COURT MARTIAL

Citation: *R. v. Gobin*, 2018 CM 2007

Date: 20180205
Docket: 201725

Standing Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Corporal R. J. Gobin, Accused

Before: Commander S.M. Sukstorf, M.J.

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, directs that any information that could identify the complainant or victim in these proceedings shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

The case

[1] Corporal Gobin is charged with one offence under section 130 of the *National Defence Act (NDA)*, that is to say, sexual assault contrary to section 271 of the *Criminal Code*.

[2] In reaching the Court's decision, I reviewed and summarized the facts emerging from the evidence, reviewed the applicable law and made findings on the credibility of

the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on the charge.

Evidence

[3] The following evidence was adduced at the court martial:

(a) In court, testimony of the sole prosecution witness being that of the complainant, A.K.

(b) In court, testimonies of the following six defence witnesses, in order of appearance:

i. Corporal R. J. Gobin (accused);

ii. Mr. Cody Huttinga;

iii. Private J. Seaward;

iv. Corporal N. Cazelais;

v. Mr. Gabriel Papakonstantinou; and

vi. Corporal T. J. Gracie.

(c) Exhibit 3: two-page, double-sided email from C.E. Brown to Lieutenant-Commander Walden dated 8 August 2017;

(d) Exhibit 4: one-page, doubled-sided Record of Disciplinary Proceedings dated 14 December 2016;

(e) Exhibit 5: Canadian Forces Health Services (CFHS) chit dated 5 December 2014;

(f) The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence.*

Facts

[4] The accused and complainant are both members of the 2nd Battalion, Princess Patricia's Canadian Light Infantry based in Shilo, Manitoba. In the fall of 2014, both were undergoing basic infantry training (hereinafter DP1 training) at Canadian Forces Base (CFB) Wainwright, Alberta when the alleged incident occurred.

[5] The incident that forms the subject of the charge allegedly occurred after both the accused and complainant had completed their training in December 2014, on the final day, before they returned to CFB Shilo and proceeded on Christmas leave.

[6] The accused is 26 years old. Prior to joining the Canadian Armed Forces (CAF), he worked as a carpenter's assistant and held various odd jobs. He first joined the CAF in November 2010 as a naval communications technician which he did for two and a half years before he released from the Navy to apprentice as a carpenter. On July 7th 2014, he re-enlisted into the CAF, but this time in the infantry. He is currently working as a barrack warden in base accommodations.

[7] The 23-year-old complainant, A.K., alleged that on the evening of 12 December 2014, the last day of their course, as they were preparing to leave and were cleaning up the shacks, he was sexually assaulted. He told the Court that, when he was walking backwards mopping the hallway, a person came from behind him and stuck his hand into his rectum and said, "You liked it, faggot." A.K. further told the Court that Corporal Gobin was the only person in the hallway that he could see. A.K. stated that Corporal Gobin used a mocking tone and spoke loud enough for him to hear the homophobic slur.

[8] In describing what happened, A.K. told the Court that Corporal Gobin's hand entered his rectum penetrating him by a couple of inches. A.K. described the pain as penetrating and sharp and that after Corporal Gobin walked away, he leaned against the mop in shock and then he went to his pod to lie down.

[9] The complainant stated that he was wearing his dress of the day, which included CADPAT (combat), his underwear and a T-shirt. His pants were not tight-fitting. He was wearing army issue green underwear. He described his underwear as boxers which were not too loose. The complainant stated that a few weeks later, while doing his laundry, he discovered a hole in his boxers that was a couple of fingers wide measuring about an inch or so. He stated that he threw the boxers away shortly thereafter because he could not patch them up and he was able to obtain new ones from stores.

[10] The complainant stated that, after the incident, he did not speak to anyone as he was in shock. He said that, later that same evening, he went to the Canex with a few guys and talked to a guy across the hall who was playing a video game before going to bed. He stated that the incident occurred after supper, but not before the Canex closed so he estimated it would be around 1800 hours.

[11] A.K. told the Court that the day following the alleged assault, while on the bus to Shilo, he noticed his rectum was excreting fecal matter which collected in his underwear. He stated that whenever he walked or rode a bike this problem would arise. He told the Court that he was always wet with liquid fecal matter which made it uncomfortable to walk. He also told the Court that when he had a bowel movement there was always a fair amount of blood which he estimated covered about half of a

standard square of toilet paper. He told the Court these symptoms lasted approximately one year.

[12] He also told the Court that he sought medical treatment for other common ailments, but he did not do so with respect to these alleged symptoms.
[13] According to Corporal Gobin, on the day of the alleged incident, they had a late wakeup due to their graduation and course party the evening before. He stated they slept in that morning and then, in the afternoon, they cleaned and tidied up and looked for bayonets that were presumed to be missing.

[14] Corporal Gobin stated that, at that time, he was on light duties as he was injured the week prior while attending the Close Quarters Combat (CQC) course. He was provided a medical chit, dated 5 December 2014 that placed him on 30 days of medical limitations. He stated he had separated his left shoulder and was unable to make much use of his left arm. He was not able to carry or hit things and had a constant dull ache in his shoulder. On the last day, he was able to pack his bags and do limited tasks. While on light duties, he had limited functionality, using only his good right arm. He nonetheless admitted that he still engaged in limited horseplay.

[15] The accused, defence witnesses and the complainant himself recognized that the complainant had a hard time on course passing the physical elements. Corporal Gobin stated that A.K. struggled on the obstacle course, rappel tower and even the general kit layout posed problems for him. He stated that A.K. particularly struggled during the CQC portion of the course where he was singled out. He stated that although A.K. originally tried to fit in with the guys, he was reclusive and kept to himself. Corporal Cazelais stated that members would always try to help a platoon mate who was struggling, but if it was perceived that the individual was not trying, then there would be a shunning and they would all just stop communicating and engaging him. He later admitted that this is what happened to A.K.

[16] A.K. testified that he reported the alleged incident to the military police in July 2016. Corporal Gobin testified that he was first arrested by the military police on 20 July 2016 and advised he was under investigation. However, he stated that he did not become aware of what the alleged charge was until 14 December 2016, when he received a disclosure package and a Record of Disciplinary Proceedings. Corporal Gobin denied the complainant’s allegation.

The course in general

[17] The Court heard that there was an atmosphere of teasing and immature conduct that unfolded during the after-hours portion of the basic infantry course. It heard that it was a regular occurrence for course mates to use vulgar slurs and profanity in communicating with each other. The Court also heard that, in the evenings, they would regularly engage in what was referred to as "tickle parties", “flash mobs” and “balaclava gangs” being the various terms used by different witnesses to describe activities where a group of them would sneak up on an unsuspecting soldier and take him down.

[18] Mr Huttinga described “flash mobs” as a situation where they would gang up on or mob an unsuspecting peer, by surrounding the individual, tackling or getting him to the ground, pinning him down and tickling him. He stated that it would happen when the person was least expecting it and it would be decided and communicated through whispers. He told the Court that at the beginning of the course it happened all the time, almost nightly, but that it slowed down as the course progressed as people were either too tired or tired of doing it. Corporal Cazelais described how someone would hold up the white balaclava and that would be the signal whereby the group would identify an unsuspecting individual, and gather around to restrain him. Testimony on what would happen next seemed to vary. Based on witness testimony, Corporal Gobin was a victim himself, having his pants pulled down and Rub·A535 applied between his buttocks and worked in with Q-Tips, while others received bear hugs, or had their pants pulled down and had their bare butt slapped, their boots or some of their clothing removed or they were thrown in the shower fully clothed.

[19] The accused and five defence witnesses, who all attended the same course, confirmed that there was a lot of physical contact during the course as the guys regularly slapped each other on the buttocks or carried out various pranks. Corporal Gobin confessed to being the perpetrator of some of these activities, but acknowledged that he was also the victim of two separate “flash mobs”. He testified that, at one point during the course, he was targeted and his pants were pulled down where he squirmed to cover his genitals. He told the Court that he specifically remembers A.K. being part of this particular takedown, participating by holding him down. He stated that when he was down on the ground, someone sat on his back and another put Rub·A535 in his butt and used Q-Tips to ensure that it was absorbed into the rectum. During his testimony, Private Seaward confirmed that Corporal Gobin had also been the subject of this treatment and confessed to being the person who applied the Rub·A535 using the Q-Tips.

[20] Corporal Gobin testified that the complainant A.K. had also been targeted. He stated that, at one point during the course, A.K. had made a makeshift fort in his bed, constructed with blankets and his barrack box to facilitate his playing of video games. The gang targeted A.K. in his fort and started tickling him, thereby both wrecking his fort and interfering with the video game he was playing. After that happened, A.K. would get hostile with anyone who tried to tickle him or touch him.

[21] When asked why they were slapping each other’s butts and conducting these pranks, Corporal Gobin stated that it was a “camaraderie thing”, as they were all living in close quarters for a long period of time. He compared it to the way it is done in football; they did it as a greeting or as a friendly gesture towards one another. Although the accused and five defence witnesses testified that this horseplay was good-natured and was meant as a way to build morale, they also stated that not all of the course members participated. Most witnesses stated that the majority of the platoon participated with the exception of three soldiers, which included the complainant after a

certain period of time. Mr. Huttinga stated that if someone did not want to partake, they just would not do it to them.

[22] In his testimony, Corporal Gobin stated that the complainant was not receptive to being slapped and did not like the physical contact. Despite knowing this, Corporal Gobin confessed that he continued to slap A.K.'s butt and put his arm around him because he thought it was funny. He told the Court that he would slap A.K. on the buttocks about once per week. Corporal Gobin stated that A.K.'s usual reaction was to tell him to "F-off" and then lash out to some extent. Corporal Gobin stated that when he did this, A.K. would also call him "gay or something like that."

Assessment of the evidence

Theory of the prosecution

[23] Prosecution alleges that A.K. was the odd man out on his course and he struggled with the course requirements. He was not part of the circle of friends that seemed to dominate the activities. As he struggled, he was shunned. The prosecution alleges that this is a case of an unprovoked assault by one course mate on another, which unfolded at the end of the day, on the last full day of their course in Wainwright, Alberta.

[24] He alleges that Corporal Gobin walked up to A.K. as he was mopping the floor and struck him with his hand penetrating four fingers into A.K.'s rectum while making a homophobic sexual slur. There were only two witnesses to this: the complainant and the accused. He described the incident as short, sharp and serious.

Theory of the defence

[25] Defence submits that this is a false complaint and that the complainant lied to the military police. He argued that the reason the complainant is making such a shocking and exaggerated allegation is to get back at Corporal Gobin. He alleges that A.K. wants Corporal Gobin kicked out of the army.

[26] The defence contends that A.K. made up a shocking story in order to get a response from the military police. He further argued that if A.K.'s injuries were as described, no reasonable person who suffered from profuse bleeding during every bowel movement and experiencing the loss of fecal matter every time he did moderate physical activity would have left such a condition unattended and not sought medical assistance. Defence further asserts that there is no other evidence on its face, nor expert evidence, to support A.K.'s allegation.

[27] He suggests that A.K. was struggling on the course and was often subjected to what the court would describe as low-level harassment, particularly at the hands of Corporal Gobin. He suggests A.K. was angry and disliked Corporal Gobin, but in making his complaint, he went about resolving his redress in an improper way.

[28] Defence submits that if any contact occurred on the evening in question, Corporal Gobin would have only slapped A.K. on his buttocks as he admitted he did during the course.

Evidence on collateral matters

[29] A great deal of the testimony before the Court related to what the Court would classify as jokes in poor taste, consistent teasing, roughhousing and low-level hazing. All of the defence witnesses recounted stories of what they believed to be good-natured horseplay that unfolded outside the formal instruction of the course. Although this evidence provided context for the events in question and provided significant assistance in my assessment of the complainant's reliability and credibility, it was not determinative of the salient facts nor considered in my analysis of the charges before the Court.

[30] The Court notes that the complainant exhibited extraordinary courage coming forward and reporting a very serious and deeply personal allegation.

[31] The Court also notes that the accused as well as all defence witnesses testified honestly and forthrightly. They also showed considerable courage in publicly disclosing details which admitted their personal involvement in what could be viewed as low-level hazing and, in some cases, harassment. Although such conduct was unacceptable in December 2014, it is reflective of the culture of concern reported on by Madame Deschamps in 2015 that led to the implementation of Operation HONOUR in the CAF. If there was any ambiguity that existed in December 2014 as to the acceptability of this type of behaviour, this was definitely clarified by Operation HONOUR. This type of low-level behaviour of hazing, roughhousing and incessant teasing is not acceptable and will not be tolerated in the CAF. As the prosecution eloquently stated, there is always camaraderie and banter in the CAF, particularly with a group of 20-year-olds. Prosecution further stated that "to suggest that the kind of banter that the witnesses testified to is acceptable is fallacious – the fact that it was commonplace on their course does not make it right – and any perception that it is acceptable sets up a gateway for harassment that will eventually break things down." Essentially, this case is about the breakdown of discipline and trust that flowed from the unofficial after-hours conduct that existed on the course.

[32] I have no doubt that the witnesses who testified in these proceedings now know that despite how well intended or good-natured they believed their conduct was in December 2014, they recognize now that it was unacceptable and the reason for this court martial; it cannot be tolerated.

[33] It is the Court's hope that the forthright and public disclosure by the witnesses, testifying as to what occurred on that course, signals their personal recognition of how horseplay may be fun until someone is not enjoying it anymore. At this point, a line is crossed and what had been considered fun becomes harassment, which eventually leads

to a breakdown of trust, loyalty and discipline, all of which are fundamental to the functioning of an effective armed force.

Credibility of the witnesses

[34] As defence counsel noted in his submissions, the determination of this case boils down to the credibility of the complainant and the accused.

[35] It is not unusual that that evidence presented before the Court is contradictory. Witnesses may have different recollections of events and the Court has to determine what evidence it finds credible and reliable.

[36] Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect?

[37] A court may accept or reject some, none or all of the evidence of any witness who testifies in the proceedings. In other words, credibility is not an all-or-nothing proposition. A finding that a witness is credible does not require a trier of fact to accept all the witness's testimony without qualification. Importantly, credibility is not co-extensive with proof. (see *R. v. Clark*, 2012 CMAC 3 (*Clark*), paragraph 47)

[38] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts? A witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. (see *R. v. H.C.*, 2009 ONCA 56 (*H.C.*))

[39] However, the reverse is not necessarily true. It does not follow that because there is a finding that a witness is credible that all his or her testimony is reliable. In fact, a witness may be completely sincere and speaking to the truth as the witness believes it to be. However, due to a number of reasons including, but not limited to, the passage of time or memory, the actual accuracy of the witness's account may not be reliable. So in effect, the testimony of a credible or an honest witness may nonetheless be unreliable. (*see R. v. Morrissey*, [1995] O.J. No. 639, 97 CCC (3d) 193 *(Morrissey)*)

[40] There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial?

[41] The evidence before this court martial consisted of the oral testimony of the complainant, A.K., and five witnesses called by the defence as well as the testimony of Corporal Gobin, the accused testifying in his own defence. As I stated earlier, there were only two witnesses to the alleged assault; the complainant and the accused. The remaining witnesses testified only on ancillary matters that provided context to what was occurring on the course.

[42] It is important to note that a trial judge must not apply a stricter standard of scrutiny to the evidence of the accused than it does to the evidence of the complainant. (see *H.C.* at paragraph 62). The burden of proof with respect to the charge remains on the prosecution. The prosecution's case is not made out simply because the testimony of the complainant might be preferred to the testimony of Corporal Gobin. In fact, it is possible to not believe some of what Corporal Gobin has testified to, but still be left in doubt as to whether the prosecution has established each of the elements of the offence beyond a reasonable doubt.

[43] The appropriate approach in assessing the standard of proof is to weigh all the evidence and not assess individual items of evidence separately. It is therefore essential to assess the credibility and reliability of individual testimony in light of the evidence as a whole. In doing so, I referred to the decision relied upon by defence in his closing submissions in *Morrissey* which was applied in the Court Martial Appeal Court decision of *Clark* where Watt JA articulated the principles concerning the analysis of testimonial evidence. At paragraphs 40 to 42, he stated:

> [40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v Thain*, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.
>
> [41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at para 39; *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 9-11.
>
> [42] Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

[44] More specifically, in distinguishing between credibility and reliability, Doherty JA had this to say at paragraph 33 in *Morrissey*:

> Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the

> witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. In this case, both the credibility of the complainants and the reliability of their evidence were attacked on cross-examination.

Presumption of innocence and the standard of proof beyond a reasonable doubt

[45] Before the trier of fact provides its assessment of the charges before the Court, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Two rules flow from the presumption of innocence. One is that the prosecution bears the burden of proving guilt; the other is that guilt must be proved beyond a reasonable doubt. These two rules are linked to the presumption of innocence to ensure that no innocent person is convicted.

[46] The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence put before the Court, satisfied me beyond a reasonable doubt that the accused is guilty on the charge.

[47] Based on the circumstances of this case, and in an attempt to explain the nuances of the varying evidentiary levels in a criminal process to our military members, It is appropriate for the Court to outline the varying levels of proof that exist within the criminal justice system. Borrowing directly from Horkins J who describes the differing standards very succinctly in the case of *R. v. Ghomeshi,* 2016 ONCJ 155:

> [123] The law recognizes a spectrum of degrees of proof. The police lay charges on the basis of "reasonable grounds to believe" that an offence has been committed. Prosecutions only proceed to trial if the case meets the Crown's screening standard of there being "a reasonable prospect of conviction". In civil litigation, a plaintiff need only establish their case on a "balance of probabilities". However to support a conviction in a criminal case, the strength of evidence must go much farther and establish the Crown's case to a point of proof beyond a reasonable doubt. This is not a standard of absolute or scientific certainty, but it is a standard that certainly approaches that. Anything less entitles an accused to the full benefit of the presumption of innocence and a dismissal of the charge.

[48] Under the military justice system, these standards of proof are the same; lower levels of proof are required by the military police and the chain of command when they are recommending or laying charges. Similarly, the prosecution applies a lower standard of proof being a "reasonable prospect of conviction" which is based on its own evidence.

[49] An accused is presumed innocent until proven guilty by the evidence. The strength of the evidence required to obtain a conviction on a criminal offence must be tested to a much higher standard than it is by the police or the chain of command in deciding to lay charges or by the prosecution preferring the charges. In a court martial,

the court is not just presented with the prosecution's evidence but it is also presented with the defence's evidence. It is only through the extensive challenging of the prosecution's evidence, through cross-examination, conducted by defence counsel, that the prosecution's evidence is truly tested.

[50] The term "beyond a reasonable doubt" is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, yet its meaning bears repeating. A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. (see *R. v. Lifchus*, [1997] 3 S.C.R. 320)

[51] In essence, this means that even if I believe that Corporal Gobin is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to the accused and acquit him because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt.

[52] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high.

[53] Therefore, in order to find Corporal Gobin guilty of the charge before the court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charge set out in the charge sheet. (see *R. v. Starr*, [2000] 2 S.C.R. 144, at paragraph 242)

The charge under the NDA and the Criminal Code

[54] The charge alleges that Corporal Gobin committed an offence under section 130 of the *NDA* that is to say sexual assault, "[i]n that he, on or about 12 December 2014, at or near Wainwright, Alberta, did commit a sexual assault on A.K. contrary to section 271 of the *Criminal Code*."

The law

[55] Section 271 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 for a term of not more than 10 years

[56] In *R.v. Chase*, [1987] 2 S.C.R. 293, at page 302, Mclntyre J defined sexual assault as follows:

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

[57] The predicate of sexual assault is that of the common offence of assault. Paragraph 265(l) of the *Criminal Code* sets out the elements of an assault and 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

[58] In *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 (*Ewanchuk*), the Supreme Court of Canada (SCC) 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*.

[59] The *actus reus* of sexual assault requires:

(a) the application of force, which the SCC in *Ewanchuk*, recognized as any degree of force, including touching, is sufficient;

(b) the second aspect is that the force must be sexual. There is no mental element associated with it being sexual. Rather, the test is whether the conduct in question, visible to a reasonable observer, can be considered to be of a "sexual" nature. In *Chase*, McIntyre J qualified sexual assault as follows:

> Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all the circumstances, is the sexual or carnal context of the assault visible to a reasonable observer" (*Taylor*, *supra*, *per* Laycraft C.J.A., at p. 269). The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act, and all other circumstances surrounding the conduct, including threats which may or may not be accompanied by force, will be relevant (see S. J. Usprich, "A New Crime in Old Battles: Definitional Problems with Sexual Assault" (1987), 29 *Crim. L.Q.* 200, at p. 204.) The intent or purpose of the person committing the act, to the extent that this may appear from the evidence, may also be a factor in considering whether the conduct is sexual. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized, however, that the existence of such a motive is simply one of many factors to be considered, the importance of which will vary depending on the circumstances.

(c) the third aspect is that the touching must be without the consent of the complainant. For the purpose of this portion of the test under the *actus reus*, consent involves only the complainant's internal state of mind. At

> this stage, it does not factor in what the accused thinks or was thinking. 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? There is no such thing as implied consent. 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.

[60] The *mens rea* is the intention of the accused to touch, knowing, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched. 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.

Essential elements of the offence

[61] The finding on this charge depends not only on my assessment of the credibility of the witnesses, but also on whether the act particularized in the charge sheet is met. In proving the particularized charge, the prosecution had to prove the following essential elements beyond a reasonable doubt:

(a) the identity of the accused and the date and place as alleged in the charge sheet;

(b) the fact that Corporal Gobin used force directly or indirectly against the complainant;

(c) Corporal Gobin intentionally used force against the complainant;

(d) the complainant did not consent to the use of force;

(e) the fact that the application of force by Corporal Gobin on the complainant was of a sexual nature; and

(f) finally, the prosecution has to prove that Corporal Gobin knew, or was reckless of or wilfully blind to a lack of consent on the part of the complainant.

Analysis

[62] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offence, I now turn to the questions in issue and address the legal principles.

[63] The contentious part of the charge before the Court is the nature of touching alleged to have occurred on A.K. on 12 December 2014. This is where the credibility assessment of both the complainant and the accused as well as the reliability of their respective evidence are factored in. To be clear, as I indicated earlier, there is no presumption that a witness is telling the truth. As such, the Court must be extremely vigilant not to fall into the trap of believing that a sexual assault complainant is always truthful. To do this would in effect transfer the burden of proof from the prosecution to the defence. This would be an error of law and would violate the presumption of innocence.

[64] Nonetheless, there is no legal impediment to a court convicting an accused based on uncorroborated evidence of a single complainant. However, the challenge that the prosecution faces is that the allegations before the Court are not supported by anything other than the complainant's own word. As the prosecution stated, the incident was short, sharp and serious.

[65] On the facts of this case, the Court would have benefited by having supporting evidence. For example, it would have been helpful to have an expert assessment of the plausibility of the incident occurring as A.K. described. For example, is it possible for four fingers that are held straight to go through two layers of clothing penetrated the anus by two inches? As a military member, the Court is aware of the durability of CADPAT (combat) pants which are specifically designed to withstand the rigours of military use. Is it possible to penetrate that far, without some type of leverage, without the fingers breaking or closing when met with the resistance from the clothing? Further, although the Court appreciated that A.K. was shy and may not have wanted to seek medical treatment originally, the prosecution's case could have also benefited from expert medical evidence on the types of complications that could flow from this type of injury and to provide an estimate on how long such an injury might take to heal. This type of alleged injury could be very serious and possibly career-limiting and although the Court appreciates the original hesitation that the complainant may have had in seeking medical assistance, it was left wondering whether A.K. has been appropriately assessed by medical personnel for this issue at all. Now that the military police, the prosecution and the chain of command are aware of the injury, I would suspect that A.K. has had the appropriate medical follow-up or will shortly.

[66] In short, there is no other evidence before the Court other than the complainant's testimony, standing on its own to be measured against the required standard of proof for a criminal conviction. It is for this reason the assessment of the credibility and reliability of both the complainant and the accused is critical.

Credibility and reliability of the complainant A.K.

[67] Both the credibility of the complainant as well as the reliability of his evidence were challenged on cross-examination. The complainant was soft spoken and somewhat timid in recounting the events in question. He had to be told on several occasions to speak up. The prosecution described A.K. as stoic, direct and somewhat literal in his

answers, handling the queries well. He was quiet and the detail had to be coaxed out of him. The Court aligns with this characterization of his testimony.

[68] The specific inconsistencies in A.K.'s evidence challenged by defence are summarized and assessed as follows:

(a) ***Presence of Private Gracie*** - Defence highlighted that the complainant first reported the incident to the military police on 19 July 2016, one and a half years after the alleged incident took place. During cross-examination, defence asked A.K. whether he told the military police, in his interview that Private Gracie may have witnessed the incident. The complainant clarified that he only told the military police that Private Gracie was the individual who sought help cleaning the barracks.

Defence played back the interview A.K. had with the military police. In seeking to place people that might have been in the area at the time, the National Investigation Service investigator asked the complainant for names. The complainant stated that Private Gracie was the individual who asked for help.

Defence challenged A.K. stating that on that night in question, 12 December 2014, Private Gracie was not present. However, A.K. maintained that Private Gracie had been the one who asked for help. When defence told the complainant that Private Gracie will testify that he left the morning of 12 December to drive to Shilo, the complainant stated that he had no recollection of this and that he must have mistaken Private Gracie's voice for someone else's. Further, it was highlighted that at the time of his interview with the military police, he knew who Private Gracie was and stated that they were in the same section. Later in his testimony, he did correct this fact for the record in court and stated that they were in fact in different sections and that he made a mistake at the time he spoke with the military police.

(b) ***Representations made in and outside of the court*** - Defence provided the complainant an email, Exhibit 3, sent by him to the accommodations section where the complainant requested to be moved into a single room. Defence alleged that one of the complainant's taskings was to meet new recruits and that the complainant used his position to seek a master list of all the rooms for his personal purpose. When asked whether he sought the master list to determine whether there were any free single rooms, A.K. denied that he sought the list for this purpose. However, A.K. did state that after realizing that there was a vacant single room, he submitted his request. In the email request, he said the company quartermaster had approved his request. A.K. told the Court that his request was approved by the second in command who was the acting company quartermaster. The email suggests that additional approvals are

required in order to switch rooms. It was not until after the fact that A.K. learned that other approvals were required. A.K. stated that he was not lying about what he said. The Court did not find that the complainant misrepresented the approval procedure. His request may have required additional approvals, but the complainant appeared not to have known this nor did he make any representations that he had. Furthermore, there was insufficient evidence before the Court to suggest that the complainant had somehow misused his position.

(c) ***Motivation to lie*** - With respect to the allegations, defence suggested that the complainant lied to the military police because he wanted to get back at Corporal Gobin. He suggested that this is evidenced in some of the statements he made to the military police. In responding, the complainant was firm in saying that he had been sexually assaulted, reported it and was trying to do something about it. When asked why he told the military police that he wanted the accused kicked out of the Army, the complainant replied that he wanted to see justice done. The complainant confirmed that he told the military police, "How can someone commit sexual assault and still stay in the Army?"

(d) ***The alleged incident*** - Under cross-examination, defence counsel challenged the complainant on whether the alleged incident occurred as described. The complainant told the military police that the strike took place over his CADPAT (combat) pants and underwear, and that Corporal Gobin had thrust four fingers into his anus. His statement was confirmed by his military police video statement where he demonstrated to the military police a knife hand, suggesting four fingers. He told the military police that the accused's hand was flat like a blade when it went into his anus.

He told the military police that Corporal Gobin's hand with four fingers, plus his underwear and CADPAT (combat) pants, penetrated his rectum up to the second knuckle. The complainant further stated that it all went into his anus about two inches deep. During his testimony in court, the complainant adopted his statement to the military police.

Defence produced evidence that at the time of the alleged incident, the accused had been placed on occupational medical employment limitations due to separating his left shoulder while conducting CQC training. Effective 5 December 2014, as evidenced with the CFHS chit, Corporal Gobin was placed on 30 days of limited physical activity regarding the use of his left arm. Corporal Gobin told the Court that his arm was very sore and he could not lift it without restriction and severe pain. He stated that he felt a constant dull ache. Although Corporal Gobin explained that he had use of his right arm, which was his dominant hand, defence submitted that it did not make sense that

Corporal Gobin would engage in specific behaviour that might provoke a fight when he was incapacitated with his left arm and shoulder.

In his examination-in-chief, the complainant mumbled significantly when asked to describe the incident; he blurted out phrases which were inaudible and he needed to be asked several times to repeat the details of what he said. He said, "offered to help", "started mopping the hallway and was walking backwards mopping" , "felt a sharp entry pain in my rectum", "thrust head forward, thrust my left arm forward in a jab, but did not connect", "saw a person come forward", "person came forward", "saw Private Gobin who said …. 'You liked it, faggot.' He then went down the hall and around the corner." The Court appreciates the personal difficulty the complainant endured in describing this sort of incident in detail in a public court, but the Court also noted that the complainant testified much more confidently on other issues.

The complainant told the military police that the day after the incident fecal matter leaked into his underwear and that this was a recurring problem for about one year. The complainant also testified before the Court that, every time he walked or went for a bike ride, liquid excrement leaked into his underwear. The Court was surprised and left wondering why, in light of the arduous physical demands that the complainant fulfils in his role as an infantryman, there was no evidence or concern raised by either counsel as to how the continual leaking of fecal matter impacted his ability to fulfil the physical demands associated with his job in the infantry.

The complainant also stated that every time he had a bowel movement and wiped, about 40-50 per cent of a standard piece of toilet paper was full of blood. In his testimony, the complainant alleged to have suffered for up to a year from the physical injuries associated with this alleged assault. Defence argued it did not make sense that A.K. alleged to have lived with liquid fecal matter in his underwear and having to wipe blood after every bowel movement, yet, he never sought medical attention. The complainant explained that he did not want to answer questions associated with the incident and he could not bring himself to tell anyone about it.

The complainant told the Court that since the bleeding went away after a year, in his mind, he saw no need to seek medical attention However, the Court learned that he told the military police, six months after he stated that he no longer had symptoms, that his anus or rectum would "never be the same again." The prosecution did not enter any evidence that A.K. saw a doctor at any time for any of the alleged symptoms associated with this injury, even after he reported the incident to the military police telling them that his rectum would never be the same again.

(e) ***Evidence of animosity towards the accused*** - Defence challenged the complainant on his examination-in-chief where he stated that while attending his DP1 course, he only had normal interactions with Corporal Gobin, communicating only when needed. However, under cross-examination, the complainant confirmed that both he and the accused were in the same section of approximately eight people where they would need to have had close collaboration every single day.

Defence counsel further asserted that the complainant did not like Corporal Gobin. A.K. told the Court that he did not have any hatred or animosity towards Corporal Gobin. Yet, defence counsel pointed out that he told the military police that Corporal Gobin acted as a "power freak" during the course. A.K. clarified that he had simply repeated what someone else had previously said. A.K. confirmed that Corporal Gobin had pulled rank on him and that he thought he was a "douche". A.K. told the Court that, in his assessment, if someone acts in a certain manner, he will call him out in a certain manner. A.K. confirmed that he did not like the way Corporal Gobin was acting in some cases and that he told the military police that Corporal Gobin had a "pig face" as it was the only way he could describe him. He also confirmed that he told the military police that Corporal Gobin had a "douchie" look. A.K. stated he describes people according to their physical features. When challenged by defence as to why he told the military police that Corporal Gobin had a "douchie" look, A.K. admitted that he did not like Corporal Gobin because of the incident. Defence suggested to the complainant that the real reason he did not like the accused was not because of this alleged incident, but because of other things that happened while he was on his course. The complainant admitted that he had a hard time keeping up physically on the course and was a bit of a loner.

Although A.K.'s anger towards the accused may reflect legitimate feelings flowing from the alleged incident or the alleged ongoing harassment, it did require the Court to be cautious in its assessment.

(f) "***Tickle parties" and "Balaclava Bandits"*** - When defence described to the complainant incidents where groups of guys would get together and jokingly tackle and tickle an unsuspecting course mate, the complainant stated that he did not recall this occurring. Defence suggested to A.K. that, at least in the beginning, he had participated in these "tickle parties" and asked the complainant whether he was lying to protect himself and others. The complainant was asked, if others were to testify that the complainant himself had participated in these "tickle parties" whether they would be mistaken, to which he replied, "No." In clarification, he stated that it was possible that he originally participated in these "tickle parties". The accused, testified that he specifically recalls A.K. engaging

in at least one of the incidents where Corporal Gobin himself was the subject of the takedown. Corporal Gobin specifically recalls A.K. helping the gang tackle him down to the floor. Corporal Cazelais stated that he specifically recalls the complainant taking part in these activities on at least one or two occasions, but as time progressed, he observed that A.K. became hesitant. Corporal Cazelais believed A.K.'s hesitation started when the complainant became a target himself and he did not appreciate it happening to him. In short, Corporal Cazelais felt that A.K. may have been more comfortable doing it than being the target.

Defence suggested to the complainant that he had participated in the "tickle party" where someone put Rub·A535 into Corporal Gobin's butt, but the complainant stated he did not recall this incident. Defence also suggested that A.K. stopped participating in these activities when the group targeted him. Defence alleged that others will say that A.K. did not like physical contact and suggested that A.K. decided not to participate in the "tickle parties" so they would not "tickle party" him, to which A.K. responded that he did not recall.

The defence witnesses had to know and appreciate that, with their testimony on their individual participation in these "flash mobs", their testimony was in effect their admission of their own misconduct and their individual decisions to testify would not have been made lightly. It concerned the Court that the complainant testified he was unaware of so-called "tickle parties" or incidents involving the "Balaclava Bandits". When originally challenged by defence on his knowledge of this conduct, he denied any knowledge or memory. The Court also heard from every witness, including the complainant, that their dormitory was constructed with open-ended pods and it would have been impossible for others not involved to be unaware of these raids unfolding, particularly when a group of grown men were running around indoors while wearing white balaclavas.

Although Mr. Huttinga told the Court he does not specifically remember A.K. participating in these raids or "tickle parties", he specifically recalled one incident where he witnessed A.K. sitting on a locker watching one unfold. He stated that from the vantage point on the lockers, you could see pretty well everywhere in the shack. He further confirmed that you would definitely be able to hear one of these events.

The inconsistency of the complainant's evidence on this point, with this evidence as a whole, concerned the Court. It questioned the complainant's motivation for minimizing his knowledge or engagement in this activity. Although these ancillary events do not offer pivotal evidence with respect to the charge before this Court, given their prominence on the course, it raised serious speculation as to whether the

complainant was willing to speak to the truth as he believed it to be, his sincerity or whether he could, in fact, accurately recall and recount the events in question;

(g) ***Butt slapping during the course*** - Defence suggested that there was a great deal of butt slapping. However, the complainant stated that he did not remember any physical contact and originally told the Court that it did not happen to him.

Under cross-examination, the complainant confirmed that he does not like physical contact nor anyone touching him and that if anyone slapped him on the buttocks, he would become hostile towards them. This was perceived as an admission that it did in fact happen. However, later, A.K. then said that he did not specifically remember any incidents, but if someone did slap him, he would be hostile.

Defence suggested to the complainant that his peers would regularly slap him on the butt to hassle him because they knew that it would get a reaction. When asked if Corporal Gobin slapped him on the butt, A.K. stated that aside from the alleged incident of penetration, Corporal Gobin did not slap him. Further, he stated that if Corporal Gobin testifies that he slapped him, that Corporal Gobin would be mistaken.

Credibility and reliability of Corporal Gobin

[69] Corporal Gobin testified in his own defence. He testified at length, however much of his testimony related to ancillary events that occurred on the course and did not relate to the specific charge before this Court.

[70] In assessing a case like this, where credibility is a central issue and the accused has testified, I must assess the charge as follows (see *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521 (*S.(W.D.)*):

(a) First, if I believe the evidence of Corporal Gobin, I must acquit.

(b) Second, if I do not believe the testimony of Corporal Gobin, but I am left in reasonable doubt by it, I must acquit.

(c) Third, even if I am left in doubt by the evidence of Corporal Gobin, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

(d) Fourth, if, after careful consideration of all the evidence, I am unable to decide whom to believe, I must acquit. (see *R. v. H.(C.W.)*, (1991) 68 CCC (3d) 146) (BCCA))

[71] Corporal Gobin testified in a forthright and confident manner. He denied the incident in question, but did confess to the Court that he had engaged in slapping the butt of the complainant on multiple occasions, despite knowing that the complainant had expressed that he did not like this and clearly was not consenting to it.

[72] Corporal Gobin stated that he did not recall slapping the complainant on the evening in question, 12 December 2014. On the ancillary issues related to the evidence before the Court, his testimony was consistent with the evidence as a whole, given by the other witnesses and is reflected in the facts as determined by the Court. He was firm and confident in his recollection of the events and was precise in describing why he engaged in what the Court sees as non-charged misconduct. Although the Court does not condone the rationale he provided for his conduct, it does accept that the accused was honest in his testimony finding it largely credible and reliable.

Overall assessment of credibility

[73] Overall, some of A.K.'s inconsistencies were either explainable, as in the email request for accommodation or were sufficiently consistent with the truth such that it did not cause concern for the Court. For example, the Court was not overly concerned that A.K. erred in stating that Private Gracie was the one who requested help on the day in question, particularly since he never stated that Private Gracie was a witness. A.K.'s inability to remember this detail in general is not surprising, particularly if Private Gracie was the one who normally requested assistance. However, A.K.'s confident insistence under oath when questioned by defence counsel did raise concern making the Court question the reliability of his memory for details on other evidence he provided.

[74] Further, the Court noted that he did not report to the military police nor did he originally admit knowledge in court of the horseplay or low-level hazing that went on within the platoon. Did he deliberately choose to be dishonest with the police and the Court? His lack of reporting on these events to the military police might be explainable given that he was focussed on reporting the "incident." However, when he was later challenged during these court proceedings, while under oath, for the most part, he insisted it never happened to him or said that he could not recall. In his testimony, A.K. consciously suppressed these facts and stated with confidence and insistence that it never happened. In terms of describing the incidents of horseplay, "tickle parties", "balaclava gangs", etc., the Court found that A.K. appeared to be putting forward a self-confident, sincere and accurate recollection of the facts that he believed. However, when challenged on cross-examination, and when his testimony was compared to the evidence as a whole, it became evident that a great deal of what appeared to be his sincere and accurate recollection of the facts was, in fact, wrong. When this happens, the Court must be concerned with the credibility and general reliability of the witness to recount accurately other events in question.

[75] Based on A.K.'s testimony as well as the testimony of his course mates, it is clear that A.K. struggled on the course. Although A.K. tried to fit in with the group in

the beginning, he made it known he did not like the physical play. Notwithstanding this, Corporal Gobin and possibly others continued to touch him by either slapping his butt or hugging him. He appears to have been a victim of ongoing harassment.

[76] The Court was vigilant to the potential consequences that may arise in the reporting of this type of event. As prosecution suggested, Operation HONOUR was designed to address and eliminate this type of misconduct. It encourages victims to come forward to report incidents, but the campaign also sends a message that the culpability of certain types of misconduct would deem the member unfit for future service. The Court was concerned with the fact that the complainant emphatically stated more than once that he was sexually assaulted and penetrated. But, when he was required to explain the events that had occurred, he lacked the same level of confidence that he displayed in other testimony, even when his sincere recollection of the facts had been proven to be wrong. Rather than simply explain what had occurred to him, he seemed insistent on labelling the incident as a "sexual assault." The Court became more concerned with his response under cross-examination when he stated that he wanted to see justice be done. He also made a comment to the military police inferring that someone who commits sexual assault deserves to be kicked out of the Army. From the various comments made both in court and to the military police, the complainant seemed very focused on the end result of having Corporal Gobin kicked out of the CAF.

[77] In applying the SCC's *S.(W.D.)* test set out above, the Court accepts almost all of Corporal Gobin's testimony and found that he was a credible witness. Corporal Gobin did confess to slapping A.K.'s butt on multiple occasions, but could not provide specific dates. Although the Court found that the accused was credible, given the fact that the incident occurred well over three years ago, and the accused was not provided disclosure on the nature of the allegations until December 2016, two years after the alleged incident occurred, this passage of time could easily impact the reliability of his evidence with respect to specific dates.

[78] After an assessment of the credibility of the witnesses and the evidence as a whole, the Court is satisfied beyond a reasonable doubt that there was some form of non-consensual touching that occurred on the evening of 12 December 2014. Hence, the Court is satisfied that the prosecution has met its burden of proof regarding the identity, the date, the place of the offence and the fact that A.K. was non-consensually touched on the evening of 12 December 2014, at the hands of Corporal Gobin.

Was the contact sexual in nature?

[79] However, as expressed above, the Court identified several concerns with both the credibility and the reliability of the complainant's testimony with respect to the complainant's description of the nature of the alleged assault. There is no other evidence before the Court other than the complainant's testimony, measured against the required standard of proof. As such, I have reasonable doubt that the incident occurred in the manner described by the complainant and I fully accept the accused's version of events in that he only slapped the complainant's butt.

[80] The critical element for the Court to decide is whether the contact in question, being a slap on the butt, in the circumstances, was sexual in nature. Sexual assault under the *Criminal Code* covers a broad spectrum of offensive activity which includes everything from low-level uninvited touching to rape. In essence, a sexual assault occurs when a common assault is committed in sexual circumstances such that the sexual integrity of the victim is violated. As discussed above, in *Chase*, the test to determine if an assault is sexual is an objective test. In essence, based on the facts of this case, is the sexual nature of the contact apparent to a reasonable person when viewed in the circumstances?

[81] A determination of whether the conduct constitutes a sexual assault will depend on the part of the body touched, the nature of the contact, the situation in which it occurred and the words and gestures accompanying the act (see *Chase*, paragraph 11). The accused confessed to slapping the complainant's butt on multiple occasions or putting his arm around him even though he knew that that type of contact bothered the complainant. It also heard of the existence of "tickle parties", "balaclava gangs" and "flash mobs" where most members of the platoon engaged in pulling pranks on unsuspecting course mates. Although the Court heard evidence that some of the "flash mobs" resulted in pants being pulled down, there was absolutely no evidence that this ever happened to the complainant. The consistent fact is that the complainant was fully clothed when any touching or butt slapping occurred.

[82] In certain cases, the intent or purpose of the person committing the act may be a factor in considering whether the contact is sexual. If the evidence suggests that the motive of the accused is sexual gratification, then this may be an ingredient in determining whether the conduct is sexual. In this case, there is no evidence to suggest that any such motive existed.

[83] A.K. also alleged that after the accused struck him, he said "You liked it, faggot." The Court has a reasonable doubt as to whether this was said. Although the Court heard testimony that it was a regular occurrence for platoon members to refer to each other using vulgar sexually-oriented slurs and whether or not a sexualized statement was made in the circumstances, the Court disapproves of the use of unacceptable, abusive language, as it undermines the goals of building a strong armed force.

[84] Based on all the evidence before the Court, and in the context in which the butt slapping was done, in the Court's view, the slapping of A.K.'s butt does not rise to the level of a sexual assault.

[85] As a result, in view of all the evidence, the Court finds that the prosecution did not demonstrate beyond a reasonable doubt the essential element of the sexual nature of the contact.

[86] However, since all the other essential elements of the offence were proved by the prosecution beyond a reasonable doubt, the Court finds the accused guilty of the lesser and included offence of assault.

FOR THESE REASONS, THE COURT:

[87] **FINDS** Corporal Gobin not guilty of sexual assault, but guilty of the lesser and included offence of assault, contrary to section 266 of the *Criminal Code.*

Counsel:

The Director of Military Prosecutions as represented by Major G. J. Moorehead

Lieutenant-Commander B.G.Walden and Major F. Ferguson, Defence Counsel Services, Counsel for Corporal R. J. Gobin