

Citation: *R. v. Private T.A. Weir*, 2009 CM 1008

Docket: 200901

**STANDING COURT MARTIAL
CANADA
ALBERTA
CANADIAN FORCES BASE EDMONTON**

Date: 19 June 2009

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

PRIVATE T.A.WEIR

(Accused)

Warning

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgement as the complainant shall not be published in any document or broadcast or transmitted in any way.

FINDING

(Rendered orally)

Introduction

[1] Private Weir is charged with one count of sexual assault. The complainant in this case is B.V. At the time of the alleged sexual assault, the accused and the complainant were both employed with 1 Field Ambulance in Edmonton.

[2] The events giving rise to the charge would have taken place during the evening of 25 July 2008, or early morning of 26 July 2008, at the residence of M.L., who was a

member of the Canadian Forces at the relevant time and who lived in the married quarters, located in Lancaster Park, Edmonton, Alberta.

The Evidence

[3] The evidence before this court consists of the testimonies of the complainant B.V.; the person who hosted the party where the sexual assault would have taken place, M.L.; and one very good friend of the complainant who also attended at the party, namely, T.G.

The testimony of B.V.

[4] The facts surrounding this case began in the late afternoon and early evening of 25 July 2008, where several members of 1 Field Ambulance attended at a private party organized and hosted by M.L., at her residence located in Lancaster Park, Edmonton, to celebrate the upcoming wedding of two of their colleagues; namely, J.E. and R.R.

[5] According to the complainant, B.V., who is an avid runner and serious athlete, she had run 30 kilometres during the morning of 25 July 2008. She stated that during the afternoon, she had been sunbathing at her place with her friend, T.V.M., prior to going shopping. She stated that she had one drink at her place between 1400 and 1500 hours. She said that she left with T.V.M. to attend at the residence of M.L. around 1800 hours to help her for the set up of the bachelor-bachelorette party. The complainant drove to M.L.'s residence in her car but had made other arrangements with M.L. to sleep over at her place and not to drive back home after the party since she intended to drink alcohol that evening. She said that she brought alcohol over with her and drank also alcohol from other persons at the party. The complainant described who was present at the party, including Private Weir. She may have had alcohol around 1900 hours, as well. According to her, people started to arrive between 2100 to 2130 hours. The complainant did not exactly remember who else was present at the party because she did not pay attention. She stated of her relationship with Private Weir that she considered him to be a friend. As people showed up, she had a few more drinks. The complainant stated that later that evening, they left the residence to go to a club near Jasper Avenue in Edmonton. She said that she left in the vehicle of a friend named Julian with many others from the party, including Private Weir. According to her testimony, Private Weir offered them a shot of rye whiskey, referred to as "Weiser". She stated that she drank one shot as well as the others in the vehicle, except for the driver. She stated that the others attended at the bar in another vehicle, but that her friend, T.V.M., did not accompany them to the bar.

[6] The complainant further testified that she had more drinks while at the bar. She stated that she had three to four shots as well as three Screwdrivers. She first stated that she had been dancing, but that her feet hurt and she felt tired. In cross-examination, she said that she had run 30 kilometres that morning. At that stage of the evening, she

referred to herself as being drunk. She said that they stayed at the club until 0030 hours or one o'clock; that is, approximately 1.5 to 2 hours. According to her testimony, they then decided to go back to M.L.'s residence to continue the party, i.e., drinking and having fun. She said that she went back to the residence in a taxi accompanied by M.L., Private Weir, M.F., L.Z., J.E., and R.R., most probably in a taxi-van.

[7] According to the complainant, they arrived at the residence at approximately 0100 hours. She said that the guests of honor did not join them, but returned to their own quarters, while others stayed to continue the party. The complainant stated that she and M.L. decided to go to the pool, a small children's pool of two feet deep, to cool down. Prior to doing so, she went upstairs and got changed from a short black dress into a two-piece bathing suit. The complainant dove in the pool head first. She stated that they both only stayed a few minutes in the pool as the water was cold. The complainant had a few more drinks during that period and a glass of wine. Again, she stated that she was pretty drunk. She then left the group to go upstairs to have a shower and change. She put on a tank top and a pair of jeans. She did not wear underwear. She thought she left her bathing suit hanging in the bathroom. She then returned downstairs with the others. The complainant testified that it is at that time that she does not remember what happened after. She described herself at that point as foggy and only remembering bits and pieces after that moment.

[8] The complainant stated that she then blacked out, which happened to her on more occasions after she had been drinking heavily. She stated that she passed out on the couch in the livingroom, which contained also a love seat, a coffee table in the middle, as well as a TV. According to her, there were still people other than M.L. and Private Weir when she walked to the couch. She did not recall in what position she was in on the couch, or how she felt at the time. She did not notice where Private Weir was at the time she went to sleep on the couch. The complainant stated that she was later awakened for the first time by a person who was behind, holding her hand and trying to pull her pants off. She described that the person was trying "to finger her in her private area". She said that she kept moving his hand away. She said that she moved the person's hand and pushed him off. She testified that she was facing the couch. According to her testimony, her pants were down to her knees, while she was on her back. She stated that the move of her body in that position could have been from the person or from her own move. According to her, she believed that the person had realized that he was doing something stupid, and she recalls the person started swearing at himself and using the "F-word". She described the use of force as aggressive, referring to the bruise on her bicep. She did not see any face nor recognize any voice. She stated that she passed out again at that time, only remembering bits and pieces, and she pulled her pants back up. It is unclear from her testimony whether she passed out before or after pulling her pants up. She testified that she woke up again later that night, although she could not say how much later, by a person who was trying to cuddle her, while her face was facing the couch's back. She stated that the person was laying behind her and rubbing his crotch area on her buttocks.

Asked by the prosecution what she did at time, she replied, "This is all blurs, so I passed back out."

[9] The complainant further testified that the next thing that she remembers is waking up shortly before six o'clock, freaked out. She said that she was crying because she knew something had happened during the night. According to the complainant, this is when Private Weir came up to her and promptly tells her something to the effect that, "Last night got out of hand but you did not say no." The complainant interprets this sudden remark by Private Weir and immediately links the said remark to what she remembers as bits and pieces as gestures made by Private Weir. The complainant testified very shortly after that she had mentioned to Private Weir that L.Z. had raped her before he made this remark. She said that she then realized that she concluded that it must have been Private Weir, not the other person. She immediately got her bags and left in her car at around six o'clock, likely still impaired by alcohol. The complainant arrived at her apartment 15 minutes later and tried unsuccessfully to call her boyfriend on his cell phone, who was in Ontario at the time. She then called her friend, T.G., and told her what had happened, according to her. She then went to see T.G. at her residence because she did not want to be alone, as she was scared and confused. They talked about everything, and the complainant showed her the scrape marks on her chest after taking off her shirt in T.G.'s bedroom. She said that T.G. was shocked and surprised. T.G. noticed, also, a bruise on her right bicep, like a fingerprint mark. T.G. testified that they remained in the kitchen and that is where the complainant showed her the bruises and the scrape marks.

[10] The complainant further stated that she spoke to M.L. later in the afternoon to let her know what had happened and went down to her place in her car, as her boyfriend was still in Ontario. According to her, they sat and talked outside about the events. She stated that M.L. was supportive. She further stated that she then left to pick up her boyfriend at the airport and reported the incident the next day to the military police. She said that she was hesitant before going to the police because of the amount of alcohol she had consumed that night and the blackout that she experienced as a consequence. She said in her testimony, "Nobody should drink that much. I would not have put myself in that situation, and Private Weir would not have done what he did."

[11] In cross-examination, she stated that she was unsure as to how many drinks she had before attending M.L.'s residence. With regard to the going to the pool with M.L., she confirmed that she dove in and stayed only a few minutes, where the others were still outside. She explained that she had a shower after exiting the pool and changed into her jeans and tank top. She then went back with the others outside and continued with the party. The complainant stated further that she then decided to go in the livingroom. She is not sure whether she went alone or not, and she was not sure whether someone was already on the couch at the time. She does not remember whether the TV was on at the time or not. She does not remember who was still present at the party at the relevant time. She does not remember if she fell asleep immediately or not when she laid on the

couch, but she said that she passed out and that she has difficulty to recollect the events. In response to defence counsel, she admitted being that drunk before and passing out in the same fashion. She claimed that what she remembers, she knows it happened, even if she only remembers bits and pieces of it. She stated that her clothes were not damaged and that she is a heavy sleeper. Further, during the cross-examination, she stated that she was not sure in what position she was when her pants were being pulled down. She also testified that she did not yell, scream or ask for help. Asked by counsel for the defence to describe the sequence of events after she woke up shortly before six o'clock, the complainant described that it was Private Weir that came to talk to her that morning as he saw her crying. Private Weir asked her how she was doing, then Private Weir told her that, "Things got out of hand last night. You did not say no." This is when she told him the name of L.Z. and realized that she thought it was Private Weir who had assaulted her during her sleep. The complainant confirmed that she interpreted the words spoken by Private Weir as an apology for what she remembered had happened to her during the night. With regard to her personality, she agreed that she was a people person, a sociable person, who likes to joke around with her male colleagues. She confirmed that she was offered an opportunity to be examined to see if she had marks or bruises and that pictures were taken by the police which revealed very little. She was offered to come back to see the military police if anything would appear shortly after. She was also offered to take a rape test but she declined, because she knew she had not been raped, based on her recollection of events.

The testimony of M.L.

[12] M.L. was the first witness called by the prosecution. She testified that she organized and hosted the party at her residence on 25 July 2008, located on Coriano Street, Lancaster Park, Edmonton, Alberta, to celebrate the upcoming wedding of two friends from her unit. She lived there prior to her release from the Canadian Forces in October 2008, and she had invited several friends from her unit, 1 Field Ambulance. She recalled that persons began to arrive at approximately 2030 hours on 25 July. She had previously set up food and cleaned up her residence before people started to arrive. She stated that 10 to 15 persons attended at the party, including Private Weir and the complainant, B.V. The complainant had arranged with her that she could sleep over at her house in a spare bedroom because she would be drinking and should not drive her car after the party.

[13] The guests were drinking alcohol and eating vegetables, sandwiches and snacks. She described her residence has a two-story duplex with four bedrooms located on the second floor, whereas the kitchen and livingroom were adjacent to each other on the main floor.

[14] M.L. testified that her party lasted approximately three hours from 2000 hours through to 2300 hours that night before they decided to continue the festivities at a local bar located on Jasper Avenue.

[15] She testified that during the party at her residence, she saw the complainant drink coolers and then shooters. She said that B.V. had quite a few drinks but does not know the amount. However, she noticed that the complainant was slightly slurring her words. People were happy and having a good time.

[16] She testified that the group left her place at 2300 hours on-board three vehicles. She said that she drove one vehicle, while one of her friends drove another. The third vehicle was a taxi. They arrived at the local bar 20 minutes later. She described the bar as a low-key club with a VIP section and a small dance floor. They had already made a reservation for the VIP lounge. While at the club, she had one drink as well as non-alcoholic beverages. Asked about the complainant's attitude at the bar, she stated that she was flirtatious and she was joking and laughing with everybody. She also testified that she saw Private Weir on the couch in the VIP section and observed him on the dance floor on a few occasions during that period.

[17] M.L. stayed at the bar approximately 1.5 to 2 hours before heading back to her place with the complainant. She described her as laughing and joking. She testified that they arrived at her place at 0130 hours along with J.E., R.R., M.F., B.V. and Private Weir. Her version of events differs from that of the complainant on that issue. According to M.L., she believes that all the others had left. She stated that the complainant and she went and got changed and, further, went to the pool for a few minutes, where they drank more shooters. After exiting the pool, she changed into her pyjamas and started cleaning the kitchen by putting bottles away. Except for Private Weir and the complainant, the guests left her place at around 0200 to 0230 hours. She saw that the complainant was laying on the couch in the livingroom, her face towards the back cushion. She also saw Private Weir on the adjacent love seat before he moved to the edge of the couch to watch TV. She told them that she was going to bed. Private Weir replied that he was going back to the shacks. M.L. tapped the complainant to join her upstairs, but she made a gesture and a sound that meant to M.L. to leave her alone. M.L. stated that the complainant was drunk. She went to bed and tried to sleep. Because she is a light sleeper, she stated that she went down in order to turn the TV off as it was too loud. Once downstairs, she saw the complainant asleep on the couch in the same position, and Private Weir asleep while sitting at the end of the couch beside the complainant's feet. She turned the TV off and returned to her bedroom. In cross-examination, M.L. added that she then later returned downstairs during the night to get a glass of water and she saw that Private Weir and B.V. had not moved and were both still asleep.

[18] She went back to sleep, to wake up between seven and eight o'clock. She then did more cleaning up in the kitchen and the livingroom, where she saw that some wine had

been spilled on the hardwood floor in front of the love seat. She noticed that the complainant had left already. Private Weir was outside having a cigarette. She asked him how he was feeling that morning, to which he replied that he had a lot of fun last night and thanked her for having him over. He left and walked back to his residence that was 1.5 kilometres away.

[19] She further testified that she spoke to the complainant later that morning on the phone. She said that the complainant was crying and seemed upset. She also mentioned that the complainant stated that she had forgotten some clothes before leaving earlier that morning. Consequently, M.L. invited the complainant to her place to discuss. The complainant arrived at around eleven o'clock, after being dropped off by her boyfriend, according to her testimony. M.L. testified that when the complainant arrived at her place, she seemed okay, although she looked confused. They stayed outside for about two hours where they talked about the previous night. The complainant told her that she thought something had happened between her and Private Weir that night, although she could not remember really everything. She testified that B.V. was crying. During that discussion they drank a cooler. Questioned about a bruise on the complainant's arm, she described the bruise as something that looked like an old bruise because it was dark in colour. It was located on the complainant's right bicep, like a thumb print. The complainant told her that her boyfriend had advised her to make a complaint to which M.L. responded to her that before doing that, she should be sure as to what happened. M.L. testified that the complainant left later with her boyfriend. This is not consistent with the evidence of the complainant and that of T.G. to the effect that her boyfriend was outside of town at the relevant time.

[20] Asked by counsel for the prosecution about the complainant's behavior before going to sleep on the couch, M.L. answered that B.V. was flirtatious and that she was pretty drunk, staggering and her speech was slurred. M.L. added that the complainant could not have driven home. She further stated that when she returned to her place later that morning, the complainant's state was okay, except that she was not feeling good and seemed upset. Finally, M.L. testified that after she had turned the TV off that night, she had not heard anything.

The testimony of T.G.

[21] T.G. was the only other witness heard during the trial. She is one of B.V.'s best friends. She was also present at the party at M.L.'s residence, but she did not accompany the group at the local bar and left the party at that time. She arrived at the party at approximately nine o'clock that evening, accompanied by her boyfriend B.K. She testified first that she only had a few drinks during the party but stated shortly after that she and B.V. had a few shots of Sourpuss as well. Her boyfriend did not. She knew Private Weir only as a member of the unit. T.G. stated that she sat and discussed with B.V. most of the night. She testified that before leaving the party, she discussed with

B.V. about mutual plans for the next day and told the complainant that she would send her a text message to confirm. She would have left with her boyfriend around 2230 hours when all the others were getting ready to go to a local bar. T.G. testified that the next time she spoke to her friend, B.V., was on the phone the next morning.

[22] According to her testimony, she sent a text message to B.V. at approximately ten o'clock to ask her if she was awake, to which B.V. replied positively. T.G. stated that B.V. then called her on her home phone line and that she missed the phone call. She phoned her back. In response to her question about how it went the previous night, B.V. told her that something bad had happened. B.V. sounded upset and her voice was shaky. She invited her to her place, because she knew that B.V.'s boyfriend was not at home. B.V. arrived shortly after. T.G. testified that her boyfriend was present at the time, but that he did not participate in the discussion that took place entirely in the kitchen. She described B.V. as crying and her hands were shaking. Her face was red and her eyes were teary. She had not seen B.V. cry before. She knew of her friend B.V. as a confident person. Then T.G. asked her what happened. B.V. replied that she thought that something bad had happened. T.G. stated that B.V. was wearing a T-top and a sweater. B.V. pulled down her sweater and T.G. noticed that her friend had scratches on her chest. B.V. then asked T.G. if she had any bruises on herself. T.G. testified that she saw something that she described as a hand mark on B.V.'s left arm, unlike what was described by both B.V. and M.L. during their testimonies.

[23] T.G. further testified concerning the nature of the conversation she had with the complainant. B.V. told her that something bad had happened to her when at M.L.'s residence. She remembered kicking someone off of her during that night and she did not know at the time who that person was, because B.V. said she thought she was dreaming. T.G. further said that B.V. told her that she had no idea who it was until the next morning when Private Weir told B.V. that he was sorry. T.G. testified that she was shocked. According to her testimony, B.V. would have stayed with her in her apartment most of the day. T.G. said that they watched two movies entitled, "Blue Crush", and "Honey". They then prepared supper together and had supper as well. T.G. added that B.V. left her place after supper at approximately 1800 hours, because her friend had to go shopping for groceries and pick up her boyfriend at the airport later that evening. This part of her testimony is also not reconcilable with the testimonies of both M.L. and B.V.

[24] This completes the summary of the evidence before this court.

The Law and the Essential Elements of the Charge

(Section 130 of the National Defence Act - Section 271 of the Criminal Code)

[25] Over the years, the Supreme Court of Canada has provided trial judges with guidance in matters related to sexual assaults. It is well understood that sexual assault is

an assault which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated. However, sexual assaults have a special dimension. In *R. v. Seaboyer*¹, Justice L'Heureux-Dubé stated:

Sexual assault is not like any other crime. In the vast majority of cases the target is a woman and the perpetrator is a man Perhaps more than any other crime, the fear and constant reality of sexual assault affects how women conduct their lives and how they define their relationship with the larger society.

[26] The test to be applied in determining whether the conduct has the requisite sexual nature is an objective one; whether viewed in the light of all the circumstances, the sexual context of the assault is visible to a reasonable observer. 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 that may or may not be accompanied by force will be relevant. 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. Sexual assault does not require proof of sexuality or sexual gratification, which are merely factors.

[27] The *actus reus* of sexual assault is established by the proof of three elements: first, the touching; second, the sexual nature of the contact; and third, the absence of consent. The first two of these elements are objective. It is sufficient for the prosecution to prove that the accused's actions were voluntary. The sexual nature of the assault is determined objectively, and the prosecution need not prove that the accused had any *mens rea* with respect to the sexual nature of his or her behaviour.

[28] To secure a finding of guilty, the prosecution shall prove each of these essential elements beyond a reasonable doubt:

- a) that Private Weir applied force to B.V.;
- b) that Private Weir intentionally applied the force;
- c) that B.V. did not consent to the force that Private Weir applied;
- d) that Private Weir knew that B.V. did not consent to the force that Private Weir applied; and
- e) that the force that Private Weir applied took place in the circumstances of a sexual nature.

¹[1991] 2 S.C.R. 577 at 648 (Dissent by Justice L'Heureux-Dubé).

Presumption of Innocence and Reasonable Doubt

[29] 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 that principle fundamental to all criminal trials. These principles are well known to counsel, but other people in this courtroom may well be less familiar with them.

[30] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[31] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and never shifts to the accused person.

[32] A court must find an accused person not guilty if it has a reasonable doubt about his guilt after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, Cory J. proposed a model charge on reasonable doubt, given the frequency at which jurors sought clarification concerning the meaning of such an expression. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts' subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case, based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt. In *R. v. Starr* [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court held that, "... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities." On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case, Private Weir, beyond a reasonable doubt. If the court is convinced that the accused is probably or likely guilty, then the accused shall be acquitted, since proof of probable or

likely guilt is not proof of guilt beyond a reasonable doubt. The accused is entitled to the benefit of the most favourable interpretation of discrepancies in the evidence.

[33] It is not unusual that some evidence presented before a court may be contradictory. Often witnesses may have different recollections of events. The court has to determine what evidence it finds credible and reliable. However, there is an important distinction between a witness whose evidence is both credible and reliable and a witness who appears to be credible, but whose evidence is nonetheless unreliable.

[34] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. 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; a witness's reasons to remember, like, were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour either the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused when the accused testifies. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify. However, the accused does not have to prove anything and he does not have to testify.

[35] 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 within itself and with the uncontradicted facts?

[36] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and it may well taint a witness's entire testimony.

[37] A court is not required to accept the testimony of any witness, except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason to disbelieve it. As the rule of reasonable doubt also applies to the issue of credibility, the court is not required to definitely decide on the credibility of a witness or a group of witnesses, nor does the court need not fully believe or disbelieve one witness or a group of witnesses.

[38] In addition to having instructed myself as to the onus and standard of proof, I have also instructed myself that the law relating to recent complaint has been abrogated in Canada, although failure to complain may be a factor to consider by the trier of fact. I have also instructed myself that there is no legal requirement for corroboration of the

complainant's story. Finally, I have reminded myself that consent is entirely subjective and that it requires the "voluntary agreement of the complainant to engage in the sexual activity in question" pursuant to section 273.1 of the *Criminal Code*. I will now examine the facts of this case as revealed by the evidence put before this court in light of the applicable legal principles.

Position of the Parties

The Prosecution

[39] The prosecution submits that the main issue in this case relates to the *actus reus* of the offence. Counsel for the prosecution suggests that all witnesses were credible and reliable. With regard to the complainant, prosecution submits that her testimony was credible and mostly reliable, despite some weaknesses in her memory as well as gaps in her recollection of events that are attributable to her large consumption of alcohol prior to the events leading to the charge of sexual assault. The prosecution's theory on the absence of consent is twofold: First, B.V. was not in a position to consent to sexual touching because of her high level of intoxication; and second, she did not consent to sexual touching as she expressed it in her testimony. The prosecution submits that the version of events of the complainant, despite her lack of memory for events that took place prior and after being sexually assaulted, is credible and reliable because it is largely and logically supported by the evidence of the complainant and other witnesses that took place after the assault in M.L.'s livingroom. Major McMahon, for the prosecution, highlighted the following events in support of his arguments, and I have listed twelve events:

1. The first reaction of the complainant when she woke up shortly before six o'clock on 26 July 2008 supports that she had a clear mind and had a better recollection of what had happened during the preceding hours.
2. Shortly after waking up, she has a conversation with Private Weir and told him that she believes that she was raped by L.Z. or that L.Z. attempted to rape her during her sleep.
3. She immediately sees Private Weir's reaction to be of shock and surprise, where he tells her words to the effect, "I am sorry that things got out of hand, but you did not say no."
4. She immediately interprets these words to mean that Private Weir, not L.Z., sexually assaulted her and she freaks out.

5. The evidence of M.L. and B.V. indicates that when M.L. decided to go to bed, only Private Weir and the two of them remained. L.Z. was no longer in the house.
6. The complainant left the house immediately after freaking out, driving her car, knowing that she should not do so after heavy drinking the previous night.
7. The complainant left M.L.'s residence and drove directly to her own place, where she tried to phone her boyfriend who was outside the province.
8. The complainant then phoned her best friend, T.G., to tell her what she believed had happened at M.L.'s residence and drove to see her to seek comfort.
9. When she arrived at T.G.'s residence, the complainant had a shaky voice, shaky hands and teary eyes. T.G. had never seen her friend in such a physical and emotional state before, where she knows her as a strong and confident young woman.
10. The complainant shows to her friend, T.G., that she has some marks on her chest, close to her left nipple, and T.G. sees that the complainant has a bruise close to a bicep.
11. The complainant speaks to M.L. the same day to tell what happened and she later drives to see M.L. at her residence. M.L. notices that the complainant is very upset and she observes a bruise on her right arm that looks like a thumb print.
12. The complainant sees the police the next day and provides a statement.

[40] Counsel for the prosecution submits that the key evidence in this case relates to the events that took place when she woke up in the morning and realized that something had happened to her during the night, even though she had gaps in her memory of the events, but believed that she had been raped by L.Z. The prosecution relies also on the words that would have been uttered by the accused to the complainant shortly after she woke up, where she states that Private Weir told her that, "Things got out of control, but you did not say no."

[41] In conclusion, the prosecution submits that the complainant is a reliable witness because of the reaction she had when she woke up shortly before six o'clock on 26 July 2008, which would be consistent with her recollection of the events that she was sexually assaulted during her sleep. Her behaviour following the alleged assault would

corroborate and confirm that she was sexually assaulted by Private Weir beyond a reasonable doubt, according to the prosecution.

The Defence

[42] Counsel for the defence suggest that the witnesses were credible, but that their evidence, mostly that of the complainant, is not reliable. The defence highlighted several areas of concern within the evidence heard at trial and with the position of the prosecution in this case. The defence disagrees with the position of the prosecution that the court can conclude from the evidence that the complainant was not in a position to consent to sexual touching because of her high level of intoxication. The defence submits that the court cannot draw such a conclusion in absence of expert evidence in the field of toxicology. The defence points also to various parts of the evidence to illustrate areas of concern of the evidence.

[43] Counsel for the accused submits that the testimony of the complainant is simply not reliable. He refers to various parts of the evidence that he considered to be problematic, whether in the testimony of the complainant or to various inconsistencies in the recollection of events by the witnesses. He noted that after the complainant had told her best friend, T.G., that Private Weir had sexually assaulted her a few hours before, T.G. was surprised because it seemed to her that it was out of his character. Defence counsel highlighted that the complainant was an exceptional athlete and fit soldier who had ran 30 kilometres the morning of 25 July 2008, who later ingested a large amount of alcohol during a party less than 12 hours later and who ended up passing out on her hostess's couch and admittedly suffered a blackout as a result. Defence counsel referred to the testimony of the complainant, who stated that she had told the police that Private Weir may have taken her flirtation as meaning something more.

[44] He referred to the testimony of M.L., who saw the accused and the complainant in her livingroom, prior to going to her master bedroom at approximately 0230 hours, and how she found them both asleep in that room when she came down, firstly, to turn the TV off, as she could not sleep because she is a light sleeper, and later during that night to drink a glass of water. He referred to her testimony to the effect that during the night, M.L. did not hear anything or anyone.

[45] Defence counsel raised several areas that he considered troubling, which, in his opinion, seriously affect the reliability of the complainant's testimony, in addition to her high level of intoxication. He noted that B.V. is a heavy sleeper. Counsel for the defence raised some inconsistencies and contradictions with regard to her previous statement to the police. For example, she would have said that she was approached from behind, after being told that it was likely what had happened; where she had told the police that she was laying on her back. He pointed to the fact that B.V. did not see a human face at any time during the alleged assault, although she testified that she heard the voice of a man

swearing at himself after she had moved him out of the way. However, when she woke up, she believed that someone other than the accused had raped her or attempted to rape her. Counsel for the defence submits that there is a significant amount of time where the complainant was already sleeping on the couch, while other guests were still present, where the alleged sexual assault could have taken place and not involve the accused, based on the testimony of the complainant. In addition, he referred to the contradictions of the various witnesses with regard to the complainant's discussions and visits to M.L. and T.G. on 26 July 2008.

[46] Finally, he raised the fact that although pictures were taken by the police with regard to marks and bruises on 27 July 2008, it revealed nothing of significance and that the complainant did not follow up the offer made by the police with regard to the taking of further photographs to show marks and bruises that could appear shortly after, as well. He also referred to the opportunity given to the complainant to take a rape test that could have assisted the investigation in the context of the lack of reliability of her testimony. Therefore, counsel for the defence submits that the testimony of the complainant is so unreliable that the prosecution did not meet its burden of proof; that is, beyond a reasonable doubt, that the accused did commit the *actus reus* of the offence.

The Complainant's Credibility

[47] The complainant testified to the best of her recollection. There is no issue with the fact that she was highly intoxicated by alcohol during the late evening of 25 July 2008, and early hours of 26 July 2008. The court understands that it is extremely painful to testify in cases of this nature. There is no doubt that she tried her best to remember what happened during the night of 26 July 2008. However, her high state of intoxication at the time made it extremely difficult to offer an accurate version of the events. It is not in issue that she had consumed a large quantity of alcohol to the point of losing consciousness. Using her own words, she passed out several times and she had a black out. She candidly admitted that this is not the first time that she experienced this situation after drinking alcohol heavily. She recognized that she only remembers bits and pieces. She had a blackout. She described that she was foggy and felt like it was a dream. There is no doubt that her large alcohol consumption had a significant effect with regard to the assessment of the trustworthiness of her testimony. I also refer to the testimony of M.L., concerning the complainant's high state of intoxication before she went to sleep on the couch in the early hours of 26 July 2008. It is also of concern for the court that some of her recollection, for example her position on the couch when the alleged incident occurred, would have been suggested by others. Unlike counsel for the prosecution, I cannot find comfort in her actions post-incident to the extent that it would make her version of events sufficiently reliable.

[48] Some elements of her evidence are problematic. She could not foresee that Private Weir's comments could have referred to something that took place between them

during the previous evening. This could explain why she would have told the police that Private Weir may have taken her flirtation as something more. Why did she believe that L.Z. had sexually assaulted her if she did not see any face, but said that she heard a person swearing? Why could she relate that original belief to L.Z.? I am deeply convinced that the complainant did not try to lie or to embellish her version, but the reliability of her version is problematic in many ways, and it is very largely attributable to self-induced intoxication.

The credibility of the other witnesses

[49] M.L. testified in a concise and straightforward manner. In cross-examination, she testified to the best of her knowledge. Her testimony is internally consistent, but it is contradicted on collateral events, such as her discussion with B.V. and subsequent visit to her residence on 26 July, by the testimony of T.G., who would have been with B.V. at the same time. Her evidence also differs on many issues with that of B.V. Her version of events does not correspond to the evidence of the complainant with regard to the transportation of the guests back to her residence, nor the number of guests that returned to her residence to continue the party. However, M.L.'s testimony leaves no doubt that B.V. was flirtatious during the evening and that she was in an extreme state of intoxication. M.L. consumed alcohol, mostly on return to her residence. The evidence does not allow drawing any conclusion or inference as to her own state of intoxication when she went to sleep after the evening. Overall, I find her evidence mostly credible, but I cannot accept her evidence with regard to the exact number of guests who returned at her house to continue the party. With regard to her discussion with and visit by B.V., it is corroborated by B.V., and it has a ring of truth, except concerning her assertion that B.V. was dropped off and later picked up by her boyfriend. Overall, her testimony is mostly reliable and credible.

[50] T.G. testified in a concise, straightforward and confident manner. Her testimony is very problematic. Her evidence is credible with regard to the fact that she spoke and saw her friend, B.V., during the morning of 26 July. She corroborates the mental and physical state of B.V. at that time. However, I do not find credible or reliable her testimony concerning her description of events to the effect that she would have spent most of the day in the presence of B.V. on 26 July 2008. I do not find her testimony credible or reliable with regard to her discovery of a bruise on B.V.'s left bicep. Both B.V. and M.L. said the contrary. I do, however, accept her evidence that B.V. was really distraught when she talked to her and met her in the morning of 26 July 2008.

Decision

[51] In matters of sexual offences, it is often the case where the trier of fact is confronted with contradictory versions of events from the complainant and from the accused. The presumption of innocence does not allow the trier of fact to decide which

one version is true, but whether the evidence as a whole raises a reasonable doubt or establishes beyond a reasonable doubt the guilt of the accused. In this case, the accused chose not to testify. The court cannot draw any negative inference from that decision. As I said previously, the accused does not have to prove anything and the burden of proof of the prosecution never shifts to the accused. The court must review the evidence that it finds credible and reliable, and determine whether the prosecution has met its burden of proof beyond a reasonable doubt.

[52] Let me deal first with the proof of the element dealing with the lack of consent. You will recall that the prosecution submits that the complainant was unable to form consent because of her high state of intoxication, and that her evidence in court to the effect that she did not consent to any touching at the relevant times establishes the proof beyond a reasonable doubt that B.V. did not consent to any application of force.

[53] It is trite law that a non-expert opinion may be given of the intoxication or impairment of an individual, as well as the emotional state of a person, such as whether distressed, angry, aggressive, affectionate or depressed. To form such opinions does not require special knowledge. Is the evidence of M.L. and that of B.V. proof beyond a reasonable doubt of lack of consent? I find that as a result of her intoxication, B.V. suffered an alcohol blackout and consequently has no memory of what happened between approximately 0130 hours to 0545 hours on 26 July 2008, when she woke up and freaked out. The only exception to this memory loss was when she had foggy, like-a-dream recollections of someone who was behind her, holding her hand and trying to pull her pants off. She described that the person was trying, "to finger her in her private area". She said that she kept moving his hand away. She said that she moved the person's hand and pushed him off. She testified that she was facing the couch. According to her testimony, again, her pants were down to her knees, while she was on her back. She stated that the move of her body in that position could have been from the person or from her own move. According to her, she believed that the person had realized that he was doing something stupid and she recalls the person started swearing at himself and using the "F-word". She described the use of force as aggressive, referring to the bruise on her bicep. She did not see any face nor recognize any voice. She stated that she passed out again at that time, only remembering bits and pieces, and she pulled her pants back up. As I said previously, it is unclear from her testimony whether she passed out before or after pulling her pants up. She testified that she woke up again later that night, although she could not say how much later, by a person who was trying to cuddle her, while her face was facing the couch's back. She stated that the person was laying behind her and rubbing his crotch area on her buttocks. Asked by the prosecution what she did at time, she replied, "This is all blurs, so I passed back out."

[54] The complainant further testified that the next thing that she remembers is waking up shortly before six o'clock, freaked out. She said that she was crying because she knew something had happened during the night. According to the complainant, this is when

Private Weir came up to her and promptly tells her something to the effect that, "Last night got out of hand but you did not say no." The complainant interprets this sudden remark by Private Weir and immediately links it to what she remembers, and concludes that the touching ought to have been done by Private Weir. The complainant testified very shortly after that she had mentioned to Private Weir that L.Z. had raped her before Private Weir makes this remark. She said that she then realized that she concluded that it must have been Private Weir, not the other person. She immediately got her bags and left in her car at around six o'clock.

[55] The court disagrees with the prosecution that the high level of intoxication and loss of memory that came as a result of the excessive consumption of alcohol by B.V. is proof of lack of consent. Absent expert evidence, it is my view that a loss of memory or a blackout attributable to excessive consumption of alcohol, is direct evidence of nothing, except the fact that the witness cannot testify as to what happened during a particular period. Without more, it means only that the complainant cannot give direct evidence as to whether or not she consented to the sexual contact or whether or not she had the capacity to do so. This does not mean that evidence of memory loss or a blackout has no probative value. It may permit inferences to be drawn about whether or not a complainant did or did not consent, or whether she was or was not capable of consenting at the relevant time. But some expert evidence will be required. Although expert evidence cannot be admitted to bolster the credibility of a complainant, it may well assist the trier of fact in order to explain the effect of severe intoxication and human behaviour. In *R. v. Marquard*², McLachlin J., as she then was, stated:

... [T]here is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact.

[56] Counsel for the prosecution submits that B.V. testified that she did not consent to sexual activity with Private Weir at the relevant times. He suggests that this is evidence of lack of consent. This proposition is flawed. It is fair to say that the actual state of mind of the complainant is determinative of the issue of consent; however, I cannot accept the prosecution's submission. Despite the fact that B.V. denied, in her testimony, that she consented to any sexual activity with Private Weir, her evidence makes it clear that she has no memory whatsoever of her actual state of mind at the relevant time. Such evidence would have to come from other sources in the circumstances. In *R. v. Brooks*³, a decision of the Court Martial Appeal Court, the accused was charged with sexual assault, and both the accused and the complainant were highly intoxicated at the time of

²[1993] 4 S.C.R. 223 at 249.

³[1999] C.M.A.J. No. 8.

the alleged offence. Commenting on the issue of consent, Bennett J.A. stated at paragraph 50:

There is nothing in the evidence of the complainant upon which it could be found beyond a reasonable doubt that she did not consent to sexual activity at the time that it had occurred. J.V.'s deduction and conclusion, after the fact, that she could not have consented is not proof beyond a reasonable doubt. This is not a reassessment of the credibility of J.V. I have no doubt as did the learned President that J.V. was honest and credible when she gave her testimony. However, what the learned President failed to address is the fact that J.V.'s evidence was unreliable due to her degree of intoxication and her almost complete inability to recall the events.

[57] Based on the evidence before the court, I conclude that the prosecution has not established beyond a reasonable doubt that the complainant did not consent to sexual activity with Private Weir. This conclusion is sufficient to determine this case. However, the court would also have been left with a reasonable doubt that Private Weir applied the use of force referred to by B.V. when she was on the couch.

[58] Even if the court accepts that it is very likely and probable that the accused has done something that was inappropriate to B.V. which would explain his comments to her when she woke up shortly before six o'clock on 26 July 2006, there is insufficient reliable evidence to conclude that the accused was the only person that could have committed the offence, based on her own evidence and her belief that L.Z. had sexually assaulted her when she was passed out on the couch.

[59] It is widely known that victims of sexual assault, mostly women, knew of their aggressor. It is also widely known that sexual assaults take place mostly in private places. The process in place to support victims of sexual assault must inspire confidence to victims and be responsive to their genuine distress. A process that does not possess these minimum requirements does not carry the necessary level of confidence required for the victims in order for them to go through the long and emotionally difficult process of making a formal complaint and further participate in long judicial proceedings. At the investigative stage, law enforcement agencies must make sure that they use every appropriate tool during their investigation to strengthen the complainant's version. In this case, there is evidence that the military police took pictures of bruises and offered the complainant to take a rape test. These are positive steps. They may also have conducted interviews of all persons present at the party to determine what if any information could assist the legal process. The court is unaware of the extent of the investigation in this case.

[60] Ordinarily, minor discrepancies and contradictions of witnesses on certain matters, collateral or not, will not suffice to destroy the credibility of a key witness and the reliability of its testimony. However, in these cases where the reliability of the testimony of a key witness, like the complainant in a trial for sexual assault, is at the very best frail from the outset, the prosecution should bring all relevant and material evidence

that will assist the search for the truth and remove every possible discrepancy, or put them in perspective. It may well be that expert evidence in the field of pharmacology and human behaviour could have assisted the court, even if only partially. It may well be that other witnesses would have resolved the discrepancies between the testimony of M.L. and that of the complainant with regard to the presence or absence of those present at M.L.'s residence when they had returned from the local bar. Also, it may have been possible to provide relevant and material evidence from other witnesses of what was supposedly the flirtatious behavior of the complainant during that evening and whether anyone saw an interaction between the complainant and the accused at any time during the evening that would provide relevant and material evidence to an issue at trial. Based on the evidence before the court, I can only assume that all material and relevant evidence was put before the court, but I have some doubt. Only the prosecution can say if it was done.

[61] Private Weir, stand up. For all of these reasons, the court finds the accused, Private Weir, not guilty of the offence of sexual assault. Be seated. The proceedings of this court martial are terminated.

COLONEL M. DUTIL, C.M.J.

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