## WARNING

The court hearing this matter directs that the following notice be attached to the file:

A non-publication and non-broadcast order in this proceeding has been issued under subsection 486.4(1) of the *Criminal Code*. This subsection and subsection 486.6(1) of the *Criminal Code*, which is concerned with the consequence of failure to comply with an order made under subsection 486.4(1), read as follows:

- **486.4 Order restricting publication sexual offences.** (1) Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
  - (a) any of the following offences:
    - (i) an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1,172, 172.1, 172.2, 173, 210, 211, 212, 212, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or
    - (ii) any offence under this Act, as it read at any time before the day on which this subparagraph comes into force, if the conduct alleged involves a violation of the complainant's sexual integrity and that conduct would be an offence referred to in subparagraph (i) if it occurred on or after that day; or
  - (b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).
- (2) **MANDATORY ORDER ON APPLICATION** In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall
  - (a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the complainant of the right to make an application for the order; and
  - (b) on application made by the complainant, the prosecutor or any such witness, make the order.

**486.6 OFFENCE** — (1) Every person who fails to comply with an order made under subsection 486.4(1), (2) or (3) or 486.5(1) or (2) is guilty of an offence punishable on summary conviction.

## **ONTARIO COURT OF JUSTICE**

DATE: 20230619

COURT FILE No.: BRAMPTON 22-1669

BETWEEN:

HIS MAJESTY THE KING

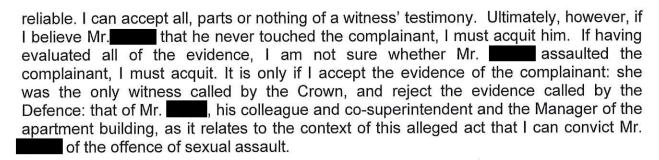
Crown

-AND-

Defendant

Before Justice K.L. McLeod Heard on April 11, 12, 13<sup>th</sup>, 2023 Oral Judgment delivered June 19<sup>th</sup>, 2023 Written Reasons delivered June 20<sup>th</sup>, 2023

Ms. A. Persad-Fordcounsel for the Crown Mr. G. Tomlinsoncounsel for the Defendant
K.L. McLeod J.:
[1] Mr. is charged with sexual assault. Mr. is a superintendent in an apartment building; the complainant, Ms. B.A., is a tenant. She alleges that on one occasion Mr. came to her apartment, ostensibly to check her smoke detector, and told her that he had been watching her. He grabbed her, rubbed his hands up and down her body, including her hair, and kissed her.
[2] Mr. denies this allegation.
[2] Wil. deflies this allegation.
[3] The issue in this trial is whether the Crown has proven Mr. It is guilt of this alleged offence beyond a reasonable doubt: what that means is that I must be sure that Mr. It is guilty before I convict him. In order to determine that, I must examine the credibility and reliability of each of the witnesses called in this trial. This is not a contest as to whose evidence I prefer, but each witness' evidence must be scrutinized for the honesty and accuracy of the details of what occurred. It is not a case that I have to believe or disbelieve all of a witness' testimony to determine whether it is credible and
NOTE: This judgment is under a publication ban described in the WARNING page(s) at the start of this document. If the WARNING page(s) is (are) missing, please contact the court office.



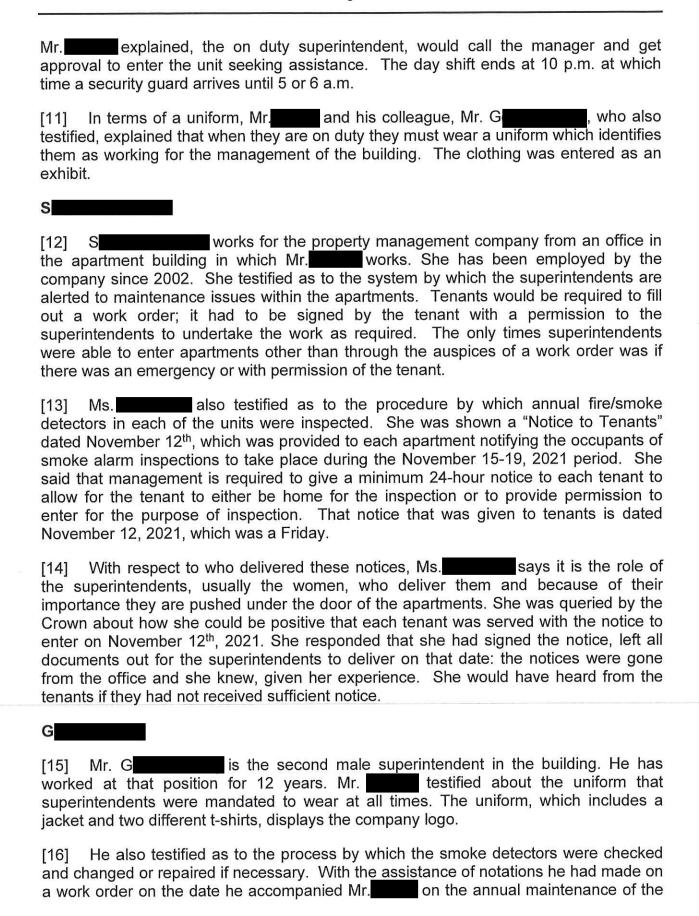
- [4] The Crown, Ms. Persad-Ford, argues that *R. v. JJRD*, [2006] O.J. No. 4749 is applicable here; that is, that I should reject Mr. 's evidence on the basis that I am able to come to a reasoned acceptance of the truth of the complainant's evidence. That is that she was so credible and reliable that I must conclude that the Crown has met its onus beyond a reasonable doubt. The Crown also, in the alternative, submits that I must reject the defence evidence because it is both incredible and unreliable.
- [5] On the other hand, Mr. Tomlinson argues that I must acquit Mr. because his testimony was both credible and reliable and buttressed, in describing the context of his work and duties in the building, by his witnesses.
- [6] I intend to commence this judgment by describing the background of each of the witnesses in order to set the context.

## Background of Ms. B.A.

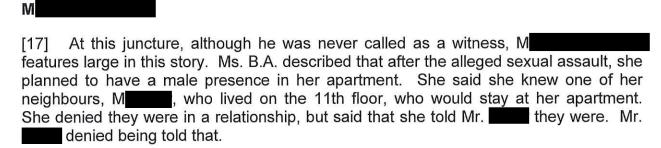
- [7] She signed a one year lease to rent her first apartment effective from September of 2021. She was to pay a monthly rent of \$1450. She took possession of the apartment in August and was billed a pro-rated rent for August.
- [8] She was 19 at the time and apparently working in a bar/nightclub and worked evening shifts from Thursday through the weekend, in the late afternoons and evenings, but says that her work was event-based. She no longer works there and says she is struggling with work but is now in school.

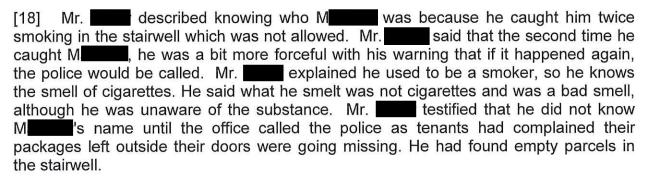
# Background of Mr.

- [9] Mr. Liping is from Syria. He came to Toronto with his family, his wife and three children. Upon arrival in Canada, the family lived in a hotel and then moved to the building in which he now resides and works. He and his wife were hired as a team as superintendents in the building in 2019. His role in the building is to make repairs where needed. His wife cleans the public areas of the building and is responsible, along with the wife of the other male superintendent, for the delivery of notices from the building management to the tenants.
- [10] Mr. explained that the tenants will drop off work orders/requests for repairs at the management office which the male superintendent on shift will collect at 9 a.m. These apparently usually number between 10-15 requests and they are the superintendent's responsibility to attend to. They work up until 5 p.m. and then one person remains on call and if they receive a telephone request for urgent assistance,







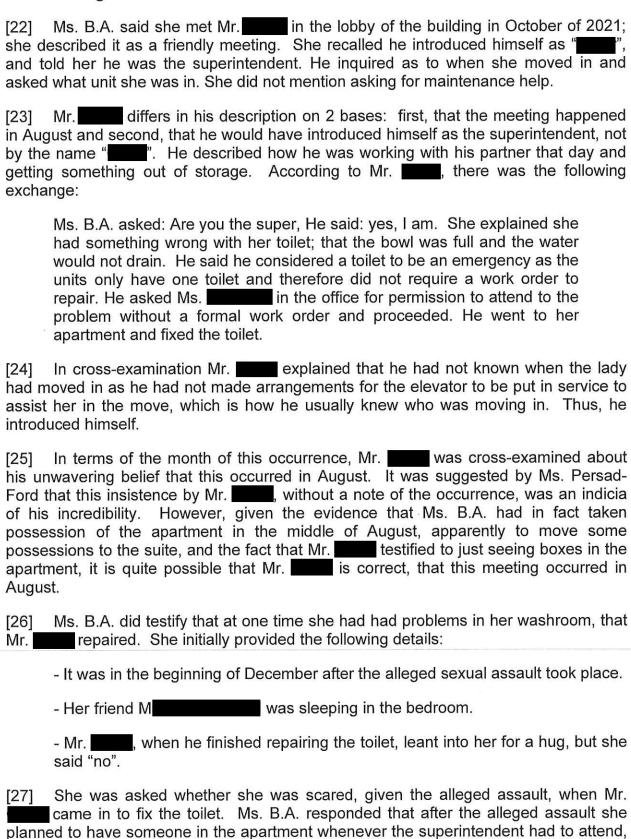


- [19] Ms. She had spoken to the leaseholder who had improperly rented the apartment out. She said there were complaints from tenants who had not received packages which were apparently delivered, and Market was apparently seen on video surveillance taking parcels from the mailroom. She also explained that she had seen him on video walking with something under his jacket and had found packaging in the stairwell.
- [20] Ms. called the police on December 28th, 2021. She testified that she wanted the police to tell him not to remain in the building, but that she knew even after that her staff brought to her attention that he was in the building. She understood that Management and Ms. B.A. were in a relationship and told the police of that. She said she had viewed video surveillance of them together acting as one would expect two people in a relationship would behave.

#### The Evidence

[21] I will now turn to the evidence of Ms. B.A as to her interactions with Mr. She testified that there were approximately 10 such occasions but was only able to specify details from certain of them. I will also contrast her descriptions of those meetings with those of Mr. and his colleagues from the building.

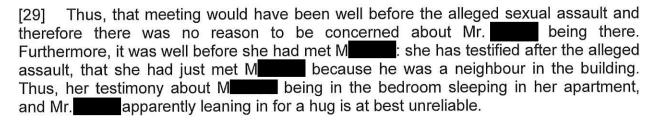
### **First Meeting**



thus she had asked Market to be there. While she could not recall how the

superintendent had been alerted as to the problem; whether by a formal notice or someone speaking to the office, she recalled something being wrong with the toilet lever.

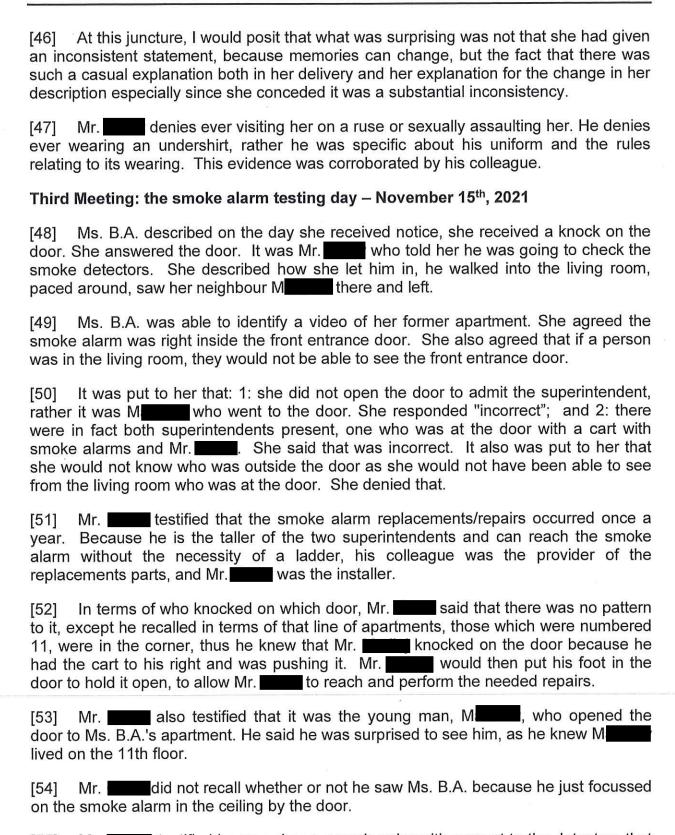
[28] However, Ms. B.A. was cross-examined about her statement to the police and agreed that she told the police that in fact the toilet issue had taken place and she had spoken to Mr. the first time she met him in the lobby, just as Mr. has testified.



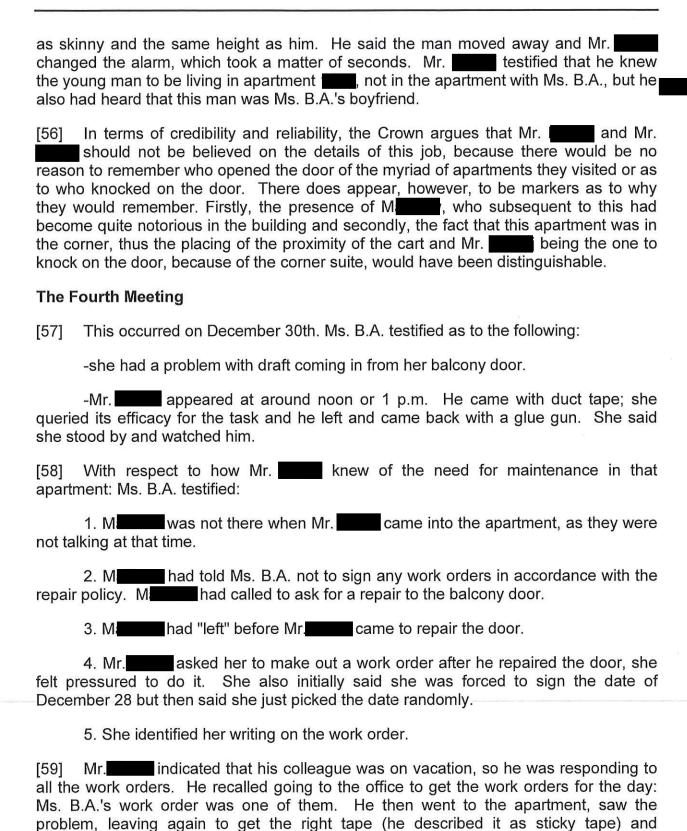
## **Second Meeting**

- [30] This is the occurrence of the alleged sexual assault. In terms of the date, Ms. B.A. said this:
  - It was on a Thursday or Friday because those where the days she worked.
  - It was after Halloween, in early November.
  - It was 2-3 days before the date of the smoke alarm inspection.
- [31] Ms. B.A. was shown a calendar and a document providing notice to tenants dated November 12 indicating that smoke alarm inspections would take place on Monday, November 15th. She was also shown a 2021 calendar showing that November 12th was a Friday and November 15th a Monday. She disputed the calendar asking if it was correct indicating it was "not correct in her mind". She never explained why she could dispute a calendar beyond that.
- [32] Ms. B.A. also disputed receiving the notice on the 12<sup>th</sup> November, rather she indicated it was on the 15<sup>th</sup>.
- [33] —She said that it was around 3 p.m. She was in the apartment with her dog. There was a knock at the door; it was Mr. He said he had to check the smoke detector. She said she put the dog in the bedroom and went to the living room. He grabbed her, was whispering in her ear: "you have such a nice body". He was "like eating my face" using his tongue. Her arms were limp by her side. He was touching her all over, her hair, breasts, thighs, bottom, waist, moving his hands up and down her body about 20 times.
- [34] Ms. B.A. said she did not call for help, reasoning that nobody would hear her and the door was locked. She described how she knew he had locked the door when she was putting the dog in her room as she had not actually seen him doing it. She said she only realized it was locked, when he abruptly left, and she heard him unlocking the door.

- [35] She described herself as "disassociating" during this assault.
- [36] She said she recalls saying something to him about the cost of the rent in the building.
- [37] In terms of what she was wearing she said: jeans and a long sleeve shirt and that Mr. was wearing a white undershirt with no sleeves.
- [38] Ms. B.A. was asked if she told anyone about what happened. She said after it happened, she got ready for work, went to work and told a co-worker whom she named as James. When asked in cross-examination to describe what she told "James" she responded that she gave her a brief overview of what happened because she was not comfortable in telling people and thus only said she had been touched in a sexual manner.
- [39] Other than James, she said she also subsequently told her supervisor at work, Names. She testified that she never described the true nature of the assault, nor did either of these people call the police
- [40] Ms. B.A. described calling a friend "who was like a sister" to her who "allowed her to vent". This was "Same". She did not tell her what had happened, just that she felt uncomfortable. When Ms. B.A. reported this assault to the police, she did not provide any of these people's names or their contact information. When asked at trial about "Same", she said that at the time of testifying they were not on speaking terms.
- [41] Additionally, apparently a week after this alleged assault, Ms. B.A. said she opened up about the situation to friends and family. None of these people were named in court or testified.
- [42] In cross-examination on this event, Ms. B.A agreed she was not able to see the door being locked from her vantage point. She said she surmised that he had locked the door because she heard him unlocking the door when he left. The problem with that stated assumption is that she had already stated that she did not scream during the assault because she knew her door was locked. She could not have known it was locked at that time.
- [43] In terms of the force used by Mr. she said it was a 10 being the highest, but said there were no injuries, bruises or scrapes.
- [44] In terms of the touching on her breast area, she indicated it was over her clothing. It was put to her that she had told the police that she had been touched under her shirt; her response: "when you are caressing someone clothes are going to move".
- [45] However, she did agree there was a significant difference between being caressed over and under the clothing.

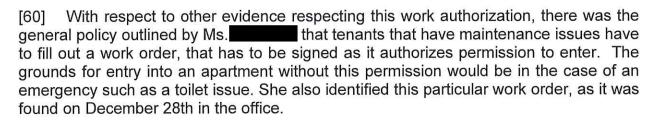


[55] Mr. testified he was shown a work order with respect to the detectors that required new parts or needed to be replaced. He indicated that on it was his writing showing that in Ms. B.A.'s apartment, the smoke detector had to be replaced. He recalled knocking on the door and it was answered by a young man who he described



thereafter doing the repair. He identified the work authorization and denied ever forcing Ms. B.A. to sign it in front of him. He completed the work and provided a written

description of what he had done on the work order.



[61] With respect to other meetings with Mr. [88]; Ms. B.A. was at best vague. She mentioned a laundry room incident which took place after the smoke inspection. She said she was doing laundry, that he said: "I finish work at 5 p.m., do you want to go out? You can call the number if you need anything. We can plan something." She said she never called the number. She also testified that there were other conversations in which he would say that he was always available and that she could call the superintendents' number.

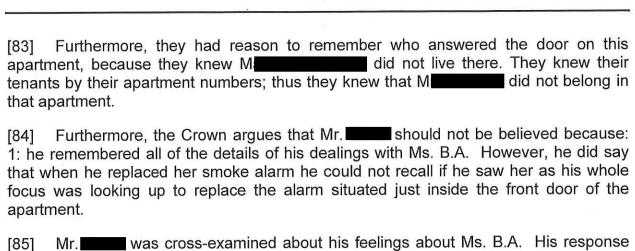
## The Complaint to the Police and the Issue of its Timing

- [62] I will now turn to Ms. B.A.'s version of her complaint to the police about Mr. She went to the police on December 30th; she says after the repair of her door, because, she said, signing the work order and backdating it would give Mr. permission to enter her apartment at anytime and was concerned.
- [63] When asked why she did not make the complaint earlier, her response was that this was her first apartment, her lease was a year long, and she did not want to leave as she did not know what the repercussions were with her contractual duty under the lease. She also indicated she did not want to take any action until she was 100 percent sure she was going to leave. She felt that if she reported to the police, she knew she would have problems with the property management and staff, and she wanted to be fully informed before she made the decision.
- [65] I do not accept Ms. B.A.'s evidence as to the making of this work order, for the following reasons
  - 1) the policy of the building to only respond to completed work orders in writing, unless there was an emergency: such as a toilet.
  - 2) had been ordered out of the building on December 28th. The Work Order was signed December 28th. It is unlikely therefore that he could have made a maintenance call on December 30th, especially since Ms. B.A. testified that they were not speaking at the time.

- [66] With respect to Ms. B.A.'s evidence about her concern about her contractual duty which delayed her complaint, I will now turn to the history of Ms. B.A.'s rent payment, or lack thereof from the first month of her lease. She had signed a contract for one year, agreeing to pay rent on the first of each calendar month.
- [67] A ledger representing Ms. B.A.'s history of paying rent was introduced. Ms. B.A. agreed it showed the extent of her history of non-payment.
- [68] In September 2021, she did not pay her rent. She received a warning notice of termination of her lease on September 15th, 2021, that she must pay her rent by 29th of September. She did not pay.
- [69] On October 1st, 2021, she did not pay her rent for October. Thus, there was a balance outstanding of \$2700. She paid \$1450 on October 5th.
- [70] On November 1st her rent was still outstanding, thus on November 11th she was served with yet another notice of termination. She finally paid the rent on November 29th.
- [71] On December 1st her rent was not paid, and again another notice of termination was served on December 15th.
- [72] Ms. B.A. did not pay her rent in January or February, 2022: her justification was that she was planning to leave. The reason for her decision, she said, was that on January 4th, she received a letter from building management that should she have any issues, she was to go to the office and speak to the women there. She was to have no contact with Mr. who was arrested and charged on December 30th.
- [73] Ms. B.A. said she felt that until that time she had had a good relationship with management (despite her continued non-payment or late payment of rent and the receipt of the notices of termination of her lease). She called the relationship with management "rocky" after she made the complaint about Mr.
- [74] Ms. testified that the police warned her there should be no contact between Ms. B.A. and Mr. who continues, to this day, to have his job in the building, thus the letter was sent. The letter sent to Ms. B.A. was filed as an exhibit. It was not in any way disrespectful. Thus, Ms. B.A.'s indication that this letter to her suggested there was to be a "rocky" relationship is incomprehensible.
- [75] Ms. Indicated that when they have tenants who are unable to pay their rent, they work with them to find solutions. She indicated that the only direct contact her staff had with Ms. B.A. was when she lost her keys to the apartment at the very beginning of her lease. This directly contrasts with Ms. B.A.'s evidence indicating that she had a good relationship with Management. Furthermore, when Ms. B.A. was asked about the notices of termination, she indicated she had received countless of these letters, she said "they don't just kick you out". She appeared remarkably nonchalant about these formal notices. She also protested that she did not understand the gravity of the notices to terminate at the time. I have reviewed the notices and, frankly, I am

not sure how a notice which says in shaded type, for emphasis, "This is a legal notice that could lead to you being evicted from your home", could be misunderstood.

- [76] Ms. B.A. also admitted she had stopped working in December and was not working in January. With respect to her non-payment of rent, she said she did not know how to leave the apartment and break her contract, so just stopped paying. Her rationale for not paying the rent, because she wanted to leave because of the alleged rocky relationship does not explain why she never actually paid the rent on time. Ms. B.A.'s attention to her contractual obligations was at least wanting.
- [77] Ms. B.A said she physically left the apartment in February, although she did not let the Management office know, she never handed the keys in to anyone and did not return until March, when she came back to collect her possessions. In fact, it appears she even used Canada Post for the return of the keys on March 11, 2022.
- [78] This chronic history of non-payment/late payment, of course, contrasts directly with Ms. B.A.'s testimony that she did not talk to the police about Mr. before the end of December because she was concerned about how it would interfere with her obligations under a one-year lease. Her contractual duties were also to pay her rent on the 1st of each month, a duty which she never complied with, and totally ignored all the notices to terminate. She had long worked out a way of not honouring the contract; it was simply not to pay rent.
- [79] Ms. B.A. also agrees that when she made the complaint to the police, she never informed them of her rent issues, or that a notice to terminate was effective the day before she made the complaint.
- [80] Finally, with respect to her outstanding rent; an order was made under an application by the Property Management Company to the Landlord and Tenant Board, that Ms. B.A. pay the Landlord outstanding rent and costs of \$2434.71. Ms. B.A. was asked in cross-examination if she had paid what she owed, she indicated she did not, that her lawyer paid the rent. The speed of this response to the question was as surprising as indeed her allegation that her lawyer paid her outstanding debt! By notice dated August 29th, 2022, Ms. B.A. now appears to be suing the Management Company.
- [81] The Crown has argued that Mr. which is evidence should be disbelieved, further that I should not have a reasonable doubt about its veracity. She points to Mr. certainty that he first met the complainant in August; it appears that is certainly possible given the state of her apartment showing she had not yet moved in.
- [82] The Crown says that both Mr. and Mr. cannot be sure as to who knocked on the door to alert the occupants of Ms. B.A.'s apartment on November 15th. As indicated, there was a reason proffered by the placement of the apartment in the building and the fact that they replaced or repaired smoke alarms on each floor of this building and to each apartment, one above the other, makes this memory perfectly credible.



- was that he was governed by the rules of management as to his interaction with her. He said that he dealt with all the tenants and everyone in a friendly human way.
- [86] He was asked: "Were you attracted to her?" He said "no".
- [87] The very next question was: "You knew she was young?" He answered: "I am a father of a daughter". He did, however, agree she looked young, but that he was aware of the sanctity of his marriage. He said he did not care if she looked young, he deals with all the tenants in the building in the same way and they were all ages.
- [88] What I am being asked to accept is that because his answers to this were "evasive" there should be a wholesale disbelief of his testimony. I do not accept that description of his answers. This is a man who came from Syria in 2016. He lived in this apartment building with his family for some years, learning English, applied for a job in the building. He obviously is such a diligent worker that, despite this allegation, management did not remove him from his job. He talked about his uniform, he brought it to court, he brought the smoke alarm to show the simplicity of the installation and why he could do it so quickly. He described how he first met Ms. B.A. in this way:

Her name is not my business. My business is the number of her apartment. What I care for is the number, what's the unit what's the problem. As for the people, I don't care, its not my business, if someone is single, divorced.

- [89] Ms. Persad-Ford also encourages me to reject the evidence of Mr. which corroborates to a certain extent the November 15th meeting. Frankly her argument that *R. v. JJRD* (supra) governs this case requires a disbelief of this evidence. Ms. Persad-Ford urges me to wholeheartedly accept the evidence of the complainant and to ignore any possibility of doubt about the veracity of Mr. sevidence and those of his supporting witnesses. That is not possible.
- [90] It is not possible because the evidence of Ms. B.A. is not worthy of belief.
- [91] Her evidence about the first meeting changed between her original statement to the police and her testimony. She had pegged that maintenance issue much further into her "tenancy" and her testimony contained details about her need for M

to be present, assuming this was after she met him, but this was clearly before she had properly moved in.

- [92] A blank calendar was put to her to try to discern the day of her alleged sexual assault; her first reaction was to check the veracity of the calendar which simply showed dates.
- [93] She maintained she never received a notice about the need for repair of her smoke alarm, however, the overwhelming credible evidence from Ms. indicates that this would have been delivered to her apartment, whether she read the notice is only known to her.
- The Crown argues that the evidence about the history of dealings between Mr. and Ms. B.A, particularly with respect to what occurred on November 15th is all a "red herring" except for the details of the occurrence on the day of the sexual assault. I disagree. For this submission, Ms. Persad-Ford proffers the decision of the Ontario Court of Appeal, R. v. L.M., 2019 ONCA 945, at para. 43, where the Court said this:

At the third stage of *W.D.*, the Trial Judge must determine whether, on the whole of the accepted evidence, the Crown has proven the elements of the offences beyond a reasonable doubt, not the details of what happened.

- [95] The context of this decision is entirely different from the case at bar. In *L.M.*, despite the defendant's statement which was admitted into evidence by the Trial Judge and portions of which were judged as a truthful confession of a sexual crime, the reasons why the trial judge still had a reasonable doubt about the elements of the sexual offence, were not explained.
- [96] The case at bar must be taken in its context; it is not an issue of whether the complainant's evidence, if accepted, would make out the offence; the issue is Ms. B.A.'s credibility and reliability as to that evidence. Ms. B.A.'s evidence must be considered in light of all of the evidence; it cannot be considered in isolation from any of the other evidence.
- [97] The Crown argues that the details proffered by Ms. B.A. about the alleged assault are fulsome in the detail. She argues that an alleged inconsistency between whether she was touched inside or outside of her clothing is not material.
- [98] The fact that Ms. B.A. did not report this alleged assault for 6 weeks is not a matter that I can consider adverse to her credibility: it needs no explanation. However, when, as in this case, the complainant provides a rationale for her non-reporting, it **can** be scrutinized in terms of an assessment of credibility and reliability. Her rationale for not reporting was that she did not want it to affect her contractual duties under the lease.
- [99] The problem with that, as stated earlier, is that she had been in breach of her contractual duties since shortly after the commencement of her lease, the most fundamental of them all of which she was fully aware; that is to pay her rent. She did

not seem to care about any of her repeated non-payment and receipt of eviction notices. Thus, her rationale for this non-reporting simply is incredible.

[100] Frankly, there were many areas of Ms. B.A.'s evidence that defy logic. To repeat just a few:

- she questioned the veracity of a blank calendar of dates,
- her explanation of how she knew Mr. had locked the door in her apartment on the day of his unexpected visit is not credible,
- the evidence as to who answered the door on the smoke alarm day, which was corroborated by both superintendents, was obviously incredible. It would have meant nothing for her to admit that it was M who had answered the door since she had testified that she had him there to "protect her". What it would have done, however, is to provide evidence that she knew of the impending service as provided by the notice which she denied receiving earlier.

[101] Corroboration of any such allegation as the one in this case is not required in law. However, in any sexual assault case, evidence is often called of episodes of disclosure of that alleged assault to friends and family of the alleged victim. While this complainant alleges she told people at work, her "sister" like friend, she provided none of their contact numbers to the police when rendering her complaint. Indeed, even with the person who she said she was closest to she said she was no longer in contact with. Again, this is not required, but this absence coupled with so many other issues in this case with respect to her credibility and reliability do not in any way provide assistance to the Crown in the proof of its case.

[102] While Ms. B.A. stated that Mr. had been in her apartment at least 10 times, interestingly enough the only episodes of interaction, with the exception of the unwarranted alleged visit on November 12th or thereabouts, are the only ones she provided any evidence of; the meetings which Mr. also recalls.

[103] Finally, the fact that the date on which Ms. B.A. went to the police – December 30<sup>th</sup> – is coincidental with two occurrences. It is two days after her "friend" Muse was asked to vacate the building for unwarranted behaviour which included Mr. 's finding of his activities in the stairwell, together with the end of the month pressures of not paying rent, while denied by the complainant. This cannot be ignored. Frankly, I find it quite likely that this allegation of sexual assault was one that Ms. B.A. made with many other goals other than reporting the truth.

[104] Mr. is no doubt a hard-working professional employee. He is supported by management of great experience and there is nothing in his testimony from which I can infer any untruthfulness, I wish I could say the same for the Crown's case.

[105] The charge will be dismissed.

Released Orally: June 19, 2023

Released in Writing: June 20, 2023

Signed: Justice K.L. McLeod