

IN THE PROVINCIAL COURT OF NOVA SCOTIA

R. v. J. W. S., 2012 NSPC 102

Date: November 22, 2012

Docket: 2311709 - 2311713

Registry: Halifax

BETWEEN:

Her Majesty The Queen

v.

J. W. S.

TRIAL DECISION

Editorial Notice

Identifying information has been removed from this electronic version of the judgment.

JUDGE: The Honourable Anne S. Derrick

HEARD: September 5, 6, 7, 10, 21, October 1, 2, 3, November 9, 2012

DECISION: November 22, 2012

CHARGES: sections 271(1); 267(b); 267(a); 264.1(1)(a) and 88(1) of the
Criminal Code

COUNSEL: Susan MacKay, for the Crown

DEFENCE: Victor Goldberg, Q.C., for the Defence, with Mark Mills,
Articling Clerk

By the Court:

Introduction

[1] In the early morning hours of May 6, 2011, Halifax Regional Police arrested J. W. S. at MLC's apartment in [...] and charged him with sexual assault, assault causing bodily harm, assault with a weapon, knowingly uttering a threat, and possession of a weapon, a knife.

[2] Police officers had been dispatched to MLC's apartment as a result of MLC calling 911. MLC had been living with two roommates, but in May 2011 only one roommate, J. C., was still staying at the apartment. Mr. C. was in the apartment when the police arrived. He had been there all night, in his room.

[3] MLC was taken by ambulance to the QEII Hospital where she was observed to have injuries, the most serious being a wound to her left forearm. It is conceded that the wound on MLC's arm was caused by Mr. S. biting her.

[4] As of May 6, 2011, MLC and J.W.S. had been involved in a sexual relationship for almost three months. MLC was pregnant and had decided to have an abortion.

The Police Investigation

[5] Sgt. Derrick Boyd and Cst. William Allen were dispatched to [...]. They found Mr. S., naked and asleep on the floor of MLC's bedroom. Mr. S. was shaken awake and arrested.

[6] Sgt. Boyd observed Mr. S. while he was lying asleep on the floor and once he stood up, and noticed no injuries on him. It did appear that he had been drinking the night before. Both Sgt. Boyd and Cst. Allen noticed a smell of alcohol in the room which Cst. Allen identified as coming from Mr. S..

[7] Mr. S. was not intoxicated. He was coherent and responded appropriately to the officers.

[8] Det/Cst. J.J. Wassen, an officer with the Identification section, seized various items in the bedroom believed to be relevant to the investigation. A man's belt and black sock were found on the floor by the side of the bed nearest the door. (Exhibit 2, Photographs 12 and 13) MLC's long-sleeved T-shirt was bunched up on the floor on the other side of the bed. (Exhibit 2, Photograph 7) A pair of torn, pink underpants, belonging to MLC, were lying on the bed. (Exhibit 2, Photographs 6 and 10)

[9] Also in the bedroom, under the desk by the wall near the foot of the bed, the police located a broken cell phone lying on top of a knife.

[10] MLC's long sleeved T-shirt was badly torn in the front with a large, gaping hole. (Exhibit 2, Photograph 42) There also appeared to be cuts in the back of the garment. (Exhibit 2, Photographs 43 and 44)

[11] Det/Cst. Wassen photographed a long mirror that was lying on MLC's bed. (Exhibit 2, Photographs 4 and 5) None of the police officers who attended at the apartment placed the mirror there nor did they do anything to disturb MLC's bedroom. Cst. Allen testified that he could not say one way or the other whether there was a mirror on the bed when he was in the bedroom. Sgt. Boyd noticed there were items on the bed but did not make note of what they were and cannot recall if one of them was a mirror.

[12] MLC testified that Mr. S. "pushed" the mirror on to the bed when he was in her bedroom in the small hours of the morning of May 6.

[13] On May 7, MLC gave a videotaped statement to Cst. Sandra MacNaughton about the events of May 6.

MLC and J. W. S.

[14] This trial was conducted with the assistance of a [...] interpreter. Interpretation was used for Mr. S. throughout the trial. MCL and Mr. S. both testified in [...], as did J. C..

[15] MCL and J.W.S. came separately to Canada from [...]. MLC arrived in Halifax from Edmonton in January 2010, having switched to Saint Mary's University. Mr. S. came to Halifax to learn English, arriving in December 2009.

[16] I understood from MLC's evidence that she and Mr. S. first met in October 2010 in a downtown bar. It seemed to me that Mr. S. recalls them meeting earlier that year. There is agreement however that a friendship developed and by February 2011, the relationship had become sexual.

[17] I previously determined pursuant to section 276(2) of the *Criminal Code* that MLC's and J. S.'s prior sexual activity was admissible evidence in this trial: *R. v. J. W. S.*, 2012 NSPC 101.

The Relationship Between MLC and J. W. S.

[18] MLC and Mr. S. gave somewhat different descriptions of their relationship. Mr. S. indicated it was a typical boyfriend/girlfriend relationship whereas MLC's testimony gave me the impression that she felt she had been undervalued. There is evidence Mr. S. was quite attentive to MLC: he testified he would buy her food and bring it over to her when she would call to say she was hungry. He said he did this even if the call came after midnight. On May 5 he brought a meal to MLC, arriving around suppertime at her apartment building with food he had cooked for her.

[19] By May 6, MLC and Mr. S. were seeing a lot of each other. They communicated almost every day; by text during the daytime, and by phone calls at night. MLC testified that they did not argue a lot.

[20] According to MLC, once they became lovers, she and Mr. S. "always" saw each other after midnight when they would have sex. They would see each other either at MLC's apartment in [...] or Mr. S.'s apartment in [...]. MLC acknowledged that they were also together at restaurants and in the downtown bars. Mr. S.'s evidence was that later in the relationship he and MLC were seeing each other more often in the evenings.

[21] MLC said only one of Mr. S.'s friends, D. C., knew about their relationship. This was contradicted by Mr. S. who denied that he was hiding the relationship from his friends. He said his friends knew he was seeing MLC. He did acknowledge that MLC complained he did not spend enough time with her and that this would cause arguments.

[22] MLC and Mr. S. had an active sex life, engaging in sexual intercourse almost every day. MLC described sex with Mr. S. being initiated by both words and actions. She did not agree with the suggestion put to her on cross-examination that words were not necessary because both she and Mr. S. knew what they wanted. When asked on cross-examination what was the normal way for sex with Mr. S. to be started, MLC said: "I just feel it" although this answer has to be viewed alongside MLC having just said that words and actions were involved. Mr. S. testified that sex with MLC was initiated just by actions, with no verbal component.

[23] MLC was asked on cross-examination if she enjoyed "rough sex" with Mr. S.. She said no, she did not. There was one occasion when she blindfolded Mr. S. and tied him up, something that was her idea. She did not agree that when she and Mr. S. had arguments followed by sex that the sex was more passionate and rougher. She also disagreed with the suggestion that she encouraged Mr. S. to rip her clothing as part of their sexual activity. Mr. S. testified about an occasion when MLC wanted him to tear her pantyhose off as a prelude to sex, provided he bought her a new pair.

[24] "Make-up" sex is an issue on which MLC and Mr. S. disagree. Mr. S. testified that he and MLC engaged in "make-up" sex after arguments. He said this was particularly appealing to MLC.

[25] Biting also became part of their sexual practices. Mr. S. said at first it was "just playing around" and then it became a sexual behaviour. According to Mr. S., MLC would bite quite hard when she became angry. Mr. S. testified that MLC bit him on two occasions when she was angry, leaving marks on his shoulders. MLC's evidence was that she and Mr. S. bit each other but not during sexual intercourse and only lightly.

[26] Mr. S. always wore a condom during sex with MLC. On one occasion when the condom slipped off, MLC used Plan B which Mr. S. purchased.

The Letter

[27] Shortly before the May 6 events, probably around the end of April, MLC wrote Mr. S. a letter in [...]. (Exhibit 4) The letter starts with “Dear Boyfriend” and is an apology for permitting someone to kiss her the night before in a bar. In the letter, MLC describes Mr. S. as a “sweet, mature person” and the one she likes “the most.” She criticizes herself for being immature and tells Mr. S. she is sorry for what happened. I was told that [...] characters in the letter indicate that [...] culture requires a woman to obey the man. This cultural view is expressed in the letter. MLC promises such a transgression will not happen again and says she will respect her boyfriend. She expresses her hope that “the sweetest and most handsome boyfriend” will accept her apology and forgive her. MLC tells Mr. S. she will be sad if he does not forgive her and asks him to wait a bit and not be angry. At the conclusion of the letter she impressed a kiss on the page.

[28] When questioned about the letter on cross-examination, MLC was very forthcoming and acknowledged what the letter said and the circumstances that gave rise to her writing it. She confirmed that the letter was an expression of her feelings for Mr. S. at the time she wrote it.

[29] Mr. S. testified that the incident giving rise to the letter happened around the end of April 2011. He and MLC had gone to a night club. While he was talking to a friend, MLC said she was going out with one of her friends. When she didn't return, Mr. S. went to look for her and saw her intimately kissing another man. He was very hurt by this and he and MLC argued. They also later had make-up sex. Mr. S. said it was on this occasion that, with MLC's encouragement, he tore her panty hose off. At first, Mr. S. told MLC he'd like to have an apology letter. After further sex, he said the letter would not be necessary but MLC wrote it anyway even though he had told her he forgave her behaviour.

[30] Mr. S. kept MLC's letter because he felt it was sincere. When asked about the letter on cross-examination he agreed that it was a full apology.

The Pregnancy

[31] MLC became pregnant at the end of March 2011. Although she and Mr. S. had been using condoms, one had slipped off during sex. MLC confirmed the

pregnancy with a home pregnancy test. She described Mr. S.'s reaction to the pregnancy as "very worried." She was "very worried too."

[32] According to MLC, Mr. S.'s demeanor toward her did not change after he knew she was pregnant. The discussions they had about the pregnancy involved whether MLC would go ahead with it or have an abortion and if there was going to be an abortion, how they were going to pay for it. MLC testified she did not have enough money to pay for an abortion which was going to cost \$2000.

[33] MLC testified that once the decision was made to have an abortion, she and Mr. S. stopped discussing the pregnancy and focused on making the appointment and getting the blood work done. The abortion was scheduled for May 10, 2011. MLC testified that Mr. S. knew about the date and was going to pay for the procedure.

[34] It was MLC's evidence that she did not know Mr. S.'s views on her decision to have an abortion. She testified that she did not remember if Mr. S. had told her he did not want her to go through with the pregnancy but would support her in whatever decision she made. She always wanted to have the abortion, citing the fact that she had been drinking and that Mr. S. was not a suitable father. According to Mr. S., MLC had said she felt she was too young to be tied down by the responsibilities of a baby.

[35] Mr. S. testified that he first asked MLC not to have an abortion. Although he posed some options to her for coping with an unplanned baby, when MLC was adamant about terminating the pregnancy, Mr. S. testified: "I have to agree with her." I took this to mean he saw that MLC had made up her mind. He testified that he said he agreed "but deep inside my heart I am not happy."

[36] Mr. S. explained his true feelings were due to the fact of his family being very religious and viewing abortion as a shameful choice. Mr. S. did not mention to his parents that MLC was pregnant.

[37] Mr. S.'s understanding of his responsibilities in relation to the pregnancy was the same as MLC's: he was to take her to the doctor and the abortion clinic, and pay the cost of the procedure.

The Night of May 5 and the Morning Hours of May 6

[38] Mr. S. seems to have a better memory of May 5 than MLC. According to Mr. S., MLC had spent the previous 3 – 4 consecutive days at his apartment. Mr. S. was about to move in with friends in [...] and give up his apartment. On May 5, Mr. S. took MLC home just after having sex with her in the afternoon. I find no reason to disbelieve Mr. S.’s recollection of these events.

[39] MLC did say in her evidence that her relationship with Mr. S. at this time was “good.”

[40] It is common ground that Mr. S. was going to be spending the evening with friends. Both Mr. S. and MLC agree that she was out of sorts about this. Mr. S. described her as being very angry. MLC said she was “not very happy” with Mr. S.. MLC testified that she was upset about not being invited along and it does appear that Mr. S.’s plans did not include an invitation to MLC to join him and his friends.

[41] Before getting his evening underway, Mr. S. brought the supper he had cooked over to MLC. He gave it to her in the lobby of her apartment building. He told her it would be very late but he would still be coming to see her that night. MLC testified that it was not unusual for Mr. S. to come to her apartment late and they would have sex.

[42] Mr. S. was out very late. MLC was awake at her apartment, using her computer. She had an angry phone call with Mr. S. asking where he was and who he was with. By this time, J. C., MLC’s roommate, had returned from a late night working. A thin wooden door separated his living space from MLC’s. He heard her sounding angry on the phone.

[43] Mr. S. had spent the evening eating and drinking with his friends. About 11:30 p.m. they went downtown. Mr. S. drank some more there. He arrived back at [...] around 3 – 3:30 a.m. His alcohol intake had included sharing with his two friends in half a 750 milliliter bottle of vodka, approximately 3 – 5 beer, and maybe 3 – 4 shots.

[44] I do not find it necessary to sort out who called who or when the calls were made. What is material is that there was an angry phone call between MLC and Mr. S. and then further calls from Mr. S. that MLC did not answer. It was MLC's evidence that she did not want to see Mr. S. and did not want him coming over to her apartment. It is a reasonable inference that she was angry with him for being out so late and leaving her out of the festivities.

[45] Mr. S. decided to head for MLC's apartment. It was his evidence that she would be even angrier with him if he did not do so. She did not respond to a text to let him in through the security door and he had to wait until he could follow someone in to the building.

[46] When Mr. S. arrived outside MLC's door he knocked. MLC testified that he knocked loudly. She said in cross-examination that he also kicked the door, basing this on the sound being louder than a knock. It was her evidence that she let him in because she did not want Mr. C. woken up. She testified: "I did open the door but in my heart I didn't really want to."

[47] I note that Mr. C. did not describe hearing anything other than the opening of the apartment door. Whether Mr. S. knocked as loudly as MLC claims or not is not material to my analysis of the facts: I am prepared to accept that it would not have been evident to Mr. S. that MLC did not want to let him in other than she had said he should not come over.

[48] Mr. S. testified that MLC was angry. It was his evidence that it was not unusual for MLC to tell him not to come and he would go anyway. There had been other times when MLC would not let him in and he would wait until someone came to the security door of the apartment building and go through with them. According to Mr. S., MLC would then let him into her apartment, they would have an argument, he would apologize, and they would have sex.

[49] Mr. S. does not deny that once in MLC's room they argued. By his own admission he spoke quite loudly, asking MLC why she didn't answer the phone. He was angry. He asked MLC why she had a cell phone if she wasn't going to answer it. It was his evidence that he said if she didn't want to answer his calls, he might as well not use his cell phone anymore. According to Mr. S. he followed this

up by breaking his cell phone. When asked about the cell phone seized by police from MLC's bedroom, Mr. S. testified that it was his phone. He admitted in cross-examination that he threw the phone because he was angry, cracking its face. (It is a little confusing that MLC testified to this having been her phone but I do not find anything turns on this.)

[50] Mr. S. acknowledged in cross-examination that he had not liked the fact that MLC would not take his calls. In addition to throwing the cell phone, Mr. S. testified that he also banged his hand on the table in MLC's room, pushed a pillow on the floor and kicked some stuff away with his foot. He agrees he was angry and quite noisy. He wanted to show MLC he was angry but testified it was not his intention to harm anyone or make anyone afraid of him. Mr. S. now feels "very bad" about his behaviour and agreed with the Crown that he was out of control that night. He testified that, nonetheless, he knew what he was doing.

[51] According to Mr. S., MLC was "very angry" because he was being loud and would disturb Mr. C. whom she said was sleeping. MLC complained about Mr. S. not taking her out with his friends that night. They got into the issue of the abortion. Mr. S. says he asked her not to go through with it. This is consistent with what MLC told Cst. MacNaughton on May 7, that when he came over to her apartment, Mr. S. asked her not to have the abortion.

[52] Mr. S.'s evidence about his demeanor in MLC's bedroom was consistent with how MLC experienced him. She testified that he seemed "very angry." She didn't "feel good" about him being there. His behaviour in her bedroom seemed "out of control." She could tell he was drunk. This, Mr. S. denies.

[53] According to MLC, once in her bedroom, Mr. S. began to push some of her furniture around. He pushed MLC's bed and a mirror that was leaning against the wall near the bed.

[54] MLC testified that while Mr. S. was pushing the furniture in her bedroom she was crouched down by the window with her arms crossed in front of her body. It was her evidence that she wanted to protect herself because she did not want the furniture to hurt her or "any other situation to happen." She felt unable to leave the room because Mr. S. was standing closer to the door. The door was closed.

[55] I cannot say that there is any clear evidence that MLC asked Mr. S. to leave. Her evidence on this was confusing, which may reflect a translation problem. In MLC's direct evidence she said she cannot remember now whether she asked Mr. S. to leave. She said on cross-examination that right after Mr. S. came into her bedroom, she asked him to leave. She then testified, according to the English translation of her answer in [...], that she cannot be certain she told Mr. S. to leave. She wanted him to leave.

[56] MLC testified that Mr. S. wanted to know why she had not answered his calls. MLC says she did not answer him. She did not want to talk to him. On cross-examination, MLC denied there being an argument. She said Mr. S. talked and she never replied. She acknowledged that she was angry.

[57] J. C. testified in his direct evidence that MLC and Mr. S. were arguing loudly and kept him from sleeping. On re-direct, Mr. C. said he only heard Mr. S. talking very loudly however, his statement to police indicated that Mr. S. and MLC were arguing and yelling at each other. He did not pay a lot of attention to what was being said but kept only one earphone in because he didn't want "anything bad to happen" in the apartment. At one point he heard Mr. S. tell MLC: "I always treat you well."

[58] Mr. C. noticed that Mr. S. was drunk. He observed Mr. S. go to the kitchen at one point. Mr. S. has acknowledged he did so to get a knife. Mr. C. testified that Mr. S. looked very angry.

[59] At some point in the sequence of events, Mr. C. says he heard MLC make a "very scaring sound". She was crying and saying, very loudly, "No." Mr. C. heard other noises from MLC's room, including glass breaking. I note that the police found broken glass in a wastebasket in MLC's room. In Mr. C.'s police statement of May 6, he put his recollection this way: "I am not sure what she was saying: I do think she was saying 'no'." In his evidence Mr. C. variously said he was "100 percent sure" MLC said no, and he "thinks" he heard 'no'.

[60] There is no dispute on the evidence that at some point, Mr. C. got fed up and called out loudly to Mr. S. and MLC in [...]. He wanted them to be quiet. It had no effect.

[61] There are problems with aspects of Mr. C.'s evidence. I am not persuaded by his explanation for the inconsistencies between his testimony and the statement he gave to Cst. Andrew Howie on May 6. I do not accept his evidence that Cst. Howie substituted his own words during the statement-taking for Mr. C.'s descriptions. I find Mr. C. told Cst. Howie that Mr. S. and MLC were arguing and yelling at each other and that this reflects what he heard on May 6 at the apartment.

[62] Mr. C.'s evidence does confirm certain facts, described by either or both of MLC and Mr. S.. Mr. S. was intoxicated when he came to the apartment, something noted by both MLC and Mr. C. although denied by Mr. S.. Mr. S. was angry and aggressive. He took a knife from the kitchen into MLC's bedroom. He was yelling at MLC and they were arguing. It is significant to me that Mr. C.'s confidence in his recall about these details was unshaken in cross-examination. He testified that this was the biggest event that he had experienced in all the time he has been in Canada, about five and a half years.

[63] According to MLC, it was after Mr. C. complained about the noise that Mr. S. left her room. He went into the kitchen and came back with the knife later located by police on the floor. Mr. S. faced MLC with the knife in his hand and told her: "I will kill the roommate."

[64] It was MLC's evidence that Mr. S. was angry and waved the knife back and forth saying: "I want to kill J." MLC testified that she felt "kind of danger and...kind of threatened, someone threatening me." In cross-examination, MLC's evidence was that Mr. S. did not threaten her, "He was in front of me with the knife." She testified that the knife was not directly pointed at her. She repeated several times that while Mr. S. did not threaten her, she felt threatened because he had a knife.

The Sexual Intercourse

[65] According to MLC, the situation in the room escalated. Mr. S. either threw or put the knife down on the floor and pushed MLC on to the bed. He pulled her clothes and ripped them. He ripped her shirt and her underpants. She testified that she did not consent to being pushed on to the bed or having her clothes ripped. She continued with her description of what happened: "Then he started to bite my arms

and body and then he have sex with me, forcing me...It was forced sex...His penis went in my vagina for maybe 5 minutes. I did not agree to have sex with him and did not want to have sex with him. He did not ask to have sex with me.”

[66] MLC testified that she was unable to stop Mr. S. from having sex with her because he was “a lot heavier, a lot stronger, and then if I refuse I end up being the one being hurt.” MLC is a small, slight woman. It was her evidence that she was afraid of being hurt by Mr. S..

[67] Both MLC and Mr. S. agree that he did not ejaculate. After the sexual intercourse, he fell asleep on the floor by the side of the bed closest to the window. According to MLC he was naked. MLC does not remember when this occurred although she testified that she and Mr. S. were in her bedroom for approximately 3 – 4 hours in total.

[68] After Mr. S. fell asleep, MLC waited about 5 minutes before going into the empty room in the apartment and calling police and an ambulance. MLC testified on cross-examination that she called for an ambulance because she was bleeding from the bite on her forearm. She wanted to avoid waking Mr. S. up. At some point after the police arrived at her apartment - MLC does not remember exactly when - she was in J. C.’s room, sitting down and crying. She was crying because her arm was really painful.

[69] Mr. C. confirmed in his evidence that around 6 a.m. he went to the bathroom. When he came out he saw MLC returning from the empty room. He testified that MLC was crying and looked scared. (Translated from [...]. Mr. C.’s description of MLC was that she looked “scary.” It is apparent to me that “scary” in the contexts used by Mr. C., means “scared.”) Mr. C. also noticed that MLC had a bite mark on her left forearm.

[70] MLC testified she said she asked Mr. S. more than three times to stop during the sexual activity. She was firm in her evidence that she did not voluntarily have physical contact with Mr. S. on May 6.

Mr. S.’s Evidence

[71] Mr. S. testified that MLC did consent to physical contact with him on May 6, including sexual intercourse. In the alternative, he says that if he was wrong to have believed MLC was consenting, it was an honest mistaken belief.

[72] Mr. S. has acknowledged he was angry and loud in MLC's room. He says he was also overly "excited" and emotional about her decision to have an abortion. He tore her t-shirt. Mr. S. had put his hand on MLC's T-shirt and asked her if she was sure she wanted to have the abortion. MLC told him she was and, as Mr. S. put it through the interpreter, "Because my strength is a little bit strong, that's why [MLC's] clothing got torn." Mr. S. admitted that he was angry MLC wanted to have an abortion and was reacting emotionally. MLC did not consent to him ripping her shirt.

[73] According to Mr. S., it was after this that he went into the kitchen and got the knife. He was overwrought. Mr. S. identified Exhibit 18, the knife seized from MLC's bedroom, as the knife he took from the kitchen. He went back into MLC's room and continued to ask her if she was still going to have the abortion. He agreed on cross-examination that he was still angry with MLC. He testified that he then lay on the floor and said if she was going to go through with ending the pregnancy he was going to kill himself.

[74] It was at this point Mr. S. says that Mr. C. complained about the noise. Mr. S. testified that he told Mr. C. to shut up or he would kill him. It was Mr. S.'s evidence that he was really emotional at this time and just wanted Mr. C. to leave them alone because they were discussing an important issue. Mr. S. testified he did not intend his words as a threat to Mr. C., he did not mean what he said in a threatening way.

[75] Mr. S. demonstrated in court how he was holding the knife, with the blade pointed toward himself. He testified that he did not point the knife at MLC or threaten her with it nor did he threaten to harm or kill her. MLC was squatting with her arms clasped around her knees. It was Mr. S.'s evidence that when he threatened to kill himself she said she did not want to have the abortion. According to Mr. S., MLC said she did not want him to hurt himself. He put the knife down although not, he says, where it was found by police. He says he cannot explain the location of the knife as shown in Exhibit 2, Photograph 12.

[76] Mr. S. testified that he then started to cry loudly. This prompted MLC to move closer to him and say, "Baby, please don't argue." This was the start of an intimate and affectionate embrace. Mr. S. and MLC ended up on the bed, Mr. S. kissing and licking MLC while she lay there. There was no mirror on the bed when he and MLC were lying on it. Mr. S. removed MLC's clothes and then his own. As is his habit, he took his belt off and then his pants. He identified his belt as the one found on the floor by police.

[77] According to Mr. S., MLC did nothing to indicate she did not want to have sex with him. It was Mr. S.'s evidence that MLC "did not move in the bed and did not say anything." Although Mr. S. says he tried, as part of the sexual activity, to tear MLC's underpants, the fabric was too strong so he just removed them. MLC did not struggle or resist in any way. She said nothing. Mr. S. lay on top of MLC on the bed.

[78] Mr. S. then described having sexual intercourse with MLC. He had an erection. He testified he touched her gently and kissed her. He noticed that she "doesn't seem to be happy like she used to..." He stopped, "because I don't want to do my sexual intercourse I don't want anything unhappy."

[79] The sexual intercourse lasted maybe less than 5 minutes. Mr. S. did not ejaculate. He testified that he stood up, telling MLC he already tried his best to please her and she was still not happy. He said he did not want to argue anymore and that if there was anything she wanted to discuss, they could talk "tomorrow." Because MLC seemed unhappy, Mr. S. decided she might not want him sleeping in the bed with her so he slept on the floor.

[80] It was Mr. S.'s evidence that he believed MLC wanted to have sexual intercourse. In his mind it was make-up sex to which she indicated her consent by saying to him, "Baby, let's not argue."

[81] On cross-examination Mr. S. agreed that he was very angry and not acting as a responsible person when he was in MLC's room but he denied that he had sex with MLC against her will. He did not ask her if she wanted to have sex "because from previous experience we never asked that, never..." He testified that when he kissed and touched MLC she did not object. Mr. S. testified that if MLC had been

afraid of him because of how he had been acting, he knew that she was no longer afraid of him when she held his hand and said they should not argue anymore. Mr. S. testified that from previous experience that was how they ended up having sex.

[82] Mr. S. testified that other than the bite on MLC's left forearm, any biting he did of MLC on May 6 was very light. He agreed that MLC did not bite him that night. I note that this is a difference from the other nights when he and MLC had sex, nights that had in the past involved mutual mild biting.

[83] Mr. S. testified that he went from being very angry with MLC that night to applying very gentle kisses to her body.

Marks on MLC's Body

[84] MLC testified that Mr. S. bit her on her face, her forearms, and her thigh although she cannot recall which thigh. Marks were observed on MLC's body at the hospital. Ms. McCall-Sani, the junior Sexual Assault Nurse Examiner (SANE), testified that the bruises on MLC were mostly oval/round in shape and were consistent with bite marks. Det/Cst. Wassen took photographs of the marks, which in addition to the bloody bite on MLC's left forearm, included: circular bruises on her upper left arm, the inside of her left arm, on her left cheek, and on her upper right leg, as well as, an abrasion on the left knuckle of her little finger, bruising on the bottom of her right-hand side jawline, slight bruising above her left breast, and slight bruising and skin slippage on her arm (the first layer of skin having been broken away or pushed.)

[85] MLC testified that before May 6 she did not have any bruises, cuts, or marks on her body like the ones seen at the hospital.

[86] Mr. S. was asked about the marks on MLC. He testified that he could not say how MLC got a slight circular bruise on her upper left arm. (Exhibit 2, Photograph 27) He is "absolutely sure" he did not bite her in that area. He does not know how MLC got an abrasion on the left knuckle of her little finger. (Exhibit 2, Photograph 28) He had nothing to do with the circular bruise on the inside of MLC's left arm. (Exhibit 2, Photographs 29 and 30) As for the broken circular mark on MLC's left cheek, Mr. S. testified that this mark was made when MLC held his arm saying "Baby, let's not argue" and he kissed her by making a sucking action. (Exhibit 2,

Photographs 31 and 32) Mr. S. also testified that he had nothing to do with what appears to be bruising on the bottom of MLC's right-hand side jawline. (Exhibit 2, Photographs 33 and 34) This was not caused by him, he says.

[87] When Mr. S. was shown Photographs 35 and 36 in Exhibit 2, the slight bruising and skin slippage on MLC's upper right arm, Mr. S. testified that he did not know if those marks were caused by him. He did not make the marks on MLC's upper right leg. (Exhibit 2, Photographs 37 and 28)

Subsequent Contact with Mr. S.

[88] According to MLC, she tried to contact Mr. S. after the events of May 6. She wanted him to pay for the abortion as he had promised. She knew he was on conditions prohibiting him from contacting her so she tried to contact him to discuss what they were going to do about the fee. It was her evidence that between 2 – 3 days after May 6 she tried to contact Mr. S. approximately 5 times.

[89] In her cross-examination MLC said she wanted to talk to Mr. S., to have a face-to-face with him to discuss "the abortion issues." MLC disagreed with Mr. Goldberg's suggestion that she was unsure about having the abortion. She said both in her direct evidence and on cross-examination that she needed someone to go with her to the hospital for the abortion and she wanted to talk to Mr. S. about him accompanying her. MLC testified that she did not feel there was anyone else she could ask.

[90] MLC acknowledged trying to contact Mr. S. by phone and also sending him some short texts. She also tried to contact his friends, hoping they would let him know she wanted to speak to him. She went to his apartment and knocked on his door but when no one answered, she left.

[91] In her May 7 police statement, (Exhibit 9), entered by consent, MLC was asked by Cst. McNaughton how she felt about Mr. S. now that it was over 24 hours since the incident she had called the police about. MLC replied by saying: "I don't know because he's quite normal when he's not drunk...And because I probably need him right now so it's hard to say..." When Cst. McNaughton asked MLC whether she felt she needed Mr. S. "because of the pregnancy and the termination", MLC responded by saying: "Yeah, the abortion and he was taking really good care

of me otherwise...” a comment that shows her not seizing an opportunity to cast Mr. S. in a negative light. Asked if she was afraid of Mr. S., MLC stated: “...So I guess I will stick with him, well, at least until the abortion is done. Yeah.” These comments help to put her subsequent attempts to contact Mr. S. in context.

The Text and Email Messages

[92] MLC testified that the purpose of the texts and emails was to get Mr. S.’s attention. The texts were put to her in cross-examination. As with the letter she had written Mr. S. in late April 2011, MLC showed no hesitation in admitting to the contents of the texts.

[93] The texts, written in [...], sound quite affectionate. MLC refers to Mr. S. as “Baby”. She tells him to use the [...] internet messaging service [...] and says, “I miss you so much, there are things I want to tell you.” (Exhibit 10, May 9 and 10) MLC testified that these messages should not be taken at face value. It was her evidence that “Baby” was just a name and did not indicate how she felt about Mr. S.. It was not that she missed Mr. S., what she wanted was to talk to him. MLC put it this way in her testimony: “The words say that but that is not what is in my heart.”

[94] In a text to Mr. S. at 6:22 a.m. on May 10 (Exhibit 13), MLC expresses some anger at his failure to respond to her. She tells him that she just went to his apartment. She asks him why he didn’t answer the phone call or open the door. She concludes by saying, according to translation: “Don’t piss me off otherwise I will sue you more.”

[95] Exhibit 11 is a screen shot dated May 10 at 1:34 p.m. from “Face Time”. It is a message from L.C., a friend of MLC’s who knew she was pregnant. L.C. told Mr. S. that MLC wanted to talk to Mr. S. on [...].

[96] On May 10 at 2:11 p.m., MLC sent Mr. S. a text telling him she had not yet had the abortion. In the message she says she does not know what to do. She asks Mr. S. to use his friend H.’s phone to call her or get on [...] so they can talk. She tells Mr. S. that she “only called the ambulance” and did not know “things would be so serious.” It was put to MLC on cross-examination that even though she knew Mr. S. was not supposed to contact her, she was still trying to talk to him. MLC

responded by saying that the hospital required her to have someone to accompany her to the abortion and, “now with this situation there will be nobody to go with me.”

[97] In a later text from MLC to Mr. S. on May 10 at 9:29 p.m. (Exhibit 14) she addressed him by a nickname “Old Man” and told him she was afraid of the abortion. She also said she wanted to keep the baby and asked him what he thinks of that.

[98] When asked during her cross-examination about these statements, MLC freely admitted making them. She was firm in her evidence that she wrote the texts to get Mr. S.’s attention so he would be with her for the abortion. She testified that she had no underlying motive for what she had reported to police. She contrasted the two situations this way: “When I tell the police there was no benefit to me but when I wrote these texts I want someone to go to the hospital with me.” She also confirmed that her intention had been to call both the ambulance and the police after Mr. S. had fallen asleep. She knew if she called the ambulance, the police would come as well.

[99] MLC also testified that she had no intention of suing Mr. S.. It was her evidence that the police had decided on the criminal process. She thought it would be a simple matter at first and did not know it would be a criminal matter.

[100] MLC was unsuccessful in her efforts to contact Mr. S. and so paid for the abortion herself, out of her scholarship money. Mr. S. never responded to any of MLC’s messages or attempts to contact him. When cross-examined about the abortion, Mr. S. agreed that he and MLC had discussed his paying for it. He felt it was his responsibility to do so. According to him he didn’t only because after his arrest he was under conditions to have no contact with MLC and could find no way to get the money to her.

[101] MLC testified that after the abortion she did not try to get in touch with Mr. S.. There is no evidence that any further contact was attempted.

The Presumption of Innocence and Burden of Proof

[102] The Crown must prove beyond a reasonable doubt that Mr. S. is guilty of the offences with which he is charged. Mr. S. is presumed to be innocent until proven guilty beyond a reasonable doubt. The Crown bears this onus throughout the trial and it never shifts.

[103] A reasonable doubt is a doubt based on reason and common sense which must be logically based upon the evidence or lack of evidence. A reasonable doubt is not a doubt based on sympathy or prejudice, or one that is imaginary or frivolous. Proof establishing the probability of guilt is not sufficient to establish guilt beyond a reasonable doubt. It is not proof beyond a reasonable doubt when guilt is suspected. Proof beyond a reasonable doubt falls much closer to absolute certainty than it does to a balance of probabilities. (*R. v. Lifchus, paragraph 36; R. v. Starr, [2000] S.C.J. No. 40, paragraph 242*)

Credibility

[104] The evidence of MLC, Mr. C., and Mr. S. must be scrutinized closely in assessing credibility and reliability. Their evidence goes to the central issues in this trial: (1) Has the Crown proven beyond a reasonable doubt that MLC did not consent to have sexual intercourse with Mr. S. on May 6, 2011? (2) Even if the Crown proves lack of consent, is there proof beyond a reasonable doubt that Mr. S. did not have an honest, mistaken belief that MLC was consenting? Mr. S. has testified that he did not sexually assault MLC because she consented to have sex with him. He says that MLC's denial that she consented is not credible. He submits that even if I am to find that MLC did not consent to the sex, I should find he is not guilty of sexual assault on the basis that he had an honest if mistaken belief she was consenting. Mr. S. makes these same arguments in relation to the charge of assault causing bodily harm charge: MLC consented to being bitten and in law, was able to do so, or alternatively, Mr. S. had an honest, mistaken belief she was consenting.

[105] In assessing the witness evidence, I am governed by the following legal principles: (1) I can accept all, some, or none of a witness's evidence; and (2) Mr. S.'s evidence must be assessed in accordance with *R. v. W(D), [1991] S.C.J. No. 26*. The *W(D)* principles require me to acquit Mr. S. if I believe his testimony; if his testimony raises a doubt even if I do not believe it; and, if on the whole of the

evidence I have a doubt even if I do not believe Mr. S.. Since *W(D)*, the Supreme Court of Canada has clarified the obligation that rests on a trial judge deciding 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. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt." (*R. v. Dinardo*, [2008] S.C.J. No. 24, paragraph 23)

The Issues

[106] The principle issue I must determine is whether the Crown has proven the charges against Mr. S. beyond a reasonable doubt. As I just indicated in relation to the charges of sexual assault and assault causing bodily harm, the issues are consent, or alternatively, an honest mistaken belief in consent.

[107] At this point in my reasons I will note that the Crown has conceded there is no evidence to support the charge that Mr. S. threatened MLC. On Mr. S.'s evidence and that of MLC, his threatening words were directed at J. C.. Mr. S. has also said they were not to be taken seriously but I do not need to deal with that as he is charged with threatening MLC and there is no evidence he did so.

[108] With respect to the remaining charges, I must sift through the evidence in order to determine what evidence I accept and make factual findings. I have to decide first whether the Crown has proven beyond a reasonable doubt that MLC did not consent to having sexual intercourse with Mr. S., and then, if her lack of consent is proven, whether there is proof beyond a reasonable doubt that Mr. S. did not have an honest if mistaken belief that she was consenting.

Consent as Part of the Actus Reus of Sexual Assault

[109] The Crown must prove lack of consent to establish the *actus reus* of the offence. (*R. v. Ewanchuk*, [1999] S.C.J. No. 10, paragraph 25) The absence of consent is subjective and determined by reference to the complainant's internal

state of mind towards the sexual touching, at the time it occurred. (*Ewanchuk, paragraph 26*) Determination of the issue of whether the Crown has proven beyond a reasonable doubt that MLC did not consent is “purely one of credibility, and whether the totality of the complainant’s conduct is consistent with her claim of non-consent.” (*Ewanchuk, paragraph 30*)

[110] Mr. S. submits that MLC’s testimony that she was not consenting to have sex with him on May 6 is not credible and should not be accepted by me.

MLC’s Evidence on Consent

[111] MLC testified that she did not consent to being bitten by Mr. S. when he came to her apartment on May 6 nor did she consent to his having sexual intercourse with her. She indicated she had in the past consented to being lightly bitten but not this time. She did not consent to him tearing her T-shirt or her underpants. She testified that during the sexual intercourse she told Mr. S. to stop.

[112] MLC described lying on her bed with Mr. S. on top of her. She did not scream or shout out before or after Mr. S. had sex with her. It was her evidence that she did not make any attempt to wake up Mr. C.. MLC did not want anyone to know what had happened to her and says she felt ashamed. According to MLC, for this reason she did not ask Mr. C. for help.

[113] On cross-examination, Mr. Goldberg sought to have MLC agree that she had not told police she had resisted the sexual intercourse by words or actions. MLC indicated she did not really remember what she told Cst. MacNaughton on May 7. She also noted that she could not be expected to answer a question she was not asked. It is correct that MLC was not asked by Cst. McNaughton at any point in the interview if she had resisted Mr. S.. MLC did make it clear in her interview that she had not wanted to have sex with Mr. S. that night and had been subjected to force by him. (Exhibit 9, page 20)

[114] MLC was asked by Cst. MacNaughton the following question: “Did you...Were you telling him no or to stop at any time? Is that why he didn’t ejaculate?” (Exhibit 9, page 22, Lines 17 – 18) MLC replied: “No, not really. I...because I was thinking I don’t want to have sex with him in the first place. So

isn't that the reason why he didn't (ejaculate?) Probably because he's drunk." (Exhibit 9, page 22, Lines 19 -22)

[115] MLC did not deny saying the words attributed to her in her May 7 police statement. She testified that she didn't really understand the question put to her by Cst. MacNaughton, which I note, was a compound question. MLC went on to say that if she didn't understand the question, how could she have known if her answer was responsive to it. She is unable to say whether she was answering the first or second part of Cst. MacNaughton's compound question.

[116] For her part, Cst. MacNaughton, at this point in the interview, carries on asking about what happened next: "So then what happens? So he doesn't ejaculate but somehow it ends. What happens?" (Exhibit 9, page 22, Line 25; page 23, Line 1)

[117] Having watched MLC's interview with Cst. MacNaughton it is apparent that the focus in the exchange where MLC is asked whether she was telling Mr. S. to stop was the fact that Mr. S. did not ejaculate. The interview was not played for MLC during her cross-examination: now that I have seen it I find that it is a reasonable inference that MLC was responding to Cst. MacNaughton's questions about the ejaculation issue. The question about whether MLC had told Mr. S. to stop was rolled into the question about why there had been no ejaculation. I do not find MLC's response to Cst. MacNaughton in her interview to be inconsistent with her trial evidence that she told Mr. S. to stop when he started to have sex with her.

The Biting

[118] MLC also denied any consent to being bitten by Mr. S.. She testified that Mr. S. began biting her right at the beginning of his assault on her. According to her, Mr. S. bit her before and during the sexual intercourse. He bit her on her left forearm inflicting a wound which bled. MLC testified that she did not want Mr. S. to bite her that way and that she did not like it. It was quite painful and made MLC "quite worried." She told Mr. S. she wanted to go to the hospital. It was her evidence that "he doesn't agree with that."

[119] According to MLC, the biting of her forearm left a scar. She pointed the scar out in court. It was quite visible on her left forearm as a small round mark.

[120] It was MLC's evidence that Mr. S. had never bitten her in that way before. Although he had bitten her and she had bitten him, they had been little bites and had not drawn blood. On this occasion, MLC testified she did not bite Mr. S.. Her evidence on cross-examination was consistent with how she described the biting that had occurred previously and the biting that occurred on this particular occasion.

[121] Mr. S. admits that he bit MLC. He says he was "kind of excited." He grabbed her hand and bit her, in his words, "a little bit stronger than usual." Mr. S. described what happened this way: "I might not have been careful enough and bite harder." Mr. S. testified in direct examination that he bit MLC to calm her down because she was angry. According to Mr. S., he did not have the intention to harm MLC. He bit her "to give her some attention" without realizing that he was biting her so hard. On cross-examination, Mr. S. acknowledged that he bit MLC in anger, agreeing that he had been very angry with MLC that night.

[122] After this, using the endearment "my old man", MLC asked Mr. S. to take her to the hospital. Mr. S. testified that his family is "a physician's family" and he had brought some "medicine" from [...]. He says what he saw on MLC's arm was pink, not red, and he thought the medication would address that. Mr. S. testified that he had previously used the medication to good effect on himself when MLC had bitten him. Mr. S. testified that the wound was not bleeding although in cross-examination he said he didn't realize there was blood until MLC came over to him and said they should not argue.

[123] Mr. S. clarified in cross-examination that he had said to MLC he could help her with the medication. It was not in her room and Mr. S. did not get to provide it to MLC because he was arrested that morning.

Findings of Fact – Consent

[124] On May 6, 2011, MLC and Mr. S. were continuing an intimate relationship that had been ongoing for several months. The relationship was important to MLC and she expected a level of attention from Mr. S. that she did not feel he always delivered. Mr. S. himself has said she complained about him not spending enough

time with her. Complicating the relationship was the fact that MLC was unexpectedly pregnant and wanted to have an abortion. Mr. S. was going along with her decision but he was unhappy that she was planning a termination.

[125] Approximately a week before the events of May 6, MLC had apologized in writing to Mr. S. for letting another man kiss her at a bar. This had made Mr. S. upset and MLC wanted his forgiveness. Mr. S. had originally asked for a written apology, but later, once they had sex, he had told her it was unnecessary. Nonetheless, he kept the letter. Its tone was subservient and contrite.

[126] On May 5, 2011, MLC understood she would be seeing Mr. S. later that night after he went out with his friends. She spent the late night hours on her own at her apartment. As the hours wore on, she became impatient and called him angrily to ask where he was. Mr. C. overheard this call. MLC told Mr. S. not to come and see her after all. He came anyway. MLC let him in. She was still angry.

[127] Mr. S. arrived at MLC's apartment in an intoxicated state. His denial that he was intoxicated is not credible. It is apparent from his conduct at the apartment and his description of how much he had had to drink that he was significantly under the influence of alcohol.

[128] I accept J. C.'s evidence about his observations of the differences between a sober Mr. S. and a drunk Mr. S.. He had previously seen Mr. S. in both states. It was Mr. S.'s behaviour at the apartment that made Mr. C. think he was drunk on May 6. Mr. C. testified that Mr. S.'s behaviour was "totally different from when he was sober." According to Mr. C., when Mr. S. is not drunk, he is quiet. On May 6, Mr. S. was anything but quiet.

[129] Mr. S. was also angry. He had tried to call and text MLC and she had ignored him. He was infuriated by this and became aggressive and loud in her bedroom. He pushed some of MLC's furniture around, he threw his phone, cracking its face, he got a knife from the kitchen, and he tore MLC's t-shirt. She did not consent to this. Disinhibited by alcohol, Mr. S. was out of control.

[130] Although MLC had been angry with Mr. S. for staying out so late without her, I accept MLC's evidence that his behaviour frightened her. She says she crouched down in the bedroom away from him. Mr. S. observed MLC in this

position. I find that while MLC and Mr. S. may have been angry and verbal with each other - there is evidence of this from Mr. C. - MLC became subdued in the face of Mr. S.'s aggressive behaviour.

[131] Mr. S. was bigger and taller than MLC, weighing about 67.5 kilograms at the time whereas MLC was a small woman weighing about 45 kilograms. Mr. S. acknowledged in his evidence that he was significantly stronger than MLC.

[132] After Mr. S. got the knife from the kitchen, I find that Mr. C. heard MLC sound scared. Following this, it was quieter in MLC's bedroom. The quiet that came after Mr. S. went back into the bedroom with the knife is consistent with MLC feeling intimidated by Mr. S. who, by his own evidence, was still angry and now armed. I accept MLC's evidence that Mr. S. holding the knife frightened her. He was moving it back and forth. He did not actually threaten MLC with it. I do not believe Mr. S.'s evidence that he was threatening suicide. I find that he was still angry as the events that followed indicate.

[133] When Mr. S. bit MLC on her left forearm he was angry. He has admitted to this. He bit her hard in a way he had never done before. She did not consent to him doing so. The bite broke MLC's skin. It was a painful and bloody wound. MLC told Mr. S. she wanted to go to the hospital. He did not respond to her request. Mr. S.'s claim that he offered to treat the wound with ointment that wasn't even at MLC's apartment makes no sense at all.

[134] Mr. S. bit other parts of MLC's body although not as hard as her forearm. His bites left marks but did not break the skin. MLC did not bite Mr. S.. She had done so in the past in the context of their consensual sexual relationship but she did not do so on May 6. That suggests a lack of mutuality on May 6.

[135] I accept MLC's evidence that she did not want to have sex with Mr. S. on May 6. She was a very self-possessed and largely consistent witness. Her demeanor in the witness box mirrored what she had told Cst. MacNaughton in her statement, that she was strong emotionally but not physically. (Exhibit 9, page 25) On the essential facts, I found MLC to be a credible witness. She was careful and measured in her responses. In the course of her evidence she did not seize upon opportunities to cast Mr. S. in an unfavourable light. I thought she was quite fair in

her portrayal of him, saying that Mr. S. had not changed toward her after they learned she was pregnant and noting to Cst. MacNaughton that he had taken really good care of her in their relationship.

[136] I did observe that MLC could be somewhat testy, stubborn, and, at times, resistant when answering certain questions, for example, when on cross-examination she was asked if she had a temper. However, these tendencies did not cause me to view MLC as lacking credibility in relation to the critical aspects of her testimony.

[137] I accept MLC's testimony that on May 6 she did not want to have physical contact with Mr. S. and that she was not subjectively consenting to have sexual intercourse with him. I find that MLC's conduct leading up to the sexual intercourse was entirely consistent with her testimony that she did not consent. I accept J. C.'s evidence that he heard MLC sounding scared when she was in the bedroom with the drunken and angry Mr. S.. I also accept that MLC said 'no' to Mr. S. and that this was not because he was threatening to harm himself, a claim I do not believe.

[138] The point was made by the Defence that MLC did not raise any alarm when Mr. S. was having sex with her. Doing so is not a requirement for proving a lack of consent. However MLC addressed this and I accept her evidence. Describing why she did not ask for help, other than from the police, MLC talked about how choosing a boyfriend was her decision. She said she bore the stigma of making a bad choice, choosing a boyfriend "who is not good to me." She said people would laugh at her for this. She did not know Mr. C. very well and was ashamed.

[139] I reject Mr. S.'s suggestion that MLC was consenting to make-up sex, whether or not that was a common practice they engaged in after an argument. I do not accept that MLC went from being crouched and frightened and bitten to being a willing sexual partner. She says she was not consenting and I believe her.

Honest Mistaken Belief in Consent

[140] Once the Crown proves the *actus reus* of sexual assault beyond a reasonable doubt as I find it has done here, then there is an evidential burden on the accused to show that he had a honest mistaken belief in consent. Once the accused has met the

evidential burden in relation to a mistaken belief in consent, the Crown bears the persuasive burden to disprove this defence. It is to the honest mistaken belief in consent that I will now turn my attention.

[141] To secure a conviction for sexual assault as charged, the Crown must prove the *mens rea* of the offence - that Mr. S. knew of or was reckless or willfully blind to the lack of consent on the part of MLC. As stated in *Ewanchuk* at paragraph 49:

In the context of *mens rea* - specifically for the purposes of the honest but mistaken belief in consent - 'consent means that the complainant had affirmatively communicated by words or conduct her agreement to engage in sexual activity with the accused.

[142] Similarly, at paragraph 46:

In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

[143] Mr. S.'s evidence is that his belief in MLC's consent was derived from his experiences in their sexual relationship. He testified that there was never any discussion about having sex, as the intention to do so was expressed through conduct. He admitted to behaving aggressively in MLC's room but said that he was also distraught about her plans to end the pregnancy. He said that when he threatened to kill himself over her decision to terminate the pregnancy, MLC spoke to him affectionately and said they should not argue anymore. This, said Mr. S., was an overture that indicated MLC wanted to have make-up sex with him. After this they were on the bed where he initiated sexual foreplay and soon thereafter, intercourse. MLC did not cry out, protest, or resist and Mr. S. believed she was consenting. He believed they were engaged in make-up sex after an argument,

something that had happened previously in their relationship. He stopped when he noticed she was not enjoying it and seemed unhappy.

[144] There are limits to the honest, mistaken belief in consent defence. Section 273.2 of the *Criminal Code* provides that it is not a defence to a charge under section 271 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where:

- a) the accused's belief arose from the accused's:
 - (i) self-induced intoxication, or
 - (ii) recklessness or wilful blindness, or
 - (iii) the accused did not take reasonable steps in the circumstances known to him at the time to ascertain that the complainant was consenting.

[145] The requirement to take reasonable steps “is personalized according to the subjective awareness of the accused at the time.” The “reasonable steps” are to be taken “in the circumstances known to the accused at the time...the accused is under no obligation to determine all the relevant circumstances - the issue is what he actually knew, not what he ought to have known.” (*R. v. Darrah, [1998] O.J. No. 397 (C.A.), paragraph 88*) The accused is also entitled, where he has taken reasonable steps to have made an unreasonable mistake about the presence of consent. (*Darrah, paragraph 90*)

[146] I must assess whether Mr. S. took reasonable steps to ascertain MLC’s consent. I do not believe Mr. S. that MLC behaved as though she was interested in make-up sex with him. His evidence about MLC becoming affectionate is not consistent with the tense atmosphere in the bedroom. I do not believe that Mr. S. threatened to kill himself and was comforted by MLC. I find that Mr. S. continued to be angry and upset at MLC, which is what she described, and that the atmosphere did not become tender and intimate.

[147] I find I cannot accept essential aspects of Mr. S.'s version of events. He denied that he was intoxicated when he arrived at MLC's apartment. The evidence conclusively establishes that he was. He had been drinking. When he was at the apartment he appeared drunk to MLC and Mr. C., who had seen him in an intoxicated state before. Mr. S. has himself said he was out of control. I do not believe his explanation for possessing the knife, that he was using it to threaten self-harm which led to MLC reconciling with him and indicating she wanted to engage in make-up sex. I find that Mr. S. was angry when he got the knife and continued to be angry and aggressive when he returned to the bedroom.

[148] Furthermore, I reject Mr. S.'s denial that he tore MLC's underpants. They were found by police on MLC's bed in a torn state. Mr. S. says he removed them because they would not tear. I do not accept this. The only reasonable inference is that Mr. S. tore them. It is not reasonable to believe that MLC would have done so. That would suggest she was fabricating a case against Mr. S.. I find there is absolutely no evidence to support such a scenario. I find the torn underpants to be an expression of Mr. S.'s ongoing aggression. The same goes for the marks on MLC's body, including the ones that Mr. S. has denied making.

[149] There were circumstances known to Mr. S. that obliged him to take reasonable steps to ascertain whether MLC was consenting to have sex with him. She did not engage in any foreplay, such as biting, which she had done on past occasions, and she was by Mr. S.'s own description, inert. He had just been physically and verbally aggressive and angry. The following comes from his own testimony. He had observed MLC to be crouched down in a corner. He inflicted a bloody wound to her arm. He had torn her t-shirt. He had been brandishing a knife. He noticed that MLC not moving on the bed and not saying anything.

[150] After all that had gone before, Mr. S. took no reasonable steps to determine if MLC was in agreement with having sex. The situation did not approximate making-up after an argument. Mr. S. had been verbally and physically aggressive in MLC's room, torn her clothing, waved a sharp knife around, and inflicted a nasty bite wound on her arm. Nothing in his evidence suggested that anything like that had happened before followed by reconciliatory sex.

[151] There is nothing in the evidence to suggest that MLC enjoyed “rough sex” or that she and Mr. S. engaged in it. The one incident of MLC tying Mr. S. up and blindfolding him indicates she could be quite engaged as a sexual partner, but it does not qualify as “rough sex.” She was treated roughly on May 6 by Mr. S. and he did nothing to ascertain that she was consenting.

[152] Furthermore, I accept MLC’s evidence that she told Mr. S. to stop. She was ignored. Continuing sexual contact after “no” is, “at a minimum reckless conduct which is not excusable.” (*Ewanchuk, paragraph 52*)

[153] The intoxicated Mr. S. was very different from the sober Mr. S.. Mr. C. and MLC indicated this and I accept their evidence. The behaviour Mr. S. exhibited toward MLC on May 6 was intimidating and violent. The law required him to take reasonable steps to ensure that MLC wanted to have sex with him. She didn’t and this became apparent to him. However it was too late. He had already committed an offence, of sexual assault against MLC, which he could have avoided had he taken the required reasonable steps before simply inserting his penis in her vagina.

[154] I find that on May 6 Mr. S. was angry at MLC because she had ignored his texts and calls. There was also the issue of the abortion which MLC was insisting on going ahead with. Mr. S. pushed around MLC’s furnishings in anger, bit her in anger, went and took a knife from the kitchen in anger, tore her t-shirt in anger, tore her underpants in anger, and then had sex with her. Mr. S. dominated MLC that night and did nothing to ensure that in spite of everything that had happened in the bedroom, she was a willing sexual partner.

[155] MLC’s description of what happened in the bedroom is supported by the physical evidence that was seized – the torn t-shirt (Exhibit 16) and torn underpants (Exhibit 17) and the broken cell phone (Exhibit 19). There are also the injuries that were documented by Det/Cst. Wassen’s photographs, most notably the wound on MLC’s left forearm.

[156] I find that the Crown has disproved Mr. S.’s defence of honest but mistaken belief in consent. His failure to take reasonable steps to ascertain if MLC was consenting before he had sexual intercourse with her means the intercourse was a

sexual assault. (On the same basis, the sexual touching before the intercourse was also assaultive.)

The Text Messages and the Issue of MLC's Credibility

[157] The text messages that were introduced into evidence do nothing to change my view of what happened on May 6 in MLC's bedroom. I accept MLC's evidence that she tried to communicate with Mr. S. on May 9 and 10 because she wanted him to accompany her to the hospital and pay for the abortion. This is not inconsistent with her claim of being subjected to sexual intercourse without her consent. I believe MLC when she says she addressed Mr. S. in an affectionate way and expressed ambivalence about the abortion to get his attention. I find these were not sincere expressions of MLC's feelings. She was attempting to achieve an objective and was employing a strategy in the hopes he would take the bait and respond to her.

[158] I do not find that these communications undermine MLC's credibility about being sexually assaulted by Mr. S. on May 6. It is worth noting that MLC's attempts to contact Mr. S. ended once she had the abortion. Not only did she go through with the abortion as she had planned originally, once it was over she did not continue to try and communicate with Mr. S..

Assault Causing Bodily Harm - The "Jobidon" Defence

[159] It has been argued by the Defence that Mr. S.'s biting of MLC's forearm was part of a consented-to pattern of behaviour, and therefore covered by the principles set out in *R. v. Jobidon*, [1991] S.C.J. No. 714 and *R. v. Paice*, [2005] S.C.J. No. 21. I reject this. *Jobidon* and *Paice* do not apply in this case. There are two aspects to this: (1) just because MLC had apparently consented on prior occasions to being bitten by Mr. S., the evidence I have accepted is that she did not consent this time; and (2) Mr. S.'s own evidence on cross-examination is that he bit MLC in anger. His doing so was unlike any biting either he or MLC had done previously and caused an injury that constituted bodily harm. There is no evidence

that the biting admitted by both MLC and Mr. S. to have been a feature of their relationship had ever before resulted in a bloody wound and a scar.

[160] Mr. S. testified on direct examination that on May 6 he bit MLC hard to “give her some attention.” On cross-examination he admitted he was angry when he bit her. There is no evidence that he believed she was consenting to being bitten hard. He testified he intended to bite her hard and misjudged the amount of force he used. A conviction for assault causing bodily harm rests on the intentional application of force without consent, with bodily harm resulting.

[161] I am satisfied I do not have to decide whether, in the context of a sexual relationship, there can be consent to any form of bodily harm as defined by the criminal law. In this case the Crown has proven beyond a reasonable doubt that there was no consent. MLC did not consent to have her forearm bitten so severely by Mr. S. that it drew blood and left a scar. I am also satisfied there is no evidence to support any claim by Mr. S. that he held an honest, mistaken belief that MLC was consenting to him biting her as he did.

Conclusion

[162] As I have explained in these reasons, on the whole of the evidence, I have no reasonable doubt about MLC’s lack of consent to having sex with Mr. S. on May 6, 2011. The Crown has proven beyond a reasonable doubt that Mr. S. does not have a defence to the charges of sexual assault or assault causing bodily harm on the basis of an honest mistaken belief in consent. I have no reasonable doubt about Mr. S.’s failure to take reasonable steps to ascertain that MLC was consenting. As I have said, he took no steps at all. I therefore find J. S. guilty of committing, on May 6, 2011 a sexual assault on MLC, contrary to section 271(1)(a) of the *Criminal Code*. I find that on May 6, 2011, by biting her left forearm, Mr. S. also committed an assault on MLC causing bodily harm, contrary to section 267(b) of the *Criminal Code*.

[163] I find that Mr. S.’s possession of the knife was for a purpose dangerous to the public peace. I reject his evidence that he possessed the knife for the purpose of harming himself. I accept Mr. C.’s evidence that Mr. S. went and got the knife after Mr. C. demanded that he and MLC be quieter. Once in possession of the knife

Mr. S. made threatening remarks about wanting to kill Mr. C.. I find that he was angry. Mr. C. observed Mr. S.'s angry demeanor as he entered the kitchen. Accordingly I convict Mr. S. of unlawful possession of a knife for a purpose dangerous to the public peace, contrary to section 88(1) of the *Criminal Code*.

[164] I am acquitting Mr. S. of committing an assault on MLC by threatening to use or using the knife, as I am not satisfied that the evidence establishes he used the knife to threaten her. I believe MLC found his possession of the knife in her presence to be frightening but I am not satisfied beyond a reasonable doubt that what Mr. S. did with the knife amounted to an assault on MLC. According to MLC's evidence, which I accept, Mr. S. moved the knife back and forth in front of his face at the same time as he was saying he wanted to kill Mr. C.. I do not find that this constitutes evidence of an assault on MLC within the meaning of section 265 of the *Criminal Code*. And although there are what appear to be cuts in the back of MLC's t-shirt, there is no evidence to prove that Mr. S. cut the material with the knife.

[165] I am also acquitting Mr. S. of uttering a threat to MLC. I find he did not threaten MLC and that the threat he made was directed at J. C..