COURT MARTIAL

Citation: *R. v. Seifi*, 2009 CM 3017

Date: 20091009
Docket: 200948

Standing Court Martial

Moss Park Armoury
Toronto, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Ex-Private S. Seifi, Accused

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Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

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

REASONS FOR FINDING

[1] Private Seifi is charged with one offence punishable under section 130 of the *National Defence Act* for a sexual assault on G.L.E.C. contrary to section 271 of the *Criminal Code*, and alternatively he is charged with an offence for an act to the prejudice of good order and discipline for having touched the breast of G.L.E.C. without her consent contrary to section 129 of the *National Defence Act*.

[2] The facts on which these counts are based relate to an event that occurred on 10 July 2008, at Canadian Forces Base (CFB) Borden during a PLQ3 Medical Technician course.

THE EVIDENCE

[3] The evidence before this court martial is composed essentially of the following facts:

a. The testimonies heard in the order of their appearance before the court: the testimony of G.L.E.C., the complainant in this case; Private Van Aert; and Private Seifi, the accused in this case;

b. Exhibit 3, a series of admissions made by the accused in accordance with Military Rule of Evidence 37(b), including, among other things, the identity of the accused, the date and the place of the incident;

c. Exhibit 4, the version in force at the time of the alleged incident of the Canadian Forces Administrative Order (CFAO), chapter 19-36, entitled "Sexual Misconduct." This document was entered in evidence by consent;

d. Exhibit 5, an article written by the accused and published on 11 September 2008 on a web site. This document was entered in evidence by consent;

e. Exhibit 6, an email sent by the accused on 9 September 2008, to the publisher of the article providing the initial title of the article. This document was also entered in evidence by consent; and

f. The judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

[4] At this stage, it would be appropriate for the court to provide the testimonial evidence presented by both parties in this case.

The testimony of G.L.E.C.

[5] The complainant, G.L.E.C., testified that she was on a QL3 Med Tech course during the summer of 2008, at CFB Borden, with 12 other course mates. She told the court that the accused was on the same course as her. She explained that she found him abrasive and that she might have used some words to let him know that she did not like him. She said that she did not have a real relationship with the accused, because she did not talk to him very often, and that they were not really socializing outside of the course. She did not do or say anything to make him not like her.

[6] She told the court that on the afternoon of 10 July 2008, all students on the course were attending, on the base, an outdoor period on medical lifts and carries in order to learn how to evacuate a person injured other than by using a stretcher.

[7] She said that the instructors demonstrated different techniques, such as the piggyback, the fireman carry, the queen's chair and few others. She testified that the candidates tried to choose a person of the same size for practicing those techniques and she paired with Private Van Aert and another female candidate to do so. Close to the end of the period there was a relay race using the piggyback technique.

[8] She told the court that candidates decided on the composition of the two teams for the relay race. Private Seifi was not desired by some members of the other team, so as some of her other teammates, the complainant invited him to join their team, which he did.

[9] The complainant testified that the relay race to be performed by paired students was about carrying on their back a teammate from one pylon to the other using the piggyback technique. Once at the end of the one way run, the two teammates had to switch position and run back to the starting point by carrying, with the same technique, the teammate. Then, another group of two would have to proceed the same way. The winner would be the first team for which all members have done the full distance by using the piggyback technique.

[10] G.L.E.C. said that Private Van Aert was first in line for the race, followed by her, so normally, she would have paired with Private Van Aert for the race; however, Private Seifi ended at the front of her team's line while both teams tried to organize themselves. The complainant saw that Private Van Aert was embarrassed by considering being paired with the accused for the race. Being very competitive, the complainant decided to pair with Private Seifi. She explained that she was unhappy with the situation, but because the most important thing for her at that moment was winning the relay race, she decided to put an end to the discomfort raised by this situation among her teammates by being Private Seifi's partner for the race.

[11] The complainant testified that Private Seifi and her were the first group to start the race for their team. Private Seifi carried her on his back using the piggyback technique for the first leg. She explained that the piggyback technique is used to carry conscious and injured patients. His part of the run went well. They switched position at the turnaround point. She said that she got off of his back and he got on hers. She then started running back to the starting point.

[12] She told the court that the lower-body part of Private Seifi was supported by having her hands holding his legs. His torso was directly in contact with her back. While running, she inclined her own body in order to counter balance Private Seifi's weight on her back. She said that Private Seifi's arms were around her neck. In fact, she was able to see his elbows on each side by using her peripheral vision. She mentioned that he put his armpit or part of his bicep on her shoulders to support the higher part of his body. She was very focused on the race and she never noticed where his hands were. She said that she did not feel his hands on her body and assumed that he put them on his forearms while she was running. She mentioned that she was wearing a sports bra that day.

[13] The complainant testified that about three quarters of the way, she felt that her left and right breasts were gripped/released for a second, at the same time, by the accused. She never saw his hands doing such thing, but she said to the court that she felt fingerprints of each hand on both her breasts. She threw her arms up and threw him off her back. She turned and yelled at him: "What the fuck, Seifi." She told the court

that Private Seifi replied by saying: "Seifi what?" She then replied, "Okay, whatever, whatever," and she went to the back of the line.

[14] She said that Sergeant Jardine, an instructor on the course, came over and asked Private Seifi to stay where he was. The instructor asked her what happened and she told her that Private Seifi grabbed her tits. Then, the instructor went to see Private Seifi and spoke to him. She spoke in quite a loud manner to him and she looked angry.

[15] G.L.E.C. testified that she heard the accused reply to Sergeant Jardine by saying that he did not do anything and asking what she was talking about. Essentially, she said that he was denying everything while confronted by Sergeant Jardine.

[16] She told the court that this incident put an end to the period. She said that she formed up with the troops and they left the location. She testified that, later that evening, she filed a complaint to the military police and that she provided a written statement. She said that five days later, she was interviewed by the MP and it was video recorded.

The testimony of Private Van Aert

[17] Private Van Aert testified that she was on the same course as the complainant and the accused. On 10 July 2008, she was attending the outdoor period on lifts and carries. She said that she paired with the complainant for the practice portion of the different techniques because they were about the same size and weight. She told the court that a relay race was organized using the piggyback technique and that the group course had to form up in two teams. The complainant and her were at the front of the line of one team. She said by being the two first in the line, they would pair together, as they did for the practice, being about the same size and weight.

[18] She told the court that Private Seifi came at the front of the line and both the complainant and her looked at each other, not knowing who will pair with him for the race because they did not want to partner up with somebody different. She said that she felt a little bit relieved when the complainant made the decision to go ahead and pair with the accused.

[19] She told the court that the accused and the complainant started the race. She did not see anything up to the time her attention was drawn by the complainant cursing and swearing at the accused. She testified that Private Seifi denied that something happened. She saw and heard the complainant explaining what happened to an instructor, Sergeant Jardine. She said that the period was ended by Sergeant Jardine and the candidates returned to their classroom.

The testimony of Private Seifi

[20] Private Seifi testified that he was on a Medical Technician course in summer 2008, and that the complainant and Private Van Aert were on that same course. On Thursday, 10 July 2008, he attended, with his other course mates, an outdoor period on lifts and carries. He told the court that for the practice portion of the period, he paired

with Mitchell and Alexander. He said that when it was the time for the relay race, teams got organized and he was told by Corporal Hoertz that he could not be part of his team. Then, he was invited by the complainant and some other course mates in the other team to join them, which he did. He told the court that he was located in the middle of the two teams when he got the invitation and he went to the front of the line of his new team because it was the shortest way for joining them.

[21] He said that the race started, and because of that, the complainant jumped on his back and told him to go. He grabbed her legs and started running. He mentioned that her hands were on top of his shoulders. When they arrived at the end of the leg, they were leading the race. He said that she came off of his back and she told him to get on her back. He had a hesitation because he was unsure that she was strong enough to carry him, considering that he was heavier than her. She took him by the hand and pulled him towards her. He got on her back. He told the court that she was using her hands to support his lower-body by holding his legs under his knees. He put his hands on her shoulders, having his elbows out on each side of her head. He specified that his hands were on her trapezoids, holding on the part between her shoulders and the base of the neck with his fingers curled a little bit.

[22] He testified that she started to run with her body leaning forward, as his, inclined to 30 degrees. He said that it was like a roller coaster and that his hands were glued on her shoulders because he was afraid to fall. He said that when they were a few feet from the finish line where the other pair of course mates were waiting for them to arrive, she opened her arms but he did not fall right away. She shook him off, got him off of her back, she turned around, looked at him, and while pointing at her chest, she yelled at him, "What the fuck, Seifi." He said that he was surprised of such behavior. He replied to her, “Seifi what?” He told the court that she said in reply, "Whatever," and she turned around heading to the back of the line while mumbling.

[23] He said that about 30 seconds to a minute later, while he was walking to the end of the line, the instructor, Sergeant Jardine, came to him and asked him what he did to the complainant. He said that she ordered him to get to the attention position and she asked him what he did to her. He heard Sergeant Jardine ask the complainant what happened. He also heard the complainant explaining that he touched her and saw her pointing at the chest while answering to Sergeant Jardine.

[24] He testified that he replied to Sergeant Jardine that he did not do that. He said, "I just want to get out of the army, people pick on me and I love everyone." He said that at that point he was in shock and very angry because he was accused of something he did not do. He said that this incident put an end to the relay race. He mentioned that the instructors took the complainant away and the group formed up and left. Later, late in the evening, he was arrested by the MPs.

[25] He told to the court that he never touched the complainant’s breasts during the incident, even by accident.

[26] As an author, he wrote some articles that were published; including the one marked as Exhibit 5 and entitled, "Selling Sex." He mentioned to the court that this specific article expressed some reflections he made on the basis of personal observations. He explained that the article must be read as a whole and it is self-explanatory. Without denying that he critiqued in this article the idea that, in Canada, there is a system encouraging the domination of the opposite sex in order to establish relationships, he clearly told the court that it was not the aim of the article and this reflection was part of a subsection that must be read with others in order to have a real understanding of what he was trying to express. He indicated to the court that the original title of the article was "Reflections of a Traveller: Capitalism's Hands in your Sexuality's Pockets. How the Social Ladder Turns a Boy's Basic Need for Love into a Commodity!" and he never suggested or approved the title of his article as published.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE

Essential elements of the offences

[27] Section 271 of the *Criminal Code* reads, in part, as follows:

> SEXUAL ASSAULT
>
> 271.(1) Every one who commits a sexual assault is guilty of
>
> (*a*) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or
>
> (*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

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

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

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

> ASSAULT
>
> 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;

[30] In *R. v. Ewanchuck*, [1999] 1 S.C.R. 330, it was established that:

> A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of assault is unwanted sexual touching. The *mens rea* is the

> intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.
>
> The *actus reus* of sexual assault is established by the proof of three elements: (i) touching; (ii) the sexual nature of the contact; and (iii) the absence of consent….
>
> … [T]he *mens rea* of sexual assault 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.

[31] Then, the prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet. The prosecution also had to prove the following additional elements: the fact that Private Seifi used force, directly or indirectly, against the complainant; the fact that Private Seifi used intentionally the force against the complainant; the fact that the complainant did not consent to the use of force; that Private Seifi knew, or was reckless of or wilfully blind to a lack of consent on the part of the complainant; and the fact that the contacts made by Private Seifi on the complainant were of a sexual nature.

[32] Section 129 of the *National Defence Act* reads in part as follows:

> (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

[33] Then, the prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet. The prosecution also had to prove the following additional elements: the act as alleged in the particulars of the charge, the prejudice to good order and discipline, and the blameworthy state of mind. In order to prove the prejudice to good order and discipline, the prosecution had to prove also the standard of conduct required, that the accused knew or ought to have known it, and that the act constituted a breach of it.

Presumption of Innocence and Reasonable Doubt

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

[35] 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.

[36] 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 it never shifts to the accused person.

[37] 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, the Supreme Court of Canada proposed a model charge on reasonable doubt. 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, and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before a court.

[38] 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.

[39] 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 Seifi, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[40] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did; it could be documents, photographs, maps or other items introduced by witnesses; the testimony of expert witnesses; formal admissions of facts by either the prosecution or the defence; and matters of which the court takes judicial notice.

[41] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[42] 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' opportunity to observe; a witness' 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 the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. 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.

[43] 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' testimony consistent with itself and with the uncontradicted facts?

[44] 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' entire testimony.

[45] The 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, rather, to disbelieve it.

[46] As the rule of reasonable doubt applies to the issue of credibility, the court is required to definitely decide, in this case, first on the credibility of the accused, and to believe or disbelieve him. It is true that this case raises some important credibility issues and it is one of those cases where the approach on the assessment of credibility expressed by the Supreme Court of Canada in *R. v. W.(D.)* [1991] 1 S.C.R. 742 must be applied, because the accused, Private Seifi, testified. As established in that decision at page 758, the test goes as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[47] This test was enunciated mainly to avoid for the trier of facts to proceed by establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word

by word as some sort of incantation (see *R.* v. *S. (W. D.)*, [1994] 3 S.C.R. 521, at page 533).

[48] As underlined by Judge Abella, writing for the majority in *R.* v. *C.L.Y.* [2008] 1 S.C.R. 5, SCC 2, at paragraph 10, I want to confirm that I am aware of the test in *W. (D.)*, aforementioned, and of the decisions of the Supreme Court of Canada delivered in *C.L.Y.* quoted just above and *R.* v. *J.H.S.* [2008] 2 S C R 152, SCC 30 on the application of that test while assessing credibility. The pitfall that this court must avoid is to be in a situation appearing or in reality as it chose between two versions in its analysis.

[49] 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, having instructed myself as to the presumption of innocence, the reasonable doubt, the onus, and the required standard of proof, I will now turn to the position of the parties and the questions in issue put before the court and address the legal principles.

POSITION OF THE PARTIES

[50] At this stage, it would be appropriate to summarize the position of the parties.

Position of the Prosecution

[51] The prosecution submits to the court that considering the admissions made by the accused about the identity, date and place for both charges, the main and sole issue for the court to resolve in this case relates to the *actus reus* and the *mens rea* of the offence of sexual assault, and alternatively, of the offence of an act to the prejudice to good order and discipline.

[52] The prosecution submits that in order for the court to make such determination on both issues, it would be necessary to proceed with the test as defined in *W. (D.)*, aforementioned, in the context of the evidence it accepted.

[53] The prosecution submits that the version of the events put by the complainant is credible and reliable because of her manner to deliver it before the court and because it is supported by other evidence adduced by the prosecution, such as the independent testimony of Private Van Aert. It is also submitted to the court that the complainant was consistent in her testimony, and that the way she described how her breasts were grabbed by the accused and her immediate reaction following such thing is enough for the court to make a finding beyond a reasonable doubt on the *actus reus* and the *mens rea* of both offences as charged.

[54] Concerning the second charge, the prosecution suggests that it could be taken as a charge laid under paragraph 1 or 2 of section 129 of the *National Defence Act*.

Considering that the act alleged in the particulars of that charge amount to a sexual misconduct, then CFAO 19-36 must find application in either way.

[55] The prosecution suggests to the court that Private Seifi's testimony must be disbelieved, despite the fact that he corroborated most of the complainant's evidence. The prosecution suggests that he consistently blamed others for what happened, and that the key position of his hands, as he described it to the court, while on the back of the complainant, does not stand.

[56] Furthermore, the prosecution suggests to the court that the article written by the accused and adduced as evidence in this trial is sufficient to support the *mens rea* element for both charges beyond a reasonable doubt because it discloses that the accused thought that he had to dominate women in order to establish a relationship.

[57] Then, the prosecution concludes that following the court's analysis pursuant to *R. v. W.(D.)*, aforementioned, it would conclude that the prosecution had discharged its burden of proof in this matter beyond a reasonable doubt, and that it has to find the accused guilty on both charges

Position of the accused

[58] Counsel for the accused agrees that the main issue in this trial is about credibility in the light of an analysis pursuant to *R. v. W.(D.)*, aforementioned, on the issues of *actus reus* and *mens rea* for both charges.

[59] Counsel for the accused suggests to the court that the testimony of the complainant was evasive and argumentative, while the accused testified in a straightforward manner and that his testimony was consistent. He submits that the complainant was mistaken on what really happened, and because nobody saw anything, including her, then there was nothing to see. He suggests that if the court accepts the description made by the complainant about the position of the accused's arms, then she would have been able to see Private Seifi's hands, which she clearly did not.

[60] Concerning the article written by the accused and introduced by the prosecution as evidence, counsel for the accused submits to the court that it reveals nothing more than an opinion, and that it could not be taken in any way as supporting the idea that the accused was thinking that he had to dominate women in order to establish any kind of relationship with them.

ANALYSIS

[61] About the first charge, the court agrees with counsel that the issue to be resolved here is about the commission by the accused of the *actus reus* and the existence of the necessary *mens rea* of the offence of sexual assault beyond a reasonable doubt.

[62] About the second charge, the court would have to make a determination, first about the applicable paragraph of section 129 of the *National Defence Act* for its analysis, and then, also about the commission by the accused of the *actus reus* and the

existence of the necessary *mens rea* of the offence of an act to the prejudice of good order and discipline.

[63] The court has to determine first if the evidence provided by the accused must be believed or not. The nature of the evidence in this case requires this court to make certain findings as to the credibility of prosecution's witnesses in order to assess properly the credibility and reliability of the accused's testimony in light of all the evidence presented by the prosecution in support of the essential elements of both offences.

[64] The cornerstone of the prosecution's case in this matter is the testimony of the complainant, G.L.E.C. Then, it is the intention of this court, considering that the prosecution case relies mainly and essentially on her testimony, to make first a finding about the credibility and reliability of her testimony in relation with the incident. It will allow, then, the court, as the trial judge did and as approved by the majority in the Supreme Court decision of *C.L.Y.*, aforementioned, to proceed with the test as defined in *W. (D.)*, in the context of the evidence it accepted.

The acceptable evidence

The Complainant's testimony

[65] G.L.E.C., the complainant in this case, testified in a straightforward, calm and honest manner. Her testimony was consistent and logical. It is clear for the court that the fact that her breasts were grabbed is a noteworthy, unusual, and striking event for her, and that she's still able to describe it in a detailed manner. She testified from her own memory, and when contradicted on some facts, such as if she turned around and talked to the accused just after the incident, she admitted right away that she has no specific recollection today of such things, but that if it is what she said in her statement made to the police just after the incident, then it should have happened. In short, it appeared to the court that she was able to tell what she was able to remember or not and why.

[66] She described herself as a very competitive person, which would explain why she paid more attention at the time of the incident to the relay race to perform than to anything else, such as to whom she will be paired to compete and where were the hands of the person on her back. She testified during her main examination that she did not see the hands of the accused when he grabbed her breasts, but she was firm and specific about how she felt such thing.

[67] The grabbing of both her breasts in a simultaneous manner by the accused was something sudden and totally unexpected as she described it to the court. It is clear for the court that she was emotionally challenged by such incident, and while trying to cope and understand what happened, she did not pay full attention to all what was going on around her just after the incident.

[68] Since the incident, she had to describe a few times how she felt the grabbing of her breasts by the accused. In court, she provided additional details such as the feeling

of finger prints on each breast. She explained that she provided those details coming from her own memory in court further to being pressed by the defence counsel during her cross-examination.

[69] The court does not find any issue with her detailed explanation, which is consistent with what she described in her previous statements to the police, which were put to her in court, as having her breasts touched or grabbed by two hands for a very short moment. In fact, she described in some different manners the same thing: Both her breasts were seized with two hands for a very little moment, enough, however, for her to understand and realize what was going on.

[70] It was put to the court that because she has not seen the accused's hands grabbing her breasts, it makes her testimony unreliable. Her competitive attitude that kept her focus on the relay race, the suddenness of the incident, the nature of the part of the body touched, and her physical and emotional instinctive reaction she had by getting off of her back the accused right away after having both her breasts grabbed by the latter, do explain logically why she did not see his hands. However, the firm and logical way she explained what she felt at that same moment make her testimony reliable.

[71] Then, the court concludes that her testimony is credible and reliable.

The testimony of Private Van Aert

[72] Private Van Aert testified in a straightforward manner. What she told the court about what she saw before and after the incident was consistent on the main details. Discrepancies that innocently occurred after some time, such as if she was first or second in the line for the relay race, do not affect the credibility and reliability of her testimony.

[73] She was, a couple of times, hesitant to answer questions from defence counsel, but provided clear answers to him and admitted easily that she had not so a specific recollection of some events, such as where the accused was coming from when he came at the front of the line where the complainant and her were standing. However, she clearly told that she had not seen anything about the incident itself. The sequence of events she described as being facts she saw and heard was consistent and logical. It appears to the court that she has no specific interest in the outcome of the trial. The court concludes that her testimony is credible and reliable.

The *W. (D.)* analysis

[74] Having now made a finding on the acceptable evidence put forward by the prosecution in order to support the charges, I am turning now to the test enunciated by the Supreme Court in *W. (D.)*, aforementioned. I will first proceed with the analysis of the evidence introduced by the accused. It requires finding on the reliability and credibility of the accused's testimony in light of the disputed essential element of the first charge: the *actus reus* and the *mens rea*. Then, the court will proceed with the same analysis for the second charge.

The first charge

[75] Private Seifi, the accused in this case, testified in a straightforward manner. He provided clear answers to the court. He confirmed in his testimony most of the evidence adduced by the prosecution and accepted by this court. He confirmed that he had to change teams for the relay race and that he was invited by the complainant and some other teammates. He also confirmed that the complainant was very competitive and that she was focused and eager to begin the race. He corroborated the fact that he was paired with the complainant and that he was first to run with her on his back. He confirmed in his testimony that he was on her back for the second leg.

[76] Further to the incident, he confirmed the sudden and unexpected reaction of the complainant, including her gestures and her words. He corroborated the evidence adduced by the prosecution and accepted by the court that he was challenged by an instructor, Sergeant Jardine, that he denied any involvement in the alleged incident, and that further to it, the relay race and the period ended right away.

[77] Essentially, the accused was consistent in his testimony with the evidence adduced by the prosecution and accepted by the court, but for two things: first, the location of his hands while he was on the back of the complainant; and second, the fact that he grabbed with his hands the complainant's breasts.

[78] The court does not find credible and reliable the explanation provided by the accused about the location of his hands while he was on the back of the complainant. According to him, he put his hands on her shoulders, having his elbows out on each side of her head. He specified that his hands were on her trapezoids, holding on the part between her shoulders and the base of the neck with his fingers curled a little bit.

[79] By putting his hands in such position, it would have been impossible for the accused to have his elbows on each side of the complainant's head in her peripheral vision. Also, the accused expressed the fact that he was afraid to fall because he was unsure if the complainant was strong enough to carry a heavier person than her as he was. So grabbing firmly the complainant's shoulders with his hands appeared to the court strange and unusual. It would have been normal in the situation described by the accused as something like a roller coaster while he was on the complainant's back, that he put his armpits over her shoulder to keep his upper body weight close to her back in order to avoid to lose his balance or to fall back. His hands could also slip in an easier manner than to have his armpits over her shoulders.

[80] Considering that the accused was afraid to be too heavy for her, by putting his armpit over her shoulder would have helped her to support his weight, considering that she was already supporting the lower part of his body by holding his legs with her hands on each side of her body.

[81] Reality is that the great fear that the accused had to fall off from the complainant's back and the way he described he held himself with his hands while on her back in the piggyback position does not stand at all and it defies logic.

[82] Private Seifi told the court, during his examination-in-chief, that when they were close to the finish line, the complainant opened her arms and she shook him off in order to get him off of her back. Why would it have been necessary for her to open her arms if the accused was holding her with his hands as he described? The court could not find any meaningful reasons, other than removing the accused arms, forearms and hands from her, to explain why the complainant did such thing, as described by the accused. Then, by confirming the evidence adduced by the prosecution and accepted by the court on this specific matter, the accused indicated that his forearms and hands were ahead of the complainant rather than having his hands on her shoulders.

[83] Finally, Private Seifi told the court that the complainant was mistaken when she claimed that he grabbed both her breasts with both his hands. He did not offer any explanation to the court in order to support such opinion. It is true that the defence counsel raised, during the cross-examination of the complainant, the possibility of having her bra straps pulled back by the accused, but during his testimony, the accused never alluded to or clearly referred to such thing. Knowing that he was on her back, that nobody else was around them, and her arms were supporting the lower part of his body, being silent on the reasons for which the complainant would have been mistaken on the fact that he grabbed her breasts, as he claimed, does not help the court to believe that he did nothing.

[84] Then, it is the court's conclusion that the evidence provided by the accused is not credible and reliable.

[85] Now, the court is turning itself to the second step of the test enunciated in the Supreme Court decision of *R. v. W. (D.)*, aforementioned. After having considered the evidence as a whole, this court is still not left in a reasonable doubt by the testimony of Private Seifi on the *actus reus* and the *mens rea* of the offence of sexual assault.

[86] Finally, turning to the last step of the same test, on the basis of the evidence that it accepts, the court is not convinced beyond a reasonable doubt by it of the guilt of the accused regarding the offence of sexual assault.

[87] The court is satisfied that the prosecution proved beyond a reasonable doubt most of the essential elements of the offence of sexual assault but not all of them. Considering the evidence accepted by the court, the court is satisfied that the prosecution proved:

a. The fact that Private Seifi used force, directly or indirectly, against the complainant;

b. The fact that Private Seifi used intentionally the force against the complainant. Considering the part of the body he touched and the fact that the accused and the complainant denied that any accidental touching could have occurred, it this clear for the court that in order to grab the complainant's breasts, as she described in her testimony, it could only be done intentionally. I would like to mention that the court gave no weight

to the article introduced by the prosecution in order to support such element because it was not indicative of any specific way of thinking by the accused;

c. The fact that the complainant did not consent to the use of force;

d. The fact that Private Seifi knew, or was reckless of or wilfully blind to, a lack of consent on the part of the complainant.

[88] However, concerning the *actus reus* of the offence of sexual assault, the court is not satisfied beyond a reasonable doubt that the contacts made by Private Seifi on the complainant were of a sexual nature. Other than the nature of the part of the body touched and grabbed by the accused, there is no other evidence that would allow the court to conclude beyond a reasonable doubt that the assault was committed in circumstances of a sexual nature, as the test is defined in *Chase*, aforementioned, at paragraph 11. The nature of the contact, the situation in which it occurred, the absence of any word or gesture accompanying the act, and the other circumstances surrounding the incident lead this court to conclude that the sexual nature of the accused's conduct was not proved beyond a reasonable doubt.

[89] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of sexual assault, but has proved beyond a reasonable doubt the less serious and included offence of assault.

The second charge

[90] It was first suggested by the prosecution that the second count, as worded, reflects an offence under subsection 129(2) of the *National Defence Act*. It is also submitted that it could be read as an offence under subsection 129(1) of the *National Defence Act*.

[91] The purpose of subsection 129(2) of the *NDA* is to give effect to regulation made by the civilian authorities concerning the "organization, training, discipline, efficiency, administration and good government of the Canadian Forces," as mentioned in section 12 of the *NDA*, and to ensure that all orders and instructions issued by the Chief of the Defence Staff that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister are applied, as indicated in subsection 18(2) of the *NDA*.

[92] Moreover, Lieutenant-Colonel Jean-Bruno Cloutier clearly identifies the purpose of this provision in his thesis entitled "*L'utilisation de l'article 129 de la Loi sur la Défense nationale dans le système de justice militaire canadien*," where he states, at pages 71 and 72:

> [English translation from *R. v. Private S.J.L.S. Bergeron*, 2008 CM 3017]
> "Subsection 129(2), for its part, is not residual in nature. It is a specific offence

> designed to punish a contravention of the instruments described in paragraphs (*a*), (*b*) and (*c)* of subsection 129(2). It creates a duty for the parties involved to comply with the regulations and orders set out in subsection 129(2) that have been duly issued and published and of which they have been notified."

[93] Consequently, it is clear to me that the second charge constitutes a charge laid under subsection 129(1) of the *NDA* because it refers to a specific set of facts for which it is alleged that it constitutes a prejudice to good order and discipline and not to a breach of a regulation or order within the meaning of subsection 129(2) of the *NDA* that had been duly issued and published and for which the accused had been duly notified.

[94] It would be appropriate for the court, at this stage of its analysis, to reiterate the fact that the *W. (D.)* analysis it made for the first charge and the conclusion thereof, applies entirely to the analysis of the second charge. Then, considering that the two first stages of the analysis have been dealt with, and considering to be at the third stage of the same analysis, on the basis of the evidence that it accepts, the court is not convinced beyond a reasonable doubt by it of the guilt of the accused regarding the offence of an act to the prejudice of good order and discipline.

[95] As it regards to the essential elements relating to identity, time and place, it is clear that they are undisputed considering the accused's formal admissions.

[96] About the fact that it has been proven beyond a reasonable doubt that the act alleged in the particulars of the second charge occurred, considering the conclusion of the court on the analysis of the first charge about the testimony of the accused made in light of the application of the *W. (D.)* analysis, the court considers that the prosecution discharged its burden of proof on this essential element.

[97] Concerning the prejudice to good order and discipline, the prosecution introduced some evidence to prove the essential element beyond a reasonable doubt. However, the court considers that the burden of proof has not been met.

[98] The prosecution relied on the fact of the existence and knowledge by the accused of CFAO 19-36 to prove the prejudice to good order and discipline. It is true that this specific CFAO defined what a sexual misconduct is and what action must be taken concerning the career of a CF member. However, it is just an element that would have helped, with some others, to establish the standard of conduct. Without having any other element in order to establish the specific and applicable standard, then it would be difficult for the court to conclude that there is a prejudice to good order and discipline. Moreover, considering the conclusion of the court on the first charge about the sexual nature of the contact, it would have been difficult for the court to conclude that the alleged conduct is a sexual misconduct in the meaning of the CFAO.

[99] Also, as stated in *R.* v. *Jones*, 2002 CMAC 11, at paragraph 7, it would have been possible for the prosecution to rely on evidence of an act for which natural consequence would constitute prejudice to good order and discipline. However, the court has not found such evidence adduced by the prosecution that would have led it to conclude in this way.

[100] Finally, the prosecution asked the court to consider the impact of the act as alleged in the particular of the charge, on the course mates and on the course that was going on at the time, as an actual and proven prejudice to good order and discipline. Some impact was proved on the complainant further to the commission of the alleged act, but none was proved on any other CF member on the course or on the course itself. In fact, the evidence is silent on this issue. Then, it would be difficult in such circumstances for the court to conclude that there was evidence of prejudice to good order and discipline.

[101] Consequently, having regard to the evidence as a whole, it is the court's conclusion that the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of an act to the prejudice to good order and discipline.

DISPOSITION

[102] Private Seifi, please stand up. Private Seifi, concerning the first charge, this court finds you not guilty of the offence punishable under section 130 of the *National Defence Act* for a sexual assault contrary to section 271 of the *Criminal Code*, but considering the authority of this court expressed at section 136 of the *National Defence Act*, this court finds you guilty of the less serious and included offence punishable under section 130 of the *National Defence Act* for assault contrary to section 266 of the *Criminal Code*.

[103] Concerning the second charge, in accordance with QR&O article 112.40(2)(b), the court finds you not guilty of the offence of an act to the prejudice of good order and discipline.

Counsel:

Captain Z. Drebot, Directorate International Operations Law
Major S. MacLeod, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander J. McMunagle, Directorate of Defence Counsel Services
Counsel for ex-Private S. Seifi