

II. Whether the prosecution proved beyond a reasonable doubt that MCpl Sutherland is the person who committed the sexual assault on V.R.

Position of the parties

[12] Counsel for the prosecution contended that the crux of the issue is identity. He highlighted some of the discrepancies in his evidence that he contended were minor and pertained to collateral issues. He contended that minor discrepancies are always expected with the passage of time, particularly when witnesses suffer a traumatic event.

He also explained that there was ample evidence to conclude beyond a reasonable doubt that you were the person who committed the sexual assault on V.R. because the evidence adduced at trial regarding identity or recognition of you as the perpetrator was reliable. The prosecution argued that the burden of proof was met beyond a reasonable doubt and that you should therefore be found guilty of the offence charged.

[13] The defence agreed that the issue in the case at bar is the identity of the person who committed the offence. The defence addressed in great details the evidence that it argued presented alarming inconsistencies. For example, he explained that the complainant claimed she went on the flight deck accompanied by S1 Miner-Turner, however S1 Miner-Turner testified that V.R. went alone and called her sister while he went for a smoke and joined her later. The defence was also concerned with discrepancies of the complainant's evidence with regard to whether she saw only one Facebook photo, or whether she saw two photos to identify the suspect as she alluded to in her prior statement.

[14] Defence also alleged that when S1 Miner-Turner showed the Facebook photograph to the complainant, it tainted the identification. He contended that, when the coxswain showed the photos to the complainant to identify the suspect, the coxswain already had her statement containing your name as the perpetrator, therefore there was a tunnel-vision approach. Counsel for the defence submitted that it is not credible that the coxswain did not read the witnesses' statements.

[15] In this regard, the defence told the Court that it cannot take judicial notice that the coxswain is a busy position. The defence added that S1 Kester was the most truthful witness he had seen in a long time, in particular because this witness was not able to answer most questions, admitting being highly intoxicated at the material time.

[16] Defence pointed out another discrepancy in the evidence of the complainant for the reasons she sat at the bar; in her prior statement, she indicated she wanted to be alone however during her testimony, she testified that she was waiting for the couch to be placed to watch a movie. He contended that not only the complainant's reliability in the identification is problematic, he questioned her credibility generally with regard to the sexual assault. He argued that there was no evidence of who was managing the bar, who was serving and so forth. He contended that it would be dangerous to convict you of the offence based on the identity evidence presented at the trial, in particular when there was also Naval Tactical Operations Group (NTOG) members onboard.

Evidence adduced at trial

[17] The prosecution called four witnesses in support of its case: the complainant, identified as V.R., S1 Kester, S1 Miner-Turner, and Chief Petty Officer 1st class (retired) (CPO1 (ret'd)) DeJong. The Court denied an application for S1 Miner-Turner to appear and give his testimony by video link (*R. v. Sutherland*, 2022 CM 5022). These four witnesses were onboard HMCS *Fredericton* at the material time. The prosecution also introduced a package composed of an email string containing three emails, with the

most recent email sent by CPO1 (ret'd) DeJong to Sergeant (Sgt) Boyd dated 26 April 2020, with nineteen photos of air det members.

[18] You testified in your own defence. The Court took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence*.

[19] The complainant testified that when she arrived at the mess around 0100 hours on 22 April 2020, there was a "smattering of people" in the mess which she clarified as being around ten, finishing up hanging around from being at the bar with some patrons getting ready to watch a movie, and with one or two duty personnel wearing their uniform. She saw S1 Kester as well as others she knew from having seen them onboard routinely. She noticed two or three air det personnel in civilian attire seated together at a table. She did not know their names. She knew they were air det members because she recognized their face from when she saw them in their flight suits while serving them in the meal line. She identified you in the courtroom as one of the air det personnel present at the mess that night. She did not know your name then, but she says that now she knows.

[20] She sat at the right side of the bar alone, observing people, waiting for the couch to be rearranged so she could watch a movie. She testified that someone came beside her and sat on the stool on her right asking her if there was something she wanted to show them. The individual seemed intoxicated: he was stumbling and had a slurring speech. She testified that she looked at the individual and asked what they meant. The individual responded by putting his left hand on her right shoulder, and as he was repeating his question, his hand went downward toward the top of the breast "when it started to curve out", rubbing his hand back and forth with his arm falling behind.

[21] She testified that she panicked a little, she was breathing heavily, and her heartbeat went faster. Her body froze. At this time, the individual was angled and slightly leaning toward her. His right hand had crossed over into her inner thigh, moving upwards to her groin area. She specified that his hand stopped when it was partly on the right side of her genitals and partly on the top part of her thigh. The individual moved his right hand with the same motion as with the left hand, with a light circling rub while commenting with a smile that he could feel her heart beating. This interaction lasted around five minutes.

[22] V.R. also testified that S1 Kester approached her, sat on her left side and put his hand on her left shoulder, asking if she was fine. Referring to you as the perpetrator, she testified that you then removed your hands. Nothing happened for a minute or two where an awkward silence set in with S1 Kester sitting there. Then she said you put both hands back in the same position, suggesting to her that the two of you should go somewhere private.

[23] S1 Kester asked her once again if she was fine, which is where she said you backed off again. This is when she got up and left to go to the cook's office because she felt it was a safe place. S1 Kester followed her there. She was trying to calm down. S1

Miner-Turner had come down the ladder from outside the cook's office and joined them as he had observed that something was wrong.

[24] V.R. believed both S1 Kester and S1 Miner-Turner had consumed alcohol and were intoxicated to various degrees. She told S1 Miner-Turner about what had happened in broader terms with S1 Kester present. She told him one of the "air det guys" was getting physical and making her feel uncomfortable. She also testified that she was sure the perpetrator was someone from the aircrew because she had seen him in his flight suit and recognized him because he had a distinct facial feature.

[25] Eventually, the complainant and S1 Miner-Turner left the cook's office and went on the flight deck. She told him she knew the perpetrator but did not know his name. She described the perpetrator to S1 Miner-Turner as being an air det member, relatively broad built, dark hair, with facial features that seemed to "sag slightly, like he had deep bags under his eyes". S1 Miner-Turner then told her that he knew who it was, and with his cellphone, found a Facebook profile and showed a picture of its incumbent to the complainant. She confirmed the photo was a depiction of the perpetrator. S1 Miner-Turner gave your name as the person on the Facebook photo. V.R. also testified that she could not guarantee it was the photo of the perpetrator because the full-body photo she was shown was slightly blurry from being zoomed-in to have a larger view of the individual. She said only seeing that one photo, forty-five to sixty minutes after the incident took place. Corporal (Cpl) Craig came over to see what was wrong and after discussing the issue with him or her, they decided to wait later that morning to report the allegations.

[26] V.R. was certain during her testimony that you were the perpetrator because later the same day or the day after the incident, following her report of the allegations to the chief cook, she was called to the coxswain's office and was shown from the computer screen a series of large photos of head shots of each aircrew onboard. There was no information, nor any identifiers provided with the photos, such as name or rank and she had a clear view of the head shots of each of the nineteen members of the aircrew. After pointing out the photo, she confirmed that she was certain, and knew it was you because there was another person on the aircrew with similar features, but you still had distinct features that the other person did not share. She was asked to continue viewing all the pictures of the air det to confirm her choice, which she did. She was able to exclude the other person with certainty. When she pointed out the photo to the coxswain, she was not provided with any name. She then identified you in the courtroom as the perpetrator and the person on the photo and said that she has no doubt it was you who sexually assaulted her.

[27] The following day, she spoke to the chief cook and Chief Belanger. She did not see you after the incident but saw S1 Kester and S1 Miner-Turner. She testified that she did not speak to them about the incident after the night in question, although she recognized that the next morning, she may have given S1 Kester a vague description of you without revealing your name when he asked her if she was fine.

[28] S1 Kester testified for the prosecution. On 21 April 2020, after the ship called secure, S1 Kester spent his time off at the mess around supper time. He socialized throughout the evening with members of the mess, but on occasion went on the flight deck. He consumed ten to fourteen standard size beer from 1700 or 1800 hours until the bar closed between midnight and one o'clock.

[29] S1 Kester testified that all he could remember around the time the bar closed is seeing the complainant seated at the far-right corner of the bar counter. He saw a male he was not familiar with, seated beside her on her left side. As he was highly intoxicated, he could not picture the male's face. He was about ten to fifteen feet away from them on the other side of the bar counter facing them and could see them from the chest up. He noticed that the complainant seemed to be in a "flight or fight mode, like a deer in the headlights, frozen". He saw the male moved his arm toward the complainant's direction. He could not see everything because the bar counter was blocking his view of their torso down, so he approached and saw the male's hand on the complainant's knee.

[30] He did not remember what he said or if anything was said, but he remembered that he approached V.R. from her left side because the male was on her right, with the intention of removing her from the situation. He did not sit. The next thing he remembers is that he was in the cook's office with the complainant who was still shaken up and upset. That's when he saw S1 Miner-Turner going down the ladder by the cook's office and coming in. S1 Kester did not know how long he was alone in the cook's office with the complainant, but felt it was not very long.

[31] When S1 Miner-Turner came in, he believes he asked if the complainant was okay. S1 Kester could not remember what was said and had no recollection of what happened after he was in the cook's office. His focus was on V.R.'s wellbeing. The next morning, he woke up in his rack hungover, struggling to remember because of blackouts but knew that something had happened the night before. He saw the complainant who thanked him and asked him if he would write a statement. He told her he could not remember what had happened the night before and asked her to help him remember the events from the previous night. She reminded him of what happened in order to refresh his memory, and it all came back to him.

[32] S1 Kester asked the complainant if she knew who the male at the bar was, and she told him the name Sutherland. Without this information, he would not have been able to know who the individual was. He wrote a statement within forty-eight hours and provided it to the coxswain or the regulating petty officer 2nd class and never saw his statement again.

[33] S1 Kester confirmed that a few days after these events, the helicopter crash happened. This event became "the most important, single aspect of the deployment". He added that such an event would drain a lot of "mental bandwidth" and overshadow other matters. He also added that "everything that happened before the crash did not matter."

[34] S1 Miner-Turner testified that he spent most of his evening on 21 April 2020 in the mess socializing as he was not on duty. He did not recall which port the ship was visiting, nor how much alcohol he drank, but estimated he had six or seven drinks; he had a "good buzz on". He recognized some people at the mess and he saw you. He knew you from having served with you previously and also being your next-door neighbour. S1 Miner-Turner could not remember if he saw you consume alcohol nor if he socialized with you that evening. He estimated that there were a dozen patrons who were in and out, therefore the number of individuals at the mess varied throughout the evening. He could not recall the time he left the mess, and whether you were still there when he left, but testified that he believed he saw you socializing with the complainant during the evening, and that you may have been sitting with her at some point. He went out for a cigarette, then saw the complainant talking with S1 Kester in the cook's office. He saw that something was wrong, walked in and asked V.R. what was going on. She said somebody had touched her in the mess but did not know who it was. She told him she was going to talk to her sister. S1 Miner-Turner went for a smoke while the complainant went on the flight deck to speak on the phone with her sister.

[35] Once they were both on the flight deck, Cpl Craig came up and the situation was explained. That is when S1 Miner-Turner asked the complainant for a description of the individual who touched her. Following the description the complainant gave him, he went on Facebook and he showed her either a few pictures or one Facebook profile. When the complainant recognized the person on the photo as the perpetrator, S1 Miner-Turner gave her your name.

[36] During his testimony, CPO1 (ret'd) DeJong explained that onboard ship, the commanding officer (CO), executive officer (XO) and coxswain form the command triad. The coxswain looks after all NCM onboard while the XO overseas the officers. He was the coxswain onboard HMCS *Fredericton* during the deployment in January 2020.

[37] On 22 April 2020, CPO1 (ret'd) DeJong was informed of the allegations of the complainant. He testified that because he was not allowed to investigate the allegations, he contacted the Canadian Forces National Investigation Service (CFNIS), Sgt Boyd, to confirm who would investigate the matter.

[38] The military police (MP) normally assigned to the ship would have been provided with the allegations for investigation, but due to COVID they were not available. Therefore, CPO1 (ret'd) DeJong, who I will refer to as the coxswain, received statements from witnesses including the statement of V.R., with instructions to send them to Sgt Boyd, which he did. He did not remember how many statements he received and if S1 Kester provided one but confirmed that any statement he received was sent to the CFNIS almost as soon as received them, without reading them.

[39] Because Sgt Boyd suggested to the coxswain to obtain photos of the aircrew, the coxswain noticed that Monitor MASS for the air det had not been populated with photos of the aircrew. Monitor MASS is a database containing all personnel info of all

members deployed onboard the ship. A photo of the individual is normally included with their respective personal information. When he noticed the photos were missing, the coxswain asked the photo technician to take photos of the aircrew in order to both populate Monitor MASS and obtain photos for the complainant to see. Nineteen photos of air det members were then sent to him, electronically, which he forward to Sgt Boyd. The photos were organized alphabetically by rank, captain to sergeant.

[40] A few days later, the coxswain met V.R. with Chief Belanger, the section chief. The complainant provided details of the incident but did not know the name of the perpetrator and never suggested a name. V.R. told him she only knew the perpetrator was a member of the aircrew. The coxswain then presented the nineteen photos of air det members in the same order on the screen of the computer, with the exception that he had placed a paper folder to cover about 1 inch of the top edge of the screen in order to block the name and rank of the individuals depicted on the photos. He asked the complainant to scroll through the photos by herself. She was seated in front of the screen and could see the full portrait of each crew member. He and Chief Belanger were seated behind. She saw all the photos. She stopped at a picture and almost immediately said "that's him" and she said she was sure and seemed tense. The coxswain asked her to continue browsing all nineteen photos. She saw another individual with similar facial features but excluded him. She went back to the photo she chose and seemed very certain. After the complainant left the coxswain's office, they verified the photo of the person depicted in the photo she chose, which was you.

[41] CPO1 (ret'd) DeJong explained in cross-examination that a small number of NTOG who wear their own distinctive uniforms were onboard for only half the deployment but did not know if they were still onboard when the ship was in Souda Bay.

Defence witness

[42] You testified that you were posted on HMCS *Fredericton* in December 2019 as part of the aircrew until the repatriation after the crash. You confirmed you were socializing at the mess onboard on 21 April 2020, with three or four other air det members seated at your table. You testified there were over fifteen people initially, that it was fairly busy in the mess, but it quieted down as the evening went on. The bar closed and stopped serving beer. You left the mess with some of your crewmates and went to the flight deck to call your girlfriend then went to bed. You denied sitting or having any contact with the complainant that night and denied seeing her in the mess.

[43] In cross examination, you revealed that you had dinner at the mess around 1730 hours, then changed into civilian attire and went back to the mess with a Dominic, Andrew, Zach, and Chad around 1800 hours until close, around midnight. You left the mess with Andrew after you finished your beer while the others stayed seated at the table. You did not recall seeing S1s Kester and Miner-Turner. You testified drinking five to six tall cans of beer during the evening. The five of you from the air det took turns buying rounds for the group. Later in the evening, you were getting your own beer

at the bar because the rest of the group stopped buying rounds. The next morning you were woken up to go see superiors because you were informed of the allegations against you. You also said that you did not really have a hangover the next day. When asked by the prosecutor in the context of being contacted by the CFNIS that you did not think inappropriate "touching in the CAF would be investigated", you responded that you "did not think it would get that far" but added that you had nothing to do with it. You also testified that, following the allegations, you decided to abstain from consuming alcohol. You explained that this was because you did not want to risk having an encounter with V.R.

[44] You testified not being sure who was in the mess that night but recognized there was a small number of people left when the bar closed. You stayed at your table except for getting drinks. You testified you did not socialize with anybody else other than the aircrew at your table, except when you were standing at the bar waiting for a drink. You believe it was just your group present at the mess at that time, but some crewmates came and went throughout the evening.

The law

[45] The evidence adduced at your trial was considered and assessed in the context of the offence laid against you. It is alleged that you committed an offence under section 130 of the *NDA*; that is to say, sexual assault, contrary to section 271 of the *Criminal Code*. In order to secure a conviction for a sexual assault offence, the prosecution must prove beyond a reasonable doubt that it was you who committed the offence; it must also prove the place and date of the commission of the offence as alleged in the charge sheet. In addition, it must prove the following essential elements:

(a) the application of force. In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the Supreme Court of Canada (SCC) recognized the application of force as any degree of force, including touching;

(b) the application of force was intentional;

(c) the complainant did not consent to the application of force, or her consent was vitiated;

(d) the application of force by you on the complainant occurred in circumstances of a sexual nature, such that the sexual integrity of the complainant was violated; and

(e) the prosecution has to prove that you knew, was wilfully blind to, or was reckless as to the fact that the complainant had not communicated consent.

[46] The application of force that occurred in the circumstances of a sexual nature can be demonstrated by the context in which the touching took place. In your case, the defence conceded that the touching was of sexual in nature. Indeed, if accepted as

credible, evidence of the perpetrator touching and rubbing of the top of the breast of the complainant with one hand, and the touching and rubbing partly of her genitals, partly of her inner thigh, accompanied by the requests of the perpetrator to be shown something and to go to a private place, meet the test as stated in the SCC decision in *R. v. Chase*, [1987] 2 S.C.R. 293. In other words, such touching would be considered occurring in circumstances of a sexual nature.

[47] In *Ewanchuk*, a seminal SCC decision that clarified the law in relation to sexual assault offences, the SCC stated the following with regard to the assessment of the evidence relevant to the element of absence of consent on the part of the complainant:

> While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the [trial judge, or jury] in light of all the evidence.

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

[49] Many factors influence the Court's assessment of the reliability of the testimony of a witness. The opportunity of the witness to observe events, their capacity to remember, as well as a witness's reasons to remember a specific event, because, for example, it was out of the ordinary; are factors that will assist the trier of fact in his or her assessment. Due to a number of reasons including, but not limited to, the passage of time or alcohol consumption, the actual accuracy of the witness's account may not be reliable. So in effect, the testimony of a credible or an honest witness may nonetheless be unreliable (see *R. v. Morrissey*, 97 CCC (3d) 193 and *R. v. Clark* 2012 CMAC 3 at paragraph 48.)

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

[51] The assessment of credibility is no easy task. As stated in *R. v. R.E.M.*, 2008 SCC 51 at paragraph 49: "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization."

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

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

[54] As stated by the Court Martial Appeal Court in *Clark* at paragraphs 40 to 42:

> [40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v Thain*, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.
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> [41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at para 39; *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 9-11.
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> [42] Third . . . a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

[55] Further, as Rowles J.A. noted in *R. v. B. (R.W.), [1993] 24 B.C.A.C. 1, 40 W.A.C. 1:*

> While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness' evidence is reliable. This is particularly so when there is no supporting evidence on the central issue which was the case here.

[56] It was also recognized by the Ontario Court of Appeal that "[t]here is no obligation on the trial judge to deal with each and every inconsistency. It is not

necessary that the evidence be microscopically analyzed" (paragraph 2 of *R. v. B. (R.W.)*, 2003 CanLII 48260).

[57] It is the prosecution that bears the burden of proving guilt; guilt must be proved beyond a reasonable doubt. These two rules are linked to the presumption of innocence to ensure that no innocent person is convicted. The presumption of innocence remains throughout the case until such time as the prosecution has on the evidence accepted at the trial, satisfied the Court beyond a reasonable doubt that you are guilty of the charge. This is not a standard of absolute certainty, but it is a standard that certainly approaches that. Anything less entitles an accused to the full benefit of the presumption of innocence and a dismissal of the charge.

[58] Your defence alluded to the term "beyond a reasonable doubt", which is anchored in our history and traditions of justice. A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence (see *R. v. Lifchus*, [1997] 3 S.C.R. 320).

[59] In essence, this means that even if I believe that you are probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give you the benefit of the doubt and acquit you because the prosecution has failed to satisfy me of your guilt beyond a reasonable doubt. On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find you guilty of the charge 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 charge set out in the charge sheet (see *R. v. Starr*, 2000 SCC 40, at paragraph 242).

Analysis

[60] The Court must ask itself if the prosecution proved, beyond a reasonable doubt, all essential elements of the sexual assault charge. Although the burden of proof never shifts, I must decide whether I believe your version of events. I must therefore examine your testimony and assess its credibility in light of the whole of the evidence that was accepted at the trial in the context of the issue alive to this case, in particular whether you are indeed the person who committed the sexual assault on the complainant.

[61] Dealing with a general denegation such as yours presents challenges when assessing credibility. Again, you have no burden to prove your innocence, but I must decide whether I accept your testimony in part or wholly, or simply reject it. In assessing your testimony, I find that there were four aspects of your examination that were particularly striking; first, your examination was extremely brief, as confirmed by your defence counsel. It lasted between five to seven minutes. Second, with your general denial of the allegations against you, you provided no contextual details about your evening. You did not provide the name of those who were with you, how long you were there, how much you drank and so forth. Third, you admitted being at the mess at

the material time when there were only a few patrons left. And lastly, you also admitted that, out of the air det members who were with you toward the end of the evening, you were the only one who would go to the bar to purchase alcohol because the others had stopped drinking.

[62] I was provided with additional details of the evening during your cross-examination. I found out that you arrived at the mess in civilian attire around 1800 hours on 21 April 2020 and sat with other air det members, namely Dominic, Andrew, Zach, and Chad until the bar closed. Strangely, you were not asked to reveal their last names. You testified that you started drinking when you arrived at the mess and had a total of five to six tall beers. Throughout the evening, you and the other air det members seated with you, took turns buying rounds. You also testified that eventually, the others stopped buying rounds because they felt they had enough to drink, so you went to the bar to buy drinks for yourself. You stopped short of saying how many rounds were bought, and how many times you went to the bar to buy drinks for yourself. You seemed to not remember much about your evening as you could not answer questions about certain details that should have been easy to remember. When asked if you were hungover the next day, you responded "not really", and said that you no longer drank after that because you were made aware of the allegations against you. You said you did not know this would go that far. Presumably, if each of the aircrew purchased only one round, and you made at least two trips to the bar because you alluded to getting up more than once, you would have had at least seven tall beers. And you did not recall simple facts. This led me to believe that when you testified, you attempted to downplay your alcohol consumption that night.

[63] Ultimately, you corroborated the prosecution's evidence that you were at the mess during the material time and made trips to the bar to purchase alcohol. You also had several drinks that evening, which casts a doubt on the reliability of your testimony. I find therefore that your general denial of the allegations is not credible nor reliable. I also found worthy of note, when the prosecutor suggested to you that you did not think inappropriate touching should be investigated, you responded that you "did not think it would get that far", implying that you did not expect your misconduct would cause military authorities to take serious actions against you.

[64] Considering the whole of the evidence, and still considering your evidence, I must now decide if I am left with a reasonable doubt as to your guilt. In this regard, defence contended that the identification methods used when the complainant was told your name by S1 Miner-Turner after seeing photos on Facebook, then by the coxswain, were flawed and therefore not reliable. While it is true that the identification evidence was collected by individuals that were not trained police officers, such evidence developed from witnesses doing their own investigation need not meet the exacting standards Cory J. recommended in *The Inquiry regarding Thomas Sophonow: The Investigation, Prosecution and Consideration of Entitlement to Compensation* (Winnipeg: Manitoba Justice, 2001) in order to be admitted into evidence.

[65] In the context of the decision of an appeal court to intervene in judge-alone cases for issues of identification evidence, in *R. v. Bigsky*, 2006 SKCA 145, the appeal court determined that this decision depends on a variety of factors:

> [41] . . . (i) whether the trial judge instructed himself or herself regarding the frailties of eyewitness testimony and the need to test its reliability; (ii) the extent to which the trial judge reviewed the evidence with such an instruction in mind; (iii) the extent to which proof of the Crown's case depended on the eyewitness's testimony or, in other words, the presence or absence of other evidence that can be considered in determining whether a court of appeal should intervene; (iv) the nature of the eyewitness observation including such matters as whether the eyewitness had previously known the accused and the length and quality of the observation; *and* (v) whether there is "other evidence" which may tend to make the evidence *unreliable*, *i.e.*, the witness's evidence has been strengthened by inappropriate police, or other procedures, between the time of the eyewitness observation and the time of testimony.

[66] Accordingly, "the assessment of the probative force of eyewitness evidence does not generally turn on credibility assessments, but rather on considerations of the totality of the circumstance pertinent to that identification". *R. v. Biddle* (1993), 84 C.C.C. (3d) 430 at pages. 434–35 (Ont. C.A.), revised in 96 C.C.C. (3d) 321 (S.C.C.), reiterated in *R. v. Biddle* (No. 3), 2018 ONCA 520, at paragraph 32.

[67] In *R. v. Mohamed*, 2014 ABCA 398, a witness showed an eyewitness of a shooting a Facebook page containing the image of the accused and drew the witness's attention to the image. The witness recognized the image of the individual as the shooter. Although this informal procedure did not provide the same probative value as a police photo lineup, in that case the court found that the lack of formal procedures did not render the identification inadmissible.

[68] That said, identity is not a live issue except where there are frailties in the identification evidence, for example when the witnesses only had a fleeting moment to observe the perpetrator who was a stranger to them. The same goes for recognition as described in *R. v. Ryan*, 2011 NLCA 53 at paragraph 25. Recognition evidence is when the witness is able to verify the identification of the accused from recognizing the voice or appearance of the accused based on their familiarity and interaction with each other. The difference from identification evidence is that the perpetrator is known to the eyewitness who is asked to provide the opinion of the identity of the perpetrator from a video tape or photo for example. See *R. v. Brown* (2006), 215 C.C.C. (3d) 330 (Ont. C.A.). However, it is the opinion of the witness as a lay person that is sought, to confirm that the person they saw in the crime scene is in fact the acquaintance because their description matches the description of the suspect, see *R. v. Leaney* (1989), 50 C.C.C. (3d) 289 (S.C.C.). While caution must still be taken to ensure that the evidence is sufficient to prove identity, recognition evidence is generally considered to be more reliable and to carry more weight than identification evidence.

[69] As stated in *R. v. John*, 2010 ONSC 6085 at paragraph 17:

> [17] The rule in *Leaney*, *supra*, permitting a witness who knows the accused to examine photographs or video evidence of the perpetrator and give an opinion as to identity, is an example of lay opinion evidence.
>
> [. . .]
>
> [22] [A] lay recognition witness must also be able to "identify idiosyncrasies of physical appearance or movement, not apparent to the trier of fact in the courtroom", before admitting lay opinion evidence.

[70] In the context of assessing the evidence related to the essential element of identity, I have carefully considered the testimonies of the prosecution's witnesses. As stated by defence counsel, S1 Kester testified very candidly, admitting to having consumed a large amount of alcohol and being highly intoxicated at the material time. He did not hesitate to state to both parties that he could not answer certain questions because he suffered blackouts. In addition, he confirmed the challenges experienced by the crew after the tragedy that took six lives, shifting the crew's focus away from other important matters. The Court has no reason to reject his testimony for the portion of the evening that he did remember. He testified that he was standing at the other end of the bar counter when he saw the complainant with a male close to her, and that she looked quite distressed. What he saw was remarkable enough to remember witnessing the event, but also, he felt compelled to approach to have a better view, and decided to intervene to assist the complainant to ensure that she was safe when he realized the male had his hand on the complainant's knee. He testified not remembering the face of the individual who was touching the complainant. His evidence corroborated the testimony of the complainant regarding the sexual assault that she was subjected to at the time. That portion of his testimony is both credible and reliable because although he was intoxicated, what he witnessed was shocking enough to remember it specifically.

[71] The purpose of S1 Miner-Turner's testimony was also to corroborate the testimony of the complainant, particularly with regard to the identity of the perpetrator. S1 Miner-Turner was calm but uncooperative. His complacent deportment in the courtroom was incomprehensible and unjustified, considering the Court specifically issued an order to remove all potential stressors. He had little independent recollection of the events and adopted as probably true the content of his prior statements. However, portions of his testimony related to events that he was able to recall generally corroborated the complainant's evidence, particularly that he believed he saw you socialize with the complainant at the mess at the material time, and that he did show pictures of you to the complainant on the flight deck.

[72] As for whether the complainant called her sister that evening when S1 Miner-Turner went for a smoke, or whether she put the call the next day instead as she attested to, or whether S1 Miner-Turner showed one picture or two of your Facebook profile are minor discrepancies that have little bearing on the credibility of the complainant or of S1 Miner-Turner. These contradictions only serve to demonstrate that minor collateral facts would have escaped this witness who was intoxicated that night and who now

experiences personal struggle as a result of the tragedy that happened on this deployment.

[73] The coxswain provided relevant details regarding the context in which the ship operates and regarding his involvement as it pertains to the investigation. His testimony largely corroborated with accuracy the testimony of the complainant regarding the method he used to show the pictures and how quickly the complainant pointed out your picture without hesitation. I find his evidence both credible and reliable. He testified in a forthwith manner and was very clear in his answers. He admitted some details were unclear because the events occurred two years ago. It is also credible that he did not read the witnesses' statements before he sent them to the CFNIS because he knew the CFNIS is mandated to investigate sensitive or serious matters such as sexual assaults. It would have been highly unusual and improper to conduct a unit investigation for such a serious matter. The coxswain confirmed he knew this because he told the Court he was not allowed to investigate the matter and would have normally referred it to the MP, but this option was not available at the time. Thus, once he was made aware of the allegations, he contacted the CFNIS and spoke to a Sgt Boyd who confirmed that they would conduct the investigation. The coxswain also understood from his conservation with Sgt Boyd that he, the coxswain, would collect and preserve the evidence for onward transmission to the CFNIS. This is exactly what he did. Once he received the statements, he almost immediately sent them to Sgt Boyd for their investigation, knowing that the matter was out of his hands. He was also acting on behalf of the CFNIS when he established a process akin to a photo lineup. I accept therefore that he did not know the name of the perpetrator when he conducted the photo lineup and that your name was not mentioned by the complainant when she was in his office to see the pictures. I have no reason to disbelieve his testimony which was consistent.

[74] The coxswain's method for conducting the process akin to a photo lineup was diligent and well thought out, aiming at not tainting the identification by the complainant. When he realized Monitor MASS had not been populated for most of the air det members, he arranged for the photo technician to take pictures of the nineteen aircrew, who all happened to be male. The photos should have been populated before; this was something that needed to be done, nevertheless. Despite the absence of law enforcement training, the coxswain's method was rigid, unbiased and beyond reproach. He knew the suspect was a member of the aircrew, he knew it was a male, and that there was a probability that the suspect was a junior rank because the offence was committed at the junior ranks mess, yet he included clear and very recent photos of all the members of the aircrew including officers and NCOs and he ensured he concealed their name and rank from the complainant's view. He asked her to continue perusing all photos even after she had selected your photo and asked her to confirm that she was sure the photo she selected was the one of the perpetrator. He also did not provide your name to the complainant once she selected your picture.

[75] The complainant was a reliable and credible witness. She was the only witness at the mess who did not drink alcoholic beverages. She testified clearly and did not hesitate to indicate when she was unsure. There were some minor discrepancies

between her testimony and the testimonies of S1s Kester and Miner-Turner, but they were on collateral issues as alluded to earlier. These latter witnesses' reliability on those collateral aspects of the case was doubtful mostly because of their alcohol consumption that evening and because of the tragedy that followed, which shifted their focus on what can be considered a life-changing event. Such minor discrepancies are always expected. There were no internal inconsistencies in the complainant's testimony, she maintained her version throughout and her credibility remained unshaken.

[76] She testified that when she sat at the bar around one o'clock in the morning, there were at least six people present in the mess at that time, which included you, the duty staff, the aircrew members seated at the table and S1 Kester, but there could have been up to twelve. All agree that there were no more than twelve persons at the mess at that time and you inferred that as well. She confirmed that she saw you seated at the table on the right of the entrance with one or two other air det members, with a member cleaning the bar and three or four others cleaning up and rearranging the sofas. Almost as soon as she arrived and sat at the bar, you came to talk to her and sat beside her which is when the touching occur. The commission of the offence lasted about five minutes and was witnessed by another person, S1 Kester, who felt compelled to intervene. The ordeal lasted about between five to seven minutes before the complainant left with S1 Kester for the cook's office.

[77] In my view, there is evidence beyond the photo lineup to support V.R.'s testimony. You were familiar to her. She testified with certainty from the very beginning that the perpetrator was a member of the air det because she had seen you in your distinctive flight suit in the meal lines on some occasions from the moment you moved onboard in December to the night of the event late April. She had many months to know your face. She obviously could not say with precision how many times this happened and accepted in cross-examination that she told the MP she saw you only once or twice. Of course, if she was to serve one meal every day to the crew excluding the officers, she most likely had seen you more often. I give little credence to this minor discrepancy. The complainant did express some doubt to the coxswain at some point, saying that one other member could have fit the description she provided, however once she saw a clear photo of you, she was consistent in her evidence, saying that you were the perpetrator, with no hesitation. She wanted to be thorough in finding out your name and excluded all other possibilities.

[78] She was in your presence in a very close proximity of you at the mess for a good five minutes at least, during which the offence lasted. She had all this time to observe the perpetrator. She also described you to the MP as a big guy, with dark hair, with a saggy face and she said that she found you had unique facial features and you stood out for her not only because of your distinctive uniform, but also because of your unique facial features. Her description was consistent, even when accounting for the minor variations of hair tone, whether it was brown, dark or black hair, all point out to roughly the same hair colour.

[79] S1 Miner-Turner knew you very well from previous service and for being your next-door neighbour. He saw you at the mess during the evening. He saw you talk to the complainant in the mess that evening, which means that it would have been during the five to seven minutes of the incident. You admitted you were the only aircrew present that evening who got up from the table to purchase drinks at the bar.

[80] The description the complainant provided was fairly detailed and consistent. The complainant identified you forty-five to sixty minutes after the offence and again a few days later. She identified you in the courtroom. In cross-examination, her evidence remained consistent. She did not try to embellish or justify some minor discrepancies. Whether she went to the mess to watch a movie or to be alone has no bearing on her credibility. The same goes for what she told S1 Kester the following day. She does recall he asked her if she was fine and believed that she may have provided your description, but again this is a minor discrepancy that has little bearing on her credibility.

[81] There was also very little to no evidence that there were NTOG members present onboard during the port visit. NTOG members have their own distinctive uniform. There was no evidence whatsoever that there was NTOG members in the mess at the material time.

[82] In *R. v. Nikolovski* (1996), 111 C.C.C. (3d) 403 (S.C.C.), at page 413, Cory J. stated at paragraph 23:

> It is clear that a trier of fact may, despite all the potential frailties, find an accused guilty beyond a reasonable doubt on the basis of the testimony of a single eyewitness.

[83] The Court finds that there are no frailties in the identification evidence. In fact, the complainant knew exactly who had touched her inappropriately; all that was missing was to put a name on the face she recognized.

[84] I am satisfied with the complainant's evidence that you committed the sexual assault. Her evidence is both reliable and credible, and was also corroborated by other witnesses including yourself admitting you were at the mess at the materiel time. The complainant maintained her description and pointed to you. There were never any identification mistakes on her part.

III. Conclusion

[85] In conclusion, I have rejected your testimony as being not reliable nor credible. In addition, your testimony leaves me with no reasonable doubt because it corroborates some of the evidence demonstrating that you were the perpetrator, when you admitted being at the mess during the material time toward the end of the evening, socializing while waiting for your drink. You had also consumed alcohol that evening. The evidence showed that the complainant was seated alone at the bar when she was approached, and your evidence shows that you were the only aircrew who went to the bar around this time.

[86] Looking at the rest of the evidence, finding the testimony of the prosecution's witnesses to be credible and reliable, and even when considering your testimony at this stage, I find that the prosecution proved, beyond a reasonable doubt, that you committed a sexual assault on V.R. on 22 April 2020, onboard HMCS *Fredericton*.

FOR THESE REASONS, THE COURT:

[87] **FINDS** Master Corporal Sutherland guilty of one charge of sexual assault.

Counsel:

The Director or Military Prosecutions as represented by Major M. Reede and Major A. Orme

Mr T. Singleton, Singleton and Associates Barristers and Solicitors, 1809 Barrington Street, Suite 1100, Halifax, NS, Counsel for the accused, Master Corporal W.C. Sutherland