

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

IN THE MATTER OF:

HER MAJESTY THE QUEEN

- V -

RUSSELL MICHAEL SIKYEA

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Transcript of the Reasons for Judgement by The Honourable  
Justice L. A. Charbonneau, sitting in Hay River, in the  
Northwest Territories, on the 20th day of February, 2013.

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APPEARANCES:

Ms. D. Vaillancourt: Counsel for the Crown

Mr. T. Boyd: Counsel for the Defence

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Charge under s. 348(1)(b) Criminal Code of Canada

INITIALS USED TO PROTECT THE IDENTITY OF THE COMPLAINANT

BAN ON PUBLICATION PURSUANT TO S. 486.4 CRIMINAL CODE

1 THE COURT: Russell Sikyea is charged  
2 with having broken into the apartment of H. S.  
3 on September 11th, 2011, and having sexually  
4 assaulted her. In my deliberations on this  
5 matter I have taken into account some of the  
6 fundamental principles that govern in any  
7 criminal trial. I am not going to refer to  
8 all of them or outline all of them in all  
9 of their details, but I have considered the  
10 applicable legal principles.

11 In particular, I have kept in mind two  
12 fundamental principles, the presumption of  
13 innocence and the requirement for the Crown  
14 to prove each element of a criminal offence  
15 beyond a reasonable doubt before any accused  
16 person can be found guilty. I have reminded  
17 myself that the accused never has any obligation  
18 to prove anything nor an obligation to explain  
19 away any evidence presented by the Crown, and  
20 I have reminded myself that in a case where the  
21 accused does choose to present evidence, as was  
22 the case here, that changes nothing of the fact  
23 that the onus of proof remains on the Crown and  
24 never shifts.

25 Credibility is the key issue in this case  
26 given how the evidence has come out, and that  
27 requirement for the Crown to prove the accused's

1           guilt beyond a reasonable doubt applies to issues  
2           related to credibility. So I have reminded  
3           myself also that as the trier of fact in this  
4           trial I am not obliged to firmly believe or  
5           disbelieve anyone who testifies.

6           The assessment of credibility in a criminal  
7           trial is not about comparing competing versions  
8           of events, rating them and deciding which one  
9           is preferred over the other. Sometimes it  
10          is impossible to know who or what to believe  
11          at the end of a criminal trial, and where a  
12          reasonable doubt remains arising from the  
13          credibility of witnesses the law is clear  
14          that the benefit of that doubt must go to  
15          the accused person.

16          Similarly, as was noted by defence counsel  
17          in submissions yesterday, if there are gaps in  
18          the evidence that give rise to a reasonable  
19          doubt the benefit of that doubt must also be  
20          given to the accused. If there are shortcomings  
21          in the evidence, areas I would have liked to  
22          have known about but were not addressed, or  
23          areas where witnesses were asked questions but  
24          did not know the answer, or areas where they  
25          were not asked certain questions at all, I am  
26          not permitted to speculate about what their  
27          answers would have been. This case, as all

1 criminal cases, must be decided on the evidence  
2 that I have heard and only on that, not on any  
3 speculation.

4 I will start by making reference to what  
5 I consider to be a number of matters arising from  
6 the events of September 11th, 2011, that are not  
7 in issue. By this I do not necessarily mean that  
8 they were the subject of formal admissions, but  
9 simply that on the evidence as a whole they are  
10 areas where there does not appear to be any real  
11 contest or challenge about them.

12 At the time of these events Ms. S. was  
13 in a relationship with R. C.; that relationship  
14 continues to this day. At the time they lived  
15 in a complex in Fort Smith that witnesses  
16 referred to as Grande Tour. This is a complex  
17 that is in the shape of a U and has a number  
18 of apartments in it. There are two floors on  
19 each side of this U-shaped building and there  
20 are apartments on both sides. Ms. S.'s apartment  
21 was on the ground floor.

22 Her common-law spouse worked at a mine  
23 on a shift of two weeks in and two weeks out  
24 at the time, and on the weekend in question  
25 he was out at the mine working and scheduled  
26 to return on the following Tuesday. The  
27 complainant is good friends with her common-law

1 spouse's sister, M. C. It was M.'s birthday  
2 that weekend. On the Saturday afternoon they  
3 and another friend, K., spent some time at  
4 Ms. S.'s apartment drinking beer and vodka.  
5 They started off, as I understood the evidence,  
6 with a 26-ounce bottle of vodka and a flat of  
7 24 beer and were joined by others in consuming  
8 that alcohol.

9 At some point in the evening, fairly late,  
10 they decided to go to a bar in Fort Smith called  
11 the Landing. Ms. S. did not stay long at the  
12 bar because she was tired, but M. and K. stayed  
13 a while longer. M. ended up back at Ms. S.'s  
14 apartment after having spent some time at the  
15 bar.

16 Russell Sikyea had also been drinking  
17 throughout that day. He was drinking first  
18 at Theresa Cumming's place and later he was  
19 drinking at George Benwell's place. He was  
20 making his way to Chez Lepine's place because  
21 he thought there was a party going on there,  
22 and on his way there he went near the Grande  
23 Tour complex and came to Ms. S.'s apartment.  
24 There is a dispute about how exactly this  
25 happened, but it is clear that he spoke to  
26 the two women at that point. He told them  
27 that he was going to Chez's place, that there

1 was a party there. M. wanted to go, Ms. S.  
2 did not. M. took a few minutes to get ready,  
3 and then she and Mr. Sikyea went to Chez's  
4 place while Ms. S. stayed home.

5 As it turns out there was no party at  
6 Chez's place. The only person there was  
7 Chez's cousin Josh, who M. had an interest  
8 in. She had seen Josh at the Landing bar  
9 earlier that evening because he worked there  
10 and he had bought her some shots. Josh had  
11 gone to Chez's after closing time. When  
12 M. arrived at Chez's place she focused her  
13 attention on Josh; she sat on his lap and  
14 engaged primarily with him. Mr. Sikyea drank  
15 some shots of vodka while he was at the house,  
16 and it is undisputed that he left the house  
17 before M. did.

18 At some point before M. returned to Ms. S.'s  
19 place Russell Sikyea went there and there was  
20 sexual contact, sexual intercourse between he and  
21 Ms. S. There is a dispute as to how he got into  
22 the house and how the sexual contact started and  
23 came to be, whether it was consensual or forced,  
24 but there is no dispute that sexual contact took  
25 place. The forensic testing done as part of this  
26 investigation establishes that without any doubt,  
27 and it is one fact that everybody seems to agree

1 on.

2 In any event, M. eventually returned  
3 to Ms. S.'s apartment. The evidence is fairly  
4 consistent that by then it would almost have been  
5 morning and it was starting to get light outside.  
6 Ms. S. answered the door almost right away after  
7 M. knocked and then apparently both women went to  
8 sleep in the living room.

9 It is also clear that at some point during  
10 the following day Ms. S. told M. and K. that she  
11 had been sexually assaulted the previous night.  
12 The three went to Chez's place to confirm the  
13 identity of the man who had been at Chez's  
14 house the previous evening. Chez had taken  
15 a photo of Mr. Sikyea with his digital camera  
16 the previous night and showed that photo to  
17 the women. That photo was entered as Exhibit  
18 2 and it is a photo of Mr. Sikyea. That  
19 information about the photograph was passed  
20 on to the police and the memory card from the  
21 camera was seized.

22 Again, how the evidence came out and that  
23 identification is not an issue in this case.  
24 There is no particular significance to that  
25 photograph other than the fact that it is part  
26 of the narrative of how the women confirmed the  
27 identity of Mr. Sikyea and also aspects of the

1 police investigation of this matter.

2 Ms. S. went to the Health Centre eventually  
3 to be examined. The RCMP were contacted through  
4 their dispatch office in Yellowknife at 9:30  
5 p.m. on Sunday evening according to Constable  
6 Froyland. He is the one who responded to the  
7 call, he met Ms. S. at the Health Centre. M.  
8 was there with her, as well as others. Constable  
9 Froyland observed that Ms. S. was the most upset  
10 of the women there and that she had been crying.  
11 He noted the smell of alcohol on her, but did  
12 not consider that she appeared to be particularly  
13 intoxicated.

14 Ms. S. underwent a sexual assault  
15 examination and samples were collected from  
16 her. A request was submitted to the RCMP  
17 forensic lab to have the samples examined  
18 and approval was received for analysis of  
19 some of those samples, including the vaginal  
20 swab. The testing confirmed, as I have already  
21 referred to, that there was sexual activity that  
22 took place, and it also confirmed the identity  
23 of the people involved because part of the  
24 testing identified some semen, and DNA testing  
25 on that later confirmed that it was Mr. Sikyea.

26 Based on the information gathered at the  
27 initial stage of the investigation the police

1 began looking for Mr. Sikyea to arrest him on  
2 these matters. They were busy with several  
3 other calls that night when the complaint  
4 was initially made, but in the following  
5 days several attempts were made to find him.  
6 Constable Froyland testified about multiple  
7 patrols in the community, 20 to 30 he said.  
8 The police visited residences where Mr. Sikyea  
9 was known to have spent time, residences where  
10 some of his family members lived, and other  
11 places following information that they received  
12 that Mr. Sikyea might be in those places.

13 Eventually they obtained a warrant for  
14 his arrest, and they also arranged for a press  
15 release to be issued so that it would be known  
16 that the police would be looking for him. On  
17 the 25th of September, 2011, Mr. Sikyea contacted  
18 the RCMP. Again, the Fort Smith members found  
19 this out through their telecoms office in  
20 Yellowknife. Mr. Sikyea advised as to where  
21 he was. The police attended that location  
22 and Mr. Sikyea was arrested without incident.

23 I have outlined all of these matters  
24 which I consider to be undisputed or clearly  
25 established by the evidence because they provide  
26 a useful framework to start from to examine the  
27 aspects of the evidence that are disputed, some

1 of which are crucial to the disposition of this  
2 matter.

3 The Crown has the burden of establishing  
4 every element of the offence charged beyond  
5 a reasonable doubt. In this case only two  
6 elements are really at issue, the element  
7 of break and enter and the element of lack  
8 of consent. That is, whether the Crown has  
9 established beyond a reasonable doubt that  
10 the sexual contact that took place that night  
11 was without Ms. S.'s consent.

12 On those issues there is direct and  
13 circumstantial evidence to consider, but  
14 the key issue is the credibility of witnesses,  
15 particularly the credibility of Mr. Sikyea and  
16 the credibility of Ms. S. On the issue of lack  
17 of consent they are the only witnesses who have  
18 any direct evidence to offer, and they are also  
19 the main witnesses on the issue of whether  
20 Mr. Sikyea was in the house with or without  
21 permission.

22 On the issue of how Mr. Sikyea entered the  
23 house he gave direct evidence that he was invited  
24 in. Ms. S. said that she did not invite him in.  
25 There is some circumstantial evidence suggesting  
26 he may have entered through a window. Ms. S.  
27 said she left the window open after having had

1 a cigarette before going to sleep and that after  
2 all of this happened she noticed that the screen  
3 to that particular window was on the floor of the  
4 residence and no longer in the window.

5 Other circumstantial evidence includes  
6 evidence about Mr. Sikyea's size and the  
7 measurements taken by the police officer  
8 sometime after these events. Mr. Sikyea  
9 himself testified that he wears a size 42  
10 belt and weighed about 255 pounds at the  
11 time of these events, and he does not think  
12 that he could have fit through that window.

13 I have reminded myself that to establish  
14 the element of break and enter beyond a  
15 reasonable doubt the Crown does not have  
16 to establish the exact mode of entry beyond  
17 a reasonable doubt. Not every circumstance  
18 alleged by the Crown as far as a criminal  
19 trial must be proven beyond a reasonable  
20 doubt. The requirement for that standard  
21 of proof applies to the elements of the  
22 offence charged.

23 So in this case what must be proven beyond  
24 a reasonable doubt on the break and enter element  
25 is that Mr. Sikyea was inside the house without  
26 permission by Ms. S., not necessarily precisely  
27 how he got in. But of course, if I conclude that

1           there is evidence, circumstantial or otherwise,  
2           that squarely contradicts the testimony of a  
3           witness or another about the mode of entry, that  
4           is something that would be a factor that would  
5           be relevant in the assessment of the credibility  
6           of that witness. But also, at the same time, it  
7           must be remembered that assessment of credibility  
8           is not an all-or-nothing exercise. The trier  
9           of fact is free to accept some aspects of a  
10          witness's testimony and reject others.

11                 So as I have said, credibility is the  
12          key issue. The evidence of M. C., Chez Lepine  
13          and Constable Froyland does not necessarily  
14          assist directly on the two key issues that  
15          I have referred to, but much like the undisputed  
16          aspects of the case their evidence provides  
17          a useful framework or backdrop against which  
18          assists with the assessment of the evidence  
19          of the other two witnesses.

20                 There were many inconsistencies in  
21          the evidence at this trial, and that is not  
22          unusual. In fact, it is understandable, and  
23          I say this in relation to inconsistencies  
24          in all of the witnesses' evidence. It is  
25          understandable because of the passage of time.  
26          It is understandable especially with respect  
27          to those witnesses who had been consuming alcohol

1 at the relevant times and were intoxicated to  
2 varying degrees. It is understandable because  
3 witnesses who testify in court are often nervous,  
4 and that may affect how they testify and how they  
5 come across.

6 It is understandable also because some  
7 of the surrounding events that these people  
8 talked about might well have been, at the time  
9 they happened, innocuous events, especially as  
10 far as it relates to before the alleged offence  
11 happened. None of these people would have known  
12 at the time that they would have to remember one  
13 day details of specific times, the order in which  
14 they did things, how much they had to drink, and  
15 details of that nature. So discrepancies and  
16 inconsistencies in certain areas are less  
17 significant.

18 Specifically looking at these three  
19 witnesses that I have talked about, and  
20 starting with Mr. Lepine, on the evidence  
21 he was the least intoxicated of the people  
22 involved in this case. Unlike the others he  
23 had not been drinking all night. He testified  
24 in a straightforward manner and he disclosed no  
25 bias in favour or against anyone. So where his  
26 evidence is in conflict with others I accept his  
27 version.

1           As for M., her evidence was fairly  
2           straightforward as well. Of course, I bear  
3           in mind that she had been consuming alcohol  
4           that night, and according to Chez she was  
5           drunk. I also bear in mind that she is close  
6           to Ms. S. Her memory is not perfect by any  
7           means and I think there is a good chance that  
8           she underestimated the extent to which she was  
9           intoxicated. I tend to accept Chez's testimony  
10          that she was perhaps more intoxicated than Ms. C.  
11          said herself she was.

12           She does not remember being kicked out by  
13          Chez. I do accept that it was Chez who asked  
14          her to leave, but I take into account that in  
15          his evidence what he said was that he simply  
16          asked her to leave and she did. There was no  
17          argument or incident or problem around that,  
18          he did not have to ask her several times. So  
19          I do not consider it particularly significant  
20          that she did not remember being asked to leave.

21           M. was not shaken on cross-examination,  
22          there is nothing to suggest any collusion  
23          between her and Ms. S. In fact, there were  
24          some differences in their accounts of events  
25          which suggests that they were each giving their  
26          own recollection of what happened as opposed to  
27          a made-up or cobbled-up story.

1           So I find M.'s evidence trustworthy and  
2           believable overall, although I accept that  
3           her recollection of certain details may not  
4           be accurate.

5           That evidence, the evidence of Chez and  
6           the evidence of M., I find is useful to assess  
7           the evidence of Mr. Sikyea on one hand and the  
8           evidence of Ms. S. also.

9           Because the requirement for proof beyond  
10          a reasonable doubt applies to the credibility  
11          of witnesses and the onus of proof always  
12          remains on the Crown, when looking at the  
13          evidence on the two key points at issue, as  
14          I have already said, it is not a matter simply  
15          of comparing the evidence of Ms. S. and the  
16          evidence of Mr. Sikyea side by side, rate them  
17          and decide which one I prefer.

18          What I have to do is this: I must ask  
19          myself first if I accept what Mr. Sikyea said.  
20          If I do then I must find him not guilty because  
21          on his version he committed no crime. If I do  
22          not accept what he said I must still consider  
23          whether his evidence in the context of the  
24          evidence as a whole leaves me with a reasonable  
25          doubt about any of the elements of the offence  
26          charged, because if so, again I must give him  
27          the benefit of that doubt and find him not

1 guilty. Even if I reject his evidence completely  
2 and put it completely aside I must not stop  
3 there, I must still then look at the Crown's  
4 evidence and decide whether it is strong enough  
5 to establish beyond a reasonable doubt that  
6 Mr. Sikyea is guilty. Obviously, if after  
7 considering all of this I am left unsure as  
8 to what or who to believe that means I do have  
9 a reasonable doubt, and that means I must find  
10 Mr. Sikyea not guilty.

11 So I start with Mr. Sikyea's evidence.  
12 In assessing that evidence I have taken into  
13 account that some aspects of what he said are  
14 confirmed by other evidence, but there are other  
15 aspects, and significant ones in my view, that  
16 are contradicted by other evidence. For this  
17 and other reasons I am about to explain I have  
18 great difficulty with Mr. Sikyea's account of  
19 events.

20 The first reason is how his evidence fits  
21 or not with evidence of other witnesses. As  
22 I said, some of the other witnesses' testimony  
23 confirmed aspects of what he said. For example,  
24 Chez confirmed that Mr. Sikyea left his house  
25 while he, Chez, had left for a while. But Chez's  
26 evidence contradicts Mr. Sikyea on one point,  
27 which I find very interesting. Chez testified

1           that while they were at his house Mr. Sikyea made  
2           a comment about wanting to have sex with M. or  
3           words to that effect. Chez told him he did not  
4           think this was going to happen. He said that  
5           because at that point M. was obviously interested  
6           in Josh. Mr. Sikyea denied making a comment to  
7           that effect.

8                     But Chez is a neutral witness in all of this  
9           and he was relatively sober. I find it unlikely  
10          that he could mistakenly remember a comment like  
11          that, and no reason why he would make it up. So  
12          I accept his evidence on that point, which means  
13          one of two things: Either Mr. Sikyea made that  
14          comment and did not want to admit to making it,  
15          which bears the question why would that be, or,  
16          possibly, Mr. Sikyea simply does not remember  
17          and that is why he said he did not make that  
18          comment. But that would mean that, contrary  
19          to what he asserted, his memory of the evening  
20          was far from complete.

21                    Mr. Sikyea also described the walk to  
22          Chez's place in a very different way than  
23          M. did. This was not lengthy evidence, but  
24          I find it again very interesting. M. said  
25          that Mr. Sikyea was wanting to walk through  
26          some bushes on their way to Chez's and that  
27          that concerned her. She did not know him very

1 well and she was concerned about walking through  
2 the bush with him. So she insisted on another  
3 route, which she said was actually quite an  
4 efficient way to get to Chez's house.

5 This is the type of detail I think a young  
6 woman in her position, even in an intoxicated  
7 state, would be likely to remember, because it  
8 is something that made her concerned. It is  
9 interesting to me that when Mr. Sikyea talked  
10 about the walk to Chez's house he talked about  
11 it in a different way. He said he was trying  
12 to take some sort of shortcut, but there ended  
13 up being a fence there so they could not get  
14 through and had to go all the way around is  
15 how he explained it. He did not say anything  
16 about suggesting a route, about M.'s concern  
17 about following that route, and her insisting  
18 on going in a different way. I accept M.'s  
19 account of this, and again it raises the  
20 question as to why Mr. Sikyea would gloss  
21 over the discussion about the route, or  
22 alternatively how accurate his memory is.

23 Mr. Sikyea's recollection of how he came  
24 to be talking to the girls at Ms. S.'s apartment  
25 is also different, not just from what Ms. S.  
26 said but also from what M. said. M. said they  
27 were both inside and there was a knock at the

1 door. Mr. Sikyea's version was that he was  
2 walking through Grande Tour and they called  
3 him over; he only went there because they called  
4 him. Neither M. nor Ms. S. were friends or  
5 acquaintances with him, and everyone seems to  
6 agree on that, so much so that they had to go  
7 to Chez's house the next day to figure out  
8 exactly who he was.

9 On that point again I prefer M.'s evidence.  
10 On its own this would not be a significant  
11 difference perhaps, but the reason it strikes  
12 me as interesting is because it fits well with  
13 Mr. Sikyea's overall account of what happened  
14 that night, putting himself not as the initiator  
15 of anything, not particularly interested in  
16 pursuing either of these women, but rather that  
17 he was the one being called over by them and  
18 invited in by them.

19 Mr. Sikyea says that M. decided to come  
20 with him to Chez, and that is consistent with  
21 what she says. That makes sense, even though  
22 M. did not know Mr. Sikyea, because she was told  
23 that Josh would be there and it was clear that  
24 she had an interest in him. But everyone also  
25 agrees that Ms. S. did not want to go to Chez's,  
26 and this fits with the context of the rest of the  
27 evidence, the fact that she did not stay at the

1 bar for very long, the fact that she was tired  
2 and the fact that she wanted to be home. What  
3 does not fit with this is that the same tired  
4 woman, who had passed up on staying at the bar  
5 and was not interested in going to the party at  
6 Chez's, would invite a virtual stranger to come  
7 back to her house later to engage in a sexual  
8 encounter.

9 I have difficulties with the circumstances  
10 where Mr. Sikyea says she invited him. He says  
11 this happened while M. was a few feet away in  
12 the bathroom. Everyone agrees that the bathroom  
13 is very close to the entranceway of the house.  
14 Mr. Sikyea said that Ms. S. took his hand and  
15 held it for a few minutes and told him to drop  
16 off M. and come back. He said it was clear to  
17 him what this invitation was about. Everyone  
18 agreed the door to the bathroom was open. M.  
19 testified she was getting ready, combing her  
20 hair, putting on lipstick, and that she  
21 could not see them but that she could hear  
22 the conversation. She was not paying close  
23 attention to the conversation, but she said  
24 that conversation was about Ms. S. not wanting  
25 to go to Chez's place because she was tired.

26 M. is the sister of Ms. S.'s common-law  
27 spouse. I find it highly unlikely that Ms. S.

1 would come on to Mr. Sikyea within feet of  
2 her common-law's sister. If there had been  
3 a secretive or hushed part to the interaction  
4 between Ms. S. and Mr. Sikyea, right there at  
5 the bathroom door, I also think it is likely  
6 it would have caught M.'s attention since she was  
7 just a few feet away. On the same theme, I find  
8 it somewhat unlikely that Ms. S. would arrange  
9 for this encounter knowing, as she would have,  
10 that M. was going to be coming back at some point  
11 to the house that night. She is again the sister  
12 of his spouse and she, Ms. S., had no way of  
13 knowing when M. would come home.

14 Mr. Sikyea's account of the sexual encounter  
15 itself is that Ms. S. took charge. She put on  
16 music, she danced in front of him, she touched  
17 him, unbuckled his pants, performed oral sex  
18 on him, straddled him and put his penis inside  
19 her. This, again, is the person who had not,  
20 for the previous hours, been looking to continue  
21 to party or to drink. This is the person who  
22 had gone home alone from the bar, was tired,  
23 and had refused to go to another party.

24 He also said that the conversation  
25 immediately before the sexual part started  
26 was that she talked about her common-law and  
27 his infidelity. Her common-law is someone

1 Mr. Sikyea knows and who he referred to as a  
2 friend. It seems a bit strange that she would  
3 bring him up immediately before engaging with  
4 Mr. Sikyea in sexual activity.

5 Then there is what he said she did during  
6 the sexual encounter. According to Mr. Sikyea,  
7 after having put out this invitation to him  
8 sometime before, and after doing all of these  
9 things where she was very much initiating the  
10 contact, in the middle of it all of the sudden  
11 in his words she "comes to" or "it is almost  
12 as if she was coming out of a blackout." She  
13 stops and she tells him to leave. He also says  
14 she hit him.

15 So not only is this drastic change of pace  
16 completely bizarre, but it also does not fit  
17 with what he said she did up to that point,  
18 being essentially the one who was very much  
19 initiating things and wanting this to happen.  
20 The description of Mr. Sikyea of what Ms. S. did,  
21 the invitation, the holding of his hand, sharing  
22 a drink with him, putting on music, dancing and  
23 all of those other things, all suggest that she  
24 had a very calculated deliberate intention to  
25 engage with him, possibly as revenge against her  
26 spouse's infidelity. But it is not consistent  
27 with someone somehow being out of it and all of

1 the sudden snapping out of this state and coming  
2 to their senses. That sequence of events simply  
3 does not make sense to me and I find it is an  
4 unbelievable account.

5 I also find strange Mr. Sikyea's account of  
6 his conversation with Chez a few days after this.  
7 This was a little bit confused in the evidence.  
8 He was being cross-examined about some of the  
9 things he said to the police about all of this,  
10 but what I understood he said was that a few days  
11 after this Chez was telling him something about  
12 the fact that it was alleged that Mr. Sikyea  
13 had broken into someone's place at Grande Tour.  
14 Mr. Sikyea testified at this trial that when  
15 Chez told him that he was thinking back, and his  
16 reaction was, in his words, "I'm going to beat  
17 this charge because I was with H. that night."

18 I find it very unlikely that this is the  
19 first thing he would think. Upon being told  
20 he is accused of having assaulted someone in the  
21 very building where Ms. S. lived, and considering  
22 how their encounter ended, with her apparent  
23 change of heart, hitting him, being upset and  
24 making him leave, I find it unlikely that he  
25 would not immediately connect the dots and know  
26 that his accuser was Ms. S. Yet his evidence  
27 was that he thought that it would be helpful to

1 him that he was with her that night, and I find  
2 this does not make much sense, especially bearing  
3 in mind that his version was that he was only  
4 with her for a relatively short period of time.  
5 So again, this detail about this conversation  
6 with Chez is something I find troubling.

7 I have considered carefully the evidence  
8 about the two-week period of time where the  
9 police were looking for Mr. Sikyea, and I want  
10 to address that specifically. The evidence from  
11 the police officer was that there were multiple  
12 patrols in town, several houses visited, family  
13 members spoken to, and that because of the press  
14 release it would have been on the radio and in  
15 the local paper the fact that they were looking  
16 for Mr. Sikyea, and Mr. Sikyea did say that he  
17 was in the community that whole time.

18 But I do have to be very cautious about  
19 this type of evidence. First of all, Mr. Sikyea  
20 was not asked, not by his lawyer nor by the  
21 Crown, anything about how and more importantly  
22 when he found out the police were looking for  
23 him, and I cannot speculate about evidence that  
24 is not before me. I have a tendency to think  
25 that it is likely he knew the police were looking  
26 for him. I think that inference could probably  
27 be drawn based on the number of attempts that

1           were made to find him, but even assuming that,  
2           I have to remind myself that this could be for  
3           many reasons other than he knew he had done  
4           something wrong. He could have been worried,  
5           he could have been afraid to turn himself in,  
6           he could have been unsure about what kind of  
7           trouble he was in. There are a number of  
8           innocent explanations for why he may not have  
9           been on the phone immediately to contact the  
10          police to turn himself in. So I have not used  
11          that evidence as an indication of his guilt.

12                 Apart from some of the differences between  
13          Mr. Sikyea's version of events and the version  
14          of the other witnesses not directly involved  
15          in this, and by this I mean Chez and M., and  
16          I have already referred to them, and apart from  
17          what I consider to be the improbability of the  
18          many aspects of his version of events, which  
19          I have also explained, I have considered as  
20          well some of the things that came up in his  
21          cross-examination about what he told the police.

22                 In this trial the defence conceded that  
23          the statement that he gave to the police was  
24          voluntary and was admissible. It was not made  
25          an exhibit because it was not put into evidence  
26          by the Crown, but it was used to cross-examine  
27          Mr. Sikyea. Without going into all of the

1 details, some of the things that Mr. Sikyea  
2 said at the trial compared to what he said  
3 to the police disclosed certain differences,  
4 differences about the level of his memory or  
5 the quality of his memory of these events,  
6 details about that conversation that he had  
7 with Chez, about how he portrayed the frequency  
8 with which he gets into trouble when he drinks.

9 I do not think that any of those  
10 inconsistencies on their own would be a cause  
11 to reject his evidence, but cumulatively and  
12 especially in combination with the other things  
13 that I have already mentioned they add to my  
14 already significant concerns about his version  
15 of events.

16 I have also, with some caution, considered  
17 his criminal record. The record can only be used  
18 for this purpose, and I am talking about now the  
19 assessment of credibility. It is not to be used  
20 to show that he is the type of person to commit  
21 crimes or is more likely to commit crimes or  
22 is more likely to have committed this one. But  
23 there is a pattern of convictions on that record  
24 that shows a disrespect for the law, and that  
25 is a factor of which I am entitled to take into  
26 account. In this regard, of particular relevance  
27 on the issue of credibility is one of the most

1 recent entries on the criminal record, which  
2 is a conviction for perjury. So this is another  
3 factor I have taken into account.

4 For all of those reasons I do not accept  
5 Mr. Sikyea's account of what happened that  
6 night as far as how he came to be at Ms. S.'s  
7 house the second time or what happened inside  
8 the house. I reject that evidence and it does  
9 not leave me with a reasonable doubt.

10 As I have already said though, Mr. Sikyea  
11 cannot be found guilty on this charge simply  
12 on the basis that his evidence was rejected  
13 because the onus is on the Crown to prove his  
14 guilt. So I must consider whether the Crown's  
15 case meets that high standard of proof.

16 Whether it does or not depends primarily  
17 on the assessment of Ms. S.'s evidence as she  
18 is the only witness who gave direct evidence  
19 about the sexual activity and the only witness  
20 who gave evidence about whether Mr. Sikyea was  
21 in her house with her permission or on her  
22 invitation.

23 As is the case with Mr. Sikyea, Ms. S.'s  
24 evidence is contradicted on some points by other  
25 evidence, and there are aspects of her evidence  
26 that were somewhat unclear. For example, Ms. S.  
27 testified that it was M. who opened the door to

1 Mr. Sikyea when he came knocking. She also said  
2 she only was briefly at the doorway, she went to  
3 see who it was, but spent most of the time when  
4 Mr. Sikyea was there on the couch.

5 Defence counsel argued that this should make  
6 me suspicious because it would suggest that she  
7 was trying to distance herself from having spent  
8 any time in proximity to him. I accept M.'s  
9 evidence that Ms. S. was in fact at the door for  
10 a period of time. M. was not sure who opened the  
11 door. She said she did not know, she thought it  
12 was H., but she definitely said that Ms. S. was  
13 by Mr. Sikyea when she, M., was in the bathroom.

14 So on that point I find Ms. S. is not  
15 correct as far as how much time she spent  
16 at the door, but I consider also that at the  
17 time this happened this would not have been  
18 a significant event. The same goes for the  
19 inconsistency between her evidence and M.'s  
20 evidence about whether Mr. Sikyea actually  
21 stayed outside the house or whether he was  
22 in the doorway or whether he was a few feet  
23 inside the house as M. described.

24 Another problematic aspect of Ms. S.'s  
25 account is what she did after the sexual  
26 assault. She said after Mr. Sikyea left she  
27 went to her mother-in-law's and spoke first

1 to her sister-in-law about what had happened.  
2 She talked about having returned home with  
3 someone else, and that does not fit with M.'s  
4 testimony that when she returned from Chez's  
5 place Ms. S. was home and was home alone. Of  
6 course, I did not hear any evidence from the  
7 mother-in-law or the sister-in-law about the  
8 timing of the disclosure to them.

9 Ms. S. also said that a police officer  
10 gave her a ride to the Health Centre, which  
11 is clearly wrong, because Constable Froyland  
12 met her at the Health Centre after the complaint  
13 was made. So clearly she is wrong about some  
14 of the sequence of events that occurred after  
15 Mr. Sikyea left.

16 We do know that the complaint was received  
17 by police after 9 p.m. and that by then Ms. S.,  
18 M. and two others were at the Health Centre.  
19 We know from M. that at some point during the  
20 day Ms. S. disclosed to her what happened and  
21 that Ms. S. was planning or thinking that she  
22 would just forget about it. It was M. who said  
23 no way and suggested that they go to Chez's  
24 to figure out who the man was who had been at  
25 the house that night. So it seems that after  
26 that they went to the Health Centre together,  
27 and that seems to fit with the rest of the

1 evidence.

2 So all that to say, I think it is clear  
3 that Ms. S.'s sequence of events is at least  
4 in part mistaken as to what happened after  
5 the assault. On her version there should have  
6 been someone at the house with her when M.  
7 returned, and her timing is off as noted by  
8 defence counsel.

9 I recognize these problems, but I do not  
10 find that they compromise her credibility on  
11 the key issue of what happened in the house.  
12 That she would be confused makes sense after  
13 what she described had happened to her. She  
14 said herself that she was shocked, that she  
15 was confused, that she did not know what to  
16 do. She was pressed in cross-examination  
17 about why she did not call the police right  
18 away instead of walking out alone to go to  
19 her mother-in-law's. She repeated that she  
20 was confused and did not know what to do.

21 I do not find this surprising, and it is  
22 consistent with M.'s evidence that Ms. S. was not  
23 really going to do anything about this when she  
24 first disclosed it to her. It is also consistent  
25 with the observations made by Constable Froyland  
26 about Ms. S.'s emotional state at the Health  
27 Centre the following night, and the fact that

1 other people were with her both at the Health  
2 Centre and at her house to support and comfort  
3 her.

4 There is no question the issue about  
5 the entry into the house is an important one.  
6 Ms. S. denies letting Mr. Sikyea in. She does  
7 not know how he got in. She assumed he got in  
8 through the window because it had been left open  
9 after she had her cigarette before going to bed,  
10 and she saw the screen on the floor after these  
11 events, but she did not say she saw Mr. Sikyea  
12 crawling through the window.

13 M. said the doors to these apartments lock  
14 automatically, but H. said they get locked with a  
15 push button on the doorknob. She also said it is  
16 possible to open the door from the inside without  
17 unlocking it, that it would stay locked, but you  
18 do need a key to get in from the outside. Ms. S.  
19 believes the door was locked.

20 It seems to me it would be fairly easy for  
21 her, if she was making up this story, to simply  
22 say that she forgot to lock the door. That is  
23 not what she said, she thought the door was  
24 locked. There was no damage to the door, there  
25 was no damage to the lock, and there really was  
26 no damage to the window. No one saw anything  
27 on the floor, dirt or anything to confirm that

1 someone came in through the window.

2 There is evidence suggesting that the  
3 opening of that window is not very big when  
4 compared to Mr. Sikyea's size. There is no  
5 evidence that Constable Froyland actually tried  
6 to make his way through the window as a test  
7 of sorts nor that there was some experimenting  
8 done with someone of a size comparable to  
9 Mr. Sikyea's size trying to wiggle his way  
10 through the window. So really, I cannot  
11 speculate about those matters.

12 I cannot conclude beyond a reasonable doubt  
13 that Mr. Sikyea entered through the window, but  
14 I do not need to be convinced of that fact beyond  
15 a reasonable doubt to accept Ms. S.'s account  
16 that he was in her house without permission.  
17 On that point she was firm. She said she did  
18 not invite him in and she did not let him in.  
19 She said she woke up in the middle of the act  
20 of intercourse.

21 Unlike what the words might suggest at  
22 first blush, to prove break and enter the Crown  
23 does not actually have to prove that anything  
24 was broken. It is possible that the doorknob  
25 button was unlocked at some point unbeknownst  
26 to Ms. S. It is possible something was done to  
27 the metal bracket on the window to create more

1 space. I make no specific finding either way  
2 because the evidence falls short on that, but  
3 what I do accept is that she did not invite him  
4 in and that he made his way in there without  
5 permission. I do not find the absence of damage  
6 to the door and the size of the window and those  
7 aspects of the evidence are a reason to reject  
8 Ms. S.'s assertion that she did not invite him  
9 in or that she was sexually assaulted by him.

10 Defence counsel made submissions about M.  
11 saying that when she came home Ms. S. answered  
12 the door right away, whereas M. had expected  
13 there to be some delay before she would come  
14 to the door. All I will say on that is Ms. S.  
15 being awake at that point is not significant  
16 because it is as consistent with her version  
17 of events as it is with Mr. Sikyea's version  
18 of events. It is clear that the sexual contact  
19 took place sometime between the time Mr. Sikyea  
20 left Chez's place and the time M. returned home,  
21 so it is not surprising that Ms. S. was awake by  
22 the time M. got home.

23 Defence notes some of the difficulties  
24 with the timeline because Ms. S. did say she  
25 returned home with other people after going  
26 to her mother-in-law's, but the evidence is  
27 unclear as to if by this she means she was

1 walked home by someone else or whether she  
2 let someone into her house after she got  
3 home. But as I have already stated, I do  
4 not accept Ms. S.'s evidence about the events  
5 that followed the sexual contact. It is  
6 not entirely reliable and she does not have  
7 a clear recollection of what happened and  
8 in what order. But I simply do not find that  
9 this taints her credibility or her reliability  
10 as far as her account of what happened in the  
11 house.

12 Defence counsel has argued that although  
13 it might seem surprising that Ms. S. would  
14 arrange this rendezvous with a virtual stranger,  
15 it is not actually surprising given that it  
16 happened in the context of a weekend that was  
17 all about drinking and partying, and, in defence  
18 counsel's words, free-wheeling. The evidence is  
19 that Ms. S., M. and others were celebrating M.'s  
20 birthday that weekend, there is no question about  
21 that, but the evidence also shows that by the  
22 time Ms. S. encountered Mr. Sikyea the first  
23 time he was at her house she was not in the  
24 mode of continuing to party at all.

25 By all accounts by then she had reached  
26 the point where she was tired, she had left  
27 the others at the bar, she had gone home alone,

1 and then she turned down an opportunity to go to  
2 another party. So the evidence does not suggest  
3 she was out looking for a party or out looking  
4 for someone to take home or anything of that  
5 sort. The evidence is to the contrary, in fact,  
6 that she had enough and that she wanted to go to  
7 sleep because she was tired.

8 Defence counsel also asked me to consider  
9 the improbability of Ms. S. not waking up  
10 until the middle of intercourse, considering  
11 her clothes had to be removed especially, and  
12 in particular because her testimony is that  
13 she was tired as opposed to highly intoxicated.  
14 Again, I cannot speculate about that, but I know  
15 from having heard trials and having done several  
16 sentencing hearings in this jurisdiction for many  
17 years that this scenario where a person wakes  
18 up during the act of intercourse being forced on  
19 them is not unheard of; far from it. It is true  
20 that in many such cases the evidence is that the  
21 complainant is highly intoxicated, passed out  
22 from drinking, but that is not always the case.

23 People are different. Evidently some  
24 people sleep very soundly and are hard to awaken.  
25 Ms. S. had been drinking most of that afternoon  
26 and evening. Although on the evidence she was  
27 not highly intoxicated by that point in the night

1           it may well be that her consumption of alcohol  
2           over the past day or days made her sleep more  
3           deeply and harder to wake up. I do not know, but  
4           I do not find that that aspect of the evidence in  
5           and of itself is a reason to reject it or have a  
6           reasonable doubt about it.

7           Ms. S.'s evidence was not perfect, nor  
8           did it fit perfectly with the other evidence.  
9           If it did that might be more suspicious than  
10          anything else. But on the key points that are  
11          at issue on this case I do find her evidence  
12          credible and reliable. I found she readily  
13          admitted when she did not know something or  
14          was not sure. She was not self-serving in  
15          her evidence and she did not evade questions.

16          Triers of fact have to be very careful  
17          about what weight they attach to the demeanor  
18          of witnesses. Juries are warned about that  
19          and judges sitting alone must be mindful of it  
20          also. But I did observe Ms. S. closely during  
21          her testimony. I observed at what points in her  
22          evidence she became upset. This was not a trial  
23          where she sobbed loudly or had any particularly  
24          dramatic outburst during her evidence, but it was  
25          very noticeable to me that when she was talking  
26          about what was happening when she woke up in  
27          particular she became more emotional. She cried

1           rather discretely, but she cried. She also  
2           started to shake at a few points when she was  
3           describing what she woke up to.

4           When she was cross-examined about the  
5           defence theory, about having been the initiator  
6           in all of this, when it was suggested to her  
7           that she touched Mr. Sikyea, that she performed  
8           oral sex on him, that she straddled him and was  
9           actually the one who put his penis inside of her,  
10          her answers and reactions appeared to me to be  
11          genuine disbelief and shock that this would be  
12          suggested to her.

13          Demeanor is not the determining factor  
14          in assessing credibility. In this case my  
15          observations of this witness during her evidence  
16          are not the determining factor in my findings,  
17          but they do lead me to the same conclusion what  
18          the analysis that I have done on the contents of  
19          her evidence have led me to. It suggests to me  
20          that her account of events is true and accurate  
21          as far as what forms the subject matter of this  
22          charge, and it confirms to me the opinion that  
23          I formed in assessing the evidence that none  
24          of the inconsistencies and problems with that  
25          evidence call into question its accuracy and its  
26          truth when it comes to the essential elements of  
27          this offence.

1           As for the exhibits, some of them are  
2           more useful than others. The Agreed Statement  
3           of Facts confirms the forensic test results,  
4           and I have already referred to that. The photos  
5           provide additional information about the house,  
6           and the windows in particular. Mr. Sikyea's  
7           photo, Exhibit 2, as I have said, is just part  
8           of the narrative of how he came to be identified  
9           as the man who had been at the house that day.  
10          The diagram he drew is useful in understanding  
11          the path that he took that brought him in the  
12          vicinity of Grande Tour, but I do not find  
13          anything turns on that. The criminal record,  
14          as I have indicated, is something that I have  
15          considered strictly in the assessment of his  
16          credibility.

17                 For all of those reasons I conclude that  
18          the Crown has proven beyond a reasonable doubt  
19          that Mr. Sikyea broke into Ms. S.'s residence  
20          and did sexually assault her. As I mentioned  
21          yesterday, the evidence of the police officer  
22          as far as the exact address of this building  
23          is not consistent with the indictment. Defence  
24          counsel conceded that nothing turned on that and  
25          no prejudice arises from that because it is clear  
26          on the evidence that everyone was talking about  
27          the same venue.

