



COURT MARTIAL

Citation: *R. v. Donohue*, 2015 CM 4004

Date: 20150313

Docket: 201408

Standing Court Martial

4th Canadian Division Support Base
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant M.J. Donohue, Accused

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR FINDING

(Orally)

Introduction

[1] The accused was charged under the Code of Service Discipline as a result of events in July 2013, at a time when he supervised twenty students from a work experience program, employed in ground maintenance at Canadian Forces Base Petawawa. He had been attached posted from the Joint Personnel Support Unit to the Engineering Services Squadron in order to gain work experience with civilians as he was to be released from the Canadian Forces after thirty-one years of service. Despite the fact that the accused has been a civilian since approximately September 2013, he will be referred to as Sergeant Donohue in these reasons, the status and rank that he held immediately prior to ceasing to be subject to the Code of Service Discipline, in accordance with paragraph 60(3) of the *National Defence Act*.

[2] At the outset of this trial, the prosecution alleged that Sergeant Donohue committed assault and/or harassment involving two students from the group he was supervising. He was charged with ten counts arising out of six distinct incidents involving two different students. In relation to four of these incidents, he was facing alternative charges under section 130 of the *National Defence Act* for assault contrary to section 266 of the *Criminal Code* and under section 129 of the *National Defence Act* for Conduct to the prejudice of good order and discipline alleging harassment contrary to Defence Administrative Order and Directive 5012-0. In relation to two other incidents, he was facing a single charge under section 129 of the *National Defence Act*, again alleging harassment.

[3] At the close of the prosecution's case, counsel for Sergeant Donohue submitted a non-prima facie application with regards to the six charges laid under section 129 of the *National Defence Act* on the basis that the prosecution had failed to introduce any evidence concerning one essential element of these offences, namely the actual or deemed knowledge, by Sergeant Donohue, of the Canadian Forces policy on harassment prevention and resolution, found at Defence Administrative Order and Directive 5012-0. The Court granted the application. Therefore, only the four charges of assault remain before the Court, stemming from four distinct incidents involving two persons.

The Charges

[4] The first, third, fifth and seventh charges were laid under section 130 of the *National Defence Act* for assault, contrary to section 266 of the *Criminal Code of Canada*.

[5] The particulars for each of these charges are as follows:

First Charge: In that he, between 1 July 2013 and 30 July 2013, at or near CFB Petawawa, Ontario, committed an assault on Stephanie Dorsch by pulling her hair.

Third Charge: In that he, between 1 July 2013 and 30 July 2013, at or near CFB Petawawa, Ontario, committed an assault on Stephanie Dorsch by lifting her upside down.

Fifth charge: In that he, between 1 July 2013 and 30 July 2013, at or near CFB Petawawa, Ontario, committed an assault on Stephanie Dorsch by spraying water on her.

Seventh charge: In that he, between 1 July 2013 and 30 July 2013, at or near CFB Petawawa, Ontario, committed an assault on Anna Demers by picking her up on his shoulders.

The Evidence

[6] The prosecution called eight witnesses in this trial: Master Warrant Officer Spence, who conducted the Unit Disciplinary Investigation on Sergeant Donohue; Mrs Kelly Russell, responsible for outdoor infrastructure maintenance at the unit, including the ground maintenance team within which the offences allegedly took place; Stephanie Dorsch and Anna Demers, the two students mentioned in the charges; Ariel Benoit, Jolin Bouchard, Kristin Ling and Taylor Gavin, four other students who participated in the 2013 Federal Student Work Experience Program within the ground maintenance team. Following the decision of the Court granting the application for non-prima facie, the defence elected not to call any evidence.

[7] In addition to these witnesses, the Court admitted a number of documents as exhibits, including two pictures taken by Taylor Gavin depicting the incident subject of the third charge. The Court also accepted some admissions from defence, including that the Court had jurisdiction to try this case and also the essential elements of identity of the accused as well as the place of the offences. The Court also took judicial notice of the matters contained in Military Rule of Evidence 15.

The Facts

Background

[8] The events leading to the charges arose in July 2013, in the course of the supervision and employment of the ground maintenance team at Canadian Forces Base Petawawa, formed principally of twenty students employed by means of a Federal Student Work Experience Program. To supervise the group, Kelly Russell had obtained the services of the accused, Sergeant Donohue, from the Joint Personnel Support Unit (JPSU) on base. Although a Mr Dunn was Sergeant Donohue's direct supervisor, Mrs Russell met Sergeant Donohue early on to make sure he was comfortable working with youth and generally observed his work throughout the April to July period, for instance, advising him at one point of the need to be less abrupt when dealing with the students in order to maintain a healthy work environment where everyone feels fine. Assisting Sergeant Donohue as second in command was Corporal Neil Sheard, also obtained from JPSU. On Thursday, 1 August 2013, just before the long civic holiday weekend, Mrs Russell received the visit of Corporal Sheard who told her that he was stressed out, had a conflict with Sergeant Donohue and could no longer work with the team. He also showed her two pictures at Exhibits 6 and 7 showing Sergeant Donohue lifting Stephanie Dorsch upside down inside an indoor compound, which was part of the workplace.

[9] Kelly Russell was upset with what she saw. She was of the view that what was depicted in the pictures was highly inappropriate, felt responsible for the students' wellness and was also upset that things were happening in the workplace without her knowing about. She gathered some information from Corporal Sheard and went to the lunchroom where the students congregated to tell them about harassment and improper

conduct and to tell them to come to her if there was anything they wished to discuss. About one hour later she was advised that Anna Demers was crying so she went to meet and discuss with her. Mrs Kelly also testified that she spoke to Stephanie Dorsch about the pictures. She placed all of that information in a report she sent to Master Warrant Officer Spence, who she advised of the incidents on 2 August 2013.

[10] Once apprised of the situation, Master Warrant Officer Spence initiated an investigation, first, formally cautioning Sergeant Donohue and ceasing his employment with the unit, thereby separating him from the students. He met over twenty witnesses in the course of the investigation, including Mses Dorsh and Demers on 7 August. After a pause to allow for an assessment on whether a police investigation was warranted or not, he completed his investigation with an interview of Sergeant Donohue on 23 August 2013, the record of which was introduced as Exhibit 3. The charges in this case were preferred on 4 March 2014 and this trial commenced over a year later, on 9 March 2015.

The alleged assaults involving Stephanie Dorsch

[11] Stephanie Dorsch provided testimony relating to the three charges involving her. As it pertains to the first charge, she stated in direct examination that during a laid-back, sunny afternoon in July 2013, probably a Friday, music was playing and she was cleaning equipment with colleagues, chatting and goofing around when Sergeant Donohue said he would cut her hair after she had made a comment about needing a haircut. Sergeant Donohue then grabbed her hair in a fist and pulled her through their workspace in building S-122. She said she was moving sideways while he walked the entire length of the compound, about four garage doors and was let go, she believes, before reaching the door of the office. She said she felt embarrassed and annoyed when that happened and guessed she felt relieved afterwards but is not certain. She does not remember exactly who was there. She said she did not consent.

[12] As it pertains to the incident when she was lifted upside down, she recognized herself in the pictures at Exhibits 6 and 7. She believes it happened sometime in July 2013, inside the indoor compound at work on the base. When asked how she ended up in that position, she stated that she was talking with Sergeant Donohue casually and was close enough to him when he grabbed the crown of her head to press it down between his knees using moderate force. He lowered her head and his knees were squeezing her temples. She said he then grabbed the belt loops on her pants and lifted her up for about ten seconds. She was then lowered back gently. She does not remember him saying anything. She said she felt embarrassed by this, as everyone was watching her and she was in the spotlight. She said she did not consent. She testified, with laughter in her voice, that she remembered saying, "Ouch, my head hurt. You gave me a headache", but does not recall if Sergeant Donohue said anything after. On cross-examination, she said that she could not recall the conversation which occurred prior to her being lifted upside down. When it was suggested to her that the discussion was about demonstrating a wrestling move, she said it was possible but she could not recall. When pressed on that point, she said that her memory as to what happened before and after was fuzzy. On

re-examination by the prosecutor, however, she answered affirmatively when asked if she would have remembered Sergeant Donohue offering her to participate in a wrestling demonstration. She said she could not recall if that was said to her.

[13] Regarding the water spraying incident, Stephanie Dorsch testified that it occurred on a sunny day in July 2013 just outside the compound, during another laid-back afternoon when she and her colleagues were cleaning equipment. Sergeant Donohue and others were using hoses but she does not remember anyone specifically being present. She, herself, had a hose and was about to go back out to work again. Sergeant Donohue sprayed her, she said, "Stop. My T-shirt is see-through," and he continued saying, "There is nothing there to see anyways." She said she did not consent and was very embarrassed, as they were heading out around other people and she was soaked.

[14] Ms Dorsch had no recollection as to the sequence of events that she related. She was on first-name basis with Sergeant Donohue who was working in casual civilian clothing like everyone in the team. She said she did not make any complaint following any of the incidents. She was aware that Sergeant Donohue was leaving soon, and said that they had a joking relationship and would joke about the moment of his departure, counting the days. She said that she considered Sergeant Donohue like an annoying little brother who would tease her frequently. She said others in the group joked about and with her and she is the kind of person to laugh things off. She stated the incidents subject to the charges were discussed between co-workers. She said that her other supervisor, Corporal Neil Sheard, came to them showing the pictures of the incident of her being lifted upside down that he had seen on Facebook. He said he would report the incident to Kelly Russell. She would have replied that it was not a big deal. He reported anyways, something he confirmed later the same day. She said she did not recognize the seriousness of these incidents before they were reported to supervisors who were able to see the events from an outsider's point of view.

[15] Kristin Ling testified that she saw the three events described by Stephanie Dorsch, although she indicated that according to her recollection, the hair pulling incident occurred immediately after the lifting upside down incident. Although she testified about witnessing these events, she could not recall any of the conversations surrounding them. Also, Ms Taylor Gavin, who took the photos of the lifting upside down incident, was called to introduce these pictures as exhibits. She confirmed what had happened on the occasion. She stated that Sergeant Donohue and Stephanie Dorsch were joking around towards the end of the work day when the atmosphere was very relaxed. She felt this was something funny to capture on photo so she took out her iPhone, aimed and took pictures. None of the three other students who testified witnessed any of the three incidents subjects of the charges involving Stephanie Dorsch.

The alleged assault involving Anna Demers

[16] As for the sole incident involving her, Anna Demers testified that she was a passenger in a truck with Sergeant Donohue driving and two other boys present on a

sunny and hot afternoon in July when jokes were exchanged, including how hot it was. At one point, Sergeant Donohue joked that he was going to throw her in the river. He then pulled over, got out, walked over to her side of the vehicle, unbuckled the seatbelt and lead her outside. On that moment, she testified that she was not sure that he would follow through. Yet, he did. He picked her up on his shoulder and started walking towards the water. At that point, she concluded that Sergeant Donohue was serious. She objected and was put down immediately.

[17] Despite that she testified to the effect that Steven Lorbetski and Jolin Bouchard were present in the truck at that moment, the former was not called to testify and the latter, although called, was not interrogated on that incident which remains, therefore, uncorroborated.

The Applicable Law

Elements of the Offence

[18] Paragraph 265(1)(a) of the *Criminal Code* defines the elements of the offence of assault. It reads, in part, as follows:

265. (1) A person commits an assault when

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

[19] Besides identity, time and place, which have been admitted or are beyond contention in this case, the following elements must be proven beyond a reasonable doubt:

- (a) that Sergeant Donohue applied force to either Ms Dorsch or Demers in the manner described in the particular of the charges;
- (b) that Sergeant Donohue intentionally applied the force;
- (c) that either Ms Dorsch or Demers did not consent to the force that Sergeant Donohue applied; and
- (d) that Sergeant Donohue knew that either Ms Dorsch or Demers did not consent to the force that he applied.

[20] On this fourth element, it is important to note that the prosecution can prove that Sergeant Donohue knew that either Ms Dorsch or Demers did not consent one of three ways: actual knowledge, by recklessness or by willful blindness to the fact that there was no consent.

Presumption of innocence and proof beyond a reasonable doubt

[21] As part of the explanation on the applicable law in this case, it is important to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, two notions fundamental to findings for Code of Service Discipline and criminal trials.

[22] In this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent.

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

[24] 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 Sergeant Donohue 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 Sergeant Donohue and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

[25] The important point for the Court is that the requirement of proof beyond a reasonable doubt applies to each of the essential elements of the offences. 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 Sergeant Donohue’s guilt beyond a reasonable doubt.

[26] Reasonable doubt also 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 Sergeant Donohue’s guilt arising from the credibility of the witnesses, then it must find him not guilty.

Position of the Parties

[27] The prosecution simply submits that it has produced witnesses who established each and every element of the four offences of assault charged, that their evidence was not contradicted and, therefore, that I should find that the evidence establishes, beyond a reasonable doubt, the guilt of Sergeant Donohue.

[28] The submissions of the defence are more nuanced and vary depending on the specific charge. As for the first and seventh charges, the defence submits that the acts have not been proven beyond a reasonable doubt. As for the third and fifth charges, the defence submits that the elements of consent and knowledge of lack of consent have not been made out. As a fall-back position, defence counsel argued that the defence of honest belief in consent is open to Sergeant Donohue and argued that even if the offences of assault are made out, the defence of "prank" is made out on the facts of this case and, therefore, the accused should be acquitted.

Issue

[29] This case does not raise overly complex facts, nor does it engage very difficult legal notions. There are few contradictory facts on the elements of the offences as one would expect when the defence elects to call no evidence. What is at the heart of this case is the credibility of the prosecution witnesses and whether I, as a trier of facts, am convinced beyond reasonable doubt of the credibility of their assertions on all of the elements of the offences.

[30] I also wish to clarify in these reasons what is not at issue. Indeed, a number of submissions and remarks were made on the part of the prosecution, especially in submissions at the close of this trial, about how inappropriate the conduct of Sergeant Donohue was, on the part of a senior non-commission member who abused his authority to touch students placed in his supervision and failed to exercise proper leadership.

[31] Yet, the role of this court martial is not to pass judgement on the leadership qualities or performance of the accused and how inappropriate his actions may have been in the presence of persons who are less than half his age. The Court's duty is to assess the strength of the evidence presented to it and decide if the four offences of assault are made out. This task would be exactly the same regardless of the age of the accused or absent any supervisory responsibilities attributed to him by virtue of rank or appointment, with the possible exception of an exercise of authority sufficient to nullify consent, something that is not present here.

Analysis

First and second elements: The intentional application of force.

[32] At this stage, I must ask myself whether Sergeant Donohue applied force intentionally to Stephanie Dorsch and Anna Demers as particularized in the charges. The defence submits that the evidence on the first and seventh counts, relating to the hair pulling incident involving Stephanie Dorsch and the picking up on the shoulder incident involving Anna Demers was insufficient to allow me to conclude that the acts were proven beyond a reasonable doubt. The defence admits that the acts relating to the other two charges have been proven.

[33] It is true that the testimony of Stephanie Dorsch raises concerns about credibility on a number of fronts. Despite the absence of concern about her character and honesty and the fact that she came across as an easy-going, jovial person who was not shy to interact in Court, her capacity to remember was weak. She could not remember the sequence of the incidents, limiting herself to state that they occurred sometime in July, on every occasion during a laid-back afternoon when members of the team would be chatting and goofing around. She said that her memory was fuzzy and testified in most cases that she could not remember the detail of conversations which could have explained the context of the incidents.

[34] This weakness was particularly evident in relation to the lifting upside down incident in relation to which she could not remember not only the detail but the subject of any conversations which would have surrounded the incident. Consequently, what is left of her testimony on that incident is that she was assaulted suddenly and unexpectedly. Despite her general evasiveness in cross-examination, she would sometimes open up on direct examination saying she could remember details of other conversations. For instance, she remembered herself saying, in a joking tone, during the lifting upside down incident, "Ouch, my head hurt. You gave me a headache." She appeared to have a selective memory and had a tendency to adapt her testimony to the examiner. In relation to the lifting upside down incident, she stated that it is possible that the subject of wrestling moves was discussed, yet readily responded positively to the suggestion by the prosecutor in re-examination that she would remember if the issue of wrestling was brought up. Despite her reluctance to volunteer information in cross-examination, I note that she did not appear to have any animosity towards the accused. To the contrary, she described their friendly work relationship, including when they teased about how many days they would still have to work together, remarks that were made as jokes, and not a sign of dissatisfaction, contrary to the submission of the prosecution.

[35] Despite these weaknesses, it remains that the testimony of Ms Dorsch as to the occurrence of each of the three incidents in which she was involved was corroborated. Even if Ms Ling was confused as to when exactly the hair pulling incident occurred in relation with the lifting upside down incident, I have no reason to doubt her testimony to the effect that she saw the incident from her own eyes. I have considered the fact that incidents were discussed between witnesses after it became known that a complaint had been lodged, but this is not sufficient to raise a doubt in my mind about the occurrence of all three incidents involving Stephanie Dorsch.

[36] As for Anna Demers, credibility concerns are less severe. Although she suffered some failures in memory, she could, contrary to Ms Dorsch, relate the context of the incident involving herself and provided specific details as to the sequence of events. She provided evidence of what was said and what happened. Despite the absence of corroborating evidence that one could have expected given her testimony on the presence of two other persons at that time, I am convinced beyond a reasonable doubt that the incident that she described, where Sergeant Donohue placed her on his shoulder and carried her towards the river, occurred.

[37] I conclude, therefore, that the prosecution has proven to the required standard that the four events subject to the charges have occurred; specifically, that Sergeant Donohue applied force intentionally on each occasion.

Third element: lack of consent

[38] The prosecution's submission on consent is simply that by virtue of the fact that both Anna Demers and Stephanie Dorsch answered affirmatively to the question of whether they consented to the force being applied on them in the course of the incidents, combined with the fact that the validity of these answers were not compromised on cross-examination or directly challenged by other evidence, I have to find that this element has been made out beyond reasonable doubt.

[39] Yet, that is not the case. Although it is acknowledged that both Stephanie Dorsch and Anna Demers asserted that they did not consent to the force applied to them, it remains my responsibility as trier of facts to assess the credibility of those assertions based on all of the evidence that I have heard.

[40] The assessment of credibility is not a science, nor is it determined by following a precise set of rules. It is a difficult and delicate task that does not always lend itself to precise and complete verbalization. Here I do have concerns about the credibility of the assertions of Stephanie Dorsch and Anna Demers on consent because in my view, there is some evidence which I have heard which could support a reasonable doubt that they may have consented to the application of force. Before verbalizing these concerns, I wish to share a quote from the British Columbia Court of Appeal which, although from a civil case, is relevant to the credibility concerns I have in this instance:

But the validity of evidence does not depend in the final analysis on the circumstance that it remains uncontradicted, or the circumstance that the Judge may have remarked favourably or unfavourably on the evidence or the demeanour of a witness; these things are elements in testing the evidence but they are subject to whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time.

[41] There is in this case a significant body of evidence, from practically all witnesses, especially the two persons named in the particulars of the charges, to the effect that there was a laid-back, joking atmosphere within the group of students and their two immediate supervisors, where people would tease and laugh at each other. Everyone in the group was on a first name basis and dressed the same to accomplish the work, including Sergeant Donohue and the other supervisor, Corporal Sheard.

[42] This evidence has an impact on the elements of the offences, as illustrated convincingly by the testimony of Taylor Gavin, who took the pictures of the lifting upside down incident. She testified that although she could not remember the conversations, she sensed that something funny was going to happen and, therefore, decided to use her phone to take the pictures at Exhibits 6 and 7. The result is two well-centered pictures showing Sergeant Donohue looking directly at the camera and

smiling, on the two shots, taken at slightly different angles. Ms Gavin testified that she did not think anything inappropriate was occurring at the time and even afterwards, as she posted the pictures on Facebook. It is clear from her testimony that Sergeant Donohue was not the only person with a smile on his face at the time; in all likelihood, the situation was perceived as funny. The testimony of Stephanie Dorsch and the way she related word for word what she said to Sergeant Donohue, in a joking tone, that he gave her "a headache," reveals the probability that she was smiling, too.

[43] In that sense, despite her answer in the negative to the question of whether she consented, there remains a strong probability, given the whole of the evidence, that she played along with whatever joke was going on at the time. I find her testimony to the effect that Sergeant Donohue would have grabbed her head without warning to place it between his knees to be non-credible in light of her total incapacity to relate the context of the conversation which would have occurred immediately prior to the incident. I also find incredible that if she would have been attacked as suddenly as she said, she would not have felt that this behaviour was worthy of at least an explanation from Sergeant Donohue. They remained on excellent terms until his departure. It is probable to me that Ms Dorsch would have had reasons to play along with the joke of her "annoying little brother" as she described her friendly relationship with Sergeant Donohue, or not to break the joking mood of the group at the time. On the whole of the evidence, therefore, I am left with a doubt on this element on the third charge.

[44] I have commented on the third charge first as it is on that charge that the evidence of an ongoing joke or joking atmosphere is the strongest, by virtue of the pictures and the testimony of Ms Gavin. Yet, the same evidence on the joking atmosphere applies to the other incidents, especially given that the order in which those events occurred is unknown.

[45] As for the incident when Anna Demers was picked up and carried by Sergeant Donohue on his shoulder towards the river, Ms Demers testified to the effect that there was a joking atmosphere in the truck at the time and that Sergeant Donohue joked he was going to put her in the river. I take from her testimony that she allowed herself to be lead out of the truck as she said she was then not sure that he would follow through. The concern for her appeared to be not being really thrown in the water. I find it is probable that she played along with the joke until it became clear that Sergeant Donohue was serious and she could find herself in the water. At that point she said she objected and the result was that she was immediately put down. I realize that it is not because someone does not object that he or she consents, yet, on the whole of the evidence relating to this incident, there is a real probability that Ms Demers consented to play along with the joke up to the point of voicing her concerns. On the whole of the evidence, therefore, I am left with a doubt on this element on the seventh charge.

[46] As it pertains to the fifth charge of spraying water, the evidence is very sketchy as to the exact sequence of events. Clearly, though, this was another of those laid-back circumstances where most of the crew was aggregated in one place cleaning equipment. Evidence was heard that spraying water on each other was not uncommon in those

circumstances. The probability, therefore, on the whole of the evidence, was that there was a form of consent to being sprayed in the course of that kind of inoffensive activity. There is evidence of words spoken by Ms Dorsh to the effect that she objected to being sprayed at that moment because she was wearing a see-through T-shirt and, therefore, her bra could be seen if she was soaked. There is also evidence of words that would have been spoken by Sergeant Donohue to the effect that there should be no worries as “there was nothing to see anyway.” What is unclear from the evidence, however, is the establishment of a clear moment when what was probably mutual spraying became an assault by the removal of consent to the activity. The evidence is insufficient to remove, in my mind, the probability that the water had been sprayed concurrently to the words to stop being pronounced and that the reply by Sergeant Donohue was akin to a mild apology, in the sense of, “Oops, but don’t worry, there is nothing to see there anyways”. I realize that, in not dismissing this possibility, I am adopting the view most favorable to the defence, but I believe this is what I am required to do in the circumstances. Once again, therefore, on the whole of the evidence, I am left with a doubt on this element on the fifth charge.

[47] Turning now to the hair pulling incident subject of the first charge, it is known that a discussion had taken place between Ms Dorsch and Sergeant Donohue during another of those laid-back, sunny afternoons in July 2013, probably a Friday, when music was playing and members of the team were cleaning equipment with colleagues, chatting and goofing around. Sergeant Donohue would have said to Ms Dorsch that he would cut her hair, then grabbed her hair in a fist and pulled her through their workspace in building S-122, something that was observed by Ms Ling. Despite her testimony to the effect that she did not consent, on the whole of the evidence of her friendly relationship with Sergeant Donohue, the possibility remains that she played along with whatever joke was going on at the time. Once again, I find it hard to believe that after having been unexpectedly grabbed by the hair in the fashion she described, she would not have felt that this behaviour was worthy of at least an explanation, and none was sought from Sergeant Donohue. They remained on excellent terms until his departure. I have to remind myself that the sequence of incidents here is unknown, from the testimony of Ms Dorsch herself. It is probable to me that this hair pulling incident was another instance of Ms Dorsch playing along with another joke of her “annoying little brother”, as she described her friendly relationship with Sergeant Donohue, or not to break the joking mood of the group at the time. Finding otherwise would, in my view, be inconsistent in light of my previous findings in relation to other incidents. Once again, therefore, on the whole of the evidence, I am left with a doubt on this element on the fifth charge.

[48] As stated above, therefore, the doubt I am left with relates to the probability that Anna Demers and Stephanie Dorsch played along with the not so funny jokes of Sergeant Donohue in relation to the incidents of assault subject of the charges. Is this doubt a reasonable doubt? I do not think that it is an imaginary or frivolous doubt. It is not based on sympathy for, or prejudice against, anyone involved in the proceedings. I believe it is based on reason and common sense as, in my view, it arises logically from

the evidence or from an absence of evidence. I do find that I am left with a reasonable doubt on an essential element on each of the four charges of assault.

Other elements

[49] This conclusion is sufficient to dispose of the case but I wish to add that even if I did not have the reasonable doubt I just expressed on the essential element of consent, the result would be the same. On the basis of the same evidence of the “joking” atmosphere at play in these incidents, I would have been left with a doubt on the next essential element of the knowledge of the absence of consent. Indeed, the prosecution has the burden to prove beyond a reasonable doubt that Sergeant Donohue was aware that Mses Dorsch or Demers did not consent to the physical contact subject of the charges. In order to do so, the prosecution must prove either that Sergeant Donohue actually knew that Mses Dorsch or Demers did not consent or that he was reckless or wilfully blind as to consent.

[50] On the whole of the evidence in this case, particularly the joking atmosphere testified to by witnesses and outlined in detail previously on my analysis of the element of consent, the probability that I have outlined would also leave me with a reasonable doubt as to the actual knowledge of consent on the part of Sergeant Donohue. I would also have been left with a reasonable doubt on the existence of a risk of absence of consent known by Sergeant Donohue who would have proceeded in the face of that risk. Finally, I would have been left with a reasonable doubt as to the awareness by Sergeant Donohue of indications that Mses Dorsch and Demers did not consent, which Sergeant Donohue would have deliberately chosen to ignore because he did not want to know the truth.

[51] I have directed my mind to the issue of whether consent to go along with the jokes of Sergeant Donohue could be nullified by the fact that such consent could have been obtained by virtue of an exercise of authority, as provided for at paragraph 265(3)(d) of the *Criminal Code*. There is no evidence to support any inference that threats may have been made or even that negative consequences could ensue by virtue of the supervisory authority held by Sergeant Donohue over the students. Besides, I take from the evidence of Mrs Kelly Russell that she was, in reality, the person who held the real supervisory power in relation to the ground maintenance team. She hired the students and vetted Sergeant Donohue to work in supervising them. On all occasions where difficulties were experienced in the supervisor-students relationship, she got personally involved. In fact, her testimony is clear to the effect that she felt responsible for the students and one of the aspects which troubled her the most when she saw the pictures of the lifting upside down incident was that things were going on in the team that she did not know about.

Conclusion

[52] I must conclude, therefore, looking at the evidence as a whole, that the prosecution has failed to satisfy the Court of Sergeant Donohue's guilt beyond a reasonable doubt.

FOR ALL THESE REASONS, THE COURT

[53] **FINDS** the accused, Sergeant Donohue, not guilty of charges 1, 3, 5 and 7 of the charge sheet, for assault contrary to section 130 of the *National Defence Act*.

Counsel:

The Director of Military Prosecutions, as represented by Major A.C. Samson.

Mr D. Anber, Counsel for Sergeant M.J. Donohue.