



## COURT MARTIAL

**Citation:** *R. v. Duhart*, 2015 CM 4022

**Date:** 20151210

**Docket:** 201544

Standing Court Martial

5th Canadian Division Support Base Gagetown  
Oromocto, New Brunswick, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Sergeant D.C. Duhart, Accused**

**Before:** Commander J.B.M. Pelletier, Military Judge

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### **REASONS FOR FINDING**

(Orally)

#### **INTRODUCTION**

[1] Sergeant Duhart is facing four charges under the Code of Service Discipline relating to alleged incidents of sexual harassment and ill-treatment involving two subordinates who served under his direct supervision at the 42nd Canadian Forces Health Services Centre, on Gagetown Garrison, between August 2011 and March 2014. For each complainant, one charge alleges conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act* and another charge alleges ill-treatment of a person who by reason of rank was subordinate to him contrary to section 95 of the *National Defence Act*.

[2] The particulars of the first and third charges under section 129 of the *National Defence Act* are very similar. Essentially, it is alleged that Sergeant Duhart did harass two of his subordinates contrary to Defence Administrative Orders and Directives (DAOD) 5012-0, *Harassment Prevention and Resolution*, for the entire period of time

that he was their supervisor, specifically between 1 June 2012 and 1 March 2014 for the first charge, and between 1 August 2011 and 1 March 2013 for the third charge.

[3] As for the second charge under section 95 of the *National Defence Act*, it is alleged that, between 1 January and 15 February 2014, Sergeant Duhart ill-treated Corporal M by touching her face or ear. As for the fourth charge, it is alleged that, between 1 August 2011 and 1 March 2013, Sergeant Duhart ill-treated Able Seaman C by touching her at the waist area.

### **EVIDENCE**

[4] The prosecution called five witnesses to testify about nine alleged incidents involving the accused. The two main witnesses for the prosecution were the two complainants. Corporal M testified about seven of the nine incidents alleged. Six of these relate to remarks of a sexual nature made by the accused that would have been directed to her individually or as part of a group of co-workers. The other incident concerns unwanted poking from Sergeant Duhart, allegedly made as she was upset following one of the remarks made to her. For her part, Able Seaman C testified about four incidents, three of which related to comments of a sexual nature made to her individually or as part of a group of co-workers or made specifically to Corporal M. The other incident relates to an alleged practice of "sensitivity checks" where Sergeant Duhart would touch her when she would not expect it, including one instance when she was touched at the waist area. The prosecution called three other witnesses who confirmed that some of the comments attributed to Sergeant Duhart were indeed made. For its part, the defence called only one witness: the accused. In addition to these witnesses, the court took judicial notice of the matters contained in section 15 of the *Military Rules of Evidence*.

### **THE TESTIMONY OF WITNESSES**

#### **Events related by the first complainant**

[5] Corporal M served under the direct supervision of the accused, Sergeant Duhart, at Care Delivery Unit Alpha (CDU "A") beginning in March 2012. CDU "A" is a section of the 42nd Health Services Centre which delivers health care to patients, notably in the course of daily sick parade in mornings. It is composed of approximately seven medical technicians (med techs) at the ranks of private or corporal, being directly supervised by a master corporal, as second in charge (2 i/c), and a sergeant, as in charge (i/c). When Corporal M arrived at CDU "A", the accused was 2 i/c in the rank of master corporal, but was acting as the i/c for significant periods in the absence of the sergeant on other assignments. On 8 July 2013, the accused was promoted to his current rank of sergeant and became the i/c of CDU "A". The chain of command for CDU "A" also includes a warrant officer physician assistant (PA) and a medical officer, typically in the rank of captain who is the team leader. The CDU is also supported by other clinicians, including a nurse practitioner and benefits from the administrative support of a clerk.

[6] Corporal M testified that she interacted with Sergeant Duhart on a daily basis as part of her duties. She spent a significant portion of her work day in what has been described as the "med tech room", where she and her colleagues at the rank of private and corporal have their workstations. More senior med techs, such as the i/c, the PA and other clinicians have offices close by in the building but are in and out of the med tech room all day. It appears that the med tech room is the hub of the activities and staff interaction at CDU "A".

[7] Corporal M made a formal complaint against Sergeant Duhart at the end of February 2014, after a conflict related to what she perceived as a threat to take away days of leave she felt she was entitled to. She described this incident as the final straw in a very rocky relationship with her supervisor. She related to the court the following incidents when Sergeant Duhart acted inappropriately:

- (a) In early February 2014, Corporal M testified that she was chatting with a colleague in the med tech room about not looking forward to an upcoming visit to the dentist when Sergeant Duhart interjected in the conversation. He inquired as to how she could hate going to the dentist when she had such white teeth stating that it "must be because you have lots of cum in your mouth." At the same time, he said he was wondering "whose cum it might be" given that her husband was deployed at the time.
- (b) Corporal M said that immediately afterwards she was very upset that her supervisor would say something like that to her; she felt she had been taking these kinds of remarks for too long and felt the compounded effect of these remarks. Sometime later, Sergeant Duhart could see she was upset and asked if she was in a bad mood due to her period. He also started poking her very annoyingly in the face and ear. She told him to stop but he continued until she said "stop or I will break your hand". The poking then stopped.
- (c) Corporal M testified about another incident, which occurred again as she was discussing with a colleague in the med tech room about getting ready for her husband's imminent return from deployment. Sergeant Duhart interjected to ask if she was "all shaved up" for her husband's return. She immediately assumed he was referring to the shaving of her vaginal area, given her previous experiences with Sergeant Duhart and his style of jokes. She said that she found these remarks to be gross and that it made her feel tense and uneasy, at a time when she was simply enjoying a relaxed discussion with a colleague.
- (d) Corporal M testified about a joke that Sergeant Duhart made on several occasions in the workplace, where he would hold a banana to his crotch area or in the zipper of his pants. On one occasion he asked her if she wanted a bite of the banana, as he was standing a foot in front of the

chair she was sitting in. She said other people were around and witnessed these events and other instances when a banana was used in a similar fashion.

- (e) Corporal M testified about another joke Sergeant Duhart often made when he had to go to the bathroom. He would imply to be needing some help in holding his penis, as it was "so heavy". She said that on one occasion, the remark was directed squarely at her. Sergeant Duhart asked if she would "hold [his] dick" while he went to the bathroom as his back was sore. She added that the remark was made to others as well.
- (f) Corporal M testified about yet another of Sergeant Duhart's jokes. Usually on Monday mornings, Sergeant Duhart would ask some of those gathered in the med tech room whether they had dreamed about him on the weekend. She said that question was asked to her directly a few times and mentioned that, on one occasion, she rolled her eyes and replied sarcastically, "Yes, I dreamed about you." just to send Sergeant Duhart away.
- (g) Corporal M testified about a final incident, in relation to a pair of combat boots she had forgotten at the end of a day in the med tech room. When picking up her boots to wear the next morning, she mentioned her socks and underwear were in them. Sergeant Duhart would have replied, "Oh yeah, I thought something smelled awfully yeasty." She grabbed her boots and walked out.

[8] When asked about her reaction to these unwelcome jokes, Corporal M said that she would often just ignore Sergeant Duhart as it was a good way to avoid his continued attention. Essentially, she got used to this kind of treatment, yet did not at all appreciate it. She said that even if Sergeant Duhart had warned the group to respect the chain of command and not bypass him, she did go to his superiors directly for help on two occasions, when she thought she could not take it anymore. The first time, she would have been told by the PA, "That's just how Sergeant Duhart is." implying she would have to live with that. On the second occasion, the team leader would have asked her what she wanted him to do about it. She replied not to bother as she was then going on course and would not have to work with Sergeant Duhart. She testified, not without emotion, that at one point she did not want to go to work again, as she did not want to have to deal with her superior.

#### **Events related by Able Seaman C**

[9] Able Seaman C testified that she worked under the supervision of then-Master Corporal Duhart from August 2011, first at CDU "B" and then at CDU "A" from the fall of 2011, until she left on maternity leave in February 2013. She said she confided early to her supervisor, Sergeant Duhart, that she was suffering from post-traumatic stress disorder (PTSD) as well as the source of that condition. She was followed regularly by a

mental health team, assistance that Sergeant Duhart had assisted in obtaining for her. She said that once Sergeant Duhart was aware of her condition, he performed what she described as several "sensitivity checks" on her, consisting of coming from behind when she did not expect it and buckling her knees, grabbing her hair or grabbing her waist. She did not like that and told him to stop. She said she remembers at least four incidents, including one incident when he grabbed her waist as she was sitting on a chair. She said that he did this to see how she would react. If she would not flinch much, he would say she is having a "good day", implying her PTSD was well controlled. She said this made her feel vulnerable and triggered some of her PTSD. She discussed the issue with her therapist who told her she needed to tell Sergeant Duhart to stop, in no uncertain terms. She went so far as to say to him that if he did that again, she would punch him. The "sensitivity checks" then ceased.

[10] Able Seaman C also provided her perception of some of the same jokes Corporal M had mentioned. She testified about the jokes Sergeant Duhart would make concerning the weight of his penis. He would broadcast to the group gathered either in the med tech room or the treatment room inquiring if someone could hold his penis while at the bathroom. She said the remark was made directly to her once and said that she witnessed the remark being made to Corporal M directly as well, adding that Corporal M would have replied, "That's disgusting, Duey." She also testified being asked on multiple occasions by Sergeant Duhart, gently and close to one ear, whether she had dreamed "about [him] last night." She said she found this gross and would wave him off with her hand when he did that. She said that she understood the question to imply a sexual dream, given the way it was asked and the kind of person Sergeant Duhart was. She said she had observed Sergeant Duhart asking the same question to Corporal M.

[11] Able Seaman C testified about remarks made to her during the third trimester of her pregnancy, at a time when everyone could see she was pregnant. Sergeant Duhart would walk in and ask, "How is my baby doing today?" She felt it implied he was the father of her child, which made her angry given that her husband was also a med tech employed at the 42nd Health Services Centre.

[12] She said the remarks made towards her by Sergeant Duhart made her feel very depressed and that she "wanted to kill [her]self almost everyday." She said she sought help from her chain of command on a number of occasions but did not get any. She said she had liked her time in the Canadian Armed Forces before, but at the point she was refused help, she felt completely hopeless. She said she wants to forget this episode of her life.

### **The testimony of Mrs Bryden, Mrs McInnis and Corporal Lynch**

[13] Mrs Bryden was a nurse practitioner at CDU "A" from March 2013 to March 2014. She said she heard several comments from Sergeant Duhart she deems inappropriate during her time at CDU "A", including several occasions when he asked people present in a given location whether someone would come with him to the

bathroom to help as his "penis is too heavy." She said these comments were sometimes directed at specific people, but could not provide details, nor could she say if it was directed at Corporal M or Able Seaman C. She also commented on the interjection by Sergeant Duhart in a conversation concerning Corporal M being ready for the return of her husband from deployment, implying that he hoped Corporal M's vagina was ready for some sexual activity. She also heard Sergeant Duhart compare his genitals to a banana on several occasions but, on cross-examination, conceded that she did not see him take an actual banana to his crotch. Finally, she observed Sergeant Duhart ask, on several occasions, med techs as a group, whether someone had dreamed about him; however, she could not say with certainty if this was asked of anyone in particular. Mrs Bryden spoke to Corporal M following the "white teeth" incident as she had noticed her to be upset. She wrote an email to authorities concerning that incident.

[14] For her part, Mrs McInnis was the CDU "A" clerk from 2012. She was friends with Corporal M and Able Seaman C. She did personally witness several comments from Sergeant Duhart she deems inappropriate, including inquiring whether anyone had dreamed about him last night which she has seen being made directly to Corporal M. She said she observed Corporal M appearing embarrassed, angry and frustrated and heard her reply, "That's gross, Duey." She cannot recall having heard the comment directed at Able Seaman C; however, she did hear Sergeant Duhart ask Able Seaman C how his baby was doing. She was present when the conversation about preparing for the return of Corporal M's husband took place. She could not recall what was said exactly but stated that he did ask whether she had shaved for her husband, which she understood as meaning "shave her crotch." Finally, she witnessed Sergeant Duhart hold a banana to his crotch once, in the presence of Corporal M and Able Seaman C. She thought such behaviour was stupid and juvenile.

[15] Corporal Lynch was at CDU "A" from 2012 to January 2014. She did hear the conversation about dental treatment in which Sergeant Duhart interjected to ask Corporal M how she kept her teeth so white, if it was from eating all of her husband's "cum". Although she had her back to Corporal M during the conversation, she turned around when the comment was made and noticed Corporal M had a look of disgust on her face. In her view, that comment went "way too far." She did hear, more than once, Sergeant Duhart inquire whether someone could help him "to hold [his] penis at the bathroom." She also heard the comment about "dreaming about him last night" made to her, Corporal M and Able Seaman C. She also heard the comment relating to "shaving" in anticipation of Corporal M's husband's return, which in her view implied shaving her genital area. She did witness an incident when Sergeant Duhart would have inserted a banana in his pants and "humped a chair" in which a person was sitting at the time.

### **The testimony of the accused, Sergeant Duhart**

[16] Sergeant Duhart was the only witness for the defence. He readily admitted having made a number of remarks attributed to him by witnesses; however, he qualified the reasons for and circumstances in which these comments were made. For instance, he did ask Corporal M if she was "all shaved up" for her husband but said that this remark

was in line with the tone of the discussion and that he never said directly that it related to her genitals but admitted this is what he was referring to. He also admitted in direct examination that the comment was crude. He did admit placing a banana to his crotch on a number of occasions but denied this silly gesture was directed at anyone in particular. He denied making any sexual gesture with the banana and said he simply held it there. He did admit asking the group whether "someone could lift ten pounds as [he had] to go to the bathroom"; however, he once again said that the remark was meant to lighten the atmosphere and not directed at anyone in particular. He said that people responded with laughter and even replied with other jokes implying that his penis was small. He did admit asking the group of med techs on occasions, in a joking manner, whether someone had "dreamed about [him] last night." He recalls Corporal M replying affirmatively on one occasion in a sarcastic tone. Sergeant Duhart is "pretty sure" he asked an obviously pregnant Able Seaman C how "his" baby was doing but said this was a joke often made in Newfoundland, where he is from. Knowing Able Seaman C is also from Newfoundland, he thought she would be "okay" with the joke as clearly he was not the father of her child. He said it was just a way to ease things up and that people would laugh at the remark.

[17] Sergeant Duhart testified that he knew about Able Seaman C's PTSD and the events that triggered the condition. She said she cried in his office on a number of occasions. He denied making regular "sensitivity checks" on her but said that he had touched her waist once, to move her out of the way, as he needed to get past her in a confined space. He does not recall poking Corporal M. With regards to the remark directed towards Corporal M about "white teeth due to eating cum" he stated he finds these words despicable and sickening. He said he remembers the conversation about dental treatment and "white teeth," remembers interjecting in that conversation with a comment but he is not certain what he said. On cross-examination, he said it is possible that he said the words attributed to him by witnesses.

[18] Sergeant Duhart testified that the atmosphere at work was very negative when he got to CDU "A" and he took it upon himself to lighten the mood with jokes. He also stressed the importance for his subordinates to respect the chain of command. He mentioned that a lot of sexual and inappropriate remarks were made in the workplace, including by senior personnel such as physicians and physician assistants. These remarks were sometimes about patients, sometimes about medical personnel. He was participating in those discussions and admitted that some of his remarks were gross and inappropriate. He was adamant that no one ever told him that what he was saying was unacceptable and that if he had been told, he would have stopped. He said he was not given an opportunity to change his behaviour before disciplinary actions were taken against him. He said he was ashamed of having to testify about these actions and that he regretted his words.

### **ADMISSIONS**

[19] The defence made a number of admissions at the outset of the trial, most of them encapsulated at Exhibit 4. Essentially, the elements of identity, time and place of all of

the alleged offences are admitted. In relation to charges one and three under section 129 of the *National Defence Act*, Sergeant Duhart admitted the existence of DAOD 5012-0 as a standard of conduct applicable to him and admitted his actual knowledge of DAOD 5012-0, in the context of the presumption of paragraph 129(2) of the *National Defence Act*. In relation to charges 2 and 4, Sergeant Duhart admitted that, at all material times, he was of higher rank and the direct supervisor of the two complainants.

## **THE ASSESSMENT OF THE EVIDENCE**

### ***General Principles***

[20] The court may accept or reject, some, none or all of the evidence of any witness who testified in these proceedings. Neither credibility nor reliability is an all-or-nothing proposition. A witness can be deemed reliable on some aspects and unreliable on others. It is a given, however, that to support a conviction, testimony must be reliable and capable of sustaining the burden of proof on a specific issue or as a whole. The court must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence.

### ***The assessment of credibility***

[21] Rendering a verdict is not a question of deciding whether the court believes the defence's evidence or the prosecution's evidence. In those areas where the evidence of the accused contradicts the evidence of prosecution witnesses, the method of assessing credibility that I must follow in order to respect the fundamental principle obliging the Crown to prove the guilt of the accused beyond a reasonable is as provided by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at p. 757 as follows:

First, if [I] believe the evidence of the accused, obviously [I] must acquit.

Second, if [I] do not believe the testimony of the accused but [am] left in reasonable doubt by it, [I] must acquit.

Third, even if [I am] not left in doubt by the evidence of the accused, [I] must ask myself whether, on the basis of the evidence which [I] accept, [I am] convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

### ***The credibility of the accused***

[22] Following the close of the prosecution's case, the accused took the stand in his defence. Sergeant Duhart admitted making all of the improper comments attributed to him, with the exception of the "white teeth due to eating cum" comment. In relation to that comment, he said he remembers the conversation, is pretty sure he intervened in it but then did not recall making the comment attributed to him. He said in direct examination that if he said that, he did not know what he was doing. On cross-examination, he admitted it is possible he said it and if he did, it would be wrong. The way Sergeant Duhart came across in direct examination on that issue causes me serious



doubts about his credibility. He expressed very strong feelings about the "white teeth" comment making him feel sick, remembered a dental conversation going on about "white teeth," remembers intervening in it, yet cannot remember if he uttered the comments attributed to him.

[23] In response to allegations of poking and "sensitivity checks", both involving unwanted touching, Sergeant Duhart says that he does not remember these events. Yet, in light of what he said before, I cannot trust what is a very suspicious lapse in memory, especially when it is accompanied by an out-of-left-field explanation for grabbing Able Seaman C at the waist to move her out of his way once. I find that the accused in his testimony accepted what all prosecution witnesses testified he said or did while attempting to offer mitigating circumstances. He denied remembering other events on which he should have been able to categorically state whether they occurred or not. His testimony, even if I don't believe it, does not leave me with a reasonable doubt on the comments about the unwanted touching incidents.

[24] I also found the testimony of Sergeant Duhart to be full of contradiction as to how he exercised his leadership responsibilities within CDU "A". On the one hand, he said he encouraged humour to foster relations and appears to justify his improper comments by the fact that his intention was to lighten the mood at work. Yet, he seems to apply a different standard in relation to other improper comments he said were frequently made by superiors, which he implied were not motivated by the same goodwill. The examples of those comments he offered in testimony were comments of a very different nature than what he has admitted having said, as they were not directed at subordinates at work. Also, I am puzzled by the contradiction between, on the one hand, his alleged good intentions in encouraging humour and informality amongst the staff, for instance by demanding subordinates address him by his nickname, and on the other hand, his rigid insistence towards subordinates that they follow the chain of command and not bypass him on any matter.

### ***The credibility and reliability of prosecution witnesses***

[25] In contrast with the testimony of the accused, I find that both complainants were credible. They were nervous and challenged by the task of testifying but I find that they did not exaggerate the facts, admitted when their memory would not allow reaching firm conclusions and reflected an extraordinary amount of dignity in relation to what they had to go through in the course of serving under the supervision of the accused. All that without demonstrating animosity towards him. I was impressed with both of them and find them credible.

[26] The three other prosecution witnesses were also credible, although their reliability was, at times, questionable given frequent hesitations in their recollection. In any event, their testimony was largely confirmatory of the complainants' testimony on comments made by the accused and most of what they said was subsequently confirmed by the testimony of the accused. The only exception is the testimony of Corporal Lynch about the conversation regarding "white teeth" in which she confirmed the testimony of

Corporal M. I find her testimony to be credible and reliable on that event. The fact that she remembered Corporal M storming out of the room after the incident is not in contradiction with the testimony of Corporal M to the effect that Sergeant Duhart came to her sometime later to ask why she was in a bad mood and poked her repeatedly.

### **THE LAW**

#### **Presumption of innocence and proof beyond a reasonable doubt**

[27] As part of the explanation on the applicable law in this case, it is important to discuss first 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.

[28] 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.

[29] 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.

[30] 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 Duhart guilty unless it is sure he is guilty. Even if I believe that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to Sergeant Duhart and find him not guilty because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

[31] The important point for me as the Court in this case is that the requirement of proof beyond a reasonable doubt applies to each and every essential element of the offence. 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 Duhart's guilt beyond a reasonable doubt.

[32] 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 Duhart's guilt arising from the credibility of the witnesses, then it must find him not guilty.

## **Elements of the offences**

[33] Considering the admissions from defence, the elements that are left to be proven beyond a reasonable doubt by the prosecution are as follows:

- (a) For charge 1 and 3 under section 129 of the *National Defence Act*: The prosecution must prove that Sergeant Duhart did harass the complainants contrary to DAOD 5012-0. Considering the definition of "harassment" in that Order, this requires four things to be proven :
  - i. Sergeant Duhart manifested an improper conduct;
  - ii. That conduct was directed at another person in the workplace;
  - iii. That the conduct was offensive to another person in the workplace; and
  - iv. That the accused knew or ought reasonably to have known the conduct would cause offence or harm.
- (b) For Charge 2 and 4: that Sergeant Duhart ill-treated Corporal M by touching her face or ear and ill-treated Able Seaman C by touching her at the waist area. For these offences, the blameworthy state of mind of the accused must also be proven.

## **POSITION OF THE PARTIES**

[34] The prosecution alleges that in relation to charges 1 and 3 under section 129, every sub-element was proven beyond reasonable doubt as it pertains to the seven improper comments attributed to Sergeant Duhart in relation to both Corporal M and Able Seaman C. In the event that one of those comments was not deemed to be proven, the prosecution submits that the admissions by the accused in his testimony regarding the statements that he did make are sufficient in themselves to conclude that harassment occurred in relation to both complainants and, therefore, all four elements of the definition of harassment are proven.

[35] For its part, the defence submits that even if the admissions of the accused are sufficient to make out the first three sub-elements of harassment, the accused's testimony is to the effect that he did not know his remarks would cause offence or harm. In the circumstances where rude and inappropriate comments of a sexual nature were constantly made by senior personnel in his workplace, the defence submits that the court should have a reasonable doubt about whether Sergeant Duhart should have known that his conduct would cause offence or harm.

[36] On charges 2 and 4, the prosecution alleges that the uncorroborated testimony of the two complainants is sufficient for me to find guilt beyond a reasonable doubt, while

the defence submits that I should be left with a reasonable doubt on whether the conduct reaches the level required to constitute ill-treatment under section 95 of the *National Defence Act*.

### **ANALYSIS**

#### **First and third charges: did Sergeant Duhart harass the complainants?**

[37] I have no hesitation to find beyond a reasonable doubt that the remarks that Sergeant Duhart admits making meet the first three sub-elements related to the definition of "harassment" at DAOD 5012-0. Indeed, in relation to both charges, Sergeant Duhart admitted asking Corporal M if she was "all shaved up" for her husband. He admitted placing a banana to his crotch area, a few times, in the presence of co-workers to simulate a penis. He admitted asking persons present in the workplace whether someone could lift 10 pounds as he needed help to go to the bathroom. He admitted asking whether someone had dreamed about him, in the presence of both Corporal M and Able Seaman C, remembering even Corporal M's response on one occasion. In cross-examination, he confirmed having asked Able Seaman C, "How is my baby doing?" on several occasions. He admitted his remarks were rude, hence offensive, and he did say that he felt ashamed having to testify about things that were stupid of him to say.

[38] I am also convinced beyond a reasonable doubt that all of these events occurred in the way prosecution witnesses related, including the manner in which he asked about "dreaming about him" to Able Seaman C, the question asked to Corporal M about having "a bite of the banana" he held and the comment about smelling "something yeasty" coming from Corporal M's boots. Yet, I don't even need to consider these non-admitted instances of improper behaviour to conclude that the first three elements are made out, simply on the basis of the comments the accused admitted making in the workplace.

[39] In summary, I find that Sergeant Duhart manifested an improper conduct in making the comments and gestures I just described; I find that these comments or gestures were directed at another person in the workplace, either specifically or as a member of a group of persons; and, I find that these remarks or gestures were offensive to another person in the workplace.

[40] What is left for me to consider is the submission made by defence counsel to the effect that I should accept what is becoming known as the *Pavlyuk* defense, based on *R. v. Pavlyuk*, 2011 CM 1014, which recognizes that the prosecution in a harassment case has the burden of proving, beyond a reasonable doubt, that the accused knew or ought reasonably to have known that his conduct would cause offence or harm, at the time when the words were spoken, in light of all of the circumstances, including the relationship between the individuals who made up the work unit at the time. In *Pavlyuk*, the military judge found that the prevailing atmosphere in the workplace was one of constant inappropriate teasing that was trivialized and encouraged by the laxity of the

leadership and co-workers, who saw no harm in it. In such circumstances, the court was not satisfied beyond a reasonable doubt that Corporal Pavlyuk knew or ought reasonably to have known that his conduct would cause offence or harm to the complainant Corporal Crompt.

[41] I find that the circumstances of this case are entirely different from those in the *Pavlyuk* case. First, this is a case of a superior who is accused of harassing subordinates, not a case of co-workers misbehaving towards each other like in *Pavlyuk*, where the complainant was of the same rank and, in fact, more experienced than the accused, a Reserve Force corporal employed at the Valcartier Garrison over a summer. In contrast, the accused here holds the rank of sergeant in the Regular Force. It is an important factor in considering whether he should have known that his conduct would cause offence or harm. As a person with a higher rank, entrusted with the responsibilities of leading a group such as the med techs in CDU "A", Sergeant Duhart had a general duty to care for his staff and ensure their welfare; he also had a specific duty provided for in DAOD 5012-0 to ensure a workplace free of harassment. That applies regardless of the alleged relaxed nature of the work atmosphere, where personnel were frequently making jokes across ranks and addressed Sergeant Duhart by his nickname. On that, I note that Sergeant Duhart testified that it is he who had encouraged an atmosphere where humour would be welcome, as he had found morale to be very low when he arrived at CDU "A". It is also he who had asked subordinates to refer to him by his nickname. At the same time, however, he also admitted having insisted in no uncertain terms that his subordinates pass through him for any concerns, that there would be consequences if he were to be bypassed. I find that CDU "A" was very much a workplace under the significant control of Sergeant Duhart, which contrasts with the workplace in *Pavlyuk* where members of the same rank were left without any supervision and developed, between them, an inappropriate atmosphere where improper comments were condoned.

[42] Even if I accept that jokes of an inappropriate nature were exchanged at CDU "A", for instance on the physical attributes of patients, it remains that the examples of inappropriate remarks raised by Sergeant Duhart in his testimony did not point to anything that would compare to the remarks he admitted making, which are not only offensive but were directed at subordinates, such as "Did you dream about me last night?", "Can anyone lift 10 pounds? I need help to go to the bathroom." or "Are you all shaved up?" Sergeant Duhart goes to great length to say that the comments were not directed at anyone in particular, yet in reality, they were directed at everyone in the workplace he was responsible for.

[43] I must also add that, on the basis of what I observed in terms of demeanour from the two complainants, what they testified about, as well as the testimony of the three prosecution witnesses about the observable reactions of complainants and others when Sergeant Duhart was making inappropriate remarks or gestures, I am left with no doubts that he ought reasonably to have known his remarks would cause offence or harm.

[44] I conclude, therefore, that both offences under section 129 of the *National Defence Act* for conduct to the prejudice of good order and discipline in contravention of DAOD 5012-0 on harassment have been proven beyond reasonable doubt.

**Second and fourth charges: did Sergeant Duhart ill-treat the two complainants?**

[45] The findings on charges 2 and 4 depend not only on my assessment of the credibility of witnesses but also on whether the acts particularized in the charges meet the definition of ill-treatment adopted in the past by courts martial. I will start by analysing the legal framework, essentially to explain what can constitute ill-treatment.

[46] Section 95 of the *National Defence Act* reads as follows:

Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[47] Note B to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 103.28 provides that "[v]iolence other than striking [ . . . ] is included, for the purposes of section 95 [ . . . ] under ill-treatment." That note provides non-binding information about offences. I am not reading the Note to suggest that physical violence is absolutely required to find ill-treatment. In my view, the term "violence" does not exclude psychological violence or a combination of psychological pressure and a physical act.

[48] The test that has been developed over time by various courts martial appears to be based on dictionary definitions, specifically as it relates to the expression "ill-treat", which translates as *maltraiter* in French. The relevant terms are defined as follows in the *Concise Oxford English Dictionary*, 11th edition and *Le Nouveau Petit Robert*.

**"ill-treat"** verb: act cruelly towards. DERIVATIVES: ill-treatment, noun.

**"cruel"** adjective: disregarding or taking pleasure in the pain or suffering of others. Causing pain or suffering. DERIVATIVES: cruelly, adverb.

**"maltraiter"** 1. *Traiter avec brutalité.* 2. *Traiter avec rigueur, inhumanité.* 3. *Traiter sévèrement en paroles (une personne à qui l'on parle, ou dont on parle).*

[49] I believe that these simple definitions of the term "ill-treat" provide sufficiently objective criteria to allow those subject to the Code of Service Discipline a clear idea of what acts are prohibited.

[50] The analysis of the context in which the acts particularized in any charge of ill-treatment were committed is important to decide whether a given conduct constitutes

ill-treatment. In *R. v. Sergeant A. Quinn*, 2000 CM 65, Military Judge Menard found the accused guilty of three charges of ill-treatment under section 95. He discussed ill-treatment of subordinates in terms of "unwanted physical contact" constituting a failure of "persons placed in positions of trust [to] meet the highest standard of personal conduct" (paragraph 6) and, also, a failure to "lead by example" (paragraph 8). The same reasoning was recently applied by Military Judge d'Auteuil in *R. v. Corporal Guarnaccia*, 2015 CM 3006 who found the accused not guilty of section 95 offences on the basis of a lack of evidence about the characterization of the accused's actions in relation to his responsibilities as an instructor in the circumstances of that case.

[51] I believe the circumstances of the two alleged incidents of touching the face or ear of Corporal M and of the alleged "sensitivity checks" on the waist of Able Seaman C are also important in this case. That said, the prosecution is certainly obliged to prove the element of physicality that is particularized in the charges, as found by Chief Military Judge Dutil in *R. v. Corporal S.J.D. Raymond and Corporal S. Robertson*, 2006 CM 46. I find that the prosecution has met this burden. I do not believe the testimony of the accused when he stated not recalling these events. His testimony does not leave me with any doubt on the question of whether these incidents occurred. It is indeed particularly telling to hear Sergeant Duhart comment in examination-in-chief that if Corporal M would have stormed out of the room after he had made the "white teeth" comment, he would have run after her. For me, this affirmation from the mouth of the accused renders the testimony of Corporal M highly credible to the effect that once Sergeant Duhart realized that she was upset in relation to the "white teeth" comment he had previously made, he repeatedly poked her on the face and ear, even after she had once told him to stop. As for the "sensitivity checks," I find that the explanation attempted by the accused in his testimony to explain how he would have touched Able Seaman C at the waist is entirely unrelated to the incidents alleged by the prosecution. I am convinced that the touching that he did not recall doing did, in fact, occur.

[52] I have accepted the evidence of the complainants on these incidents of unwanted touching and I am convinced beyond a reasonable doubt by that evidence that these events occurred. I believe that Sergeant Duhart had the requisite intent to touch the complainants in that fashion and, in my view, this is the only proof of blameworthy state of mind or *mens rea* that is required for a charge of ill-treatment of subordinates.

[53] That being said, I am aware of the decision of Military Judge d'Auteuil in *R. v. Murphy*, 2014 CM 3021 where he found at paragraph 48 that "the prosecution must prove beyond a reasonable doubt the intent of Corporal Murphy to abuse his authority or to use violence toward a subordinate because of the existence of [a] hierarchical relationship." Even if that was the test for the *mens rea* of the offence under section 95, in my view, the test would be met in the circumstances of this case.

[54] Indeed, the circumstances of the two instances of unwanted touching involving Sergeant Duhart find their source in the subordinate-superior relationship which operated at the time. Sergeant Duhart went after Corporal M once he found out she was

not in a good mood because he had access to her as a supervisor and he felt, as he testified, that it was his duty to ensure the well-being of his people. As for the "sensitivity checks" performed on Able Seaman C, they were a response to the condition of PTSD disclosed by Able Seaman C to Sergeant Duhart along with the source of this PTSD, by virtue of the fact that he was her superior.

[55] It may well be that proving an assault by a superior over a subordinate is sufficient to make out a charge of ill-treatment, as the prosecution submits. Yet, I do not need to take a position on that submission to dispose of this case. Indeed, the circumstances of the two minor instances of unwanted touching particularized in both charges are such that I am left with no doubt that Sergeant Duhart showed blatant disregard for the suffering he could cause to both Corporal M and Able Seaman C by his actions. He knew they were both emotionally vulnerable at the time he touched them; Corporal M because she was upset at the very rude comment that he had made to her a few minutes before on the cause for the whiteness of her teeth and Able Seaman C because of her PTSD. He nevertheless proceeded in imposing himself on them physically. Even if the physical acts themselves are of a relatively minor nature, the conduct of Sergeant Duhart in the circumstances amounts to violence and, therefore, ill-treatment as that term is understood in *Queen's Regulations and Orders for the Canadian Forces*, Article 103.28.

[56] I conclude, therefore, that both offences under section 95 of the *National Defence Act* for ill-treatment of subordinates have been proven beyond reasonable doubt.

### **CONCLUSION**

[57] I must conclude, therefore, looking at the evidence as a whole, that the prosecution has satisfied the court of Sergeant Duhart's guilt on all four charges beyond a reasonable doubt.

### **FOR THESE REASONS, THE COURT:**

[58] **FINDS** the accused, Sergeant Duhart, guilty of charges 1, 2, 3 and 4 on the charge sheet, for conduct to the prejudice of good order and discipline and ill-treatment of subordinates.

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### **Counsel:**

The Director of Military Prosecutions as represented by Major D. Martin

Major D. Hodson, Defence Counsel Services, Counsel for Sergeant Duhart