



COURT MARTIAL

Citation: *R. v. Whitehead*, 2016 CM 3007

Date: 20160429

Docket: 201425

Standing Court Martial

Royal Military College of Canada
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Officer Cadet A.R. Whitehead, Accused

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

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that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

[1] Officer Cadet Whitehead is charged with two offences punishable under paragraph 130(1)(a) of the *National Defence Act*, for having allegedly committed a sexual offence at two different times on two different complainants contrary to section 271 of the *Criminal Code*.

[2] Those offences are related to two different alleged incidents of a sexual nature that would have both occurred overnight on two different dates in September and October 2013 at the Royal Military College of Canada (RMC) in Kingston, Ontario.

[3] The trial started on 19 May 2015 and 21 days of hearing were necessary to proceed with it. The final addresses were delivered by counsel on 21 April 2016. Throughout the proceedings, a variety of applications were raised involving disclosure, procedural matters, admissibility of evidence and a constitutional issue. Those various matters required the court to hear them at different times, with the addition to compose with the availability of the four counsel involved in this matter on both sides and the one of the court.

[4] This prosecution's case relies on, more than anything else, the testimony of the two complainants. The prosecution called two additional witnesses and 32 documents were identified as exhibits, ranging from pictures, texts, emails and Facebook messages to policies, directives and a manual. A birthday card and a Christmas card from one complainant to the accused were also included.

[5] The accused testified on his own behalf. He also called an expert witness. The court did not allow this witness to testify as an expert because it declared his testimony unnecessary on the matters contemplated by the defence counsel.

[6] Finally, the court took judicial notice of matters listed at article 15 of the *Military Rules of Evidence*.

[7] Concerning the incident with Officer Cadet D.H.S., who is the complainant involved in the first charge, it appears that at the time of the incident, both the accused and the complainant knew each other for about a year and were close friends. They were in the same squadron at that time and were both on the fencing team at the college. Officer Cadet Whitehead was the captain of that team.

[8] Prior to the beginning of the school year, both were together on the indoctrination course for a period of two weeks at the end of the month of August. It was once the course was terminated, in early September 2013, that both decided to go out and celebrate the end of the course by going out late in the evening to The Spot in Kingston. They were accompanied by Officer Cadet Swan.

[9] According to Officer Cadet Whitehead, the complainant and he had some drinks. She was wearing a short black dress revealing part of her chest. He found her attractive and sexy. She denied having worn such a dress that night or even having possessed such a dress in her wardrobe.

[10] At some point, during that night, she invited him to dance while she was dancing alone. She started kissing him on the lips. They were making out and shared an intimate moment on the dance floor for about 30 minutes, up to 45 minutes. He was aroused and excited by all of that.

[11] To the contrary, the complainant denied such a thing happened. She told the court that she did not drink much that night, while the accused, on the other hand, became

intoxicated. She admitted later in her testimony that she did not recall much about what happened at The Spot that night, including dancing and drinking, because of the trauma she had further to the sexual assault.

[12] Officer Cadet Swan told the court that he did not see them dancing together that night but that, in the following days, he wondered if something had happened between those two, to the point that he asked the complainant about it. As a reply, she told him that there was nothing, but that she had kissed the accused on that night.

[13] Officer Cadet Whitehead told the court that the complainant told him while dancing that she wanted to leave. He took that as an invitation to leave with her. They took a cab. According to the complainant, when she told him she wanted to leave, Officer Cadet Whitehead offered to come back with her; she accepted the offer.

[14] The accused told the court that he sat in the front passenger seat, while the complainant sat in the back seat of the taxi. He said that she took his hand and rubbed it on her knee during the drive. Basically, it was a continuation of what had happened in the club. He still felt aroused. The complainant stated that they both sat in the back seat of the taxi and that nothing really happened.

[15] The taxi dropped them off at the building at the college where their respective rooms were. They passed by his room first. According to him, she took his hand and invited him to her room. According to the complainant, he continued to walk with her, making her think that he would like to continue to talk with her. She said that he was intoxicated.

[16] Officer Cadet Whitehead said that she pulled him into her room. She told the court that he followed her into her room. They started to make out for a moment.

[17] She made the decision to have a shower. She took off her dress, bra and underwear. She invited him to join her and went out of her room. He sat on her bed for a moment and decided to follow her. He entered the female washroom, took off his clothes and joined her in the shower. While their bodies pressed together in the shower, they kissed. He then got out of the shower, dried himself off, put his clothes back on and went back to her room and waited for her.

[18] She came back and put her pyjamas on. As they were making out, he fell onto her bed, with her on the top of him. They took off their shirts and switched positions. He tried to take her shorts off, but she took his hands and said, "no". She said that she did not want to have sex. They continued to kiss for several minutes. He asked her if he could come on her. She said, "yes", and he did. They continued making out for a while. They stopped at some point and sat. He put his clothes on, said goodbye to her and left. He went to his room and went to bed. He fell asleep. He saw her quickly the next morning.

[19] According to the complainant, once in her room, things took a totally different turn. From her perspective, it was a platonic relationship and she did not expect anything else, but it went differently than she expected.

[20] He gave her a hug while in her room and started to kiss her. They were making out. She said to him that it was better for him to "go now". He pushed her over and they fell down on her bed. He touched her with both hands, on her legs, hips and chest. She struggled to get out and finally succeeded. She told him that she wanted to take a shower, giving him an opportunity to leave. She put her bathrobe on and she went to the women's washroom.

[21] She undressed and went into the shower, thinking that the accused would not pass the point of coming into the female's washroom, but he did. She covered herself with the curtain and put the hot water on to make him leave. Officer Cadet Whitehead undressed and went into the shower where he touched her arm and her back. He then dressed again and left. She stayed in the shower and cried while the water was running. When she went back into her room, he was still there. He finally left her room. She did not go to bed, instead she sat and cried for a long time.

[22] Three to four days after the incident, she talked to Officer Cadet Huxter about it. He then referred her to Officer Cadet Reeves, who told her to talk with the padre, which she did later. Those officer cadets were part of the peer assistance group programme set up in the college to allow officer cadets to help their peers and refer them to the proper resources.

[23] Once she had talked to the padre, Officer Cadet Whitehead was removed from his squadron lines, and from the fencing team and was put in a different room temporarily.

[24] Rumours going around, feeling ostracized by her male peers and not looking to have an impact on Officer Cadet Whitehead's career because he was a "good guy" and had "made a mistake", the complainant went back to the padre in the following days and made it clear that she did not want to press any charges against Officer Cadet Whitehead. Instead, she wanted a resolution of the matter, removing any restriction imposed on him and having a discussion with him. The padre then suggested proceeding with mediation.

[25] However, Officer Cadet Whitehead and the complainant communicated via Facebook and text messages, despite the interdiction to communicate, and manage to see each other in his temporary room so they could have a one-on-one exchange.

[26] Further to that, the complainant indicated to the padre that she was satisfied with the conversation she had had with the accused and that mediation was not necessary.

[27] To make sure that the resolution of the matter was proper and to check if restrictions concerning Officer Cadet Whitehead should be removed, the padre met him in her office. At that point, without being solicited by the padre to provide his version of the incident, Officer Cadet Whitehead told the padre that he wanted to have sex with the

complainant by pushing her down on her bed; he, then, opened her shirt and pants. He masturbated and ejaculated on her. He clearly stated that the complainant did not want to have sex with him. He confirmed that she went out of the room to take a shower and that he followed her. He said that she pushed him out. It is there that he realized that nothing else would happen.

[28] The padre recommended that the restrictions against Officer Cadet Whitehead be lifted. He returned to his usual room and resumed all of his responsibilities at the college. After that, the complainant tried to revive and maintain her friendship with Officer Cadet Whitehead, which is reflected in, among other things, the birthday card and the Christmas card she sent to him. The relationship was restored, but not to the point of their friendship before the incident.

[29] The complainant resolved the matter at the lowest level. However, she had to meet with the padre, the social worker, the psychologist and the psychiatrist in order to personally deal with the incident.

[30] With respect to the incident with Officer Cadet R.S., it appears that the accused and the complainant were only acquaintances at the time of the incident. Basically, in order to celebrate the end of the exam period and Halloween, the complainant went out to the mess and, then, later she went to a bar in Kingston. She saw Officer Cadet Whitehead while on her way to the bar and later at the bar. Essentially, she told the court that, on that night, she drank a lot and that she was really drunk.

[31] Officer Cadet Whitehead confirmed that he saw her that night and that he went to the bar further to an invitation made to him. He changed his clothes and put on a suit. He went in the same car as the complainant. He said that during the night he moved from a bar to another one and, finally, came back to his room by taxi with another officer cadet.

[32] In order to check on the people he initially went out on that night, he went to their respective rooms and knocked on their door. If he could enter their rooms, he did to check on people. If there was no response, he would then text message or call those people. That night he located and confirmed with four out of five people. The only person he could not get a hold of was Officer Cadet D.H.S. After he text-messaged her, he went to Officer Cadet R.S.'s room to check on her.

[33] He knocked on her door. She answered and invited him to come into her room. They had a chat with the complainant making most of the conversation.

[34] At some point, she started tickling him to the point he had to tell her to stop. She got on top of him with her legs on each side of him. She leaned on him and started to kiss him. He told her that they should not do this. She kissed him back and took her dress off; she helped him take off his clothes. She put his penis in her vagina, "riding" him for a while. She then asked him to "finish" her with his fingers. He went behind her and did it. She was loud and vocal when she had an orgasm. Basically, he told the court it was "fast

and furious." He may have ejaculated on her. He got up, put his clothes on and left. He felt excited and surprised.

[35] After that night, it took some time before he could talk to her because she was avoiding him. He finally had a conversation with her where she said to him that she did not want to talk about it and she gave him a hug.

[36] According to the complainant, things went a totally different way. As she mentioned to the court, she was drunk that night. She came back to her room where she changed. She tried to wash the dress she had as a costume for that night, but was lacking coordination to really succeed. She hung up her dress to dry it and then set three alarms and went to bed.

[37] She was woken up by a hard knock on her door. She opened it and Officer Cadet Whitehead was there. He entered the room. While she was lying on her bed, he sat on it, close to her pillow, and started to talk.

[38] He tried to kiss her. She moved back and hit her head on the wall. She did not want to kiss him, but he continued to try. He got on top of her and started to undress her. He slid her dress and she tried to stop him, but she was unable to actively fight back because of her drunkenness. She closed her eyes and he started to sleep with her. They had full intercourse and then she heard him getting dressed and leaving. She turned towards the wall and fell asleep.

[39] In the morning, she woke up and had no clothes on her. She showered, dressed and was late for class.

[40] After that, she tried to avoid him while he was trying to talk to her. They finally talked and she told him that she wanted to pretend things were normal between them and that he needed to "have [his] hormones checked."

[41] In January 2014, one evening, while having sushi in her room with the other complainant, she told her what happened with the accused on Halloween night. Officer Cadet D.H.S. was angry and felt betrayed. She told Officer Cadet R.S. to tell her story to the padre, which she did later.

[42] Two days later, Officer Cadet D.H.S. attempted suicide by cutting her wrist, but did she not succeed.

[43] Both complainants met a police investigator separately and each told their version of the events.

[44] Later, charges were laid against the accused.

[45] 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 Code of Service Discipline and criminal trials. These principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[46] The first and most important principle of law applicable to every Code of Service Discipline and criminal case is the presumption of innocence. Officer Cadet Whitehead enters the proceedings presumed to be innocent, and the presumption of innocence remains throughout the case unless the prosecution, on the evidence put before the court, satisfies it beyond a reasonable doubt that he is guilty.

[47] Two rules flow from the presumption of innocence. One is that the prosecution bears the burden of proving guilt. The other is that guilt must be proved beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[48] The burden of proof rests with the prosecution and never shifts. There is no burden on Officer Cadet Whitehead to prove that he is innocent. He does not have to prove anything.

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

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

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

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

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

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

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

[56] The pitfall that this Court must avoid is to be in a situation as appearing, or in reality, to choose between two versions in its analysis. As recently established by the Supreme Court of Canada in its decision of *R. v. Vuradin*, 2013 SCC 38, at paragraph 21.

[57] Of course, if the Court believes the testimony of Officer Cadet Whitehead that he did not commit any offence charged, the Court must find him not guilty of it.

[58] However, even if the Court does not believe the testimony of Officer Cadet Whitehead, if it leaves it with a reasonable doubt about an essential element of the offence charged, the Court must find him not guilty of that offence.

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

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

[61] Officer Cadet Whitehead is charged with sexual assault. Section 271(a) of the *Criminal Code* reads, in part, as follows:

271. Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years and, if the complainant is under the age of 16 years, to a minimum punishment of imprisonment for a term of one year . . .

[62] 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.

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

A person commits an assault when

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

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

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

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

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

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

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

[70] The prosecution also had to prove the following additional elements:

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

[71] During his testimony before the court, Officer Cadet Whitehead clearly admitted that he was the one, at the date and place alleged in both counts, who used force, intentionally, on both complainants, having contact of a sexual nature with both of them.

[72] It is the Court's conclusion, then, that the prosecution proved, beyond a reasonable doubt, the identity, date, place, the use of force, the intent to use such force and the sexual nature of the contacts regarding both complainants.

[73] The court is left with two essential elements to decide on both charges:

- (a) the fact that the complainant did not consent to the use of force; and
- (b) that Officer Cadet Whitehead knew of, or was reckless of or wilfully blind to, a lack of consent on the part of the complainant.

[74] In order to decide, the court must first make a determination about the credibility and reliability of the testimony provided by all witnesses in this matter.

[75] Officer Cadet Whitehead testified in a clear, calm and very straightforward manner. The story he told in relation to all charges he is facing was very consistent with itself. He had a good recollection of both incidents.

[76] As suggested by the prosecution, the way Officer Cadet Whitehead told his story appeared a bit scripted, in the sense that he told his account of the events in a very organized and specific way in order to answer any question that may arise from it. A written account would have probably, in some ways, resulted in the same way.

[77] Once the prosecution raised the issue of using or not using birth control while having sexual intercourse with Officer Cadet R.S, he seemed surprised and shocked by the fact that he did not consider this aspect of the facts before. During the examination-in-chief, Officer Cadet Whitehead told the court he may have ejaculated, but during cross-examination he said that he did not and that he got dressed with the condom on him, then providing an explanation why the complainant did not find a condom in her room. This

aspect of his story, not previously covered during his examination-in-chief, appeared a bit improvised, like not having given it any thought prior to his testimony, contrary to the balance of what he reported to the court.

[78] In the context where both complainants ended up being troubled and disturbed by the sexual relationship they had had with Officer Cadet Whitehead on one specific night, no matter what the court thinks about their respective testimony on the issue of consent, his account of both incidents appeared too good to be true. Essentially, he put the responsibility on each complainant of offering him an opportunity to have sex with them, discharging him of any responsibility about consent. Both complainants, according to him, made a clear and unexpected invitation to have sex with him.

[79] Concerning Officer Cadet D.H.S., she is the one who "started everything" and at some point, did not want to go further. Concerning Officer Cadet R.S., she basically "started everything" and he just had to follow her desires. If the Court understands well what he said, he became a sudden object of desire for sex for one night, which makes his story less than more believable.

[80] In addition, he admitted to the padre that he made a mistake and went too far with Officer Cadet D.H.S., which is a contradiction to what he told to the court. Also, Second Lieutenant Swan stated that he saw nothing of what was reported to the court by the accused about what happened at The Spot. Basically, those two matters make Officer Cadet Whitehead's version harder to believe.

[81] It is the conclusion of the Court, then, that on the issue of consent and on the issue of knowing about the lack of consent on the part of both complainants, the accused's version is not credible and reliable.

[82] Despite disbelieving Officer Cadet Whitehead's evidence, the Court is not left with a reasonable doubt by his testimony on the essential element of consent and the one concerning the accused's knowledge about the lack of consent on the part of both complainants.

[83] Has the prosecution proved beyond a reasonable doubt those two essential elements? Officer Cadet D.H.S. testified for 6 days before the court, two days for the examination-in-chief and re-examination, and four days during which she went through a thorough cross-examination.

[84] The complainant was not very straightforward in her testimony. She was not responsive, sometimes argumentative and reluctant to provide some details. She looked at the prosecution a couple of times, probably expecting approval to her obligation to answer a question or expecting an objection in order to find out if she had to answer a question.

[85] As a matter of reliability, the Court finds it difficult to believe that she was unable to remember at all what happened at the bar called "The Spot." It appears to the Court

that she tried to present things as though she had no involvement in the way the accused acted towards her. Without saying that she started or triggered something, she tried to diminish her involvement and the responsibility of the accused in this matter.

[86] In fact, her testimony is to the effect that she tried her best to avoid consequences to the accused and maintain her relationship with him. Once she learned about what he did to the other complainant, she first got angry and felt betrayed. However, two weeks prior to the trial, she provided important details, such as the hot water in the shower and the fact that she screamed while in the shower, which she had not revealed during her informal declaration to the padre and her formal statement to the police investigator.

[87] She told the court that the accused kissed her on the lips in her room during her examination-in-chief, but later admitted during cross-examination that she was making out with him, when she was told about her declaration to the police investigator.

[88] She stated in court that the accused limited himself to getting on her and touching her on her legs, hip and chest. She denied that he opened her shirt and her pants and ejaculated on her, which was the version provided by the accused to the padre.

[89] Her version of the incident gave the impression that she tried to limit her involvement in it and, at the same time, that of the accused to a certain extent. Considering some lack of memories, her tendency to limit details and her reluctance to provide details, the Court concludes that her testimony is not credible and is unreliable.

[90] The Court is left with a reasonable doubt about the essential element of consent and the one about the accused knowing the lack of consent on the part of the complainant. The Court, then, concludes that the prosecution failed to prove beyond a reasonable doubt those two essential elements.

[91] Now, regarding the testimony of Officer Cadet R.S., it must be said that it was also not provided in a very straightforward manner. The complainant was very argumentative, unresponsive, sometimes evasive and reluctant to answer some questions, turning to the prosecutor to know if she had to answer some questions asked by defence counsel.

[92] She told the court that she was drunk at the time of the incident. She did not have a clear recollection of it at the beginning, but along the way she was able to put things together. Her statement to the police investigator was to the effect that she assumed that she had sex on that night with the accused.

[93] Looking at her testimony as a whole, it does not appear clear that the complainant was upset because she had sex with someone she told she would not, or because she did not consent at all. She provided her version of her story and mentioned in court that she was terrorized. This key aspect of her emotional behaviour had not been mentioned in any other statement made prior to the court.

[94] She said that she was mumbling and incoherent, but was able to recall every detail of what happened that night. According to her testimony, she was able to recall some parts of what happened and assumed some other things by "going with logic". When she had difficulty answering a question, she raised the fact that she was drunk. In other instances, she was clear that she recalled a very specific detail. It appears to the Court that her memory was fragmented because of her state of drunkenness and that she was unable to recall everything.

[95] Essentially, she told the court that the accused took advantage of her situation to get what he wanted. However, it is still unclear to the Court if this was the case or not, considering the reluctance of the complainant to answer many questions and her argumentative way of answering to those asked by the defence counsel. Did she put things together to make her story believable or was it really what happened? Taking her testimony as it is, it is still difficult for the Court to decide what to believe or not.

[96] It is the conclusion of the Court that her testimony is not credible and is unreliable.

[97] The Court is left with a reasonable doubt about the essential element of consent and the one about the accused knowing the lack of consent on part of the complainant. The Court, then, concludes that the prosecution failed to prove, beyond a reasonable doubt, those two essential elements.

[98] Then, on those two charges, it is the conclusion of the Court, having regard to the evidence as a whole, that the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of sexual assault on both charges.

[99] It is likely possible that both complainants did not consent to have sex with the accused at some point during the incidents, but the evidence of both of them is not credible and reliable to the extent that the Court would be in a position to conclude, beyond a reasonable doubt, that it is the case for both charges.

[100] I want to be clear. I am not saying that the complainants lied here, just that they were not credible and reliable enough to meet the requisite standard of proof, nothing else.

[101] I would like to add that the few things we learned throughout this case are disturbing enough to make people wonder about what the military authorities at RMC are willing to do in order to ensure students that the college environment is free of any threat regarding their personal, physical and psychological integrity. I invite them to take the facts of this case as a lesson learned with the aim of improving the manner in which to deal with such matters in the future.

FOR THESE REASONS, THE COURT:

[102] **FINDS** Officer Cadet Whitehead not guilty of the first and second charges on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Major M. Pecknold, Major A.-C. Samson and Major J.A. Peck

Major C.E. Thomas and Major D. Hodson, Defence Counsel Services, Counsel for Officer Cadet A.R. Whitehead