



COURT MARTIAL

Citation: *R. v. Jackson*, 2017 CM 3001

Date: 20170104

Docket: 201525

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal D.T. Jackson, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR FINDING

(Orally)

[1] Master Corporal Jackson is charged with one offence punishable under paragraph 130(1)(a) of the *National Defence Act (NDA)* for having allegedly committed a sexual offence contrary to section 271 of the *Criminal Code*, and, alternately, he is charged for having behaved in a disgraceful manner contrary to section 93 of the *NDA*.

[2] Those two offences are related to a single alleged incident that would have occurred between the complainant and the accused in the female shacks on Connaught Ranges and Primary Training Centre, Ottawa, Ontario, on or about 21 October 2011.

[3] The trial commenced on 17 August 2016, but had to be adjourned because of the incapacity of defence counsel to proceed for unexpected personal reasons. With the agreement of the prosecution and the concurrence of the Court, the trial was adjourned to 9 September 2016. On that date, it was agreed to proceed with the trial on 14 December 2016.

[4] The hearing lasted six days. The prosecution's case relied essentially on the testimony of the complainant, who was the only witness that was called.

[5] Master Corporal Jackson, the accused in this trial, testified on his own behalf. He also called seven other witnesses, who are, in order of appearance before the Court: Ms. Dagenais; Master Corporal Buker and Corporal McPeak, both investigators in the matter; Chief Petty Officer 2nd Class Casey; Sergeant Easton; Corporal Perry and Mr. Huard.

[6] Thirty-one exhibits were introduced by both parties, going from pictures, Facebook pages, Reserve Force Basic Attendance Registers, to cell phone recordings, emails and meal management records.

[7] The parties also agreed on some facts and made admissions which read as follows:

- a. Connaught Ranges and Primary Training Centre (CRPTC) is located in Ottawa, Ontario;
- b. CRPTC is a Defence Establishment as defined at s. 2 of the *National Defence Act (NDA)*;
- c. the alleged offence occurred in or on CRPTC; and
- d. Master Corporal (MCpl) Jackson is a member of the Reserve Force and, at all material times, was subject to the Code of Service Discipline, pursuant to s. 60(1)(c)(viii) of the *NDA*.

[8] The complainant and Master Corporal Jackson knew each other since 2008 when she joined The Brockville Rifles. They are acquaintances and Facebook friends since that time. Outside the unit circle, they do not socialize or see each other.

[9] During the weekend of 21 to 23 October 2011, the unit had to provide a section in order to participate at the parade for the change of the brigade commanding officer that was supposed to take place in Ottawa.

[10] Eight members of the unit, led by Sergeant Easton, including the complainant and the accused, were assigned to perform this task.

[11] Early evening on Friday, 21 October 2011, six members gathered at the armoury in Brockville to get in a panel van and travel to Ottawa. Sergeant Easton and another member were already in the Ottawa area. Once they received confirmation that Sergeant Easton was already in Ottawa and would wait for them, the remaining members of the section departed.

[12] Sergeant Easton, having already checked in all members of the section with range control, provided them with their room keys once they arrived at Connaught Ranges. All members took their bags and got ready for the next day.

[13] In the morning, the section had breakfast and travelled to Cartier Square Drill Hall in Ottawa for the parade practice that lasted all day. All members came back to Connaught Ranges' mess hall for dinner at about 6 p.m., just before closure, and they got something to eat.

[14] After dinner, they went back to their rooms, changed clothes and went to the Beer Store in order to drink alcohol at the shacks together, which they did.

[15] Then, around midnight, they decided to go to a bar. They all went together. However, once they arrived, the complainant could not access the bar because she was unable to show an identification card because she had left hers back at the shacks. She was driven back by Sergeant Easton. They came back and both entered the bar later while others, including Master Corporal Jackson, had entered, not waiting for her.

[16] The complainant and the accused did not spend any time together in the bar and saw each other only outside.

[17] The group went back to Connaught Ranges just after the last call was made at the bar, around 2 a.m. on Sunday. Once they returned, they went to their respective rooms.

[18] Concerning the alleged incident itself, both the complainant and the accused testified that a sexual encounter occurred. However, while the accused described it as being consensual; the complainant clearly said that she never consented to anything of a sexual nature with the accused on that night.

[19] The complainant said that she went back to her room, got ready for bed, changed clothes, and prepared her uniform for the parade. She then heard somebody knock on her door. She found out it was Master Corporal Jackson. He entered her room and clearly let her know that he was interested in sex, but he did not want full sexual intercourse. She was confused about his intent and not interested in having sex with him and let him know. He closed the door, removed her top while she was sitting on her bed. She didn't react because she was shocked. She watched him undo his pants and masturbate. He put his left hand on her head, but did not apply much force. She was frozen. He ejaculated on her chest, face and hair. He put his pants on and left the room. She then moved, not knowing how to react about what had just happened. She felt overwhelmed and confused.

[20] She went into the shower and spent quite a long time there. She cried heavily and vomited. She went to bed in the early morning. She got up one to two hours later, got dressed in her uniform for the parade and went to the van to join the other members. On the way to the parade, the van stopped because she had to vomit. The parade took place and a picture of the group was taken. She does not remember how things went after.

[21] According to Master Corporal Jackson, once they came back from the bar, he walked the complainant to her room and left the building. He went to his own room and got his uniform ready for the parade. While he was doing this, he wondered how the complainant was doing regarding the preparation of her uniform. During the parade practice, her uniform was a concern and when they came back from the bar, they had a discussion about it. He then decided to text message her in order to know if she would need help to prepare her uniform. She answered positively and he returned to her room.

[22] When he arrived at her room, her jacket was on a table. He explained to her what to change. While he was ready to return to his room, she asked for a hug and he gave her one. Their heads tilted and he gave her a kiss. They touched each other, including genitals, both pants came off and he performed oral sex on her. She told him that she would not have sexual intercourse on that night. He continued to perform oral sex on her while she was on her back on the bed. She masturbated him. He stood up and she told him that her arm was tired. He took over and masturbated himself. He asked her where he could ejaculate and she told him on her chest. He ejaculated on her chest. It was then time to go to bed. He put his pants on, wished her good night and left the room. He confirmed that the next morning the panel van had to stop to allow the complainant to vomit outside.

[23] The complainant explained that it was about two years after the incident that she considered bringing a complaint against the accused for what allegedly happened. Meanwhile, she tried to act as nothing occurred and did her best to forget it.

[24] She explained to the Court that it was an unrelated and personal event that triggered her desire to make the matter known and to avoid the repetition of it to anybody else. After she told her account of what happened with the accused to some people in December 2013, she went to the military police detachment in Kingston in January 2014 to officially make her complaint. She was interviewed accordingly; however, she had to provide her story again in February 2014 because the recording equipment failed to take the audio properly.

[25] Charges were preferred against the accused in April 2015.

[26] Before this Court provides its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt; a standard that is inextricably intertwined with the principle fundamental to all Code of Service Discipline and criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may be less familiar with them.

[27] The first and most important principle of law applicable to every Code of Service Discipline and criminal cases is the presumption of innocence. Master Corporal Jackson entered these proceedings presumed to be innocent, and the presumption of innocence remains throughout the case unless the prosecution, on the evidence put before the Court, satisfies it beyond a reasonable doubt that he is guilty.

[28] Two rules flow from the presumption of innocence: one is that the prosecution bears the burden of proving guilt and the other is that guilt must be proven beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[29] The burden of proof rests with the prosecution and never shifts. There is no burden on Master Corporal Jackson to prove that he is innocent. He does not have to prove anything.

[30] Now, what does the expression “beyond a reasonable doubt” mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[31] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The Court must not find Master Corporal Jackson guilty unless it is sure he is guilty. Even if the Court believes that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, the Court must give the benefit of the doubt to Master Corporal Jackson and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

[32] The important point for the Court is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. The Court must decide, looking at the evidence as a whole, whether the prosecution has proven Master Corporal Jackson’s guilt beyond a reasonable doubt.

[33] Reasonable doubt applies to the issue of credibility. On any given point, the Court may believe a witness, disbelieve a witness, or not be able to decide. The Court need not fully believe or disbelieve one witness or a group of witnesses. If this Court has a reasonable doubt about Master Corporal Jackson’s guilt arising from the credibility of the witnesses, then it must find him not guilty.

[34] The Court has heard Master Corporal Jackson testify. When a person charged with an offence testifies, the Court must assess that evidence as it would assess the testimony of any other witness, keeping in mind instructions mentioned earlier about the credibility of witnesses. The Court may accept all, part, or none of Master Corporal Jackson’s evidence.

[35] It is one of those cases where the approach on the assessment of credibility and reliability expressed by the Supreme Court of Canada in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, must be applied, because Master Corporal Jackson testified.

[36] This test was enunciated mainly to avoid for the trier of fact to proceed by establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word for word as some sort of incantation. The pitfall that this Court must avoid is to be in a situation appearing, or in reality, as it chooses between two versions in its analysis, as stated by the Supreme Court of Canada in its decision of *R. v. Vuradin*, 2013 SCC 38, at paragraph 21.

[37] Of course, if the Court believes the testimony of Master Corporal Jackson that he did not commit any offence charged, the Court must find him not guilty of it. However, even if the Court does not believe the testimony of Master Corporal Jackson, if it leaves it with a reasonable doubt about an essential element of the offence charged, the Court must find him not guilty of that offence.

[38] Even if the testimony of Master Corporal Jackson does not raise a reasonable doubt about an essential element of the offence charged, if, after considering all the evidence, the Court is not satisfied beyond a reasonable doubt of his guilt, it must acquit.

[39] About the evidence, it is important to say that the Court must consider only the one presented in the courtroom. Evidence is the testimony of witnesses and things entered as exhibits, including documents and pictures. It also comprises admissions. The evidence includes what each witness says in response to questions asked. Only the answers are evidence. The questions are not evidence unless the witness agrees that what is asked is correct.

[40] Master Corporal Jackson is charged with sexual assault. Paragraph 271(a) of the *Criminal Code* reads, in part, as follows:

271. Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment of not more than 10 years ...

[41] In *R. v. Chase*, [1987] 2 S.C.R. 293, at page 302, Judge McIntyre provided the definition of a sexual assault:

Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) [now section 265(1)] of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.

[42] Paragraph 265(1)(a) of the *Criminal Code* reads, in part, as follows:

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

[43] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, it was established that a conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*.

[45] The *actus reus* of assault is unwanted sexual touching and is established by the proof of three elements: touching; the sexual nature of the contact; and, the absence of consent.

[44] Consent involves the complainant's state of mind. Is it the voluntary agreement of the complainant that the accused do what he did in the way in which he did it and when he did it? In other words, did the complainant want the accused to do what he did? A voluntary agreement is one made by a person, who is free to agree or disagree, of his or her own free will. It involves knowledge of what is going to happen and voluntary agreement to do it or let it be done.

[45] Just because the complainant did not resist or put up a fight does not mean that she consented to what the accused did. Consent requires knowledge on the complainant's part of what it is going to happen and a decision by that same person, without the influence of force, threats, fear, fraud or abuse of authority, to let it occur.

[46] The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched and it contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched.

[47] Then, the prosecution had to prove the following essential elements beyond a reasonable doubt on both charges: the identity of the accused and the date and place as alleged in the particulars of each charge on the charge sheet.

[48] The prosecution also had to prove the following additional elements about the offence of sexual assault:

- a. the fact that Master Corporal Jackson used force directly or indirectly against the complainant;
- b. the fact that he used intentionally the force against the complainant;
- c. the fact that the complainant did not consent to the use of force;
- d. that he knew, or was reckless of or wilfully blind to, a lack of consent on the part of the complainant; and
- e. the fact that the contacts made by him on the complainant were of a sexual nature.

[49] Master Corporal Jackson is also charged with having behaved in a disgraceful manner contrary to section 93 of the *National Defence Act*, which reads as follows:

Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

[50] With respect to this charge, the prosecution thus had to prove, in addition to the usual essential elements to be proven for both charges, that the accused's conduct was disgraceful.

[51] As I said in my decision of *R. v. Morel*, 2014 CM 3011, in order to prove that the conduct of the accused was disgraceful, an objective test based on harm must be applied, which would include the two following steps:

- a. First, by its nature, the conduct at issue causes harm or presents a significant risk of harm to individuals or society, which includes the Canadian Forces, in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws of Canada;
- b. Second, the harm or risk of harm is of a degree that is incompatible with the proper functioning of society, which includes the Canadian Forces.

[52] As suggested by defence counsel, both charges must be decided by this Court on the issue of consent. The Court agrees that the essential element related to the fact that the complainant did consent or not is decisive on both charges. The accused admitted in his testimony all other essential elements on both charges.

[53] On the sexual assault charge, clearly if the Court comes to the conclusion that the prosecution succeeded in proving beyond a reasonable doubt this essential element, as a matter of context, it would also mean that the accused was reckless or wilfully blind to a lack of consent on the part of the complainant.

[54] About the disgraceful conduct charge, if the complainant did not consent to the sexual encounter with the accused, then his behaviour is clearly one that caused harm to an individual and is incompatible with the proper functioning of the Canadian Forces and the society in general.

[55] So, the issue the Court must decide is the following one on both charges. Did the prosecution prove beyond a reasonable doubt that the complainant did not consent to the sexual encounter she had with Master Corporal Jackson?

[56] In order to decide on this very issue, the Court must first make a determination about the credibility and reliability of the testimony provided by witnesses in this matter.

[57] As previously mentioned, Master Corporal Jackson testified. He appeared to the Court as calm, straightforward and clear in his manner to answer questions. He did not hesitate to correct himself or to ask to clarify a question. His account of the events on how the evening took place is mainly supported by the testimony of Sergeant Easton and Corporal Perry. As a matter of fact, those two last witnesses appeared as credible and reliable to the Court. They were both disinterested in the outcome of the trial and had clearly taken a distance from the accused for the last two years. As a matter of fact, both witnesses were also familiar with the complainant, and clearly, they both did not want to take any side in this trial. They limited themselves to provide facts they saw and heard in relation to this matter.

[58] Master Corporal Jackson's memory of the events was good. He clearly recalled the different steps the group went through the night of the incident. He told the Court that on the Saturday evening, he had an opportunity to get to know the complainant better and spent some time with her. He affirmed that he exchanged text messages with her on the way to the bar and when they came back from the bar.

[59] On the issue of text messaging, the Court would say that the accused demonstrated that the complainant did text message him on that night. Despite not being able to know with whom she did so, it is clear that it made his account of the events concerning this aspect of his testimony possible.

[60] Sergeant Easton confirmed that the accused walked the complainant to her room when they came back from the bar, as the latter testified. In addition, the accused's concern about the preparation of the uniform for the parade on the Sunday appeared to be validated by the complainant.

[61] The prosecution put to the Court that the accused's motive to go see the complainant was unfounded and made no sense. However, even the complainant, in her testimony, said that when she came back from the bar, she went to her room, got changed and prepared her uniform.

[62] Having the accused concerned about the ability of the complainant to correctly prepare her uniform, seems, in the circumstances revealed to the Court, a valid reason for him to inquire about the help he could provide. The complainant had difficulties on that day with her uniform during inspections. She discussed specifically that issue with the accused and she confirmed that she prepared her uniform on her return from the bar. Having Master Corporal Jackson texting her about the help he could provide her, does make sense in the circumstances. The state of drunkenness of the complainant could be of a concern and offering his help was not illogic.

[63] As the accused related it to the Court, the complainant invited him to her room in order to help her. It ended up in a casual sex encounter. How things unfolded after that did not appear as being exceptional, as long it was consensual.

[64] It is not surprising, if after five years, the accused does not have a memory of the signs outside the female shacks and, in itself, does not impact his credibility and reliability.

[65] In addition, I would add that what occurred on that night was on the basis of a personal relationship between two members of the Canadian Armed Forces. There is no evidence whatsoever about the use of Master Corporal Jackson's authority as a master corporal, toward the complainant as a corporal. This type of relationship never existed at that time, even in the account made by the complainant. Then, the idea of abusing his authority in order to get what he wanted cannot stand in any shape or form. If the prosecution wanted to see the Court consider such a thing, it would have been necessary to prefer a charge accordingly, which it did not do in this case. No consideration can be given by the Court to such an argument.

[66] Overall, the testimony of the accused appeared as being sincere and accurate in the circumstances and it raises a reasonable doubt on the essential element of consent to be proven by the prosecution on both charges.

[67] As a matter of fact, if the Court had disbelieved the accused, it would have stayed with a reasonable doubt in any matter.

[68] The complainant testified in a calm manner. However, it clearly appeared to the Court that she tried to minimize some aspect of her story in relation to:

- a. her consumption of alcohol and her use of drug. Her testimony revealed that at different steps of the investigation and before the Court, she went from eight coolers to six coolers to four coolers; came back to eight coolers in her testimony before this Court. So she was unsure of the exact quantity she had at that time;
- b. her relationship with the accused. She also tried to minimize her relationship with the accused just prior to and after the alleged incident. She basically pretended that he did not exist; that there was no text messaging on the day of the alleged incident with him and she tried to minimize contacts on Facebook. I would say that regarding that, I do understand that pretending that the alleged incident did not occur would explain, in part, the fact that she kept Master Corporal Jackson as a friend, among many other friends, on Facebook. However, at some point, she commented on things he put on his own page and it took the fact that the accused brought the issue of text messaging and Facebook for her to talk about it, and at some point, admitting that she had some contact in one way or another with him; and
- c. She was also trying to minimize, in a way, how she would be seen as a complainant before a Court by fearing the impact of modeling on her credibility and reliability. She had difficulty talking about this issue with

the investigators and even before the Court. It looked like she was fearing that it would impact or for an unknown reason, she had difficulty talking about it.

[69] Clearly, the complainant's consumption of alcohol on that night, combined with her use of drug, also impacted her capacity to remember many details of the night of the incident. Sometimes she was vague and at other times she had some uncertainties.

[70] In addition, she tried to forget the alleged incident for about two years. This clearly resulted in her incapacity remembering the fact that she did not drive on her own to get to Connaught Range from her house on the Friday evening. She even confused the night when the incident would have occurred as well as the day the official parade took place.

[71] Then, for the Court, her testimony raised some doubts about her sincerity and accuracy. For these reasons, the Court then would have concluded that her testimony must be disbelieved and that the prosecution did not prove beyond a reasonable doubt the essential element of lack of consent by the complainant on the sexual assault charge, and the essential element of disgraceful conduct by the accused on the second charge.

[72] Now, I would like to specify that by saying that the Court has some doubts, it does not mean that the Court thinks that the complainant lied. People may have their own reason to minimize or have difficulty to remember things accurately. However, it does not automatically mean that they are lying. Testifying is a difficult and unusual experience. It belongs to the prosecution to assess if the evidence provides a reasonable prospect of conviction and the justice system relies on its professionalism in order to decide if a case must go to court or not, with all the consequences it implies.

[73] It must be remembered that the requirement for convicting somebody before a court martial is very high, as our Constitution reflects it. Victims of an alleged sexual assault must be encouraged to continue denouncing improper conduct within the Canadian Armed Forces in order to attract the attention of the authorities on this issue. In this case, the complainant succeeded by getting the attention on what was going on in her unit. It belongs to the proper authorities to decide what to do with it.

[74] As far as the Court is concerned, it concludes that the prosecution failed to prove beyond a reasonable doubt all the essential elements on both charges.

FOR THESE REASONS, THE COURT:

[75] **FINDS** Master Corporal Jackson not guilty of sexual assault on the first charge and not guilty of disgraceful conduct on the second charge.

Counsel:

The Director of Military Prosecutions as represented by Major P. Rawal and Captain N. Thiessen

Lieutenant-Commander B.G. Walden, Defence Counsel Services, Counsel for Master Corporal D.T. Jackson