

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Colley et Al.*, 2021 NSPC 37

Date: 2021-06-24

Docket: 8223967, 8223968,
8223969, 8223970

Registry: Dartmouth

Between:

Her Majesty the Queen

v.

Jermaine Cameron Colley, Alex Newcombe, Walter Newcombe
and McKenzie MacDonald

Restriction on Publication: Section 486.4 & 486.5

TRIAL DECISION

Judge: The Honourable Judge Theodore K. Tax

Heard: June 24, 2021, in Dartmouth, Nova Scotia

Charge: Section 344 of the **Criminal Code of Canada**

Counsel: Robert Fetterly, Q.C., for the Public Prosecution Service of
Nova Scotia
Jeremiah Raining Bird, for the Defence Counsel for Jermain
Colley
Jennifer MacDonald, for the Defence Counsel for Alex
Newcombe
Peter Kidston, for the Defence Counsel for Walter
Newcombe

Quy Linh, for the Defence Counsel for Mackenzie
MacDonald

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Section 486.4 & 486.5: Bans ordered under these Sections direct that any information that will identify the complainant, victim or witness shall not be published in any document or broadcast or transmitted in any way. No end date for the Ban stipulated in these Sections.

By the Court:

[1] The four accused, Jermaine Cameron Colley, Alex Newcombe, Walter Newcombe, and McKenzie MacDonald are jointly charged with having unlawfully robbed Bryson McKinnon, contrary to section 344 of the **Criminal Code**. The offence is alleged to have occurred on or about March 13, 2018, at or near Dartmouth, Nova Scotia. The Crown proceeded by indictment and the four accused elected to have their trial in the Provincial Court.

Procedural Background:

[2] The trial commenced on January 28, 2019 with the Crown Attorney calling Mr. Bryson McKinnon. The Crown Attorney completed her direct examination of Mr. McKinnon and Defence Counsel for Mr. Alex Newcombe completed her cross-examination of Mr. McKinnon. The continuation of Mr. McKinnon's cross-examination by the other three Defence Counsel had to be adjourned to June 11, 2019. Since other witnesses were present and available to be heard on January 28, 2019, the Crown Attorney called two additional witnesses that day: Ms. Cathy Dorrington and Constable Glenn Sawler.

[3] On the June 11, 2019 trial continuation date, Mr. McKinnon was not present in court. As a result, the Crown Attorney requested that the Court issue a witness warrant as Mr. McKinnon had been personally served with a subpoena to attend court on that date. Defence Counsel opposed the issuance of a warrant and, instead, they asked the Court to declare a mistrial.

[4] The Court considered that the Crown Attorney's request for a witness warrant and determined that the Crown had met the *R. v. Darville* test as stated by the Supreme Court of Canada. Based upon the information related to the Court, the Court determined that it was highly likely Mr. McKinnon would attend on the next date scheduled to complete his trial evidence. The Court secured an early date, which happened to be a full day for the continuation of evidence on June 19, 2019. The Court issued a witness warrant and did not declare a mistrial.

[5] On June 19, 2019, the Court was advised that Mr. McKinnon had been arrested on the witness warrant and he attended court as directed. Once Mr. McKinnon was on the witness stand, Defence Counsel for Mr. Walter Newcombe,

Mr. Colley, and Mr. MacDonald each advised the Court that they had no additional questions for him. The Crown had no questions on re-examination.

[6] Following the completion of Mr. McKinnon's testimony, the Crown's next witness was Mr. Colin Joudrey. The Crown Attorney's direct examination was completed on June 19, 2019. Defence Counsels' cross-examination of Mr. Joudrey was expected to be conducted on the trial continuation date of August 15, 2019.

[7] However, prior to the trial continuation date of August 15, 2019, Defence Counsel for Mr. Alex Newcombe made an application to the Court to declare a mistrial. On August 15, 2019, the other three Defence Counsel advised the Court that they were also making an application for the Court to declare a mistrial on the same basis. The mistrial application was based upon issues which Defence Counsel submitted had arisen both during and after the evidence of Mr. Colin Joudrey on June 19, 2019.

[8] Given the Defence Counsels' application to declare a mistrial, instead of hearing evidence in the trial on August 15, 2019, the Court heard the submissions of the Defence Counsel and the Crown reply. After hearing those submissions, in an oral decision made on August 15, 2019, the Court dismissed the discretionary application for the declaration of a mistrial. Following that decision, each one of the Defence Counsel, who had represented the four accused persons during the first two days of the trial, made an application to withdraw as solicitors of record. Their applications were granted by the Court.

[9] As a result of the withdrawal of all four Defence Counsel, the four accused people were left without counsel. They all advised the Court that they wished to retain counsel. A status date was set on September 4, 2019 to see whether counsel had been retained, and if so, then trial continuation dates could be scheduled.

[10] On September 4, 2019, three of the four accused persons confirmed that they had retained new lawyers. The trial continuation date was set for January 28, 2020, since those three Defence Counsel and the Crown Attorney had said that they were available on that date. Further status dates were set for that fourth accused person to retain counsel. On November 26, 2019 status date, Defence Counsel for the fourth accused person confirmed that he would be available for the continuation date of January 28, 2020.

[11] On January 28, 2020, the trial continued, with each accused person now represented by a new Defence Counsel. The cross-examination of Colin Joudrey was completed and following a brief re-examination by the Crown Attorney, he tendered his exhibits and closed his case.

[12] When court resumed on the afternoon of January 28, 2020, Defence Counsel for Alexander Newcombe indicated that she would be calling her client as a witness in the trial. Following Mr. Newcombe's evidence, the parties advised the Court that no further evidence would be called by either side. As a result, the Court scheduled April 3, 2020 for the hearing of submissions and determined the order in which the submissions would be made.

[13] In addition, on January 28, 2020, the Crown Attorney advised the Court that with respect to Alexander and Walter Newcombe, the Crown's submissions would relate to the charge before the Court, namely, that they had unlawfully robbed Bryson McKinnon contrary to section 344 of the **Criminal Code**.

[14] However, based upon the evidence presented in court, the Crown Attorney indicated that there might be reasonable doubt as to whether McKenzie MacDonald and Jermaine Colley were aware that a robbery was going to take place. As a result, the Crown Attorney stated that, with respect to those two accused persons, his submissions would only be in relation to whether the Crown had established, beyond reasonable doubt, that they had committed the included offence of the assault of Mr. Bryson McKinnon, contrary to section 266 of the **Criminal Code**.

[15] Unfortunately, the April 3, 2020 date scheduled for the closing submissions had to be postponed due to the COVID-19 pandemic and the declaration of a public health state of emergency. All trial matters and in-person hearings of the Provincial Court were suspended for a significant time in view of the health and safety measures put in place by the government. Due to the complexities of addressing COVID-19 concerns and scheduling closing submissions when all counsel were available, the closing submissions were scheduled and heard on February 10, 2021. In making those closing submissions, all counsel had been provided with transcripts of all the evidence heard during the trial.

[16] The Court reserved its decision and originally scheduled the decision hearing date for May 25, 2021. Unfortunately, because of the COVID-19 pandemic and the significant number of cases in Nova Scotia at that time, the Court suspended in-

person hearings until mid-June, and the Court's decision was rescheduled for today's date.

Positions of the Parties:

[17] It is the position of the Crown that although all four accused were charged with robbery, the allegations in relation to the robbery offence relate primarily to Alex Newcombe and Walter Newcombe. The Crown Attorney submits that Mr. Colley and Mr. MacDonald only participated by applying force to Bryson McKinnon without his consent to do so.

[18] Moreover, the Crown Attorney submits that given the nature of the injuries suffered by the complainant, Mr. McKinnon, there can be no consent to that level of force. However, he does acknowledge that the force applied to Mr. McKinnon may be justified if the Court was to conclude that any one or more of the accused persons had acted in their self defence or the defence of property. It is the position of the Crown that neither one of those potential defences would be applicable if the Court accepts the evidence that Alex Newcombe stomped on the head of Bryson McKinnon when he was off the property and laying defenceless on the street.

[19] The Crown Attorney submits that the actions of the four accused were motivated as an act of anger and vigilante justice when Mr. McKinnon came over to the Newcombe house after Mr. Alex Newcombe's girlfriend [SJ] told him that she had been raped by Mr. McKinnon. It is the position of the Crown that Alex and Walter Newcombe beat up Mr. McKinnon and robbed Mr. McKinnon by taking his watch and a gold chain.

[20] The Crown Attorney acknowledges that Mr. McKinnon was not able to identify Alex Newcombe as one of the people who attacked him, but he submits that Mr. Joudrey identified all of the people involved and the role that they played in attacking Mr. McKinnon. The combination of the direct evidence and reasonable inferences from that direct evidence supports the conclusion that meets the definition of a robbery in section 343 of the **Criminal Code**, namely, property was stolen from Mr. McKinnon and in doing so at least two of the accused beat, struck or used personal violence against the complainant.

[21] Although the Crown Attorney acknowledges that Mr. McKinnon had some issues related to his ability to recall and relate the events to the Court, likely due to

the injuries and concussion that he suffered, his evidence is supported by the evidence of Mr. Joudrey, photographs, and reasonable inferences from the totality of the evidence.

[22] Ultimately, the Crown Attorney submits that there are a couple of versions of the events which occurred inside and outside the Newcombe residence at 58 Kennedy Dr. in Dartmouth, Nova Scotia on March 13, 2018. As a result, the Court will have to analyze the totality of the evidence in light of the instructions for triers of fact in the Supreme Court of Canada case of *R. v. W.(D.)*.

[23] In addition, it is the position of the Crown that during Mr. Joudrey's cross-examination, based upon his demeanour, flippant and sometimes argumentative responses, it would be unsafe for the Court to convict any of the accused on the evidence of Mr. Joudrey alone. However, the Crown Attorney submits that Mr. McKinnon's evidence is supported or confirmed by the testimony of other witnesses, the exhibits filed in the trial, and reasonable inferences therefrom.

[24] In the final analysis, the Court ought to conclude that the Crown has established that Mr. Alex Newcombe did not act in self-defence or in defence of property, and conclude that Walter and Alex Newcombe used personal violence to attack Mr. Bryson McKinnon and commit a robbery by taking his watch and chain. The Crown Attorney submits that they have established, beyond a reasonable doubt, that Mr. MacDonald and Mr. Colley each administered at least one blow to the victim and participated in the beating of Mr. McKinnon by Walter and Alex Newcombe, while the victim was defenceless, without his consent, and thereby assaulted him contrary to section 266 of the **Criminal Code**.

[25] Defence Counsel for Mr. Alex Newcombe submits that with the presumption of innocence and the Crown requirement to prove the charge beyond a reasonable doubt, the Crown has not established the robbery charge beyond a reasonable doubt. She points to the fact that Mr. McKinnon could not identify Mr. Alex Newcombe as one of the people who had assaulted him and submits that this inability undermines the overall credibility of Mr. McKinnon's testimony. In addition, Mr. McKinnon was highly intoxicated at the time of these events and his evidence was not based upon specific recall of all events but was based upon "bits and pieces" of what he "thinks" or "assumes" occurred. Therefore, his evidence should be given relatively little weight.

[26] For example, Defence Counsel points to the allegations in relation to the watch. Mr. McKinnon stated that he did not know what he was walking into at the Newcombe house and he “thinks” that he took the watch off himself and then started swinging at Mr. Newcombe. Mr. McKinnon also “assumed” that this was a four-on-one assault but was not certain. Based on what he thought or assumed, as opposed to what he specifically recalled and related to the Court, puts in question the credibility and reliability of Mr. McKinnon’s evidence.

[27] With respect to the evidence of Mr. Joudrey, Defence Counsel for Mr. Alex Newcombe submits that his evidence is completely unreliable and not credible. However, with respect to Mr. Joudrey’s description of the first time that Mr. McKinnon came to the Newcombe house, Mr. Joudrey clearly stated that Mr. McKinnon had tried to push his way into the house, but Mr. Alex Newcombe pushed him back out and Mr. McKinnon left the area. Based upon that evidence, Mr. McKinnon was the aggressor, and that evidence supports Mr. Newcombe’s position that he acted in self-defence and/or defence of his property in not allowing Mr. McKinnon into the house.

[28] On the second occasion that Mr. McKinnon came to the Newcombe house, Mr. Joudrey claimed that three other people were now in the house and that before the fight started, Mr. McKinnon took his own chain off. However, Mr. Joudrey also said that Mr. Walter Newcombe ripped the chain off and punched Mr. McKinnon. In relating different versions of events to the Court, Defence Counsel submits that Mr. Joudrey minimized his role to avoid being prosecuted himself, stated that he did not want SJ to be in trouble with the police, and for those reasons, she submits that Mr. Joudrey was prepared to “fudge the truth.”

[29] During the cross-examination of Mr. Joudrey by Defence Counsel for Mr. Alex Newcombe, he acknowledged providing “inaccurate information” at SJ’s trial in Youth Court. During this trial, she submits that there are numerous internal and external inconsistencies in the evidence of Mr. Joudrey that establish that his testimony is not credible or reliable and should not be accorded any weight.

[30] Defence Counsel for Mr. Alex Newcombe pointed to several passages in Mr. Joudrey’s cross-examination where he acknowledged not being sure of who or how the gold chain and the watch came off Mr. McKinnon. In response to several questions about those key facts, Mr. Joudrey agreed with Defence Counsel that his evidence on those points in SJ’s trial and this trial should have been the same. He also agreed with Defence Counsel that it was not the same in this trial.

[31] In concluding her submissions, Defence Counsel for Mr. Alex Newcombe submitted that he gave a detailed description of Mr. McKinnon's evidence arriving at his house, being quite inebriated on three occasions, and that he was not invited to enter his house. In those circumstances, she submits that there is an air of reality to his claim of acting in self-defence as well as the defence of property in this case. When the Court applies the instructions for triers of fact in *R. v. W.(D.)*, she submits that her client's evidence should be accepted, but if not, at a minimum, it raises a reasonable doubt with respect to the charge before the Court.

[32] Defence Counsel for Mr. Walter Newcombe submits that Mr. McKinnon's evidence is neither credible nor reliable, as he acknowledged that he was quite drunk that day and does not have a good memory of the events. Mr. McKinnon is not sure who took his watch and only thought that Alex Newcombe took his gold chain. However, he also stated that he broke the chain and took it off himself. Mr. McKinnon also agreed that he was not sure whether two, three, or four people had hit him.

[33] Defence Counsel submits that Mr. McKinnon never stated that he had been robbed by Mr. Walter Newcombe and he was not sure who had hit him. Although there is evidence that Mr. Walter Newcombe was found with the gold chain, Defence Counsel submits that the Crown has not established, beyond a reasonable doubt, that Mr. Walter Newcombe ripped the chain off Mr. McKinnon's neck during this incident. In fact, there was evidence to the contrary as Mr. McKinnon had said that he took the watch and chain off himself and put them down before the physical altercation started.

[34] With respect to the evidence of Mr. Joudrey, Defence Counsel for Mr. Walter Newcombe points to several places in the trial where his responses were evasive, argumentative, and flippant. Moreover, at several points in his testimony, Mr. Joudrey's evidence was internally inconsistent as well as being externally inconsistent with evidence that he had given under oath at SJ's prior trial. In the final analysis, given the lack of credibility and reliability of Mr. Joudrey's evidence, Defence Counsel submits that it would be unsafe to place any weight upon it. He submits that the Crown has not established the robbery charge or any included offences beyond a reasonable doubt as against Mr. Walter Newcombe.

[35] Defence Counsel for Mr. Colley submits that Mr. McKinnon's elevated level of intoxication on March 13, 2018 and his equivocal testimony in Court totally undermines the credibility and reliability of his evidence. Most importantly, there

was no evidence from Mr. McKinnon to identify Mr. Colley as one of the people who had allegedly assaulted him.

[36] Defence Counsel for Mr. Colley also submits that Mr. Joudrey's testimony should be given very little, if any, weight as its credibility and reliability was undermined by evasiveness and his admission that he purposely provided different evidence in SJ's trial and in this trial. It is the position of the defence that, at several points in Mr. Joudrey's testimony, his statements amount to an admission of perjury. In those circumstances, Mr. Joudrey should be considered as an "unsavoury witness" and the Court ought to apply the "*Vetrovec*" warning from *Vetrovec v. The Queen*, [1982] 1 SCR 811 and not to rely upon his evidence.

[37] It is the position of Defence Counsel for Mr. Colley that Alex Newcombe's evidence established that Mr. Colley and Mr. McDonald arrived at the house, later after the incident with Mr. McKinnon, to bring rats to feed his snake. There is no credible or reliable evidence that Mr. Colley or Mr. MacDonald participated in an assault of Mr. McKinnon and if the Court was to conclude that he did hit Mr. McKinnon one time, that trifling contact does not amount to an assault contrary to section 266 of the **Criminal Code**.

[38] Defence Counsel for Mr. McKenzie MacDonald essentially made the same submissions as Defence Counsel for Mr. Colley. He submits that Mr. MacDonald and Mr. Colley arrived after the altercation with Mr. McKinnon with food for Mr. Alex Newcombe's snake. There is no credible or reliable evidence that Mr. MacDonald was involved in any altercation with Mr. McKinnon.

[39] In his reply, the Crown Attorney noted that three of the four Defence Counsel maintain that their client was not even present when an altercation occurred between Mr. Alex Newcombe and Mr. McKinnon. He submits that those submissions do not square with the totality of the evidence, primarily from Mr. McKinnon and Mr. Joudrey, who described a multi-person assault, which Mr. McKinnon described as a beating both inside and outside the house, and then collapsing unconscious on the street.

Overview of Trial Evidence:

[40] Mr. Bryson McKinnon was 21 years old when he testified on January 28, 2019 with respect to the events which occurred, about 14 months earlier, on or about

March 13, 2018. He stated that he had been a “friend with benefits” of a young female [SJ] for about three or four years. Although he stated that he did not have a good memory of events, Mr. McKinnon thought that he had seen SJ on March 12 or 13, 2018. He was “pretty sure” that he was “hanging out” with her in Bedford at the Comfort Inn hotel the night before the incident.

[41] Mr. McKinnon was not sure what his plan with SJ was for the next day after spending the night together at the hotel. He thought that they were going to spend the day together, but then he recalled that he had dropped her off at an address on Kennedy Dr. in Dartmouth. He did not recall what time it was when he dropped SJ off on Kennedy Drive. After that, he met his friend, John, and they spent the day together at the hotel or just driving around. He was not sure how long they stayed at the hotel, but they were drinking alcohol and Mr. McKinnon stated that he was “probably pissed, loaded” indicating that he was quite drunk at that time.

[42] A little later that afternoon, Mr. McKinnon said SJ was texting him and they argued a bit, but she asked him to come and get her at a house on Kennedy Drive. He thought that he went with John to pick her up on Kennedy Drive around 4:00 p.m. He did not recall the house number. After picking her up, John, Mr. McKinnon, and SJ drove around for a while, but then they got into an argument and she left the car in Dartmouth, near the Lawton’s store, just off Main Street. They both got out of the car and were running around the parking lot as they argued. Then, a lady in a car approached SJ and asked her if she needed a drive. SJ left with that woman.

[43] About an hour later, SJ sent him another text and they continued to argue, but she asked him to come and get her where he had previously picked her up on Kennedy Drive. John drove him back to Kennedy Drive, Mr. McKinnon got out of the car, and John went ahead, turned around, and came back to the area. It was at this point that Mr. McKinnon was “pretty sure” that he met Alex when he was walking towards the Kennedy Drive house. He added that he had never previously met “him,” referring to Alex.

[44] As Mr. McKinnon was walking up to the Kennedy Drive house, Alex met him outside and asked him if he was Bryson to which he said yes. As they continued to walk towards the house, they were talking and, then, Mr. McKinnon said that he saw a couple of other cars pull up and a couple of other guys got out of them. Mr. McKinnon said that those two cars had parked in such a way that they blocked John’s car on the street. Mr. McKinnon told the two guys to let John go by, because “he had nothing to do with what was going on.” They moved their cars to let him out.

[45] Mr. McKinnon said that he had “no clue” what he was walking into, but in his words, “It turned out to be getting the living shit kicked out of me.” Coming back to the brief conversation with Alex as they were walking to the house, Mr. McKinnon confirmed that he was asked if he was Bryson, he said yes, and he only recalls Alex saying something like “just follow me” as they went into the house. The other two guys came into house shortly after Mr. McKinnon, because they had just moved their car out of the way to let John move his vehicle.

[46] Mr. McKinnon confirmed that, once he entered the house, the people in the house were Alex, an older person who he was “pretty sure” was Alex’s uncle, two other guys, and SJ was also there. Once in the house, Mr. McKinnon only had a brief conversation with SJ, but he did not recall what they had discussed. He stated that his “whole reason” for going to the house was to have a conversation with SJ because she had texted him and told him to come there.

[47] When asked why the conversation with SJ was not long, Mr. McKinnon said that he is “pretty sure” that is when his watch and chain were taken and “fists started swinging.” He did not recall who took his watch off his wrist, but he thought it was Alex. He did not recall if he said anything in response. As for the chain around his neck, Mr. McKinnon said, “I just ripped that off and broke it because I did not want them to have it intact.” The gold chain ended up in someone’s hands, but he did not recall who had it.

[48] In terms of the assault, Mr. McKinnon said that after he entered the house to try and talk to SJ, he could not recall if he even got to speak to her, because the next thing that happened was that Alex took his watch and tried to take his chain. Mr. McKinnon reacted to his property being taken by Alex and swung at him. The next thing he remembers is “just getting pelted with fists” in his head. He guessed that he got “smashed a couple of times” and then he was thrown outside, and his head was smashed into the ground.

[49] Mr. McKinnon stated that most of the blows were to his head after he was thrown to the ground in the front yard on the walkway. He was “pretty sure they just stomped my head in the ground a couple of times.” He assumed that four people had struck him and the four accused in court were the ones who did that. He did not have a specific recollection of how many people had struck him, because he did not even know what was going on. Mr. McKinnon had a broken nose, internal bleeding in his brain, and some hemorrhaging, as well as a concussion.

[50] The gold chain and Mr. McKinnon's Nixon watch were recovered later and photographs of those two objects were tendered as Exhibit 1. Mr. McKinnon said that the value of his watch was \$400, and the value of the gold chain was about \$100. The police returned those items to him, but he has not fixed the chain.

[51] With respect to the injuries that he sustained, Mr. McKinnon said that he was not sure who beat his head into the ground. He originally answered that it was "probably pretty quick" but then said that he "really got the shit kicked out of me in, like, five minutes."

[52] When asked again if he recalled who beat his head into the ground, Mr. McKinnon said that he did not remember. At that point, the Crown Attorney asked him if he recalled testifying in SJ's trial approximately six months earlier and they provided a portion of the transcript of that trial to refresh his memory. Mr. McKinnon reviewed what he had said in SJ's trial and stated that it was Alex who beat his head outside the house, while he was down on the ground.

[53] After the beating stopped, Mr. McKinnon said that Alex told him "to get the fuck out of there." He had a specific recollection of that statement because right after that, he stumbled out onto the road and passed out. Mr. McKinnon thinks that one of the people involved the beating came and dragged him off the road.

[54] Mr. McKinnon "guessed" that the beating lasted about five to 10 minutes, from what he could remember. Then, the Crown Attorney showed Mr. McKinnon four black-and-white photographs, which he identified. He pointed out the numerous bruises on his head and face which were caused by the beating that he sustained on the date in question. The four photographs were filed as Exhibit 2. He recalled that the photographs were taken about a half-hour to an hour after the attack but was not sure who had taken them. Although he confirmed that the photographs accurately showed what he looked like after the assault, he stated that a couple of days later, "the swelling puffed right up."

[55] Mr. McKinnon confirmed that he was beaten up on the front walkway to the house on Kennedy Drive and when the beating ended, he got up, stumbled onto the road, and passed out. He believes one of the assailants came and dragged him off the road to the curb. After that, Mr. McKinnon recalled getting up from the snowbank, walking a few steps, and then collapsing into a snowbank in front of the house. Mr. McKinnon recalled that SJ came out of the house and she called 911.

[56] On cross-examination by counsel for Mr. Alex Newcombe, Mr. McKinnon confirmed that the snowbank that he fell into was probably icy as there had previously been some freezing and melting. He confirmed that he had told the police that SJ was his girlfriend and that they were in an on/off relationship. He denied having done cocaine with her at the hotel but stated that he and SJ had consumed about half of a 40-ounce bottle of Jack Daniels that evening.

[57] Defence Counsel asked Mr. McKinnon whether SJ had made an allegation against him that he had sexually assaulted her. Mr. McKinnon stated that he was not aware of that allegation because he had not sexually assaulted SJ. He also said that he was not aware of any allegation made by SJ that he had thrown her down on the floor during the evening of March 12, 2018.

[58] Defence Counsel suggested that Mr. McKinnon had assaulted SJ on the morning of March 13th during an incident in the car, when she asked to be dropped off. Mr. McKinnon stated that what actually happened was that SJ punched him in the nose, causing a nosebleed, and as she tried to punch him again, he pushed her hands out of the way and, in doing so, they hit the radio in the car. Mr. McKinnon stated that is why she said she hurt her hand.

[59] Mr. McKinnon confirmed that when he dropped SJ off on Kennedy Drive around noon on March 13, 2018, it was near a blue apartment building on Kennedy Drive. After dropping SJ off, he agreed with Defence Counsel that she did not go into the apartment building, but rather got into a black Mazda. He did not see who was driving that black car. Although Mr. McKinnon had earlier said that he had been in an on-off relationship with SJ for about three or four years, it did not upset him to see her get in the other car, because their relationship was “very weird.”

[60] Mr. McKinnon stated that after he dropped SJ off in front of the blue apartments, which were a short distance away from 58 Kennedy Drive, he drove back to the hotel and continued drinking alcohol with his friend John. A short time later, Mr. McKinnon received a text message from SJ to come back and get her.

[61] After getting that text message, John drove his BMW and the two of them went back to Kennedy Drive and picked up SJ. Mr. McKinnon said that SJ came out and they went to a Lawton’s drug store where they got into a verbal argument and she got a drive back to Kennedy Drive with someone else. A short time later, Mr. McKinnon stated that he got another text message from SJ and, this time, she told him to come to 58 Kennedy Dr. and pick her up.

[62] When John stopped his BMW in front of the house, Mr. McKinnon denied that he got out of the car or that he walked up to the front step of the house. He said that SJ came out of the house with a backpack. When it was suggested that he had walked up to the stairs and that Alex stopped him from coming up the steps when he said that he was there to pick up SJ, Mr. McKinnon did not remember that happening. When it was suggested that it was possible that it happened, Mr. McKinnon only recalled SJ coming out with a backpack.

[63] Mr. McKinnon disagreed with Defence Counsel's suggestion that the first time he came to the Kennedy Drive house he was told to leave, and he went back to his friend's BMW and they left.

[64] However, Defence Counsel questioned Mr. McKinnon about a statement made to the police while he was in the hospital where he stated that he had dropped his girlfriend off at this house, and she was mad at him, so he went back there because he wanted to talk to her and solve the problems. Defence Counsel then read a portion of the statement to the police: "The first time I went there, this guy came to the door and he was in my face and he was yelling and screaming at me." Mr. McKinnon did not recall saying that, but added that the statement was taken while he was in the hospital and, at that time, the doctor had informed him that he had a concussion, broken nose, and there was bleeding in his head.

[65] Mr. McKinnon maintained that the first time he was on Kennedy Drive on March 13, 2018, he dropped SJ off up the street near some blue apartments and she walked up the street. A little later, on March 13, 2018, Mr. McKinnon got a text from SJ to come and pick her up at 58 Kennedy Drive. On that second occasion when he was on Kennedy Drive, Mr. McKinnon said that he stayed in the car and SJ came out of the house with a backpack.

[66] After that, Mr. McKinnon said that his friend John was driving his BMW with him and SJ and they drove around for a while, but then Mr. McKinnon and SJ got into a verbal argument when the car was stopped in a parking area near the Lawton's store just off Main Street. There, SJ got out of the car and started running around the parking lot and screaming at Mr. McKinnon. He was chasing after her and trying to calm her down. The argument had started after he asked SJ why he was dropping her off and picking her up from the address on Kennedy Drive. He told her that if she wanted to be with him, then choose him, but if she wanted to be with the other guy, then choose him, go back to Kennedy Drive and stop texting him. The

argument in the parking lot ended when a lady offered SJ a drive, she got in her car, and they drove off.

[67] After that, Mr. McKinnon and his friend John drove around in his BMW for a while, but then he received another text message from SJ to come back to Kennedy Drive and get her. He agreed that the house which he went to at SJ's request was a duplex with three concrete steps, with railings on the side going up to the front door. When he entered the house, Mr. McKinnon observed three or four people in front of him, two people off to the side, and he recalled seeing SJ seated on the couch with someone else.

[68] Mr. McKinnon disagreed with Defence Counsel's suggestion that he had walked directly into the house and that no one was outside the house after his friend, John, had dropped him off. Mr. McKinnon stated that Alex came out of the house asked him what his name was, and he said it was Bryson, and then they walked into the house. There were two or three other guys also outside the house and they followed him into the house. He felt that the other people were "friends" of Alex Newcombe but did not know their names.

[69] Mr. McKinnon agreed with Defence Counsel that he was quite drunk, close to blacking out, and might have been stumbling a bit when he got into the house. When it was suggested that he did not really recall exactly what had occurred that day, Mr. McKinnon conceded that not "every single detail was fully clear" but he clearly remembered "bits and pieces" of the incident.

[70] Mr. McKinnon disagreed with Defence Counsel's suggestion that he had walked in the house through the unlocked front door, sat down on a short couch, while three individuals were sitting on a long couch, one of whom was SJ, and then Alex Newcombe stood up and asked him to leave. Mr. McKinnon stated that, after he entered the house, he was pushed to sit down on a couch, then he was pulled up by Alex Newcombe, but was not asked to leave. After that, Alex said, "Nice watch," to Mr. McKinnon and after Alex Newcombe removed Mr. McKinnon's watch by pressing the clasp to release the strap and stole his chain, Mr. McKinnon took a swing at him.

[71] With respect to the number of people involved in beating him during the physical altercation, Mr. McKinnon stated that he knew there were four individuals in the house, he was not sure whether they all hit him, but he was "pretty sure" that two or three of them did hit him. Defence Counsel pointed to the transcript of the SJ

trial where Mr. McKinnon stated that there were five individuals in the house and during that trial, he stated that all five of them had assaulted him.

[72] With respect to his statement to the police, taken at the hospital, it was pointed out that Mr. McKinnon had said that there may have been five or six guys involved. Mr. McKinnon did not recall the details of what he had said to the police at the hospital because he was drunk and “beat to death almost.” However, he did generally recall speaking to the police at the hospital and recalled that they took pictures of him there. He saw those pictures for the first time, during the trial.

[73] Defence Counsel posed questions which suggested that Mr. McKinnon slipped and fell on his own as he was walking towards the road. Mr. McKinnon stated that he had not fallen down the steps of the house because “they threw me out of the house.” He added that, at page 113 of the transcript of January 28, 2019:

They literally beat me in the house and then threw me out the door and then I was on the ground there, and they beat me on the ground and then they told me to get the fuck out of here. So, then I got myself up, walked, like five steps and then collapsed on the road.

[74] Mr. McKinnon stated that the first time that he became aware that SJ had alleged that he had sexually assaulted her was during SJ’s trial. She had face-timed him while he was in the hospital and that is when he learned that SJ and others had been arrested. After he was released from the hospital, Mr. McKinnon and his friend, John went to the police station and picked up SJ after she was released by the police. Mr. McKinnon agreed with Defence Counsel that he and SJ went back to the hotel and they spent the night together there.

[75] The next witness called by the Crown was Ms. Cathy Dorrington who confirmed that she resided at 58 Kennedy Drive in Dartmouth, Nova Scotia, on March 13, 2018. She confirmed that Walter Newcombe is her brother and Alex Newcombe is her son. On that date, she had been out of the house all afternoon and evening, arriving at her home sometime after 1:00 a.m. on March 14, 2018. When she got back to her house, it was surrounded by police officers. She asked them what was going on and they told her, but she waited outside for another hour or two.

[76] While she was in conversation with the police, Ms. Dorrington asked if there was something that she could do to speed up the process. They told her that, if she

signed a consent for them to enter the home with her, it would move things along. She signed a consent to enter the house with her, not a consent to search the house.

[77] Ms. Dorrington spoke to her son on the telephone before she signed the consent for the police to enter the home. She asked him if he had something in the house that did not belong to him; he said yes but did not tell her what it was. The police told her that they were looking for a watch and chain.

[78] After the consent was signed, Ms. Dorrington and a police officer went into the house and she passed him one of the items that they were looking for, which was on her coffee table. She believed that the only thing that was handed over to the police was a watch. Her son told her that he had come into possession of it after there was an argument, that it just did not go as planned, and that there was a scuffle and an argument between him and somebody else. She did not observe any signs of a scuffle in the house.

[79] On cross-examination by Defence Counsel for Mr. Alex Newcombe, Ms. Dorrington said that she had telephoned her son and it was possible that she had told her son that the police were looking for a watch. She could not really recall the conversation that she had with her son between 1:00 a.m. and 3:00 a.m. in the morning, but he could have told her that he did not know what the police were looking for.

[80] On cross-examination by Defence Counsel for Mr. Walter Newcombe, Ms. Dorrington confirmed that when she came into the house with the police, she saw a watch on the coffee table which was in plain view. She agreed that if someone had wanted to hide it, they certainly had ample opportunity and time to do so before the police entered the house. She did not see any blood on the floor in the living room, but did not really go looking for anything like that on the floor. Outside the residence, she saw “a couple of drops” of blood off the step and onto the driveway, but no big puddle of blood.

[81] In answer to a couple of questions by Defence Counsel for Mr. MacDonald, Ms. Dorrington stated that she could not remember if they had a snake in March 2018, but they did have a snake in the house at one time.

[82] Constable Glenn Sawler of the Halifax Regional Police stated that immediately after he started his shift on March 13, 2018 around 7:00 p.m., he was sent to Kennedy Drive in Dartmouth to cordon off a crime scene. Just before his

shift started, there was a report that a male had been found unconscious in a snowbank on the street.

[83] About an hour later, just after 8:00 p.m., he was called to assist with the search of a person who was in custody at the Dartmouth police office. Constable Sawler identified where that person was sitting in the courtroom. The person searched was very cooperative throughout. Constable Sawler was told that there was a small pocketknife in a back pocket of the jeans and he also found a gold chain in that person's left front pocket. The chain was approximately 18 to 24 inches in length, broken at one of the links, but the ends were still joined by the clasp.

[84] Constable Sawler stated that the chain shown in Exhibit 1 looked like the chain that he found in the man's pocket. He had not taken the photograph but confirmed that the chain was broken at a link and that it was still clasped together.

[85] On cross-examination, Constable Sawler confirmed that Mr. Walter Newcombe was cooperative and volunteered where the pocketknife was located. The police officer did not know if the gold chain had a special brand name or monogram on it, he simply described it as a thin gold chain. He also confirmed that he had not interacted with anyone involved in the incident at 58 Kennedy Drive. He had guarded the scene on the roadway until he left to assist with the search.

[86] The final witness called by the Crown Attorney was Mr. Colin Joudrey. At the outset, Mr. Joudrey stated that he was not "enthusiastic" about testifying as he was "nervous about retaliation." He stated that he recalled the events of the day and the evening of March 13, 2018 "for the most part." On that day, he stated that he was at Alex Newcombe's house and that he has known Alex Newcombe for a long time. He stated that the people living at that house with Alex were his mother, Cathy and his uncle, Walter Newcombe, but he did not know the name of Alex's sister. He identified Alex and Walter Newcombe in Court.

[87] On March 13, 2018, Mr. Joudrey recalled receiving a text message from SJ, who he knew through Alex Newcombe, which asked him to come and pick her up. She was at the bottom of Kennedy Drive outside a blue apartment building. In the text message, she told Mr. Joudrey that she had been raped by Bryson McKinnon and she wanted to tell Alex Newcombe about that. Mr. Joudrey told her that she should not tell Alex without him being present as well. Mr. Joudrey confirmed that he did not know Mr. McKinnon and had not met him before March 13, 2018.

[88] Mr. Joudrey was shocked when he received that text message from SJ and added that he wanted to be with her when she told Alex so that he could try and calm him down “if something was to happen.” Mr. Joudrey met SJ in the early afternoon and they drove around for about 30 minutes in his black 2012 Chevy Cruze car to calm her down before going to Alex Newcombe’s house. When they got to the house, Alex was the only one at home. Mr. Joudrey and SJ sat down and SJ was quiet while Alex was asking, “What’s wrong? What’s wrong?”

[89] While SJ and Mr. Joudrey were driving around in his car, they had discussed a little bit of her allegation of being raped and that she wanted to tell Alex about it. Mr. Joudrey told SJ that he should be present when she told him to “help you with this.”

[90] Mr. Joudrey was also asked to describe the Newcombe house on Kennedy Drive and he said that it is painted yellow, has two entrances: a front door and a side door. When you enter the house through the front door, there is a wall and as you turn left there is a couch by the window and there is also a couch on the back wall with the table in the centre, a safe, and the kitchen and bathroom.

[91] Mr. Joudrey said that the first time he saw Mr. McKinnon, he was in a late-model blue BMW-3 series four-door car with his friend, in front of Alex’s house. He was pretty sure that the friend was driving because Bryson was intoxicated.

[92] Mr. Joudrey said that Mr. McKinnon got out of the car and came up to the front door and just outside the door, Mr. McKinnon and Alex Newcombe had conversation which also involved “a little bit of pushing and shoving”, but there was no punching. He did not hear what they were saying because he was still sitting on the couch and did not move from there. He was not sure whether SJ was behind Alex or with him, but he was sure that she remained in the house and was not outside the house with Mr. McKinnon.

[93] Alex Newcombe was standing in the front doorway and he was blocking the door so that Mr. McKinnon could not get in the house. Mr. Joudrey noted that Mr. McKinnon’s speech was slurred, and he believed that Mr. McKinnon was intoxicated. The first time Mr. McKinnon came to the Alex’s house, Mr. Joudrey observed some physical contact between Alex and Bryson. Bryson pushed Alex first and Alex pushed him back. Then Bryson left in the car with his friend.

[94] After Mr. McKinnon left the house, Alex came back in the house and a little while later, Mr. Joudrey said that SJ walked out of the house and he assumed that Mr. McKinnon and his friend picked her up, but he did not see them pick up SJ. A short time after SJ left the house, she sent a text message to Alex to tell him that Mr. McKinnon and his friend had picked her up and that she was going to the group home. Mr. Joudrey saw the text message from SJ to Alex and then they left his house in Mr. Joudrey's car, with Alex driving it to look for her.

[95] Alex Newcombe and Mr. Joudrey began driving around looking for SJ because they wanted her to come back to his house and did not want her to be with Mr. McKinnon because of what she said had happened. While they were driving around looking for SJ, Mr. Joudrey and Alex were talking and Alex asked him something along the lines, "Do you have my back if something happens?" Mr. Joudrey told Alex Newcombe no, that he would not be fighting for him and he said that Alex's only response was, "That's fine."

[96] Mr. Joudrey was asked if anything else was said by Mr. Alex Newcombe. Initially, he said that there was nothing else mentioned. However, the Crown Attorney provided Mr. Joudrey with a transcript of his evidence during SJ's trial, a few months earlier, to refresh his memory. In SJ's trial at page 30, Mr. Joudrey had said that Alex asked, "Will you have my back?" and he answered, "No way, buddy. I said no." Then, Alex said, "That's fine," but in SJ's trial, Mr. Joudrey added that Alex then said, "So I'll get someone else." Mr. Joudrey confirmed that the review of the transcript refreshed his memory about what Alex had said at that time.

[97] Mr. Joudrey also said that while they were driving around looking for SJ and after Alex Newcombe had said, "I'll get someone else," Mr. Newcombe did take some steps to secure someone else by making phone calls to MacKenzie MacDonald and Jermaine Colley. The phone calls were made when he and Mr. Alex Newcombe were back at his house. No phone calls were made from the car. In fact, when the two of them got back to the Newcombe house, SJ was already there, on the front porch.

[98] When Alex Newcombe and Mr. Joudrey got to the group home, SJ was not there so they drove back on the highway and came to a four-way stop just off the highway on Main Street near a Petro Canada station. When the two of them pulled up to the red light, there was a BMW car beside them and he saw that Bryson McKinnon and his friend were in the car, but SJ was not there. Although Alex Newcombe and Mr. Joudrey were in the right turn lane, they went straight and

followed the BMW back to Alex's house, but the BMW kept going and in Mr Joudrey's word, "disappeared."

[99] Once Alex Newcombe and Mr. Joudrey were back at his house, that is when he started making phone calls to his friends. As mentioned previously, SJ was on the porch when they got back to the house. Mr. Joudrey said that he was seated on the couch in the living room while Alex Newcombe was pacing around the living room making the phone calls. SJ was seated beside him on the couch.

[100] The next thing that happened was that while Mr. Joudrey was sitting on the couch beside SJ he heard her side of the conversation on the phone with Bryson McKinnon to come pick her up and take her home. Shortly after that phone call to Mr. McKinnon, the BMW car came back to the house, but so did Cameron and Mackenzie.

[101] At that point, the only three people in the house were Mr. Joudrey, Alex Newcombe and SJ. Mr. Joudrey said that the only conversation between them was him saying to Alex Newcombe that he did not "need to do this and it's a waste of time." The reference to "no need to do this" was clarified by Mr. Joudrey as a message to tell Alex Newcombe that there was no need to have a fight and that he also told him "it was stupid."

[102] Mr. Joudrey said that when Mr. Alex Newcombe's two friends arrived at the house, their cars blocked the BMW in which Mr. McKinnon arrived. He noted that, at this point, it had started to snow. Then, Alex Newcombe went out of the house to the BMW and "brought Bryson inside." On this point, Mr. Joudrey stated that he did not specifically see what happened outside because he was still seated on the couch, but they walked into the house together.

[103] After Mr. McKinnon entered the house, he sat on the couch by the window, not the couch against the wall where he and SJ were sitting. Mr. Joudrey said that Alex was standing in front of Mr. McKinnon and at that point, Walter Newcombe came into the house as well. Mr. Joudrey said that it was "calm" for a bit, but then Alex Newcombe got in Bryson McKinnon's face and "it just went downhill from there."

[104] In response to the Crown Attorney's question as to what specifically happened at that point, Mr. Joudrey stated that Walter Newcombe punched Mr. McKinnon in the head and then ripped the chain off Mr. McKinnon's neck. Then, Alex

Newcombe asked Mr. McKinnon to take his watch off but did not hit him at that point. Then, Alex Newcombe threw Mr. McKinnon onto the couch and told him to give him the watch. Mr. McKinnon replied that he would not give him the watch and in response, Mr. Joudrey stated that Alex Newcombe threatened him and after that, Mr. McKinnon took off his watch.

[105] The next thing that occurred, according to Mr. Joudrey was that “then the beating started.” Mr. Joudrey did not participate in the beating, and he said that for the most part, the people hitting Mr. McKinnon were Alex Newcombe and Walter Newcombe. He stated that Mr. MacDonald and Mr. Colley each “hit him maybe once.” Most of the hits were to Mr. McKinnon’s head. Mr. McKinnon got up and tried to make it to the door and then Alex Newcombe got him outside the house. Once they were outside the house, Mr. Joudrey did not initially get up from the couch to watch what was going on outside, but he heard sounds like “ooh, aah, ooh.”

[106] Mr. Joudrey stated that he was very familiar with Wally Newcombe because he had met him as many times as he had met with Alex Newcombe and that the two of them were often together. He was very familiar with McKenzie MacDonald because they had previously worked together. With respect to Jermaine Cameron Colley, he knew him through his friendship with Alex Newcombe and that he had previously been with Mr. Colley and Mr. Newcombe “a fair bit.”

[107] In terms of the participation of Mr. Colley and Mr. MacDonald in the incident, Mr. Joudrey said that they each one of them hit Mr. McKinnon one time with their fists. After hitting Mr. McKinnon, Mr. Joudrey said that Mr. Colley and Mr. MacDonald stayed by the door to the house. He said that Mr. McKinnon was not really doing anything in response as, in Mr. Joudrey’s words, “he didn’t really have a chance.” He estimated that this beating lasted for about 45 minutes in total, because it continued outside for about 15 to 20 minutes.

[108] Although Mr. Joudrey had stated that he had not watched what was going on outside, he did say that he then got up to see what was going on outside and that is when he saw Mr. McKinnon “just stumbling around on the street.” Although Mr. Joudrey confirmed that he did not go outside the house, he looked outside and also saw Mr. McKinnon crawling on the street in the snow. The only other person outside on the street with Mr. McKinnon was Alex Newcombe.

[109] Mr. Joudrey confirmed that SJ did go outside the house after a while to see if Mr. McKinnon was okay and he is pretty sure that she called the ambulance.

[110] There was no mess in the living room and nothing had really moved except a table before the incident in the house.

[111] At that point, during the hearing on June 19, 2019, the Crown Attorney completed her direct examination of Mr. Joudrey. Mr. Joudrey's cross-examination and the trial continuation was scheduled for August 15, 2019. However, on that date, a mistrial application was made, and no evidence was heard. After the Court dismissed the mistrial application, all four Defence Counsel withdrew as solicitors of record. Once new Defence Counsel were retained, the cross-examination of Mr. Joudrey was conducted on January 28, 2020.

[112] On cross-examination by Defence Counsel for Mr. Alex Newcombe, Mr. Joudrey confirmed that he had provided a statement in this matter to Constable Doyle on May 10, 2018, after he had been arrested on the robbery charge and he confirmed that he had testified in SJ's trial in Youth Court.

[113] Mr. Joudrey agreed that, at that time when he was arrested, he had just obtained a new job and had three kids at home and was worried that he would have to spend the night in jail. He agreed that Constable Doyle had told him that if he was not involved in the incident, the police officer would re-evaluate Mr. Joudrey's situation. Mr. Joudrey agreed that he told Constable Doyle he had been able to talk himself out of trouble in the past and had described a situation in high school when his girlfriend's ex-boyfriend wanted to fight him.

[114] Then, Defence Counsel posed questions with respect to how the whole incident on March 13, 2018 began. She suggested that Mr. Joudrey had spoken to SJ more than once after the incident about it and his initial answer was, "I have no idea," and when it was suggested again that it was more than once, he said, "Sure, we'll go with that." He agreed with the suggestion that when he gave his statement to Constable Doyle, he knew that SJ had been charged with an offence, but in his opinion, she had not done anything wrong.

[115] When Defence Counsel suggested that, in fact, SJ had started this series of events of March 13, 2018 with her text message, Mr. Joudrey's reply was, "That's hit or miss." When pressed about SJ sending a text message, his response was, "It is still up in the air. Because no one's ever going to know. Because no one's seen the phone."

[116] Then, when Defence Counsel suggested that the first thing that occurred in relation to this matter was that Mr. Joudrey had received a text message from SJ on March 13th, his answer was, “That had nothing to do with this.” However, with a follow-up question, Mr. Joudrey did agree that he had received a text message from SJ while he was in Enfield and, at the time, he agreed that he knew that SJ was dating his friend, Alex Newcombe.

[117] Following that exchange, Defence Counsel asked Mr. Joudrey how long he had known Alex Newcombe, adding that he had previously told the Court that he had known him for about three years. Mr. Joudrey stated that he never said that, but maybe he meant three years, and added, “Three years is ridiculous.” After that response, Defence Counsel referred to the transcript of Mr. Joudrey’s earlier evidence in this trial where he said he had known Alex Newcombe for a long time, and then added, “Three years, probably.” Mr. Joudrey’s reply was that was not the truth, he did not know him for three years but agreed that is what he had previously said, and agreed what he had earlier said was not accurate.

[118] With respect to SJ’s text that Mr. Joudrey had received on March 13, 2018, he agreed that in her text, SJ had told him that she had just been raped, she wanted to tell Alex Newcombe what happened, and that his response was to not to do that, but rather to wait and we would tell him together. He also agreed with the suggestion that he had insisted that SJ not say anything to Alex Newcombe until he was with her. He agreed with Defence Counsel’s suggestion that SJ was on Kennedy Drive at the time, he was still in Enfield, and that SJ was close to Mr. Newcombe’s place on Kennedy Drive.

[119] Mr. Joudrey confirmed that it took him about 20 minutes to drive his car over to Kennedy Drive, SJ had waited for him, and he picked her up. Then, he agreed that the two of them went for a short drive and talked, then went to Alex Newcombe’s house. Mr. Joudrey also agreed that, despite saying that he wanted to be present when SJ told Alex Newcombe about what had happened, he only remained in the house for “a little bit” of their conversation and then, he left the house.

[120] At this point, Defence Counsel again turned to the transcript of Mr. Joudrey’s earlier evidence where Mr. Joudrey had stated that he had heard none of the conversation between SJ and Alex Newcombe. On the follow-up question as to whether he had heard some of their conversation, Mr. Joudrey said, “I might have. I might not have.” Following several questions about what his evidence was, on

cross-examination Mr. Joudrey said that he “heard some” of the conversation and then left. He agreed that his statement made in June 2019 was “inaccurate.”

[121] In this trial and in SJ’s trial, Mr. Joudrey had stated that he left the Newcombe house for a period of time – in this case he had estimated that it was about 20 to 30 minutes, whereas in SJ’s trial it was estimated as five to 10 minutes. He agreed that he did not know how long he was out of the house while SJ and Alex Newcombe were talking. He agreed that it could have been from five minutes and 30 minutes.

[122] Mr. Joudrey agreed with Defence Counsel that in his May 10, 2018 statement to Constable Doyle, he had said that when he got back to the house SJ was there and Alex Newcombe was making calls to his friends. However, in this trial, Mr. Joudrey had testified that the phone calls happened later. Mr. Joudrey agreed that the calls were made later and agreed that what he had said to the police officer about the timing of the calls to the friends was not accurate. Those calls to the friends were made later.

[123] Mr. Joudrey was then asked again whether he had spoken to SJ between the time of the incident on March 13, 2018 and his statement to Constable Doyle on May 10, 2018. He answered, “Yes, I was. Or was I?” Defence Counsel asked him to tell the Court which it was, to which Mr. Joudrey responded, “That’s for you to find out. Isn’t that your job?” After direction from the Court to answer that question, Mr. Joudrey agreed that he had talked to SJ to fill in some “blanks.”

[124] Defence Counsel suggested that, when he returned to the Newcombe house, Mr. Joudrey, SJ, and Alex Newcombe smoked a joint together. He stated that he did not remember that and when asked whether it was possible, Mr. Joudrey said it was not possible because he would have remembered that.

[125] With respect to layout of the living room in the house, Mr. Joudrey agreed that there was a longer couch under the window and that the couch against a wall was a loveseat. Mr. Joudrey stated that he was sitting on the couch by the window, with his back to the window. He agreed that, at a certain point, he turned around and, through the window, he saw a blue BMW-3 series car pull up in front of the house. From where he was sitting, he could see that there were two people in that blue BMW and he later learned that the person who walked towards the house was Bryson McKinnon.

[126] From where he was sitting, Mr. Joudrey said that Alex Newcombe went to the doorframe to ensure that Mr. McKinnon did not come into the house, but there was no confrontation. Mr. Joudrey understood that Mr. McKinnon was not invited there, and that he was not welcome there. He thought Mr. McKinnon was really drunk and stumbling around, but he could not hear what was being said. However, Mr. Joudrey did see Mr. McKinnon push Alex Newcombe and then Mr. Newcombe pushed him back. There was no hitting, there was only a push and shove back, and then Mr. McKinnon left in the BMW.

[127] Defence Counsel confirmed that it was Mr. Joudrey's evidence that very soon after that he realized that SJ had left the house without saying goodbye and he did not know where she had gone. He did not hear her go out the door. Mr. Joudrey confirmed that then Alex Newcombe got in the driver's seat of his car, with him seated in the passenger seat, and then they went looking for SJ. Shortly after driving around looking for SJ, Mr. Newcombe got a text from SJ, which Mr. Joudrey saw, saying that she was at the group home.

[128] Mr. Joudrey confirmed that when they got to the group home, SJ was not there. On the way back to the Newcombe residence, he agreed that they pulled up beside a blue BMW-3 car at a stoplight at Main Street and Lakecrest, by a PetroCan gas station. They were surprised to see the car there and decided to follow the BMW to see where it was going. Defence Counsel pointed out that although Mr. Joudrey had just said that he and Mr. Newcombe were looking for SJ, during his statement to Constable Doyle he had told the police officer that he and Alex got in his car to find Bryson McKinnon and his friend. Mr. Joudrey stated that they were in his car to find SJ.

[129] Mr. Joudrey said he did not stay in the house smoking joints while Alex Newcombe went looking for SJ in his car. He reiterated that the two of them had gone to look for SJ, but did not find her, so they returned to the house. On arrival, they saw that SJ was there, sitting on the step. Then, the three of them went into the house and Alex Newcombe started making phone calls to MacKenzie MacDonald and Jermaine Colley.

[130] Mr. Joudrey had earlier said that he heard part of the conversation between Alex Newcombe and his friends, but was not really paying attention to what was being said because he knew "what was going down" and wanted to "stay out of it." Mr. Newcombe's phone calls were being made while he was sitting on the loveseat beside SJ. At that point, Mr. Joudrey was shown his transcript of his evidence during

SJ's trial, where he told that Court that SJ was not present when those calls were made to the friends. Mr. Joudrey reiterated that SJ was seated beside him when those calls were made.

[131] When Defence Counsel suggested that Mr. Alex Newcombe did not make any calls that afternoon, Mr. Joudrey said that he had made those calls. At that point, Defence Counsel questioned Mr. Joudrey about whether Alex Newcombe had a snake and he agreed that Alex did have a snake, and in fact he was with him when he got it. Mr. Joudrey agreed that the snakes only need to be fed every week or two and they eat large things like mice. However, Mr. Joudrey disagreed that Alex Newcombe's call to the two friends related only to bringing food for the snake.

[132] Following those questions, Defence Counsel questioned Mr. Joudrey about the second time that Mr. McKinnon came back to the house with his friend in the blue BMW. He confirmed that he was beside SJ when she called Mr. McKinnon and asked him to come back to the house and pick her up. Mr. Joudrey had understood that SJ had alleged that Mr. McKinnon had raped her the night before, and agreed that she had asked to be picked up and added that SJ "was weird."

[133] At this point, there was a great deal of confusion as to whether Defence Counsel was questioning Mr. Joudrey about the first time that Mr. McKinnon had come to the house with his friend in the blue BMW or the second time that they came back to the house as result of SJ calling Mr. McKinnon to come and pick her up at the Newcombe house. After reviewing the transcript of his earlier evidence, wherein Mr. Joudrey stated that "Alex went out of the house to the BMW and brought Bryson inside," Mr. Joudrey confirmed that Mr. McKinnon was "walking with these people" and although he may have been dragged out of the car, he was not dragged into the house by Alex Newcombe or the others.

[134] Once Mr. McKinnon was inside the house, he sat down on the couch by the window. Mr. Joudrey was on the loveseat by the wall with SJ. Mr. Joudrey disagreed with Defence Counsel's suggestion that Alex Newcombe never left the house and that Mr. McKinnon had walked into the house on his own and sat down in the living room on a couch. Mr. Joudrey acknowledged that he cared for SJ and that he did not want her to leave with a guy who he thought had raped her the previous evening and was, that afternoon, stumbling around drunk.

[135] Mr. Joudrey disagreed with the suggestion that Mr. McKinnon had just walked into the house when only SJ, Alex Newcombe, and Mr. Joudrey were there

in the living room and that everything was calm. He said that the next thing that occurred was Alex Newcombe got in Mr. McKinnon's face, told him he was not welcome in his home, and then the first thing that actually happened was Walter Newcombe ripping the chain off Mr. McKinnon's neck.

[136] ,At this point, Defence Counsel read an excerpt of Mr. Joudrey's evidence during SJ's trial which referred to the fact that Alex was talking to Mr. McKinnon on the couch and then he told him, "You are not leaving the house." Mr. Joudrey had stated in that other trial, as he did in this trial, that he was sitting on the couch with SJ and he thought this was not good, because "Bryson was blocked in by everybody."

[137] Defence Counsel continued referring to SJ's trial transcript where Mr. Joudrey had previously said that Bryson was on the couch, Alex was in front of him, Wally was beside Alex, and Mackenzie and Cameron were by the door so that Bryson had nowhere to go. As Bryson stood up, he was getting mouthy with Alex and that is when Alex said, "That is a nice chain," and ripped it off his neck.

[138] After hearing what he had said during SJ's trial, Mr. Joudrey speculated that he might have said that for her, but what he had said at that time was not true. He stated that was not the way things happened, and that in SJ's trial, he "probably got it mixed." He reiterated what he had said earlier in this trial, that Walter Newcombe had ripped the chain off Mr. McKinnon's neck, not Alex Newcombe. When Defence Counsel asked if he would be surprised by the fact that, in this trial, Mr. McKinnon actually stated that he had ripped the chain off his own neck, Mr. Joudrey said that it did not surprise him to hear that.

[139] With respect to the watch, in this trial, Mr. Joudrey had stated that Alex said, "Give me the watch," and Mr. McKinnon gave him the watch because Alex had threatened him. He agreed that he did not really remember what words were said. He also agreed that, in this trial, he had said that Mr. McKinnon took the watch off himself. However, Defence Counsel pointed out that in SJ's trial, Mr. Joudrey had said that Walter Newcombe took the watch from Mr. McKinnon. Mr. Joudrey acknowledged that he might have "mixed things up". Defence Counsel suggested that Mr. Joudrey was now not certain how the chain or watch came off, to which he answered, "Sure."

[140] With respect to the physical altercation, Defence Counsel pointed out that Mr. Joudrey told the police, in his statement, that Walter Newcombe hit Mr. McKinnon

first. Then, Defence Counsel suggested that, during SJ's trial, Mr. Joudrey had said that McKenzie MacDonald had hit Mr. McKinnon first, to which Mr. Joudrey responded, "No," in stating that was not his evidence during SJ's trial.

[141] As a follow-up to that question, which is found at page 80 of the transcript in this trial, Defence Counsel read an excerpt of Mr. Joudrey's evidence at page 40 of SJ's trial transcript, which appears to be a follow-up question with respect to who ripped Mr. McKinnon's chain off his neck. The question posed by Defence Counsel and Mr. Joudrey's answer in this trial was as follows:

Q. line 1 and you're talking about the watch... The chain here, "Ripped it off, and Wally did the same with his watch. And Mackenzie hit him once. And Cameron did the same."

A. Correct.

[142] In this trial, during his direct examination, Mr. Joudrey had previously said that during the physical altercation with Mr. McKinnon, Mr. MacDonald and Mr. Colley had probably only hit Mr. McKinnon one time. In terms of this exchange, I find that his answer during SJ's trial is not inconsistent with what he had said on direct examination during this trial. I find that, even without having the full context of that series of questions leading up to those responses during SJ's trial, that Mr. Joudrey has clearly stated the number of punches thrown by Mr. MacDonald and Mr. Colley at Mr. McKinnon during the physical altercation, and not a reference to the order in which they were thrown in relation to anybody else.

[143] Mr. Joudrey agreed with Defence Counsel that he was not sure how long the fight inside the house lasted, stating that it was "pretty quick" and it then went outside. Once the fight went outside the house, Mr. Joudrey agreed that he did not go out of the house and he added that he did not look at what was going on outside.

[144] The next series of questions posed on cross-examination were by Defence Counsel for Mr. Walter Newcombe. Defence Counsel asked whether his testimony was accurate, and Mr. Joudrey stated that some things may have been forgotten since it has been two years since the incident occurred, but he has also been able to piece things together or he recalled things, given the number of times that he has been in court. While he acknowledged that he had a couple of conversations with SJ before his statement to the police officer in May, 2018, Mr. Joudrey stated that she did not

fill in any gaps for him, nor did he have any conversations with Alex Newcombe or any of the others after the incident.

[145] Defence Counsel suggested that the police had a theory that SJ had set this whole incident up to get Bryson McKinnon over to Alex Newcombe's house to beat him up. Mr. Joudrey understood that their theory was SJ had orchestrated this as retaliation because she was alleging Bryson McKinnon had raped her. Mr. Joudrey stated, that at the time, he thought that SJ had been raped, but he now does not think that happened. He also stated that he does not think SJ set this all up.

[146] Defence Counsel suggested that Mr. Joudrey made up a story to talk himself out of any trouble for himself as well as SJ, because he was starting a new job and did not want to be arrested for a robbery charge. Mr. Joudrey responded that he told Constable Doyle what had happened. Although he agreed that he did not want SJ or himself to get in trouble, Mr. Joudrey repeated that what he had told Constable Doyle was not made up and that "everything that I said was pretty bang on."

[147] On further questioning, Mr. Joudrey acknowledged that a lot of what he had said at SJ's trial on July 30, 2018 in Youth Court was in his word, "hogwash." He made the point that he may have "mixed up" some things during SJ's trial because he "did not really care about that trial at all." When asked why he didn't care about SJ's trial, Mr. Joudrey said that he knew what was going to happen and didn't care what the outcome would be, because she would be bouncing back-and-forth between a group home, jail, and her mother's house.

[148] When it was pointed out by Defence Counsel that Mr. Joudrey's evidence had changed from what he had told the police to what he said at SJ's trial and now in this trial, he said that, if it did not match, it was probably due to the fact that this incident has been before the Court for over two years. He agreed that the Crown Attorney had provided him with transcripts of his police statement, his evidence during SJ's trial on July 30, 2018, as well as the transcript of his earlier evidence in this trial from June 2019. Mr. Joudrey agreed that he could have used any one of those transcripts to refresh his memory, but chose not to read them.

[149] Defence Counsel confirmed that during SJ's trial on July 30, 2018, his evidence was that Alex Newcombe had said to Mr. McKinnon, "That's a nice chain," stood up and then ripped it off his neck. Mr. Joudrey agreed with Defence Counsel that was not correct, even though his evidence was given just four months after the

incident. Mr. Joudrey said that he got the names “mixed up” and agreed that both trials involved the same incident.

[150] When questioned why it was not the same evidence in both trials, Mr. Joudrey repeated that he “did not really care what I said at that court because I knew nothing was going to happen anyway.” When asked if he cared what he was saying in this court, Mr. Joudrey said, “Yes, I do because there are two people in this room that should not be here,” and added that was his “personal opinion.”

[151] Defence Counsel for Mr. Colley asked Mr. Joudrey if, during his conversation with Mr. Newcombe in the car about having his back, whether there was any discussion about stealing or committing a robbery. Mr. Joudrey answered no, there was no discussion whatsoever about stealing something from Mr. McKinnon. Mr. Joudrey said that it just happened, it was not premeditated.

[152] Defence Counsel posed several questions in relation to Mr. Joudrey having a black belt in karate and why he did not get involved in the altercation to defend Mr. McKinnon. He simply answered that his knowledge of karate would only be used to defend himself and since he was not in the fight with Mr. McKinnon, he did not want to get in the middle of the fight between the other people and Mr. McKinnon.

[153] When it was suggested that Mr. Colley had not struck Mr. McKinnon, Mr. Joudrey repeated, on two occasions, that Mr. Colley had hit Mr. McKinnon “once,” but it was “barely even a hit.” When he was asked about his statement to the police officer that there were two people who should be going to jail and two who should not, Mr. Joudrey said that this case was about a robbery and not a beat down, adding, once again, that Mr. Colley had only hit Mr. McKinnon a couple of times - one being a hit and one that was barely a hit. When questioned about what force was involved when Mr. McKinnon was “hit” a couple of times, Mr. Joudrey responded, “Enough force to hurt.”

[154] The final questions on cross-examination were posed by Defence Counsel for Mr. MacDonald. Mr. Joudrey confirmed that there was a snake in the house at that time but he had no idea if the snake had been fed that day or there were any mice in the house to feed the snake.

[155] In response to a question as to whether SJ seemed upset when Mr. McKinnon arrived at the house, he stated that she was probably not happy to see him there. Mr. Joudrey agreed that she did look upset, but he was not really trying to calm her down,

he was just sitting beside her. When Defence Counsel suggested that Mr. MacDonald arrived at the house after the so-called “beat down” had occurred, Mr. Joudrey disagreed and stated that Mr. MacDonald’s sole purpose for being there, was not just to feed the snake.

[156] On re-examination by the Crown Attorney, Mr. Joudrey said that he had not lied or intentionally made things up during the interview with Constable Doyle. He also stated that when he arrived at the house with SJ, he stayed for a bit of their conversation and then he felt that she did not need him there so he left for a while.

[157] With respect to where Mr. Joudrey was seated the first time that Mr. McKinnon came to the house, he said that he was seated on the couch by the window when he saw the blue BMW arrive. From there, he saw the “little altercation” which was a “push and shove” incident at the door and then he moved over to the loveseat and sat beside SJ.

[158] The Crown Attorney then questioned Mr. Joudrey about the location where he and Mr. Alex Newcombe were in his car and ended up beside the blue BMW at an intersection just off Main Street. Mr. Joudrey explained that his car was a 2012 Chevrolet Cruze and the other car was an early 2000’s BMW 325 I, four-door sedan. Mr. Joudrey drew a diagram of the street and where the BMW and the Chevy Cruze were located which was filed as Exhibit 3 in the trial.

[159] He explained that although the BMW was in the lane to turn left, it went straight. Mr. Alex Newcombe and Mr. Joudrey were in the lane to go straight or turn right, so they followed the BMW across the intersection.

[160] With respect to the sequence of things occurring and who took the watch or the chain, Mr. Joudrey said the order in which things happened was first the chain was taken, then the watch, and then Mr. McKinnon was hit. With respect to who took the chain or the watch, Mr. Joudrey stated that he probably “mixed up” the two names but did not do so intentionally. With respect to the statement that two individuals should not be here, Mr. Joudrey stated that he was referring to McKenzie MacDonald and Cameron Colley “because this is a robbery, not a beatdown” trial. He confirmed that neither one of them had taken anything that did not belong to them and that he was referring to the fact that they each hit Mr. McKinnon once with some force and another hit with barely enough force to hurt.

[161] Mr. Joudrey was asked how Bryson McKinnon came to be outside the house after his things were taken. Mr. Joudrey said that Mr. McKinnon was “forced outside” by Alex Newcombe. When asked if he was aware of whether Mr. McKinnon had been injured by the blows, Mr. Joudrey initially said that he did not know that, then immediately added that Mr. McKinnon was probably injured because “there was blood on the snow outside.” He did not notice blood on Mr. McKinnon while he was in the house, he could not tell and for that matter, he was not looking, but he knew that Mr. McKinnon had been “pretty banged up.”

[162] When asked whether anyone of the other individuals in the house stepped in to prevent the beatdown of Mr. McKinnon, Mr. Joudrey answered, “No.” He added that Alex Newcombe was the only one who went outside the house and that no one else had gone outside the house, they stayed inside the house. He agreed that an emergency vehicle had come to assist Mr. McKinnon and he thinks that it was SJ who called the ambulance because she had gone outside to see if he was all right.

[163] After the completion of Mr. Joudrey’s evidence, the Crown Attorney confirmed that was the case for the Crown and he was also tendering the Exhibits.

[164] When court resumed in the afternoon, Defence Counsel for Mr. Alexander Newcombe indicated that she would be calling her client as a witness in the trial. Mr. Alexander Newcombe stated that he was now 23 years old. On March 13, 2018, he was living at his mother’s place located at 58A Kennedy Drive in Dartmouth, NS, with his sister and his uncle.

[165] Sometime between 1:00 and 2:00 p.m. on March 13, 2018, SJ and Colin Joudrey came over to his house unannounced, without sending any text messages to say that they were coming. At that time, he thought that SJ was his girlfriend and that they had been in a relationship for about two months. At that time, SJ was living in a group home. He stated that he saw SJ every day or every second day. As for Mr. Joudrey, he stated that they were “pretty good friends” since December 2017 and they got together almost every day.

[166] When they arrived at his house, the first thing that Mr. Newcombe noticed was that SJ was “shook up” and it looked like she had been crying and had some bruising on her neck. They came into the house sat down for a short time and within a few minutes, Mr. Joudrey left the house. Mr. Joudrey had come in the house and said that SJ needed to talk to him and then he left. He found that it was odd that Mr.

Joudrey had come over to the house, said they needed to talk to him, and then he left.

[167] After Mr. Joudrey left the house, SJ told Mr. Newcombe that she had been raped by an ex-boyfriend of hers the night before when they stayed at a hotel, and one of his friends was also there and they had been drinking. Mr. Newcombe said that she was very upset, shaking and crying. He did not know her ex-boyfriend nor did he know his name. While he was trying to comfort her and telling her to calm down, he noticed that it looked like SJ had a couple of handprints on either side of her neck. She confirmed that the ex-boyfriend had bruised her neck.

[168] After SJ calmed down, Mr. Newcombe sent Mr. Joudrey a text that they had finished their talk and he could come back. Mr. Joudrey arrived back at the house in about five to 15 minutes. At this point, only the three of them were home and when Mr. Joudrey came back, the three of them smoked a joint to calm things down a little more, listen to some music and talk. Mr. Joudrey did not say anything about earlier conversation with SJ and Alex Newcombe did not have a conversation with him about what he had discussed with SJ.

[169] A short time later, SJ said that she was going with her sister to get some clothes from her house and about 20 to 30 minutes later, someone arrived outside to pick her up in a blue BMW. SJ said that her sister was picking her up, but Mr. Newcombe did not know her sister. She left the house and he watched her get into the blue BMW with two males - the driver and a passenger. He did not think anything about that, just that somebody else was probably picking her up. He had no idea who was in the blue BMW and he did not take any offence to the fact that she just got into a vehicle with two men.

[170] Mr. Newcombe said that SJ came back to his house about a half-hour later sometime around 3:00 p.m. When she returned, she had a bookbag and a little gym bag with her, which he believed contained her clothes. He did not see who had brought SJ back to his house. On her return, she seemed to be in a good mood and there was nothing unusual in their conversation. At that point, the only people in the house were Mr. Alex Newcombe, Mr. Joudrey, and SJ. He recalled that they smoked another joint and just relaxed while listening to music.

[171] Mr. Newcombe maintained that he did not drive Mr. Joudrey's car at all that day and he confirmed that he did not have a car, nor did he have access to any other

vehicle. However, with respect to the statement made by Mr. Joudrey that Mr. Newcombe had driven his car, Mr. Newcombe maintained that was “false.”

[172] About a half-hour after SJ returned to the house, Mr. Newcombe noticed that the blue BMW that had previously picked SJ up had come back again and was outside the house. Mr. Newcombe noted that the man who had been in the passenger seat got out of the car and started walking towards the front door. He got up and went to the door, opened it, and asked who he was and why he was there. Mr. Newcombe did not know the person at the door but realized that he was the person who had been in the blue BMW that had previously picked up SJ.

[173] At this point, Mr. Newcombe was standing in the doorway and Mr. McKinnon was standing about three feet from the bottom of the steps and about halfway up the driveway. Mr. Newcombe thought this was probably SJ’s ex-boyfriend and he acknowledged that it upset him “a little bit” to see him there. He told Mr. McKinnon that SJ did not want to talk to him. SJ and Mr. Joudrey were seated on a loveseat against the wall at that time.

[174] Mr. Newcombe stated that he did not believe that SJ knew what was happening at the door or what he had said, but Mr. McKinnon said that he wanted to talk to SJ again and became more aggressive in saying that. Mr. Newcombe turned around and asked SJ if she wanted to talk to her ex-boyfriend and she said no. Mr. Newcombe then told Mr. McKinnon that SJ did not want to talk to him and “kindly” asked him to leave and he left the house.

[175] Mr. Newcombe noted that while Mr. McKinnon was talking to him, he was kind of leaning back-and-forth and his words were a little slurred. He felt that Mr. McKinnon was agitated when he was talking and got more agitated when he told Mr. McKinnon that SJ did not want to talk to him. There was no altercation at that point, there was just a verbal exchange and Mr. McKinnon stayed about six feet away from Mr. Newcombe. Mr. Newcombe says that Mr. McKinnon went back to his car and they drove off. He did not recognize the driver of the blue BMW.

[176] After Mr. McKinnon left in the blue BMW, Mr. Newcombe came back into the living room, sat down and asked SJ who it was and why he was there. She said she did not know why he was there and told him that there was no reason for him to be there. Mr. Newcombe felt that SJ was “shocked” to hear that Mr. McKinnon had showed up at the house.

[177] Mr. Newcombe stated that before Mr. McKinnon arrived at the house the first time, he had noticed on Snapchat that Cameron and McKenzie were together and he asked them if they could pick up a rat to feed his snake. At that time, his friends were some distance away and he did not know how long it would take for them to pick up food for his snake and then come to his house. He stated that they often hung out together with him and the two of them were usually around when he fed his snake.

[178] Mr. Newcombe said that he did not mention anything to Cameron or McKenzie about what SJ had told him about as it was “none of their business.” He also said that he did not mention anything about SJ’s ex-boyfriend showing up at the house because he recalled having sent the message to his two friends before the first time that Mr. McKinnon came to the house.

[179] About a half-hour after Mr. Newcombe had asked SJ about who the guy was who came to the door and why he was there, Mr. Newcombe was walking from the kitchen to the living room, looked straight out the window and saw the blue BMW parked in front of the house. When he saw the car, he was closer to the loveseat by the wall where SJ was sitting and Mr. Joudrey was closer to the door sitting on the sofa by the window. Mr. Newcombe opened the door and walked out to meet Mr. McKinnon on the driveway, about six feet from the bottom of the stairs to the house. The driver of the blue BMW remained in the car.

[180] As they were approaching each other, Mr. McKinnon told Mr. Newcombe that he wanted to talk to SJ and, once again, Mr. Newcombe told him that she did not want to talk to him. He again asked Mr. McKinnon to leave the area. Instead of leaving, Mr. McKinnon approached and pushed Mr. Newcombe as he stumbled a little bit. Mr. Newcombe responded by shoving Mr. McKinnon back and he fell to the ground. Then Mr. McKinnon got back up, quickly, gave Mr. Newcombe another shove before running to his car and driving off again.

[181] During this push and shove exchange, Mr. McKinnon and Mr. Newcombe were only about two feet apart. Being that close, Mr. Newcombe noticed that Mr. McKinnon was definitely drunk; he was slurring his words and he smelled an odour of alcohol. Mr. Newcombe stated that Mr. McKinnon was very angry and was “very, very agitated.”

[182] After this pushing and shoving incident with Mr. McKinnon on the driveway in front of the house, Mr. Newcombe went back in the house and asked SJ why that

guy kept coming to the house, what did he want, why was he texting her and what did he want to talk to her about. She said she did not know and so Mr. Newcombe asked her if she would text Mr. McKinnon and let him see it so that he would know that she was telling him not to come to the house again. She sent the text message to Mr. McKinnon and he saw that message himself. Mr. Joudrey remained seated on the couch by the window as Mr. Newcombe was talking to SJ.

[183] About 15 minutes after SJ sent that text message to Mr. McKinnon, Mr. Newcombe was sitting on the loveseat with SJ and Mr. Joudrey was sitting on the couch by the window and the next thing he knew, the door was opened and Mr. McKinnon walked in and sat on the couch next to Mr. Joudrey. Mr. Newcombe said that he did not notice Mr. McKinnon arrive because he was not really paying attention to the front door and they were talking, plus it was starting to get dark around 5:30 p.m. in mid-March.

[184] Mr. Newcombe's thoughts were that Mr. McKinnon is now in his house and he has been made aware twice that he was not welcome there. Mr. Newcombe said that he was in shock that Mr. McKinnon had just opened the door, closed it, and come in and sat down on the couch by the window next to Mr. Joudrey. He was seated on the loveseat with SJ beside him.

[185] Then Mr. Newcombe stood up and told Mr. McKinnon to get out of the house. However, instead of leaving the house, Mr. McKinnon stood up and attempted to come at Mr. Newcombe but there was a table in the way, and he stumbled a little bit. Mr. Newcombe got around the table and pushed Mr. McKinnon's chest with his hands and was pushing him towards the door.

[186] In response, Mr. McKinnon swung at Mr. Newcombe and hit the top of the left side of his head. He responded by punching Mr. McKinnon in the ribs on the left side, which seemed to wind Mr. McKinnon and that gave him an opportunity to push him closer to the door. Mr. Newcombe opened the door, but then Mr. McKinnon pushed him back into a closet and Mr. Newcombe responded with the punch to the left side of Mr. McKinnon's jaw with his right hand. The only other people in the house at this time were SJ and Mr. Joudrey, and Mr. Joudrey had moved over to the loveseat to sit beside SJ.

[187] After Mr. Newcombe punched Mr. McKinnon on the jaw, he stumbled a bit and Mr. Newcombe gave him another shove out the door and then he closed and locked the door. He was not sure if Mr. McKinnon was going to try to get back into

the house, so he locked the door to protect the house. He sat down on the couch for about five minutes and then he realized that Mr. McKinnon was still laying outside, so he looked at SJ and asked her if she would call an ambulance because he was not sure if Mr. McKinnon had hit his head when he fell down. Mr. Newcombe said that he asked SJ to do that because he wanted to make sure that Mr. McKinnon was all right.

[188] Mr. Newcombe also asked SJ why Mr. McKinnon kept coming back to the house and what he wanted to talk to her for about, even after she had told him not to come. She said that she still did not know why he kept coming back. Mr. Newcombe stated that Mr. Joudrey had no reaction to any of this conversation, and did not say anything.

[189] A short time later, Mr. Newcombe's uncle, Walter Newcombe, knocked at the door and when Alex Newcombe opened the door to let him in, he saw that Mr. McKinnon was still outside laying on the ground. He let his uncle in and then closed the door and locked it again. The, he saw Mr. McKinnon laying about two feet from the bottom of the stairs.

[190] After Walter Newcombe came into the house, he asked Alex Newcombe what had happened with the guy outside on the ground. In response, Alex Newcombe told his uncle that the guy had been there three times, and that he had told him that he did not want him there, but when he came back to the house, Alex Newcombe got him out of the house and that is where he ended up.

[191] Mr. Alex Newcombe confirmed that the ambulance had been called and it arrived about 10 to 15 minutes after the call. He added that, two minutes after he saw the ambulance approaching up the street, that is when Cameron and Mackenzie arrived with the rat for his snake. He let him in the house and closed the door. A short time later, the house was surrounded by police officers.

[192] Mr. Newcombe was asked to describe SJ's actions after he was able to push Mr. McKinnon out of the house. He stated that when he first got Mr. McKinnon out of the house, SJ wanted to go outside to make sure that he was okay. He "guessed" that this was probably before his uncle, Walter Newcombe, arrived at the house. When SJ went out of the house to check on Mr. McKinnon, he told her that it was either she was staying with him or she was going out with Mr. McKinnon. When she went out to see how he was, Mr. Newcombe locked the door behind her. A short time later, SJ knocked at the door to come back in and said that she just wanted to

make sure that Mr. McKinnon was okay. Mr. Newcombe opened the door to let her in and locked the door again.

[193] Mr. Alex Newcombe confirmed that SJ had called the ambulance which arrived about 15 minutes after SJ came back into the house. He stated that his uncle Walter had arrived at the house about two minutes after he let SJ back in the house. Mr. Alex Newcombe confirmed that, at no point in his interactions with Mr. McKinnon, he told him to give his watch over to him. He also stated that at no point in their interaction did he say anything to Mr. McKinnon about giving him his gold chain.

[194] With respect to when he first saw the gold chain and the watch, Mr. Alex Newcombe said he never saw the chain. As for the watch, he found out that there was a watch in the house that the police were looking for when his mother phoned him and relayed that information to him. He recalled that the conversation with his mother about the watch had occurred while the police were surrounding the house around midnight.

[195] At the time of the phone call from his mother, Mr. Newcombe stated that the only people left in the house were him, Cameron Colley, and Mr. Joudrey. The others had left or he had kicked them out. In particular, he was referring to SJ whom he had asked to leave the house. When his mother mentioned that the police were looking for a watch, he asked the others in the house to help him find it. It was located underneath the couch where Mr. McKinnon had been sitting, near the window. Mr. Newcombe said that in his efforts to locate the watch, he was tearing everything apart, moving everything, and ripping the curtains down in his efforts to look for that “misplaced” watch.

[196] On cross-examination by the Crown Attorney, Mr. Alex Newcombe confirmed that his uncle, Walter Newcombe, was not at the house during these events, and although he was not sure of their exact time of arrival, he believed that his friends, Cameron and Mackenzie came shortly after the ambulance arrived at the house. He maintained that Mr. McKinnon came to their house on Kennedy Drive on four occasions, one time to pick up SJ and then there were three other times when he had contact with him.

[197] Mr. Newcombe stated that he had also read a text message sent by SJ to Mr. McKinnon telling him not to come back to the house, but that was the only text message that he had seen her send. He also stated that when SJ came over to his

house, she usually sent him a text message before arriving but this time he was not expecting her and had no idea why she was there with Mr. Joudrey. When SJ came into the house and sat down, and Mr. Joudrey stayed by the door. Mr. Joudrey had said that SJ and Mr. Newcombe needed to talk, then he went outside and drove off in his car. Mr. Newcombe saw that SJ had some purple bruises on the side of her neck.

[198] After Mr. Joudrey left in his car, then SJ told him that she had been sexually assaulted or raped by a former boyfriend. Mr. Newcombe stated that he had been in a relationship with her for a couple of months at that point and that he was “upset” to hear that but he tried to calm her down and console her. She did not mention the former boyfriend’s name and he did not ask her for his name. Mr. Newcombe said that SJ had calmed down, so he sent a text to his friend, Colin Joudrey, to tell him that it was okay to come back to the house and he returned within about five minutes. Mr. Newcombe estimated that Mr. Joudrey had left him and SJ alone in the house for between 15 and 30 minutes before returning there.

[199] Mr. Newcombe confirmed that his mother was not home and he was not exactly sure where his uncle was, because he had left the house around 6:00 a.m. and was working, doing building maintenance at a nearby building complex. Mr. Newcombe added that he was not sure when his uncle had left for work because he had been asleep until sometime between 10:30 a.m. and 11:30 a.m.

[200] Mr. Newcombe stated that after his friend, Mr. Joudrey, came back to the house, they smoked a joint together and tried to stay off the topic of what happened to SJ the night before to keep her calm. While they were listening to music, SJ told him that her sister was coming to pick her up to go home and get some clothes. Mr. Newcombe estimated that about 20 to 30 minutes later SJ left with what was supposed to be her sister. Before she left, he told her that she was welcome to come back if she wanted to. Mr. Newcombe had never heard SJ mention that she had a sister before that time.

[201] Then, Mr. Newcombe confirmed that it was not a woman who came and picked SJ up at his house. He confirmed that it was two males in the vehicle and that based upon his later interaction with Mr. McKinnon, he confirmed that the driver was not Mr. McKinnon. He did not know who the two males were in the car when they picked up SJ. Mr. Newcombe estimated that SJ was gone for about half an hour and then returned to the house with two bags of clothes. When she returned to the house, Mr. Newcombe said that the three of them again shared another joint.

[202] Without specifying the time that had elapsed between SJ returning to the house with two bags and Mr. Newcombe maintaining that the three people in the house shared a joint, the next thing he noticed was that the same blue BMW was outside the house. There were two males in the vehicle, who he did not recognize, but then the passenger got out of the car. Mr. Newcombe opened the house door to see what he wanted. He was not alarmed to see this stranger coming to the door, but he wanted to know who he was and why he was there.

[203] Mr. Newcombe asked those questions while he was standing in the doorway and the stranger was about three feet in front of the steps to the house. He said that he was SJ's boyfriend and that he wanted to talk to her. The first thing that came to Mr. Newcombe's mind was that this is the guy that had just sexually assaulted his girlfriend the night before. He initially stated that he was a "little upset" by that guy being there and wanted to protect SJ. When questioned about being "a little upset" as opposed to a lot upset, he initially agreed with "a lot" upset and then added, "Yeah, we can definitely go with I was very, very upset, then."

[204] Mr. Newcombe told the ex-boyfriend [Mr. McKinnon] that SJ did not want to talk to him. He acknowledged that he had not asked SJ about whether she wanted to talk to Mr. McKinnon, stating that it was his choice, his house, and Mr. McKinnon wasn't welcome in his house. However, Mr. Newcombe said that Mr. McKinnon persisted and wanted to talk to SJ. While this conversation was occurring, Mr. Newcombe and Mr. McKinnon were about six feet away from each other, with him being about three feet away from the bottom of the steps to the house.

[205] At that point, SJ was sitting in the living room on the loveseat furthest away from the window. Mr. Newcombe looked at Mr. McKinnon and then asked SJ if she wanted to talk to him. He told her that she could talk to him if she wanted to, but she said that she did not want to talk to him. Although SJ could not see Mr. McKinnon at the door from where she was sitting, Mr. Newcombe assumed that she had heard them speaking at the door, because the door was open.

[206] When they were speaking at the door, Mr. Newcombe noticed that Mr. McKinnon appeared to be very intoxicated, because he was slurring his words and was swaying back and forth while standing still. He also noticed that, after the first time Mr. McKinnon said that he wanted to speak with SJ and that he was her boyfriend, the next time that he asked to see her, he was more aggressive and got agitated. Mr. Newcombe confirmed that, on this occasion, there was only a verbal exchange at the door between him and Mr. McKinnon, then he left the area.

[207] After Mr. McKinnon left the house, Mr. Newcombe came back inside, sat down and asked SJ why Mr. McKinnon was there, and she said she didn't know. Although he asked SJ who that guy was, he confirmed that he "kind of already knew who he was" because, when they met outside the house, he introduced himself as being SJ's boyfriend. Mr. Newcombe stated that SJ appeared to be shocked when Mr. McKinnon showed up at the house.

[208] About a half-hour later, Mr. McKinnon came back to the house. As Mr. Newcombe was walking from the kitchen to the living room, he had a clear view out the front window of Mr. McKinnon walking toward the house from the blue BMW parked in front of the house. As Mr. McKinnon approached the house, Mr. Newcombe went outside and met him on the driveway. Mr. Newcombe agreed that he was a "little agitated" and was wondering why this guy came back to the house when he had told him that SJ did not want to talk to him.

[209] Mr. McKinnon told Mr. Newcombe that he wanted to talk to SJ, and Mr. Newcombe, once again, told him that she did not want to talk to him. After that, Mr. McKinnon pushed Mr. Newcombe backwards using both his hands with a push to the chest. Mr. Newcombe agreed that he is a fairly solid and strong guy, who then weighed about 175 pounds. He estimated that Mr. McKinnon was similarly built.

[210] Mr. Newcombe stated that Mr. McKinnon pushed him, but he did not fall to the ground. In response, Mr. Newcombe pushed Mr. McKinnon hard enough that he fell to the ground. Mr. McKinnon got back up and pushed Mr. Newcombe back with a similar force to the first push. After Mr. McKinnon pushed Mr. Newcombe back, that gave him enough space to get away and Mr. McKinnon left the area.

[211] Mr. Newcombe went back into the house and asked SJ if she had texted Mr. McKinnon and told him not to come back to the house. SJ said that she forgot to text Mr. McKinnon with that message, so Mr. Newcombe asked her to send that text message to him at that point. Mr. Newcombe also told SJ that he wanted to see the message himself and he saw the message that SJ sent to Mr. McKinnon.

[212] However, about 15 to 30 minutes later, Mr. McKinnon showed up at again the house. On this occasion, Mr. Newcombe did not see him coming toward the house because he did not think that he saw the blue BMW car parked in front of the house. He later noticed the car was parked down the street in front of another house. Mr. Newcombe stated that Mr. McKinnon walked right into the house and sat down on the couch by the window. He was shocked and stunned to see that Mr. McKinnon

had just walked into the house to apparently speak to SJ. Mr. Newcombe walked over to where Mr. McKinnon was seated and told him to “get the fuck out of my house.” Mr. Newcombe acknowledged that, at this point, he was “very, very agitated.”

[213] After Mr. Newcombe told Mr. McKinnon to “get the fuck out of my house,” Mr. McKinnon got up and tried to come at him, but the coffee table got in his way. Mr. McKinnon stumbled over the coffee table. Mr. Newcombe got around the coffee table and started to push Mr. McKinnon towards the door. As he was doing so, Mr. McKinnon punched him in the head once.

[214] Mr. Newcombe moved back a little from the punch and gave Mr. McKinnon a punch on the left side of his ribs, which winded him and gave him the opportunity to push Mr. McKinnon closer to the door. Mr. McKinnon pushed Mr. Newcombe into the closet, but he came out, got the exterior door open, and gave Mr. McKinnon a shove back. Mr. Newcombe also punched Mr. McKinnon on the left side of the face above the jaw, one time, and then shoved him out the door.

[215] On further cross-examination, Mr. Newcombe confirmed that there had been no interaction in the house where Mr. McKinnon’s chain or watch were taken off. Furthermore, Mr. Newcombe stated that he had no idea how the watch or gold chain came off Mr. McKinnon. In fact, Mr. Newcombe stated that only the watch had been found in his house, not both items, referring to the gold chain.

[216] Mr. Newcombe initially said that he gave Mr. McKinnon “a good push” but did not throw him out of the house. However, he agreed that he had “pushed him very hard” to get him out of the house and then he locked the front door. As the door was being closed, Mr. Newcombe noticed that Mr. McKinnon “went down the stairs” but was not sure if he walked or fell, because he had closed the door.

[217] Mr. Newcombe did not look out to see how Mr. McKinnon was doing or call the police. He stated that he only found out that Mr. McKinnon was still outside the house first through SJ and then after his uncle entered the house. Just prior to SJ going outside to see if Mr. McKinnon was okay, Mr. Newcombe told her that she had to make a choice whether she wanted to be with him or Mr. McKinnon. Since SJ chose to outside and check on Mr. McKinnon, he locked the door behind her.

[218] After locking the door behind SJ, Mr. Newcombe looked through the window in the door and saw that Mr. McKinnon was about two feet from the end of the steps

laying down in the snow. He did not see any blood in the snow. Mr. Newcombe confirmed that the only other person in the house was his friend, Colin Joudrey, as neither his mother nor his uncle were home at that time. He also confirmed that his two friends had not yet arrived, although he had sent them a message much earlier in the afternoon to bring over some food for his snake.

[219] Mr. Newcombe said that SJ knocked at the door and said that she wanted to come back in and told him that Mr. McKinnon “was okay or whatever it was” so he let her back in and locked the door again. Shortly thereafter, his uncle showed up and knocked at the door. Mr. Alex Newcombe went to the door, looked out the window to see who it was and let his uncle in. At that point, he noticed that Mr. McKinnon was still laying in the snow in the same position and he had not moved.

[220] Once Walter Newcombe was in the house, his uncle asked him about “the guy laying outside” and Mr. Alex Newcombe told his uncle what had happened. Then, Mr. Alex Newcombe became concerned because Mr. McKinnon had not moved and that is why he suggested to SJ that she should probably call an ambulance for Mr. McKinnon. SJ made the call for an ambulance.

[221] Mr. Newcombe stated that he saw the ambulance in front of the house around 6:00 p.m., which was about 15 minutes after SJ’s call. Mr. Newcombe stated that the ambulance arrived and then his friends, Cameron and MacKenzie, arrived at the house about two or three minutes after the ambulance. He noticed that the ambulance had its lights flashing in front of the house and he also noticed, at the same time, that there was a police paddy wagon behind the ambulance with its lights flashing. The police never came to the door, but a short time later there were a great number of police cars surrounding their house.

[222] Mr. Newcombe stated that after the police arrived in the area and surrounded the house, his uncle went out of the house to get into his car. Walter Newcombe’s car was parked on the other driveway to the duplex. Mr. Alex Newcombe noticed that as his uncle got close to his car, he was arrested by the police.

[223] Mr. Newcombe confirmed that, between 7:00 p.m. and 8:00 p.m., he asked SJ to leave the house. She left the house and he saw her get arrested by the police.

[224] Mr. Colley and Mr. MacDonald stayed in the house with him but around 11:00 p.m., Mr. MacDonald left the house and was arrested by the police. Mr. Alex Newcombe had no idea why the police were there, or why they could not leave the

house without being arrested. However, he was informed that if he left the house he would be arrested by the police, so he closed the door and remained in the house.

[225] Around midnight, his mother called him and asked him why the police were there. Mr. Alex Newcombe gave his mother a “quick rundown” of what had happened, and she advised him that she was on her way home. About 45 minutes later, she called again to say that the police were looking for a watch, and at that point the only people in the house were Alex Newcombe, Cameron Colley, and Colin Joudrey. He asked them to help him find the watch and after they moved the couch, they located the watch at the back of the couch.

[226] On further cross-examination, the Crown Attorney suggested that either Mr. Alex Newcombe or his uncle took Mr. McKinnon’s watch and tried to take his gold chain or took his chain off. Mr. Alex Newcombe said that did not happen. When it was suggested that one of them had demanded that Mr. McKinnon take the watch and chain off, Mr. Newcombe said that he did not say that, and his uncle was not even there, so he could not have made that demand.

[227] The Crown Attorney also suggested that Alex Newcombe, MacKenzie MacDonald, Cameron Colley, and his uncle, Walter Newcombe, all had struck Mr. McKinnon at least once. Mr. Alex Newcombe disagreed with that suggestion and stated that, in fact, he was the only one who laid hands on Mr. McKinnon.

[228] In concluding his cross-examination of Mr. Alex Newcombe, the Crown Attorney then posed questions in the form of several suggestions which Mr. Alex Newcombe did not dispute during the following exchange starting at line 18 at page 282 and concluding at line 13 on page 283 of the transcript:

Q. And you struck him and... so you’re the only one that struck him. You agree that you struck him and caused the injuries that he suffered.

A. Yes, I did. Yes, I did.

Q. And he was pretty seriously injured.

A. I’m not sure. But yes.

Q. Knocked out.

A. Yes, he was.

Q. I mean he wasn’t really a threat to you. Because I mean he was....

A. I didn’t know who he was.

Q. ... Drunk

A. I... exactly. Some people are Superman. They can be.

Q. Okay. So, my suggestion to you is you were really angry.

A. I was upset, yes.

[229] In response to the final questions on cross-examination by the Crown Attorney, Mr. Alexander Newcombe stated that he did not get his friends involved in this incident, that he did not “work over” Mr. McKinnon, nor was he looking for retribution in his dealings with Mr. McKinnon.

[230] During cross-examination by the other Defence Counsel, Mr. Newcombe stated that he had seen a Snapchat that his friends, Cameron Colley and MacKenzie MacDonald, were hanging out together in a car. He was not sure where they were, but he asked Cameron if he could pick up some rats for his snake. They did pick up some rats for the snake and arrived at his house with them.

ANALYSIS:

[231] In a criminal trial, the most fundamental rule is that the burden of proving the guilt of the accused person beyond a reasonable doubt rests upon the prosecution and does not shift to the accused at any stage in the proceedings. The trier of fact must be satisfied beyond a reasonable doubt of the existence of all the essential elements of the offence in order to convict an accused person.

[232] Reasonable doubt has been defined by the Supreme Court of Canada in *R. v. Lifchus*, [1997] 3 SCR 320 and in *R. v. Starr*, [2000] 2 SCR 144. Those cases have determined that a “reasonable doubt” does not involve proof to an absolute certainty, but more is required than proof that the accused is probably guilty. As a result, the Supreme Court of Canada cases have determined that proof beyond a “reasonable doubt” is much closer to absolute certainty than it is to probable guilt.

[233] Where credibility is the key issue of the case, as it is here, then reasonable doubt will also apply to that issue. In *R. v. W. (D.)*, [1991] 1 SCR 742, the Supreme Court of Canada formulated model instructions for a trier of fact regarding the issue of reasonable doubt which I must keep in mind and apply. If I accept the evidence of the accused, I must acquit. If I do not accept the evidence of the accused, but the

evidence of the accused leaves me with a reasonable doubt, then I must acquit. If I am not left with a reasonable doubt by the evidence of the accused, then I must look at the totality of the evidence which I accept and, on that basis, determine whether the Crown has proved its case beyond a reasonable doubt.

[234] It must be emphasized that mere disbelief of the accused's evidence does not satisfy the burden of proof which rests upon the Crown. Given the third step in the application of the burden of proof as mentioned in the *W. (D.)* case, it is not necessary for the trial judge to believe or accept the defence evidence for there to be a reasonable doubt. The evidence as a whole may leave the trier of fact with a reasonable doubt and in considering the evidence or lack of evidence, I may believe and accept all, some, or none of the evidence of a witness or accept parts of the witness's testimony and reject other parts.

[235] There are many tools for assessing the credibility and reliability of testimony and determining whether I am satisfied beyond a reasonable doubt as to the guilt of the accused person. First, I can consider whether there are any material inconsistencies with previous statements or testimony at trial. Second, I can assess the partiality of witnesses due to kinship, hostility or self-interest. Third, I can consider the capacity of the witness to relate their testimony, that is, their ability to observe, remember and communicate the details in their testimony. Fourth, I can consider contradictory evidence as well as the overall sense of the evidence and when common sense is applied to the testimony, whether it suggests that the evidence is impossible or highly improbable.

[236] As the evidence unfolded, it became apparent that there were, at least, two different versions of the events presented to the Court by the witnesses. In terms of the background circumstances, to provide context to the events that unfolded on the evening of March 12, 2018 and then during the day of March 13, 2018, there does not appear to be very much, if any, dispute between the parties.

[237] It would appear from the evidence that Mr. McKinnon and a young female [SJ] had been in a "friends with benefits" relationship for about three to four years. At the same time, based on the evidence of Mr. Alex Newcombe and Mr. Colin Joudrey, Mr. Newcombe had believed that SJ was his girlfriend and that they had been in a relationship for about two to three months. Mr. Newcombe stated that he was with SJ every day or every second day from December 2017 until mid-March 2018.

[238] Based upon that evidence, without hearing from SJ who was not called as a witness during this trial, Mr. McKinnon, who in March, 2018 was approximately 20 years old and Mr. Alex Newcombe who was about 21 years old at that time, believed they were both in some form of a relationship with SJ. At the time of this incident, I find that SJ was less than 18 years old in March, 2018, as the parties referred to portions of Mr. McKinnon's and Mr. Joudrey's evidence in the transcript of SJ's trial in Youth Court, arising out of this incident, which was heard in July 2018.

[239] Moreover, I find that the evidence established that, on or about March 13, 2018, Mr. McKinnon and Mr. Alex Newcombe had never met each other and neither one of them knew that the other male was in some sort of a relationship with SJ. I find that the evidence established that Mr. McKinnon was wondering why he was dropping off or picking up SJ on Kennedy Drive on several occasions. At the same time, Mr. Newcombe was wondering why SJ kept getting text messages from Mr. McKinnon and why Mr. McKinnon had come to the house on a few occasions to pick up SJ or wanting to talk to her.

[240] In those circumstances, I find that Mr. McKinnon could not have had any prior animus towards Mr. Alex Newcombe before they met at 58 Kennedy Drive on a couple of occasions. In addition, since Mr. McKinnon and Mr. Alex Newcombe did not know each other, the only logical explanation for Mr. McKinnon coming to the Newcombe house at 58 Kennedy Drive on at least a couple of occasions is that SJ had facilitated those visits, on each occasion, by a telephone call or text message to Mr. McKinnon to ask him to pick her up at that location or to come to that location in order to see and presumably talk to her.

[241] Furthermore, with respect to the background and the complicated relationship triangle which was created by SJ, Mr. McKinnon had no idea whatsoever that SJ had informed Mr. Alex Newcombe and Mr. Colin Joudrey that she was alleging that he had raped her the previous evening when they spent the night together at a hotel. Mr. McKinnon acknowledged drinking quite a lot of alcohol with SJ during the prior evening and that he was still intoxicated during the afternoon of March 13, 2018. However, he categorically stated that he had not sexually assaulted or assaulted SJ the previous evening.

[242] For his part, Mr. Alex Newcombe acknowledged that he was "upset" to hear about the allegation that his girlfriend had been raped by someone during the previous evening and wanted to comfort her. Later in the afternoon of March 13, 2018 when Mr. McKinnon arrived at the Newcombe house located on Kennedy

Drive to either pick up SJ or to want to talk to her after receiving text messages or phone calls from her, Mr. Alex Newcombe acknowledged that, at that point, he was “very, very agitated” to see Mr. McKinnon coming to the house, after having told him that SJ did not wish to speak to him and making it very clear, in no uncertain terms, that he was not welcome at his house.

[243] As a result of what I have found to be the background and context to the events related to the Court by the witnesses, I find that when Mr. Alex Newcombe came face to face with Mr. Bryson McKinnon, although previously unknown to each other, there can be no doubt that Mr. Newcombe had a very distinct animus towards Mr. McKinnon. I find that Mr. Alex Newcombe’s animus towards Mr. McKinnon started when he wondered why his girlfriend was communicating with this “other guy” and, undoubtedly, would have been significantly heightened upon hearing the allegation that she had been assaulted and raped by him the previous night.

[244] On the other hand, based on Mr. McKinnon’s testimony, it does not appear that he had any real animus towards Mr. Newcombe by virtue of the fact that he had never previously met him and was only wondering why he kept dropping SJ off or picking her up at the Newcombe house or on Kennedy Drive. Given the fact that he considered his relationship with SJ to be “friends with benefits,” his stated position that SJ would have to make a choice - to stay with him or if she wanted to be with Mr. Newcombe, who he only knew as the “other guy,” then she should stay with “the other guy” and stop communicating with him, is logical and not based on any animus towards that “other guy.”

[245] Although the Court was presented with a couple of versions as to what transpired inside and outside the Newcombe house on Kennedy Drive on the late afternoon of March 13, 2018, there is no dispute in the evidence that Mr. McKinnon was quite drunk when he arrived, at a minimum, two times at Mr. Newcombe’s house in a blue BMW without any announcement.

[246] The versions of events related to the Court by the witnesses differ with respect to whether the physical interaction and assault of Mr. McKinnon by Mr. Alex Newcombe and others occurred in the house and then continued outside the house. There is also a difference in the versions related to the Court as to whether the initial physical confrontation in the house was only between Mr. McKinnon and Mr. Alex Newcombe or whether his uncle, Walter Newcombe also played a significant role in assaulting Mr. McKinnon, with the other two accused playing a more minor role in joining Alex Newcombe and Walter Newcombe in the assault of Mr. McKinnon.

[247] Finally, there is no real dispute in the evidence that Mr. McKinnon was apparently seen by SJ lying unconscious on the roadway of Kennedy Drive after being, in his words as well as Mr. Alex Newcombe's words, literally thrown out of the house and down the three steps of the front entry. Mr. McKinnon was able to get up and walk a few feet, before collapsing on the snow-covered road. He was then dragged off the road by someone and left on a snowbank on the side of the road where he was located by the ambulance which attended at the scene around 6:00 p.m. on March 13, 2018. According to Mr. Alex Newcombe, SJ had gone out of the house to see if Mr. McKinnon was okay and she had called for the ambulance.

[248] Although no medical practitioner was called as a witness nor were any medical reports filed as exhibits in the trial, the Crown introduced four black-and-white photographs as Exhibit 2, which were identified by Mr. McKinnon as being photographs of his face taken at the hospital. Those photographs documented the severe bruising under his left eye, marks on his right ear and right side of his neck, as well as on the left side of his face above the jaw and the right jaw. The photographs were taken at the hospital by a police officer on the evening of March 13, 2018. Mr. McKinnon was informed by the medical staff that he had sustained a broken nose, internal bleeding in his brain, and some hemorrhaging as well as a concussion.

[249] Based upon those photographs, Mr. McKinnon's testimony in relation to those photographs and his understanding of the nature and extent of his injuries while he was examined at the hospital on the evening of March 13, 2018, I find that the evidence established that he sustained "bodily harm" as defined in section 2 of the *Criminal Code*. I find that there can be no doubt that the hurt or injuries sustained by Mr. McKinnon both inside and outside 58 Kennedy Drive in Dartmouth, Nova Scotia, on March 13, 2018, certainly interfered with his health or comfort and they were more than merely transient or trifling in nature.

[250] Furthermore, I also find that, during the cross-examination of Mr. Alex Newcombe, the Crown Attorney established both the nature and the seriousness of the injuries suffered by Mr. McKinnon. In his questioning, the Crown Attorney suggested that Mr. Alex Newcombe was the one that had struck Mr. McKinnon and caused the injuries that he had suffered, to which Mr. Newcombe answered, "Yes, I did. Yes, I did." On the further question by the Crown Attorney, "And he was pretty seriously injured," Mr. Alex Newcombe answered, "I am not sure. But yes." Then

the Crown Attorney also suggested that Mr. McKinnon was “knocked out” by him, to which Mr. Alex Newcombe answered, “Yes, he was.”

[251] While there is obviously a dispute between the parties as to whether a robbery occurred or not, what is not disputed and has been clearly established by the evidence, after Mr. McKinnon had been taken to the hospital, police officers surrounded the Newcombe house on Kennedy Drive for several hours. Mr. Alex Newcombe’s mother, Cathy Dorrington, phoned her son and said that the police were looking for Mr. McKinnon’s watch and his gold chain, which were no longer in Mr. McKinnon’s possession after the physical altercation at the house. Mr. Alex Newcombe said that after searching the house intensely, Mr. McKinnon’s watch was located under the couch where he had been sitting while he was in the residence for a short time. Mr. McKinnon’s Nixon watch was turned over to the police when they entered the house with the consent of Ms. Dorrington.

[252] As for the gold chain, I accept Mr. McKinnon’s evidence that when he entered the Newcombe house, he had a gold chain around his neck and a Nixon watch on his wrist. However, I find that there is no doubt in the evidence that when Mr. McKinnon spoke to the police about what had happened around 6:00 p.m. on March 13, 2018, he was no longer in possession of his Nixon watch or his gold chain. I find that the watch and gold chain photographed in Exhibit 1 matched in every detail Mr. McKinnon’s descriptions of his watch and gold chain, with the additional very specific detail that the gold chain was broken on a link, with the clasp still attached. Mr. McKinnon identified his gold chain and Nixon watch as being the ones shown in Exhibit 1 and the ones that he had been wearing when he entered the Newcombe house around 6:00 p.m. on March 13, 2018.

[253] Based on the evidence of Mr. Alex Newcombe and Constable Sawler, Mr. Walter Newcombe had been arrested by police officers who were surrounding 58 Kennedy Drive in Dartmouth, Nova Scotia, shortly after 7:00 p.m. when he walked out of the Newcombe residence. Constable Sawler had been outside the Newcombe residence to secure the perimeter but was called by a colleague around 8:00 p.m. to come to the station and assist in the search of Mr. Walter Newcombe.

[254] In the search incidental to the arrest of Mr. Walter Newcombe, a gold chain matching the description provided by Mr. McKinnon and photographed in Exhibit 1 was found in Mr. Walter Newcombe’s left front pocket of his jeans. There is no dispute in the evidence that Constable Glenn Sawler located a gold chain of about 18 to 24 inches in length, broken on one of the links, with the ends still joined at the

clasp when he searched Mr. Walter Newcombe, incidental to his arrest, at the Dartmouth police station just after 8:00 p.m. on March 13, 2018.

[255] I find that the evidence established, beyond a reasonable doubt, that the gold chain in Mr. Walter Newcombe's pocket was the gold chain that Mr. Bryson McKinnon was wearing when he entered the Newcombe residence on March 13, 2018.

[256] In addition, I find that evidence established that Mr. McKinnon's Nixon watch was valued at about \$400 and his gold chain was valued at about \$100.

Was Mr. Joudrey a Witness of "Unsavoury Character"? and The Vetrovec Warning

[257] As mentioned by the parties in their submissions, a key issue is whether the Court accepts the evidence of Mr. McKinnon who was quite intoxicated at the time of this incident and had difficulty recalling some details of this incident due to the consumption of alcohol. The Crown Attorney submits that the difficulty recalling details and relating them to the Court is also likely due to the concussion that he suffered as a result of a severe beating primarily perpetrated by Alex and Walter Newcombe, with some additional blows being inflicted by the other two defendants on Mr. McKinnon.

[258] Defence Counsel have submitted that Mr. McKinnon's evidence, while possibly being somewhat credible, is not reliable as he was not able to provide significant details, guessed at some, or assumed other details in his testimony.

[259] With respect to the evidence of Mr. Joudrey, the Crown submits that his evidence should be carefully scrutinized given the sometimes flippant and argumentative nature of his answers, but the Crown Attorney ultimately submits that his evidence supports and provides confirmatory evidence of Mr. McKinnon's account of a four-on-one, in his words, "beat down" of Mr. McKinnon at the hands of primarily Alex and Walter Newcombe. For those reasons, the Crown Attorney also submits that the Court should accept Mr. Joudrey's account of what transpired inside and outside the Newcombe residence on March 13, 2018.

[260] Defence Counsel have submitted that Mr. Joudrey should be regarded as an unsavoury witness and that the court should very carefully scrutinize his evidence and ultimately reject it in its entirety. Defence Counsel drew the Court's attention

to several similar questions and answers provided by Mr. Joudrey during SJ's trial in Youth Court where he acknowledged providing inconsistent or different answers during this trial. Moreover, they submit that Mr. Joudrey's attitude of not caring what he said in SJ's trial shows that he has acknowledged, in their words, that he has "fudged the truth" in the past while under oath in a court. Therefore, Defence Counsel submit that Mr. Joudrey's evidence is neither credible nor reliable in any aspects and should not be given any weight whatsoever.

[261] In *Vetrovec v. The Queen*, [1982] 1 SCR 811, the Supreme Court of Canada determined that when an unsavoury or untrustworthy witness gives testimony, the trial judge must warn the trier of fact of the risks inherent in accepting such evidence. In this case, as the trial judge, I am the trier of fact and therefore, it is important to instruct myself on the *Vetrovec* warning and the special scrutiny of the evidence proffered by a witness who may be considered to be an unsavoury or untrustworthy witness.

[262] In *R. v. Khela*, 2009 SCC 4, Justice Fish outlined the principles that should inform a *Vetrovec* warning, which in the majority opinion, had two purposes: first, to alert the jury to the danger of relying on the unsupported evidence of unsavoury witnesses and to explain the reasons for special scrutiny of their testimony; and second, in appropriate cases, to give the jury the tools necessary to identify evidence capable of enhancing the trustworthiness of those witnesses. The Supreme Court of Canada stated that a proper *Vetrovec* warning should ensure that both purposes are served.

[263] In essence, the trier of fact, in a judge alone trial, should instruct themselves on the characteristics of the witness that may bring his or her credibility as a witness into serious question; for example, whether they were an accomplice, a jailhouse informant or an unsavoury witness. The evidence of those witnesses must be approached with the greatest of care and caution, especially if they have an interest in the outcome of the case, a strong motivation to lie, the ability to conceal true motives or a desire to minimize his or her own involvement.

[264] In *Khela, supra*, Justice Fish stated that it would be dangerous to base a conviction on unconfirmed evidence of this sort and that the trier of fact should look for confirmatory evidence that "can provide comfort that the witness is telling the truth." Fish J. noted that confirmatory evidence should be independent, but other evidence is also material if it bolsters the trier of fact's confidence in that witness's testimony. However, it is also important to note that the confirmatory evidence of

the unsavoury witness does not necessarily have to implicate the accused, its main role is to support the credibility of the witness.

[265] In this case, Mr. Joudrey has not been mentioned as an accomplice and, in fact, several questions posed on cross-examination by Defence Counsel related to why he did not enter the fray, with his black belt, either to inflict blows on Mr. McKinnon or to prevent the others from hitting him. Mr. Joudrey explained his rationale with respect to his martial arts training and why he did not become involved in this incident. He was questioned by the police because he was still in the Newcombe house with SJ and others once it was surrounded by the police and ultimately he was questioned on what, if any, involvement he had in this incident. No one has suggested, including Alex Newcombe, that Mr. Joudrey participated in the assault of Mr. McKinnon, nor was he a co-accused or a jailhouse informant who had a strong motivation to lie, or desire to minimize his own involvement in this incident.

[266] Moreover, I find that the totality of the evidence established that Mr. McKinnon was a complete stranger to Mr. Joudrey and they had never met each other until Mr. McKinnon happened to come to the Newcombe residence while Mr. Joudrey was there with SJ and Mr. Alex Newcombe. In those circumstances, I find it would be reasonable to infer and for that matter, when logic and common sense is applied to that scenario, that there would be absolutely no reason for Mr. Joudrey to be in collusion with the stranger in order to fabricate or exaggerate evidence in order to implicate his friends or well-known acquaintances.

[267] However, given the fact that Mr. Joudrey's evidence was at times evasive, argumentative, and flippant as well as being at times internally inconsistent and at other times externally inconsistent with the evidence that he had given under oath at SJ's prior trial, although he may not be technically classified as an "unsavoury" witness, those answers do bring the credibility of his evidence into question.

[268] Nevertheless, it is important for the trier of fact to keep in mind that, pursuant to the Supreme Court of Canada's *Vetrovec* warning, the trier of fact may still accept the evidence of Mr. Joudrey if the Court finds that there was material and independent evidence which was capable of enhancing the trustworthiness of his evidence.

[269] Having conducted an extensive review of all of the evidence proffered during the trial, I find that there are many examples where the confirmatory evidence of Mr.

Joudrey's testimony comes from other witnesses in this trial. Furthermore, as Justice Fish pointed out in *Khela, supra*, and it is important to repeat here when conducting the detailed analysis of Mr. Joudrey's evidence, that the confirmatory evidence of the unsavoury witness does not necessarily have to implicate the accused, its main role is to support the credibility of the witness.

[270] Some key examples which illustrate the independent confirmatory evidence of Mr. Joudrey's evidence are as follows:

- (a) Mr. McKinnon stated that, around noon, on March 13, 2018 after spending the evening with SJ, he and his friend, John, dropped her off in front of blue apartment buildings on Kennedy Drive in Dartmouth. He noted that SJ did not go into the blue apartment building, but rather, she got into a black car. Mr. McKinnon did not see who was driving that black car. Mr. Joudrey's evidence was that he got a text message from SJ saying that she had been raped by Mr. McKinnon and wanted him to come and get her before she talked to Alex Newcombe. Mr. Joudrey arrived in his black car and picked up SJ at the bottom of Kennedy Drive outside a blue apartment building. Mr. McKinnon's testimony with respect to the location where SJ was dropped off and then getting into Mr. Joudrey's black car is confirmatory evidence of Mr. Joudrey's account.
- (b) Mr. Joudrey's evidence was that he and SJ drove around for a short time and talked and then they went to the Newcombe house. He testified that he had told SJ that he should be present when she told her boyfriend, Alex Newcombe, that she had been raped by Mr. McKinnon. Mr. Joudrey stated that he wanted to be present at that time in order to try and calm down Mr. Newcombe. During this trial, Mr. Joudrey testified that he left the two of them alone shortly after SJ started to tell Mr. Newcombe what had happened and that he had only heard "a little bit" of their conversation. Mr. Joudrey was extensively questioned on his inconsistent answer on this issue which he provided during SJ's trial in Youth Court where he had stated that he had not heard any of their conversation. The confirmatory evidence of Mr. Joudrey's account during this trial that he left a very short time after SJ started to tell Alex Newcombe about the alleged rape the previous evening came from Alex Newcombe himself. Mr. Newcombe stated that when Mr. Joudrey and SJ arrived at the house, she was "shook

up” and crying and “within a few minutes” Mr. Joudrey left the house. After Mr. Newcombe and SJ had finished their conversation, Alex Newcombe testified that he sent a text message to Mr. Joudrey to tell him that it was okay to come back to the house.

- (c) Mr. McKinnon had stated that the first time he and his friend, John, drove to the Newcombe house at 58 Kennedy Drive in his blue BMW-3 was after he received a text message from SJ to pick her up at that address, around 4:00 p.m. Mr. McKinnon stayed in the car in front of the house and SJ came out of the house with a backpack and they left. Mr. Joudrey initially stated that he saw SJ leave the house, but did not see her get into the car, but he said that he had “assumed” SJ had left with Mr. McKinnon and his friend. Mr. Newcombe’s evidence was that SJ had told him that her sister was coming to pick her up to get some clothes from the group home where she was living. However, Mr. Newcombe stated that SJ did not leave the house and get into a car being driven by a female driver, but rather, got into a blue BMW with two males and then they drove off. Mr. Newcombe’s evidence confirms the evidence of Mr. McKinnon and, at the same time, confirmed that the assumption made by Mr. Joudrey that SJ had left with Mr. McKinnon was, in fact, correct. I find that Mr. Joudrey’s assumption was based on what he saw from his vantage point as well as what he heard while he was sitting beside SJ in the Newcombe residence when she had sent text messages or phoned Mr. McKinnon to come and get her. In fact, Mr. Joudrey had also testified that shortly after those texts or phone calls, SJ left the house and got into the blue BMW with two males, which was also observed by Mr. Alex Newcombe, after hearing her tell Mr. Newcombe that she was going to get some clothes with her sister. Mr. Newcombe confirmed that, shortly thereafter, SJ returned to his house with a bookbag and a gym bag which he believed to contain some of SJ’s clothes. All 2 accounts of this occasion where SJ got in the blue BMW confirm that SJ did not get in a car with her sister.
- (d) Mr. Joudrey described another incident where Mr. McKinnon got out of a blue BMW-3 four-door sedan and came up to the house. He heard Mr. McKinnon talking and noted that his speech was slurred. Mr. Joudrey testified that he believed Mr. McKinnon was intoxicated when he came to the Newcombe house. On this point, there is no

dispute in the evidence as Mr. McKinnon acknowledged that he was quite intoxicated on March 13, 2018, stating, in his words, that he was “probably pissed, loaded.” Mr. McKinnon’s evidence is certainly consistent with and supports the opinion evidence of Mr. Joudrey and Mr. Newcombe with respect to the fact that Mr. McKinnon was quite intoxicated on those occasions when he came to the Newcombe residence during the afternoon of March 13, 2018.

- (e) Mr. Joudrey had described one occasion when Mr. McKinnon came to the door, Alex Newcombe was standing in the doorway and Mr. Joudrey, who remained in the residence, heard a short conversation between the two of them, which led to some pushing and shoving, but no punches were thrown and then Mr. McKinnon left in the blue BMW. Mr. McKinnon did not initially recall Alex Newcombe stopping him as he was coming up the steps to pick up SJ, but his memory was refreshed by a prior recorded statement to the police which was made at the hospital while he was being evaluated. After refreshing his memory by reviewing a statement made shortly after the incident, he recalled that he had told the police that this guy came to the door, was in his face, and “yelling and screaming at me,” before he left. Mr. Newcombe’s evidence was Mr. McKinnon had come towards the door to the house on a couple of occasions and then left, with the first time being soon after SJ came back from the group home with some clothes in a backpack. Although Mr. Newcombe had never previously met Mr. McKinnon, he saw him come out of the same blue BMW that had earlier picked up SJ and he acknowledged that he was “a little bit” upset to see the person who had apparently raped his girlfriend the previous night walk up to the door. Mr. Newcombe said that they had a short conversation and he “kindly” asked Mr. McKinnon to leave and he did. Given the fact that Mr. Alex Newcombe had just come face to face with the person who he understood to be the alleged rapist of his girlfriend, I do not believe that there was a “kindly” request to vacate the property. Given his level of upset and agitation after hearing that Mr. McKinnon was the alleged rapist, it is far more likely that the words expressed, without any punches being thrown by Mr. Alex Newcombe, were a lot closer to yelling and screaming than to a polite conversation.

- (f) However, Mr. Newcombe also testified that Mr. McKinnon came back to the house on another occasion and came up to the door and wanted to speak with SJ. On this occasion, Mr. Newcombe's evidence was that he was "a little agitated" when he saw Mr. McKinnon approach the house and went outside and told Mr. McKinnon that SJ did not wish to speak with him. Mr. Newcombe's evidence was that Mr. McKinnon kept coming forward, stumbled, and pushed at him. Mr. Newcombe's evidence was that he responded by shoving Mr. McKinnon to the ground, but then Mr. McKinnon quickly got back up and shoved him once more and then ran back to the blue BMW and drove off with his friend. I find that Mr. Newcombe's own evidence is confirmatory of Mr. Joudrey's account of a pushing and shoving incident at the door without punches being thrown. Mr. McKinnon did not specifically recall the pushing and shoving aspect of this incident, but his evidence that "the guy" at the door was quite upset and yelling and screaming at him is certainly consistent with Mr. Newcombe's "agitated" state of seeing Mr. McKinnon back at the house after being told that SJ did not want to see him and undoubtedly being told in profane language and a loud voice, as Mr. McKinnon had stated, that he was not welcome there. I find that, given the agitated state of Mr. Newcombe, coupled with Mr. McKinnon returning to the house is entirely consistent with Mr. McKinnon's account of the guy at the door yelling and screaming at him due Mr. McKinnon's persistence in attending at the Newcombe house, which is certainly consistent with and supportive of Mr. Joudrey's evidence that there was a pushing and shoving altercation at the door, without punches being thrown.
- (g) Mr. Joudrey's evidence was that during the afternoon of March 13, 2018, the only people at the Newcombe residence located on Kennedy Drive were himself, Mr. Alex Newcombe, and SJ. Although there are differences in their evidence with respect to what Mr. Joudrey and Mr. Alex Newcombe did after they saw SJ leave the house in a blue BMW with two males, instead of her sister, and whether Mr. Newcombe drove Mr. Joudrey's vehicle looking for SJ at the group home, they both agree that SJ did return to the Newcombe residence a short time later that afternoon. I find that their evidence established that they were the only three people in the Newcombe house on those occasions

when Mr. McKinnon was at or near the Newcombe house in his friend's blue BMW-3 car when Mr. McKinnon was able to leave that area in his friend's blue BMW-3 series car, instead of being transported to the hospital in an ambulance.

- (h) Mr. Joudrey also testified that he overheard SJ's comments on the phone call to Mr. McKinnon where she asked him to come and pick her up at the Newcombe house. Mr. Joudrey said that he overheard SJ's comments while he was sitting beside her on the couch in the living room of the Newcombe residence, after Mr. McKinnon had come to the Newcombe house on a couple of occasions - the first time being when SJ walked out of the house and got into the blue BMW-3 car and another time when Mr. McKinnon came to the house and he and Mr. Newcombe became involved in a pushing and shoving incident. Mr. Joudrey's evidence is supported by Mr. McKinnon's recollection that, later in the afternoon on March 13, 2018, he received a text message from SJ to come and get her at the Newcombe residence. For his part, Mr. Alex Newcombe stated that, after the pushing and shoving incident outside the house, he went back into the house and asked SJ if she had sent a text message to Mr. McKinnon to tell him not to come back to the house. Mr. Newcombe says that SJ told him that she had forgot to do so, so he asked her to send a text message to Mr. McKinnon to tell him not to come to the house again. Mr. Newcombe stated that he wanted to know that SJ had sent a text message to Mr. McKinnon to tell him to stay away from the house and his evidence is that he saw that message himself. I find that, given what later transpired, it would appear that SJ communicated with Mr. McKinnon by sending different messages in the text, which Mr. Newcombe says he viewed, and during a phone conversation, which Mr. Joudrey stated that he overheard SJ's side of the conversation. Given the fact that I accept the evidence that there was an earlier incident which involved some pushing and shoving as well as yelling by an agitated Mr. Newcombe that the alleged rapist of his girlfriend was not welcome at his house, I find that, as Mr. McKinnon had stated in his evidence, his "whole" reason for coming back to the Newcombe house was because SJ had asked him to come back there, pick her up, and have a conversation with her. Mr. McKinnon's evidence is consistent with and confirmatory of the evidence proffered by Mr.

Joudrey that SJ had asked Mr. McKinnon to come back to the Newcombe house.

- (i) Although Mr. Joudrey and Alex Newcombe differ on the timing of the arrival of Walter Newcombe, Jermaine Colley, and McKenzie MacDonald, they both agree that those three people arrived later that afternoon and none of them were present when SJ walked out to the blue BMW or Mr. McKinnon walked up to the door and interacted with Mr. Alex Newcombe in a pushing and shoving incident, after which Mr. McKinnon left with his friend in the friend's blue BMW-3. Mr. McKinnon stated that, later that afternoon, when he came back to the Newcombe house at SJ's request, the three other accused were there and they followed him into the house after Alex Newcombe requested that he follow him into the house. Mr. McKinnon's evidence supports the evidence proffered by Mr. Joudrey that, after Mr. McKinnon got out of his friend's blue BMW-3 car, Mr. Colley and Mr. MacDonald followed him into the house and Walter Newcombe came into the house at about the same time;
- (j) I find that there is no real issue in dispute with respect to the identification of any of the accused as they were well-known to Mr. Joudrey through his friendship with Alex Newcombe and having been at the Newcombe house on many occasions with Mr. Walter Newcombe, his friend's uncle. Mr. Joudrey identified Mr. Colley and Mr. MacDonald as being the others in the house at all relevant times to the incident before the Court. Mr. McKinnon did not know any of the four accused prior to this incident, but he had a specific recollection of his interactions with Alex and Walter Newcombe and that all four accused were in the house when he was beaten up primarily by Alex and Walter Newcombe. Mr. Alex Newcombe also identified all of the people in his house; however, I do not accept his evidence that his uncle Walter Newcombe, Mr. Colley, and Mr. MacDonald all arrived after the incident and that he alone was involved in the physical altercation with Mr. McKinnon. Mr. McKinnon's evidence was that there were five or six people in the house, which is entirely accurate and confirmatory of Mr. Joudrey's evidence that the four accused were in the house with him and SJ. Mr. McKinnon's evidence that there were at least two or three people involved in beating him up inside the Newcombe house is consistent

with and confirmatory of Mr. Joudrey's account that the four-on-one "beat down" of Mr. McKinnon was primarily perpetrated by Alex and Walter Newcombe, with only a couple of blows being struck by the other two accused.

(k) With respect to Mr. McKinnon being in the Newcombe house for a short period of time prior to sustaining any injuries, Mr. Joudrey testified that when Mr. McKinnon came back to the Newcombe house in the blue BMW, which Mr. McKinnon had previously stated was at SJ's request, he had just got out of the BMW when Mr. Newcombe's two friends arrived and blocked the BMW. Mr. Joudrey testified that Alex Newcombe went out of the house towards the BMW and "brought Bryson inside" with the two of them walking into the house together. Mr. Colley and Mr. MacDonald followed Mr. McKinnon and Mr. Newcombe into the house. Mr. McKinnon had a very specific recollection of these events as he stated that, just after he got out of the blue BMW, a couple of cars pulled up and blocked his friend John from leaving. Alex Newcombe had met him outside and confirmed that he was Bryson McKinnon and told Mr. McKinnon to follow him into the house. Mr. McKinnon recalled saying that his friend John "had nothing to do with what was going on" and Mr. Newcombe's friends moved their cars to let John drive away in his BMW and then they followed him into the house. I find that Mr. McKinnon's evidence was entirely consistent with and confirmatory of Mr. Joudrey's evidence with respect to Mr. McKinnon's arrival in the house. Mr. Joudrey's evidence that Alex Newcombe's uncle, Walter Newcombe, was in the house when Mr. McKinnon followed Alex Newcombe into the house is also supported by the confirmatory evidence of Mr. McKinnon.

(l) On the other hand, I do not accept Mr. Alex Newcombe's evidence that he was just sitting in his house talking to SJ and Mr. Joudrey about why the blue BMW and Mr. McKinnon had come to his house on a few occasions and then, all of a sudden, without noticing the BMW arrive, Mr. McKinnon just walked into the house and sat on the couch beside Mr. Joudrey, I find that his evidence it is completely inconsistent with and contradicted by the evidence of Mr. McKinnon and Mr. Joudrey. I find that Mr. Joudrey had no axe to grind with Mr. Alex Newcombe, Walter Newcombe, or the other two defendants. I

also find that Mr. Joudrey's evidence clearly established that he was present in the house with SJ and the four accused, at all material times to this incident. In those circumstances, he had the ability to observe, at a close distance the actions of all persons, who were known to him, in the good lighting conditions of the house and also at a short distance outside the house. Mr. Joudrey was able to recall and relate the specific details in court of the sequence of events in relation to the assault of Mr. McKinnon, which he clearly and unequivocally stated was primarily committed by Alex Newcombe and Walter Newcombe.

(m) Most importantly, I find that the key details of the "beat down" assault of Mr. McKinnon which were provided by Mr. Joudrey in his evidence during this trial were supported by the confirmatory evidence of Mr. McKinnon and, in many material aspects, by Mr. Alex Newcombe himself as well as the circumstantial evidence. Mr. Joudrey's evidence also made it clear that although he was present and observed Mr. McKinnon being set upon by the four defendants, and that he did not wish to get involved in supporting the others in the "beat down" of Mr. McKinnon or use his martial arts training to come to the defence of Mr. McKinnon and engage in a confrontation with his friends. For those reasons, I do not accept Mr. Alex Newcombe's evidence that he claimed to be the only one involved in the physical altercation and that none of the other defendants participated in the physical altercation with Mr. McKinnon or for that matter were even present in the house when it occurred. In particular, the fact that Mr. Colley and Mr. MacDonald were there is certainly consistent with Mr. Joudrey's evidence that he would not be a backup for Mr. Alex Newcombe, which is certainly consistent with the plan to physically confront Mr. McKinnon, which could easily be orchestrated by SJ sending text messages or phone calls to Mr. McKinnon to have him come over to the house and pick her up or talk to her as specifically described by Mr. Joudrey.

(n) Moreover, I do not accept Mr. Alex Newcombe's evidence that Walter Newcombe had absolutely nothing to do with this incident, as I find the evidence of Mr. McKinnon is consistent with and confirmatory of Mr. Joudrey's evidence, which I accept. Their evidence identified Walter Newcombe as the person who inflicted physical violence on Mr. McKinnon immediately before or shortly

after taking or ripping the gold chain off his neck. In addition, I find that Mr. Joudrey's evidence is certainly supported by the fact that Mr. Walter Newcombe was found in possession of Mr. McKinnon's gold chain when he was arrested by the police within a couple of hours of the "beat down" of Mr. McKinnon. Furthermore, I find that Mr. Alex Newcombe's evidence provided no reasonable alternative explanation for how his uncle came to be in possession of Mr. McKinnon's broken gold chain. In those circumstances, I find that there is no evidence which could support any reasonable explanation that would be consistent with Mr. Walter Newcombe having lawful possession of Mr. McKinnon's property when he was arrested, especially when Mr. Alex Newcombe claimed that Walter Newcombe was not even in the house when Mr. McKinnon's gold chain was broken and removed and he was beaten up.

- (o) With respect to the physical altercation itself, Mr. Joudrey testified that it started with Walter Newcombe punching Mr. McKinnon in the head and then ripping the chain off his neck. Then, Alex Newcombe asked Mr. McKinnon to take his watch off, but did not hit him at that point, although he threatened to do so if he did not take off the watch. Mr. McKinnon took off his watch and Mr. Joudrey said "then the beating started" with most of the blows being struck by Alex and Walter Newcombe. Mr. Joudrey also stated that Mr. MacDonald and Mr. Colley also punched Mr. McKinnon at least one time. Mr. Joudrey had described a four-on-one beating and in his words, Mr. McKinnon "didn't really have a chance." Mr. Joudrey stated that Alex Newcombe was able to push Mr. McKinnon out the door and continued the beating outside the house. Mr. McKinnon had described being beaten up by at least 2 or 3 people including Alex and Walter Newcombe and that the beating continued outside the house. Mr. McKinnon's evidence is consistent with the evidence of Mr. Joudrey and their evidence contradicts Alex Newcombe's evidence on these critical facts and issue.
- (p) Mr. McKinnon's evidence was that shortly after he entered the house, he only had a very brief conversation with SJ and he recalls that Alex Newcombe said, "Nice watch," and opened the clasp of the watch and took his watch off of him. As for the gold chain, Mr. McKinnon stated that he may have ripped the chain off himself so that the assailants

would not have an intact chain and the chain ended up in someone's hands, but he could not recall who had it. In response the watch being taken off, Mr. McKinnon took a swing at Alex Newcombe and then, Walter Newcombe and he was "pretty sure" that two or three other people who were in the house hit him and in his words, he was "just getting pelted with fists" in his head. Mr. McKinnon then said that "they literally beat me in the house, then threw me out the door and then I was on the ground there, and they beat me on the ground and then they told me to get the fuck out of here." He added that after being beaten and stomped upon inside and outside the house he got up, walked a few steps, and collapsed on the road. I find that Mr. McKinnon's account of what transpired both inside and outside the Newcombe house on Kennedy Drive is entirely consistent with and confirmatory of Mr. Joudrey's account of what Mr. McKinnon had described as being "beat to death almost." Mr. McKinnon's evidence is also consistent with and confirmatory of Mr. Joudrey's evidence that Mr. McKinnon had also been beaten outside the house by Alex Newcombe and had collapsed on the street

- (q) I find that Mr. McKinnon's evidence in using the personal pronoun "they" beat me and he was "pretty sure" that "they" "just stomped my head in the ground a couple of times" is an unmistakable reference to the fact that he was stating that more than one individual had taken those actions in attacking him. I find that it is highly unlikely that he would have confused a singular pronoun, such as "he" or a specific name, i.e. Alex or his uncle, punched me which would obviously be a reference to one person versus his use of the personal pronoun "they" in his evidence unless he was clearly stating, especially in circumstances of this incident where he did not know their names and that more than one person was involved. For example, I noted that Mr. McKinnon stated that after he had been beaten up in the house, he specifically stated that Alex told him to "get the fuck out of there." Mr. McKinnon's evidence is also confirmatory of Mr. Joudrey's account as to the fact that this was a four-on-one "beat down" primarily at the hands of Alex Newcombe and Walter Newcombe. As Mr. Newcombe himself acknowledged, he was "very, very agitated" which is probably an accurate statement of his heightened animus towards Mr. McKinnon when he came face to face with the person

who his girlfriend, SJ, had alleged to have raped her the previous evening. Moreover, he conceded during his cross-examination that he had struck Mr. McKinnon and knocked him out and agreed that the result was that Mr. McKinnon was seriously injured. However, in responding to the questions by the Crown Attorney, I do not accept that Mr. Alex Newcombe was the only person who struck the blows that seriously injured Mr. McKinnon or his evidence that Mr. Walter Newcombe, Mr. Colley or Mr. MacDonald arrived after the beating and had nothing to do with it.

- (r) Mr. Joudrey's evidence that SJ had gone outside the house to check on Mr. McKinnon's condition after he collapsed in the snow or on the street was consistent with and confirmed by Alex Newcombe. Mr. Newcombe added that he locked the door to the house after she went outside to check on Mr. McKinnon but did let her back in the house when she asked. Alex Newcombe confirmed Mr. Joudrey's testimony that it was SJ who dialed 911 for the ambulance to come to the house and attend to Mr. McKinnon who had been dragged off the street but left on a snowbank around 6:00 P.M. on March 13, 2018.
- (s) Mr. McKinnon's evidence of the beating may not have been accurate in some peripheral details, such as its estimated duration, how many blows were struck by each person in what order, and on a couple of occasions he honestly stated that he was "pretty sure" of the evidence that he was relating to the Court, but, in total, I find that he was certainly able to recall and relate the key details of a severe beating that he sustained both inside and outside the Newcombe house, shortly before 6:00 p.m. on March 13, 2018. I find that his inability to specifically state who hit him and how many times he was hit by a person is a factor of his evidence that he was "just getting pelted with fists" at his head. He stated that at least two or three people attacked him shortly after he was escorted into the Newcombe house by Mr. Alex Newcombe and two friends, who had followed him into the house. Once inside the house, Mr. McKinnon identified an older person, who he understood to be Mr. Alex Newcombe's uncle, and he recalled and related being punched by Alex and Walter Newcombe and his belief that at least one of the other friends of Mr. Alex Newcombe who followed him into the house also became involved in the "beat down." Mr. Joudrey's evidence was completely consistent

with and supported the account of the “beat down” related to the Court by Mr. McKinnon.

- (t) I find that Mr. Alex Newcombe’s evidence that his uncle was neither present nor involved in the beat down or the taking of Mr. McKinnon’s gold chain is contradicted by Mr. Joudrey’s specific recollection that Mr. Walter Newcombe ripped the gold chain off Mr. McKinnon’s neck. Mr. McKinnon’s recollection of Walter Newcombe’s role in the beat down and in removing the gold chain from his neck is also supported by the confirmatory evidence which I have accepted that the gold chain which was described by Mr. McKinnon was broken at a link and not undone at the clasp. I find that Mr. McKinnon’s gold chain which was broken at a link and not undone at a clasp matches, in all respects, the photograph of that gold chain which was filed as Exhibit 1. I find that the evidence of Constable Sawler established that Exhibit 1 was located in the left front pocket of Mr. Walter Newcombe’s jeans around 8:00 p.m. on March 13, 2018, when the police conducted a search incidental to Mr. Walter Newcombe’s arrest after he exited from the Newcombe house. Given the timing of the location of the gold chain on Mr. Walter Newcombe and the gold chain matching in all details the description provided by Mr. McKinnon, I find that Mr. Walter Newcombe had taken the personal property of Mr. McKinnon, without any colour of right to be in possession of that gold chain, based upon the evidence of Constable Sawler, Mr. McKinnon, and Mr. Joudrey, which I have accepted.

[271] As is evident from my overview of the facts and the foregoing detailed analysis of Mr. Joudrey’s evidence, I have instructed myself on the *Vetrovec* warning and based upon each one of the Defence Counsel’s submissions that Mr. Joudrey should be considered as an “unsavoury witness” and for whom the Court should take great care and caution in accepting his evidence. Defence Counsel conducted a very detailed and thorough cross-examination of Mr. Joudrey which included several occasions where he was challenged on his evidence during this trial on the basis of inconsistent or inaccurate statements made on an earlier date during the trial of SJ in Youth Court or his statement to the police. In the preceding paragraphs, I have highlighted what I consider to be the material and independent confirmatory evidence which, in my opinion, enhanced the reliability and trustworthiness of Mr. Joudrey’s evidence. As I have outlined, I have found that material and independent

confirmatory evidence was proffered by Mr. McKinnon, Constable Sawler and in several instances by Alex Newcombe himself.

[272] The key point in issue with respect to the trustworthiness of Mr. Joudrey 's evidence as submitted by the Defence Counsel was the fact that, during this trial, he acknowledged having provided inaccurate information while he was under oath in SJ's trial which related to this incident in Youth Court. During this trial, he explained that his testimony in that trial was at some points inaccurate or understated in certain aspects of people's involvement based upon his stated view that regardless of the result in the Youth Court trial, there would be very little, if any, repercussions for SJ.

[273] I find that it is highly unlikely that Mr. Joudrey was motivated to provide inaccurate information during SJ's Youth Court trial for his own self-interest or to minimize his own involvement. I have accepted his evidence and Mr. McKinnon's evidence that he was merely present in the house and able to clearly observe what transpired. Most importantly, there is no evidence from any witness that he participated in any way in the "beat down" of Mr. McKinnon.

[274] However, based upon the fact that SJ first wanted to disclose to Mr. Joudrey that she had been raped by Mr. McKinnon the previous evening, it would certainly appear that SJ and Mr. Joudrey were very close friends and that she considered him to be a confidant. Based upon Mr. Joudrey's affinity towards SJ, I find that it was certainly possible that, during her Youth Court trial, he provided testimony with a view to minimizing her role in or responsibility for the charges before that Court, knowing at the same time that none of the four accused in this trial were facing any charges from this incident in the Youth Court. In terms of the evidence which I find to have enhanced the inherent trustworthiness of Mr. Joudrey's evidence, I have already referred to the material and independent confirmatory evidence, but I also find that it was significant that, during Mr. Joudrey's testimony in this trial, he stated that, on reflection, he now believes SJ's accusation of being raped by Mr. McKinnon was false. Based upon that statement, I find that there would be no reason for Mr. Joudrey to want to "fudge" his testimony in order to protect her, since her trial had concluded and SJ was not an accused person in this trial.

[275] In doing a careful analysis of Mr. Joudrey's testimony based upon the *Vetrovec* warning, there is no doubt that, on several occasions, he gave flippant, evasive or argumentative answers during this trial during his very thorough and vigorous cross-examination conducted by the four Defence Counsel. In carefully

analyzing those occasions where Mr. Joudrey responded in an unresponsive manner or his answer was in the form of a question back to the Defence Counsel, I find that those exchanges primarily arose when he was confronted with different statements being made in this trial versus the ones made by him during SJ's trial, which I have addressed in the preceding remarks. However, it was interesting to note that during detailed cross-examination with respect to the essential elements of a robbery charge, Mr. Joudrey responded that he was of the view that this incident had nothing to do with a robbery of Mr. McKinnon, but was, instead, an intentional "beat down" of him, based upon SJ's allegation that she had just been raped by Mr. McKinnon. I find that Mr. Joudrey's comment that this incident was not really about a plan to rob Mr. McKinnon, but rather, was an intentional "beat down" enhanced the trustworthiness of his evidence.

[276] Let me explain, I find that when Mr. Joudrey stated that this incident was an intentional "beat down" of Mr. McKinnon as the alleged rapist of Mr. Alex Newcombe's girlfriend [SJ], his evidence made it clear that he was drawing a distinction, in his mind, as to what occurred in the Newcombe house on March 13, 2018. Mr. Joudrey was clearly stating that the "beat down" of Mr. McKinnon was primarily perpetrated by Mr. Alex Newcombe and his uncle, Mr. Walter Newcombe, and since Alex Newcombe and Mr. McKinnon had never met each other, the only possible connection between them was that they both viewed SJ as a girlfriend or a "friend with benefits" and that Mr. Alex Newcombe's actions, supported by three others, were retribution and vigilante justice for the transgression of raping Mr. Newcombe's girlfriend as alleged by SJ.

[277] I find that the sincerity, accuracy and trustworthiness of Mr. Joudrey's evidence was enhanced by his additional statement that, in his opinion, two people, namely, Mr. Colley and Mr. MacDonald, should not even be before the Court because neither one of them had robbed Mr. McKinnon of anything. On that point, Mr. Joudrey never wavered in his testimony that those two accused only had a minimal involvement in the "beat down" of Mr. McKinnon by each of them hitting him, at most, a couple of times. More importantly, Mr. Joudrey also specifically noted that neither Mr. Colley nor Mr. McDonald took anything from Mr. McKinnon and in that respect neither one had anything to do with a robbery. As Mr. Joudrey testified, Mr. Colley and Mr. MacDonald only played a minor role in the "beat down" of Mr. McKinnon. In making those statements, Mr. Joudrey repeated that the main assailants of Mr. McKinnon were Alex and Walter Newcombe and during his testimony he specifically identified Alex Newcombe taking the watch and Walter

Newcombe taking Mr. McKinnon's gold chain and as it turned out, within a couple of hours of the beating, being found in possession of Mr. McKinnon's gold chain when Mr. Walter Newcombe was searched at the police station.

[278] For all of those reasons, I find the evidence of Mr. McKinnon and Mr. Joudrey to be credible and reliable and I accept their evidence that primarily Mr. Alex Newcombe and Mr. Walter Newcombe intentionally committed an assault of Mr. Bryson McKinnon, which I find to have undoubtedly established that their assault of him had caused bodily harm. While I have certainly accepted parts of Mr. Alex Newcombe's evidence, I have stated, for the reasons outlined above, that I have rejected other parts of his evidence.

[279] Furthermore, in accepting the evidence of Mr. McKinnon and Mr. Joudrey and in rejecting the evidence of Mr. Alex Newcombe that he was the only one involved in the physical altercation with Mr. McKinnon, I find that Mr. McKenzie MacDonald and Mr. Jermaine Colley did inflict a few blows to Mr. McKinnon without his consent, but they did not steal any of his property while he was essentially defenceless during the four-on-one "beat down" of Mr. McKinnon. In those circumstances, I find that neither Mr. MacDonald nor Mr. Colley committed a robbery of Mr. McKinnon contrary to section 344 of the **Code**. However, I find that they did commit, what I find to be an included offence in that robbery charge of committing an assault of Mr. McKinnon, contrary to section 266 of the **Code**. Furthermore, I also find that, based upon the evidence proffered by Mr. McKinnon and Mr. Joudrey, which I have accepted, I cannot conclude, beyond a reasonable doubt, that the application of force to Mr. McKinnon's body, without consent, by either Mr. Colley or Mr. MacDonald as they participated in the assault of Mr. McKinnon caused him any bodily harm.

Is Assault Causing Bodily Harm or Assault Included Offences in a Robbery Charge?

[280] After having reviewed several cases, in particular, decisions of the Nova Scotia Court of Appeal, I conclude that the offence of assault causing bodily harm or assault contrary to section 266 of the **Criminal Code** are certainly lesser and included offences of a robbery charge.

[281] In *R. v. K.R.*, [1992] N.S.J., No..8 (NSSC-Appeal Division), the Nova Scotia Court of Appeal dealt with an appeal from conviction for assault causing bodily harm and whether robbery *simpliciter* included the offence of assault causing bodily

harm. The trial judge had acquitted the accused on the charge of robbery, but the victim had suffered a broken tooth, a fractured jaw and some bruises. The charge in the Youth Court was that on or about May 19, 1991, K.R. “did unlawfully rob T.E., contrary to section 344 of the **Criminal Code**.”

[282] The Nova Scotia Court of Appeal held that the trial judge had not made any error in finding that assault causing bodily harm under section 267(1)(b) of the **Criminal Code** is an included offence in the robbery charge. In the Court of Appeal’s brief decision, they referred to the case of *Lockett v. The Queen* (1980), 50 CCC (2nd) 489 (SCC) where Justice Chouinard stated at page 494:

Robbery is one offence which can be committed in different ways and a reference to the relevant section is a reference to its entirety.

[283] The Nova Scotia Court of Appeal noted that the *Lockett* decision of the Supreme Court of Canada was followed in the British Columbia Court of Appeal in *R. v. Horsefall* (1990), 61 CCC (3rd) 245 where the court said at page 248:

Assault is not an ingredient in section 343(a) or (d). However, it is an ingredient in section 343(b) and (c). **Lockett v. The Queen** establishes that because an assault is an ingredient in at least one of the four ways in which robbery can be committed, it is an included offence in an indictment which charges robbery, *simpliciter*.

[284] Chief Justice Clarke noted that section 343(b) of the **Criminal Code** provides as follows:

343. Everyone commits robbery who...

(b) steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person.

[285] Chief Justice Clarke concluded, based on *Lockett* and *Horsefall*, that assault causing bodily harm is an included offence in robbery *simpliciter*.

[286] More recently, the New Brunswick Court of Appeal came to a similar conclusion to the Nova Scotia Court of Appeal in *R. v. Saulis*, 2020 NBCA 36. In some respects, the factual circumstances of the New Brunswick case are quite

similar to the instant case. In that case, the trial court had convicted the accused for robbery. At the Court of Appeal, the Crown admitted that there was no evidence to establish that the appellant stole the victim's phone or wallet or that he was a party to the theft. The victim had identified the appellant as being part of a group of individuals who had barged into his home. The appellant then attacked the victim and punched him in the head several times. Once the victim fell to the ground, the Appellant began to kick him in the face, resulting in bruising and welts on the victim's face.

[287] In *Saulis, supra*, the New Brunswick Court of Appeal set aside the robbery conviction and substituted a conviction for the included offence of assault causing bodily harm. The Court concluded that although there was a lack of evidence regarding the theft, the evidence had established a violent assault committed by the Appellant, which met the definition of "bodily harm" as defined in section 2 of the **Criminal Code**. The Court was satisfied that the injuries suffered by the victim, which were reflected in the trial judge's decision, did constitute bodily harm.

[288] Based upon those decisions and the fact that section 343 of the **Criminal Code** spells out the four ways in which a robbery may be committed by an accused person, as the noted by our Court of Appeal in *K.R.* and the New Brunswick Court of Appeal in *Saulis*, a charge of robbery *simpliciter*, contrary to section 344 of the **Code**, puts an accused person on notice that all included offences in the four possible ways to commit robbery are in issue and could be considered as lesser and included offences.

[289] For all of the reasons outlined above after having reviewed the totality of the evidence, I have concluded that the offence of assault causing bodily harm, contrary to section 267(b) of the **Criminal Code**, is a lesser and included offence in a robbery charge, contrary to section 344 of the **Code**. In addition, I find that the Crown has established beyond a reasonable doubt that, at a minimum, Mr. Alex Newcombe and Mr. Walter Newcombe did, on March 13, 2018, at or near Dartmouth, Nova Scotia, assault Bryson Alan McKinnon, and did thereby cause him bodily harm, contrary to section 267(b) of the **Criminal Code**.

[290] For all of the reasons outlined above after having reviewed the totality of the evidence, I also conclude that the offence of assault, contrary to section 266 of the **Criminal Code**, is a lesser and included offence in a robbery charge, contrary to section 344 of the **Code**. Having come to that conclusion, I find that the Crown has established, beyond a reasonable doubt, again, at a minimum, that Mr. Jermaine

Cameron Colley and Mr. McKenzie MacDonald did, on March 13, 2018 at or near Dartmouth, Nova Scotia, assault Bryson Alan McKinnon, contrary to section 266 of the **Criminal Code**.

Has the Crown Established Beyond a Reasonable Doubt that Alex Newcombe Did Not Act in Self-Defence or in Defence of Property?

[291] Section 34 of the **Criminal Code** sets out the requirements in relation to a defence that an accused person acted in self defence and therefore is not guilty of the offence(s) for which he or she was charged. Section 35 of the **Criminal Code** sets out the requirements in relation to a defence of property. Those sections define the circumstances in which the defence may arise and prescribe the nature and extent of what a person may do in defending him or herself or their property.

[292] However, it must be remembered that it is not the accused person's responsibility to prove that what he or she did was a lawful self-defence or a lawful defence of property, it is the Crown's responsibility to prove, beyond a reasonable doubt, that the accused was not acting in lawful self-defence or defence of his or her property.

[293] Section 34(1) of the **Criminal Code** contains the three requirements or conditions in relation to self defence:

1. the accused believed on reasonable grounds that force and/or the threat of force was being used against him or against another person;
2. the accused committed the act for the purpose of defending or protecting himself or another person from the use of force or the threat of force; and
3. the accused's act was a reasonable response in the circumstances.

[294] Looking at the factual issues in this case in relation to those three requirements or conditions, the focus of that first element is the accused's perception or belief that force was being used against him by another person was reasonable.

[295] The second requirement focuses on the subjective purpose of the accused for doing the act that constitutes the offence. The accused's purpose must be to defend or protect himself or another person from the actual or threatened force of the other person. It is clear from the case law that this element in the analysis of self-defence

will not be met if the accused's purpose was to seek vengeance or to inflict punishment on that third party.

[296] In many cases, the third condition or requirement is often the most critical issue as the accused's acts must be reasonable in the circumstances. The standard for assessing this element is subjective and requires a contextual analysis of all the circumstances, including such factors as the nature of the force or threat; the extent to which the use of force was imminent or whether there were other means available to respond to the potential use of force; the accused role in the incident; the size and age, gender and physical capabilities of those involved in the incident; the nature, duration and history of any relationship among the people involved; the nature and proportionality of the accused response to the use or threat of force.

[297] In view of the findings of fact that I have previously made in relation to the totality of the circumstances present in this case, while it appears that Mr. McKinnon may have taken the first swing at Mr. Alex Newcombe in response to him and/or his uncle's act in ripping his gold chain off his neck or taking off his watch on a threat of violence, I find that the Crown has established beyond a reasonable doubt that neither Mr. Alex Newcombe nor any of the other accused became involved in the physical altercation and inflicting a series of punches to Mr. McKinnon for the purpose of defending himself or themselves from his use of force.

[298] Looking at the totality of the circumstances in this case, I find that the Crown has established beyond a reasonable doubt that Mr. McKinnon apparently came to the Newcombe house at the request of SJ where he was escorted into the house by Mr. Alex Newcombe with two of his friends following Mr. McKinnon into the house to "have his back" as stated by Mr. Joudrey. I have found that Mr. Alex Newcombe acknowledged that when Mr. McKinnon came into the house he was "very, very agitated" and shortly thereafter, he and his uncle Walter Newcombe commenced what became a four-on-one "beat down" to seek vengeance on Mr. McKinnon for the alleged rape of SJ and vindicate the honour of his girlfriend, SJ.

[299] While the evidence established that Mr. Alex Newcombe and Mr. McKinnon were relatively the same size, age, gender with similar physical capabilities, as I have found, this incident was a four-on-one beating of Mr. McKinnon. I have no doubt that the beating of Mr. McKinnon primarily by Mr. Alex Newcombe and Mr. Walter Newcombe was, as I mentioned, to seek vengeance on him as Mr. McKinnon had never previously met, and was totally unknown to all four accused persons. Therefore, the only reason they could have come together on March 13, 2018 was

as result of SJ's disclosure, which Mr. Joudrey later believed to be a false accusation, that she had been raped by Mr. McKinnon the previous evening.

[300] With respect to the final requirement or condition to establish self-defence, I have no doubt that the four-on-one assault of Mr. McKinnon, perpetrated primarily by Mr. Alex Newcombe and Mr. Walter Newcombe, resulted in serious injuries which meet the definition of causing Mr. McKinnon "bodily harm." When Mr. McKinnon arrived at the Newcombe residence in an intoxicated state and was escorted into the house by Alex Newcombe and his two friends as backup, with his uncle Walter Newcombe already in the house, Mr. McKinnon was outnumbered and surrounded by four assailants. In those circumstances, I find that Mr. McKinnon did not present any basis for Alex Newcombe to have a reasonable belief that force was being used or threatened to be used against him, especially in those circumstances where Mr. McKinnon believed he was only going to that house at the request of SJ to pick her up or have a conversation with her.

[301] In view of the foregoing analysis and the findings of fact that I have previously made with respect to this incident, I find that the Crown has proven, beyond a reasonable doubt, that none of the three conditions or requirements to establish a defence of self-defence were present in order to conclude that Mr. Alex Newcombe or, for that matter, any of the other accused acted in self-defence during what I have found to be a four-on-one beating of Mr. McKinnon to seek vengeance for his alleged rape of SJ.

[302] Given the fact that I have found that Mr. McKinnon was escorted or brought into the house by Mr. Alex Newcombe and his two friends as backup, I certainly cannot conclude that any of the accused persons engaged in a physical altercation with Mr. McKinnon to preserve the "peaceable possession of property" by preventing him from entering the property or for removing him from the property.

[303] Moreover, as I have indicated, in this analysis of possible defences, the defence of property as set out in section 35(1) of the **Criminal Code** has a third requirement that also requires the acts taken by the defendant to be a reasonable response in the circumstances. In either claim of self defence or defence of property, even if the first two requirements of a claim that a person acted in self-defence were met, I find that the beating sustained by Mr. McKinnon at the hands of the Alex Newcombe, Walter Newcombe and the other two accused could not possibly be considered to be a reasonable response in the circumstances.

[304] With respect to Alex Newcombe or Walter Newcombe and the question of whether their actions were justified as a defence of property, I find that the Crown has established, beyond a reasonable doubt, that none of the three requirements or conditions to establish a defence of property have been met and in those circumstances, I find that neither Alex Newcombe nor Walter Newcombe's actions may be justified as a defence of property pursuant to section 35(1) of the **Code**.

Has the Crown established all of the essential elements of the robbery charge as against Alex Newcombe and Walter Newcombe?

[305] In this case, the four accused have been charged that they did "unlawfully rob Bryson Alan McKinnon, contrary to section 344 of the **Criminal Code**, on or about March 13, 2018 at or near Dartmouth, Nova Scotia. Section 344 of the **Code** is actually the section which provides the punishment for robbery, which is an indictable offence and subject to a maximum penalty of imprisonment for life. In certain circumstances, which are not applicable in this case, a conviction for robbery may also include minimum punishment of terms of imprisonment.

[306] The essential elements of the offence of robbery and extortion are contained in section 343(a)-(d) of the **Criminal Code** which set out the different ways in which a robbery may be committed. Justice David Watt's commentary in his *2020 Annotated Tremear's Criminal Code*, Thomson Reuters at page 631 states that theft is an essential ingredient of the external circumstances of robbery under section 343(a),(b) and (d) and the other additional elements vary. Under section 343(a) of the **Code**, the prosecution must prove, beyond a reasonable doubt, the use or threat of violence by the defendant to a person or property *for a specified purpose*. Section 343(b) of the **Code** demands proof of the infliction of personal violence upon the victim within the time specified to commit the theft.

[307] In terms of the different manners in which a robbery may be committed by an accused person, in the circumstances of this case, it would appear from the facts and circumstances of this case, that sections 343(a) and (b) of the **Criminal Code** would be the most relevant to consider. Those subsections provide as follows:

343. Robbery - Everyone commits robbery who

- (a) steals, and for the purpose of extorting whatever is stolen or to prevent or overcome resistance to the stealing, uses violence or threats of violence to a person or property;

(b)steals from any person and, at the time he steals or immediately before or immediately thereafter, wounds, beats, strikes or uses any personal violence to that person.

[308] In terms of the mental element or *mens rea* of a robbery charge which is required to be established by the Crown beyond a reasonable doubt, Justice Watt goes on to indicate that the prosecution must establish, under sections 343(a), (b) and (d) of the **Criminal Code**, that there was an intention to cause the external circumstances described in each of the paragraphs.

[309] Justice Watt also notes that “steal” is a defined term in section 2 of the **Code** to mean “commit theft,” which requires proof of the ulterior mental element described in section 322(1) of the **Code** in cases of robbery falling within those paragraphs. For robbery to be committed under **Criminal Code** section 343(a), the prosecution must prove the use or threat of violence was for the defined purpose.

[310] The offence of “Theft” is described in section 322 of the **Code** as follows:

Theft:

322.(1) Everyone commits theft who fraudulently and without colour of right takes, or fraudulently and without colour of right converts to his own use or to the use of another person, anything, whether animate or inanimate, with intent,

(a) to deprive, temporarily or absolutely, the owner of it, or person who has a special property or interest in it, of the thing or of his property or interest in it;

...

Time when theft completed:

(2) A person commits theft when, with the intent to steal anything, he moves it or causes it to move or to be moved, or begins to cause it to become movable.

[311] First dealing with the Mr. McKinnon’s gold chain which was broken at a link, with the clasp still attached, which was located by the police in the front left pocket of Mr. Walter Newcombe’s jeans by Constable Sawler approximately two hours after Mr. McKinnon was located unconscious on Kennedy Drive by ambulance attendants, having suffered significant injuries as demonstrated in the photographs filed as Exhibit 2 in the trial. Mr. McKinnon was informed by medical staff that his injuries included numerous bruises on his head, swelling, internal bleeding on the brain, some hemorrhaging, a broken nose, and a concussion.

[312] Given the evidence of Mr. Joudrey and Mr. McKinnon there may be doubt as well as to whether Walter Newcombe ripped the gold chain off of Mr. McKinnon's neck, Alex Newcombe ripped off the chain, or Mr. McKinnon, himself, ripped the chain off his neck so the attackers would be not be able to use it. When these various options were presented to Mr. Joudrey during his cross-examination, he was firm in his response that it was Walter Newcombe who had had ripped the chain off Mr. McKinnon's neck. Regardless of that aspect, I find that Mr. McKinnon's chain was ripped off his neck immediately before a group of people, primarily Mr. Alex Newcombe and Mr. Walter Newcombe, had beaten, struck and used personal violence against Mr. McKinnon as noted in the definition of a robbery pursuant to section 343(b) of the **Code**.

[313] Therefore, I find that the Crown has established, beyond a reasonable doubt, the beating, wounding or personal violence essential elements of a robbery committed pursuant to section 343(b) of the **Code**, but the key question is whether the Crown has established that Mr. Walter Newcombe "stole" the gold chain pursuant to the definition of "theft" in section 322 of the **Code**.

[314] Furthermore, after having considered the totality of the evidence, I find that the Crown has also established, beyond a reasonable doubt, that the broken gold chain found in the front pocket of Mr. Walter Newcombe's jeans at the police station, approximately two hours after the "beat down" had concluded, clearly established that Mr. Walter Newcombe had at the very least, fraudulently and without colour of right, deprived Mr. McKinnon temporarily and perhaps intended to be absolutely of his property, that is, the gold chain.

[315] Having come to those conclusions, I find that the Crown has established all of the essential elements of a robbery, contrary to section 343(b) of the **Criminal Code**, beyond a reasonable doubt, and in those circumstances, I find Mr. Walter Newcombe guilty of that robbery charge, contrary to section 344 of the **Criminal Code**, as alleged in the Information before the Court

[316] With respect to the robbery charge in relation to Mr. McKinnon's Nixon watch, unlike the gold chain which was found in Mr. Walter Newcombe's personal possession hours later and outside the Newcombe residence, the police located Mr. McKinnon's watch in the house, in plain view, on a table in the living room. The evidence of Ms. Cathy Dorrington, Alex Newcombe's mother, was that when she got home very late in the evening of March 13, 2018, the police had surrounded her house and in order to expedite a resolution of the situation, she authorized the police

to enter the house. Prior to entering the house with the police, Ms. Dorrington had a conversation with her son, Alex Newcombe, and told him that the police were looking for Mr. McKinnon's gold chain and his Nixon watch.

[317] Mr. Alex Newcombe stated that he had no idea where the gold chain or the watch were located and began to search the house high and low to locate them. Although he claims to have looked everywhere for Mr. McKinnon's watch and chain, I do not accept that he made this arduous attempt to locate those articles since, by everyone's account, Mr. McKinnon was only in the house for a few minutes, briefly seated on a couch by the door and then severely beaten in a four-on-one physical altercation and unceremoniously thrown out the front door. Once outside, Mr. McKinnon was able to briefly get up and take a few steps, but ultimately collapsed unconscious on the road.

[318] Given the evidence which I have accepted that was proffered by Mr. Joudrey who was in the house at all relevant times and Mr. McKinnon's confirmatory evidence of Mr. Joudrey's account, I reject Mr. Alex Newcombe's suggestion that Mr. McKinnon's watch somehow fell off his wrist while he was briefly seated on a couch before he was severely beaten. I have previously accepted the evidence of Mr. Joudrey, who was in the house at all material times and provided confirmatory evidence of Mr. McKinnon's account that Mr. Alex Newcombe had made comments to the effect that Mr. McKinnon had a "nice watch", threatened to assault him if he did not remove it, and based upon that threat, Mr. McKinnon did not initially oppose Mr. Alex Newcombe taking the watch off his wrist by undoing the clasp. However, I accept Mr. McKinnon's evidence that after Mr. Alex Newcombe took the watch off his wrist, Mr. McKinnon did take a swing at Alex Newcombe and immediately thereafter, it became a four-on-one melee, with the principal assailants being Alex and Walter Newcombe .

[319] Although Mr. McKinnon's Nixon watch was not found in the personal possession of Mr. Alex Newcombe by the police, like the gold chain being in Mr. Walter Newcombe's possession, I find as a fact that, with respect to the watch, Mr. Alex Newcombe committed a theft and stole Mr. McKinnon's Nixon watch through the use of violence or threats of violence to prevent or overcome resistance in order to fraudulently and without colour of right temporarily or absolutely deprive Mr. Bryson McKinnon of his Nixon watch, valued at \$400.

[320] In those circumstances, I find that the Crown has established all of the essential elements, beyond a reasonable doubt, that Mr. Alex Newcombe committed

a robbery, contrary to section 343(a) of the **Criminal Code**, through the use of threats and violence to prevent or overcome the resistance of Mr. McKinnon to the theft of his watch by Mr. Newcombe and, at the very least, temporarily depriving Mr. McKinnon of his property, thereby committing a robbery, contrary to section 344 of the *Code*. Having come to those conclusions, I find Mr. Alex Newcombe guilty of the robbery charge, contrary to section 344 of the **Criminal Code**, as alleged in the Information before the Court.

[321] In conclusion, I find that the Crown has established beyond a reasonable doubt that Mr. Alex Newcombe and Mr. Walter Newcombe committed the offence of robbery of Mr. Bryson McKinnon, and I hereby find them guilty of that offence, contrary to section 344 of the **Criminal Code**.

[322] In addition, after having considered the totality of the evidence, I find that, with respect to Mr. Jermaine Colley as well as Mr. McKenzie MacDonald, the Crown has not established all of the essential elements of the robbery offence, contrary to section 344 of the *Code*, and I hereby acquit them and find them not guilty of that offence.

[323] With respect to Mr. Jermaine Colley and Mr. McKenzie MacDonald, after having considered the totality of the evidence, I find that the Crown has established, beyond a reasonable doubt, that Mr. Colley and Mr. MacDonald committed an assault of Mr. McKinnon, contrary to section 266 of the **Criminal Code**. Having come to those conclusions, I hereby find them guilty of that charge, as I have concluded that the offence of assault, contrary to section 266 of the **Code**, is, in fact, a lesser and included offence in the robbery charge, contrary to section 344 of the **Code**.

Theodore Tax, JPC