Citation: *R. v. Lieutenant(N) R.E. Edwards*, 2008 CM 2017

Docket: 200846

STANDING COURT MARTIAL
CANADA
ONTARIO
HER MAJESTY'S CANADIAN SHIP STAR

Date: 21 November 2008

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
LIEUTENANT(N) R.E. EDWARDS
(Accused)

Warning

Pursuant to section 486.4 of the *Criminal Code* and section 179 of the *National Defence Act*, the court has directed that no person shall publish in any document or broadcast or transmit in any way information that could identify the witnesses referred to as K.S., C.R., M.H., C.L., or W.S.

FINDING
(Rendered orally)

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[1] Lieutenant(N) Edwards is charged in a charge sheet with six charges under the *National Defence Act* as follows: four charges of sexual exploitation, contrary to section 153(1)(*b*) of the *Criminal Code*; a charge of scandalous behaviour unbecoming an officer, contrary to section 92 of the *National Defence Act*; and, finally, a charge of behaving in a disgraceful manner, contrary to section 93 of the *National Defence Act*.

[2] The charges arise out of a visit to the Netherlands by a group of Canadian sea cadets in July of 2006, on an international exchange with other cadets from the United States, the United Kingdom, and the Netherlands.

[3] The accused, Lieutenant(N) Edwards, was the escort officer for the group of five Canadian cadets. During the second week of the two-week visit, the male cadets visited what was referred to as the "red-light district" of Amsterdam, in the company of the accused and the British escort officer, one Petty Officer A.

[4] On the evidence before me, it is clear that in this particular area of Amsterdam prostitutes openly solicit members of the public to supply sexual services. The prosecution alleges that during the visit, four of the male cadets were encouraged or assisted by Lieutenant(N) Edwards and Petty Officer A. to engage in sexual activity with the prostitutes in the red-light district, and that some of the cadets did indeed have sexual relations with prostitutes on this occasion.

[5] Thus the theory of the prosecution is that the accused, while in a position of trust with respect to the four cadets, and for a sexual purpose, invited, counselled, or incited the cadets to touch the body of another person; that being, one of the prostitutes in the red-light district, and that this behaviour in all the circumstances amounts to scandalous or disgraceful behaviour on his part.

[6] The defence agrees that the group of male cadets visited the red-light district, but takes issue with the prosecution as to what actually occurred during the visit and the actions of the accused. The accused, in his evidence, denied that he encouraged or facilitated the obtaining of sexual services of prostitutes by the cadets, and testified that he was not aware that some cadets engaged the services of prostitutes.

[7] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context, this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed, the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[8] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt and the accused must, therefore, be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt.

[9] But reasonable doubt is not a frivolous or imaginary doubt. It is not something based on sympathy or prejudice. It is a doubt based on reason and common sense that arises from the evidence or the lack of evidence. The burden of proof beyond a

reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[10] The rule of reasonable doubt applies to the credibility of witnesses in a case, such as this case, where the evidence discloses different versions of the important facts that bear directly upon the issues. Arriving at findings of fact is not a process of simply preferring one version given by one witness over the version given by another. The court may accept all of what a witness says as the truth, or none of what a witness says, or the court may accept parts of the evidence of a witness as truthful and accurate. If the evidence of the accused as to the issues or the important aspects of the case is accepted, it follows that he is not guilty of the offence. But even if his evidence is not accepted, if the court is left with a reasonable doubt, he is to be found not guilty. Even if the evidence of the accused does not leave the court with a reasonable doubt, the court must look at all the evidence it does accept as credible and reliable to determine whether the guilt of the accused is established beyond a reasonable doubt.

[11] I have considered the evidence of each of the four cadets who testified. At the time of the visit to the Netherlands they were all either 15 or 16 years of age. Cadet K.S. is an American who turned 15 years of age the February prior to the visit. He accompanied his mother, W.S., on the trip to the Netherlands. She testified that she was very active in the cadet organization in the United States, and on this occasion, she escorted the American cadet contingent to the Netherlands.

[12] On the whole, I was impressed with the manner in which K.S. gave evidence. He appeared to be genuinely trying to tell the court the truth as he recalled it, without any embellishment or exaggeration. He readily admitted his error with respect to minor matters, such as mistakenly telling the investigator the month of the visit to the Netherlands, but his evidence as to what occurred during the walk through the red-light district did not change in any significant way in the course of cross-examination. Much of the testimony of K.S. is confirmed by the evidence of Cadet C.L. and the other cadets.

[13] I accept the evidence of K.S., that he overheard Lieutenant(N) Edwards speaking to the Canadian male cadets the evening prior to the day of the visit about going to the red-light district and talking about visiting the prostitutes and telling them that if they purchased sexual services, that he, Lieutenant(N) Edwards, would turn a blind eye. His evidence on that point is confirmed by Cadet C.L. I accept his evidence that during the walk through the district, Lieutenant(N) Edwards told K.S. that he, K.S., could get a woman and be a real man, and that Lieutenant(N) Edwards asked one of the prostitutes, in his presence, about the price of engaging a prostitute, and that he was given money by Lieutenant(N) Edwards for the purpose of engaging a prostitute.

[14] I conclude from all the evidence that Lieutenant(N) Edwards knew at the time he gave K.S. a small amount of money in euros, that K.S. intended to engage a prostitute. It is true that his fellow cadet, M.H., also encouraged K.S. to engage a

prostitute, but that does not cause me to doubt that the accused also encouraged K.S. by urging him to prove his manhood, and by knowingly giving him money for the purpose of obtaining sexual services.

[15] I accept the evidence of K.S. that he was conflicted as to whether he should engage in sexual relations with a prostitute. His personal convictions and his emotional attachment to a young woman militated against engaging in this conduct, but he felt what he called, "peer pressure" emanating from other cadets, as well as encouragement from Lieutenant(N) Edwards, and he eventually gave in to the pressure.

[16] In the course of his cross-examination, the American cadet, K.S., was asked about the details of his sexual encounter with the prostitute. Over the objection of the prosecutor, based upon relevance, I permitted the question to be put to the witness. Thereupon, the prosecutor applied to close the court for the hearing of the evidence on this point. The prosecutor referred the court to section 486 of the *Criminal Code*, arguing that the proper administration of justice required that the public be excluded from the courtroom during this evidence, in view, particularly, of the age of the witness, K.S. I denied the application to proceed in camera, and undertook to give reasons for this decision.

[17] Subsection 180(2) of the *National Defence Act* reads:

> (2) A court martial may order that the public be excluded during the whole or any part of its proceedings if the court martial considers that it is necessary
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> (a) in the interests of public safety, defence or public morals;
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> (b) for the maintenance of order or the proper administration of military justice; or
>
> (c) to prevent injury to international relations.

[18] The prosecutor argues that in applying this provision, the court should have regard for the provisions of section 486 of the *Criminal Code*, which deal more specifically with the circumstances that obtain in this case, where the witness is a young person and the charge is under one of the sections enumerated in subsection 486(3); that is, sexual exploitation, contrary to section 153.

[19] I agree with the prosecutor that these circumstances and others should weigh with the court in deciding this application, but I am not persuaded that the proper administration of justice requires the court to be closed. This particular witness struck me as a mature young man, who, at the time of testifying, was but a few months shy of his eighteenth birthday. Other than the ordinary shyness to be expected in these circumstances, I detected no reluctance on his part to disclose other matters of a private or

intimate nature on which he was examined by both counsel. I do not see a risk to the administration of justice if the court were not to be closed, and, accordingly, I denied the application.

[20] Other cadets gave evidence confirming that they felt pressured by the comments and actions of both the escort officers, Lieutenant(N) Edwards and Petty Officer A., to engage in sexual relations with prostitutes, and, indeed, some of the cadets did so. Cadet C.L. testified that he was part of the Canadian contingent on the exchange, but he did not know Lieutenant(N) Edwards until the trip to the Netherlands. He confirmed that Lieutenant(N) Edwards had a private discussion with C.L. and the only other male Canadian cadet about going to the red-light district, and testified that Lieutenant(N) Edwards said, "If we wanted, we could have sex with the prostitutes and he would turn a blind eye."

[21] Originally, C.L. thought that Lieutenant(N) Edwards might be just kidding, but the next day, after a visit by all the cadets to the Anne Frank house, Lieutenant(N) Edwards and Petty Officer A. took charge of all the male cadets, and the female cadets went off with K.S.'s mother, or, perhaps, the Dutch escort officer. After lunch at a fast food outlet, the males went to the red-light district. Cadet C.L. heard both the escort officers making comments about the prostitutes, stating that one might be good for the witness and that he would become a man. Lieutenant(N) Edwards asked how much the prostitute charged and was told 50 euros, and both Lieutenant(N) Edwards and Petty Officer A. said they would chip in money to engage a prostitute. C.L. became increasingly uncomfortable with what the escort officers were saying. C.L. did not engage a prostitute, but three other cadets and the British escort officer, Petty Officer A., did engage prostitutes.

[22] I accept the evidence of C.L. as to what occurred and the actions and statements of the accused in the red-light district, as I found him to be a very impressive young witness. He understood the significance of the statements and actions he attributes to the accused and the British escort officer, because he had the presence of mind to make a written memorandum within hours of the events in the red-light district. The memorandum is not before me, and I do not intend to suggest that the existence of the memorandum bolsters the evidence of the witness because he made a statement at an earlier time out of court. I simply refer to it as demonstrating that this witness had an excellent perception of the significance of the events to which he has testified.

[23] None of the prosecution witnesses changed their evidence in any important respect under cross-examination. There is no suggestion in the evidence that the young cadet witnesses got together to testify falsely against the accused, and, indeed, no evidence that any of them bears ill will toward the accused. Some of the evidence of the cadets was confirmed by the evidence of Lieutenant(N) Edwards, such as the conversation the evening before the visit to the red-light district in which Lieutenant(N)

Edwards informed the two Canadian cadets that they would visit the red-light district the next day.

[24] It is true to say that there are some inconsistencies among the cadet witnesses as to how events unfolded in the walk through the red-light district. For example, K.S. testified that he was accompanied up to a prostitute by another cadet, M.H., but C.L. says that he was accompanied by the accused. Also, C.L. testified about the strong emotional reaction of guilt that K.S. experienced after they had returned to their accommodation following the visit to the red-light district; whereas K.S., himself, did not give similar evidence. In my view, such inconsistencies as there may be among the witnesses are a product of the different ways that different witnesses will perceive the same events. And, in any case, the inconsistencies do not bear on the substantial questions of fact, which come down to whether the accused, by his actions or statements, encouraged or facilitated the engaging of prostitution services by some of the cadets.

[25] At the conclusion of the case for the prosecution, counsel for the defence argued that with respect to the four charges of sexual exploitation, a *prima facie* case had not been established, and submitted that the accused should be found not guilty of those charges. After hearing the prosecution and considering the matter, I granted the application and found the accused not guilty on charges 1 to 4. I undertook at that time to give reasons for my decision.

[26] Queen's Regulations and Orders, article 112.05(13) provides:

> (13) When the case for the prosecution is closed, the judge may, of the judge's own motion or upon the motion of the accused, hear arguments as to whether a *prima facie* case has been made out against the accused, and:
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> (a) if the judge decides that no *prima facie* case has been made out in respect of a charge, the judge shall pronounce the accused not guilty on that charge; or
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> (b) if the judge decides that a *prima facie* case has been made out in respect of a charge, the judge shall direct that the trial proceed on that charge.

[27] Note B to QR&O article 112.05 states:

> (B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

[28] In my view, Note B continues to accurately sum up the law set out by the Supreme Court of Canada in cases such as *R. v. Fontaine* [2004] 1 S.C.R. 702.

[29] Section 153(1)(*b*) of the *Criminal Code*, at the date alleged in the charges, read as follows:

> 153. (1) Every person commits an offence who is in a position of trust or authority towards a young person, who is a person with whom the young person is in a relationship of dependency or who is in a relationship with a young person that is exploitative of the young person, and who
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> ...
>
> (b) for a sexual purpose, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites and the body of the young person.

[30] Counsel for the accused submitted that it is an essential ingredient of the offence created by section 153(1)(*b*) that the prohibited touching be, "for a sexual purpose," and while there was evidence of sexual touching of the prostitutes by some of the cadets, there was no evidence as to the sexual purpose in the present case.

[31] What is the meaning of the phrase, "for a sexual purpose"? The same phrase appears in other provisions of the *Criminal Code*, including the definition of child pornography in section 163.1. Commenting on this phrase, Chief Justice McLaughlin, for a majority of the Supreme Court of Canada in *R. v. Sharpe* [2001] 1 S.C.R. 45, wrote at paragraph 50:

> The objective approach should also be applied to the term "dominant characteristic" in s. 163.1(1)(a)(ii), which targets possession of visual material whose "dominant characteristic" is "the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years". The question is whether a reasonable viewer, looking at the depiction objectively and in context, would see its "dominant characteristic" as the depiction of the child's sexual organ or anal region. The same applies to the phrase "for a sexual purpose", which I would interpret in the sense of reasonably perceived as intended to cause sexual stimulation to some viewers.

[32] In my view, on an ordinary grammatical reading of section 153, the sexual purpose for the kind of touching that is prohibited by section 153 must be the purpose of the accused, not that of the person who actually engages in the touching. That purpose is really a matter of the state of mind of the accused as it can reasonably be inferred from all the surrounding circumstances.

[33] Nearly all the case authorities drawn to my attention by counsel involve fact situations where the accused might reasonably be considered to have derived some sexual stimulation from the prohibited touching, even if the accused was not party to the touching. In those kinds of cases, it is not difficult to conclude that because he obtained some sexual satisfaction, the purpose of the accused can be taken to be a sexual purpose. In the present case, though, I consider that there is simply no evidence that the accused obtained any sexual stimulation from encouraging the cadets to have sexual relations with any of the prostitutes.

[34] The prosecution argues that the sexual stimulation of the accused is not an element of the offence; only having a sexual purpose is an element of the offence. I agree that in some cases it may be possible to establish a sexual purpose on the part of the accused in the absence of a reasonable conclusion that the accused intended to obtain some kind of sexual gratification for himself. I merely say, though, that this is not one of those cases, as there is simply no evidence of a sexual purpose on the part of Lieutenant(N) Edwards at the time of the conduct complained of in charges 1 to 4. For these reasons, I granted the application and pronounced the accused not guilty on charges 1 to 4.

[35] The particulars of both the fifth and sixth charges are identical, and allege that the accused:

> "... on or about 25 July 2006, at or near Amsterdam, Netherlands, while serving as an escort officer with the Royal Canadian Sea Cadet International Exchange Programme, encouraged or facilitated one or more cadets to obtain the services of prostitutes."

[36] In the fifth charge, this conduct is alleged to amount to behaving in a scandalous manner, contrary to section 92 of the *National Defence Act*, and in the sixth charge, the same conduct is alleged to amount to behaving in a disgraceful manner, contrary to section 93. The charges are laid in the alternative to each other.

[37] The accused testified in his defence. He agreed that he spoke to the Canadian male cadets about touring the red-light district the next day, but denies telling them that he would turn a blind eye if they engaged in sexual contact with prostitutes. On the date alleged in the charges, after lunch, he and the male cadets walked through the district and all were laughing and joking about the prostitutes. He denied pressing any of the cadets to engage a prostitute.

[38] After refreshments at an outdoor café, they all went into a new area of the district at about 1415 hours. A Canadian cadet, P., left the group for a period of about five to eight minutes and returned. British cadets did the same thing. The accused testified that he understood they were just going off to look at different girls. The accused denied enquiring of the prostitutes as to the legal age to obtain their services, or giving cadets

money for the purpose of paying prostitutes. He agrees that he gave K.S. money, but it was for the purpose of shopping. At that point, K.S. left the group in the company of a British cadet for a short period of three to five minutes, then they all left the red-light district for the second time, at about 1445 hours, having arrived about a half-hour earlier. The next day, the accused learned from Petty Officer A the details of allegations made by Cadet C.L.

[39] I am invited to conclude from the evidence of the accused that if the young cadets engaged in sexual activity with prostitutes during the visit to the red-light district, it was without the knowledge, must less the encouragement or assistance of Lieutenant(N) Edwards. I do not accept the evidence of Lieutenant(N) Edwards on these points, nor does his evidence raise a reasonable doubt in my mind that he encouraged and assisted the behaviours of the cadets in engaging the services of prostitutes.

[40] I found the testimony of Lieutenant(N) Edwards in cross-examination to be, at times, argumentative and evasive, but more importantly, I do not consider that his evidence hangs together in a coherent way. It appears to have been common knowledge amongst the male cadets at the time of the visit to the red-light district that some of their number were, in fact, engaging the services of the prostitutes. This was a matter of open discussion among them, even laughing and joking without any apparent attempt at secrecy among themselves or in respect of their escort officers.

[41] It appears that even Petty Officer A., the British escort officer, had sexual relations with a prostitute to the knowledge of the cadets. Yet on the evidence of the accused, whose responsibility at the time was to supervise the actions of the cadets and keep them out of trouble or danger, the accused had no idea what his young charges were up to. I simply cannot accept this as true or accurate.

[42] I accept the evidence of the accused in cross-examination that he kept a daily journal of events during the visit to the Netherlands for the purposes of assisting him in compiling a report to his superiors at the end of the exchange. While daily events of greater or lesser significance are apparently noted in the journal, the accused made no entry concerning the visit to the red-light district. I do not accept the suggestion that this event was not sufficiently important to justify an entry in the journal. Rather, I find this omission on the part of the accused to be consistent with an attempt on his part to keep the events in the red-light district under wraps.

[43] On all the evidence, I am satisfied beyond a reasonable doubt that some of the cadets engaged in sexual activity with prostitutes during the visit to the red-light district, and Lieutenant(N) Edwards must have known of this behaviour. Further, I am satisfied beyond a reasonable doubt that Lieutenant(N) Edwards encouraged and assisted the cadets to obtain these services by counselling the cadets to behave in this manner in order to demonstrate their manhood; by acquiescing in their conduct by turning a blind eye despite his position of responsibility and authority over all the male cadets; and, in at

least one case, by furnishing a small amount of money in order that a cadet could obtain sexual services. The particulars of both charges 5 and 6 are established.

[44] I agree with former Chief Military Judge Carter, who held in the case of *R. v. Short*, 2002 CM 19, decided at a Standing Court Martial, 16 April, 2002, that for the purposes of section 93 of the *National Defence Act*, the standard of disgraceful behaviour is to be viewed objectively. That is, would a reasonable person viewing the matter objectively conclude that the behaviour was so outside community norms that the behaviour can properly be characterized as shockingly unacceptable?

[45] Defence counsel appeared to accept in the course of his address that if the conduct charged were proven, it indeed amounts to shockingly unacceptable behaviour. I agree, and accordingly the accused is guilty on charge No. 6.

[46] Defence counsel also appeared to accept that if proven, the conduct amounted to scandalous behaviour on the part of this officer, contrary to section 92. I was referred to no authority interpreting this relatively rare charge under the Code of Service Discipline. The learned authors of *Canadian Military Law Annotated*, say only, at page 603:

> The scope of this offence is very wide ... [encompassing] a large variety of verbal and physical behaviour by officers.

[47] I was referred by the prosecutor to the Oxford Dictionary, which defines, "scandal" to mean, "an action or event regarded as morally or legally wrong and causing general public outrage."

[48] In my view, this definition is of considerable assistance in deciding on the reach of the prohibition contained in section 92. While there is some evidence that certain persons connected with the case may have been outraged by the proven conduct of the accused, I am not satisfied that there is a sufficient basis upon which to conclude that the general public has been outraged by the conduct of the accused, and I am therefore not satisfied beyond a reasonable doubt that the proven conduct of the accused amounts to scandalous behaviour. I find him not guilty on charge No. 5.

[49] Stand up, please, Lieutenant(N) Edwards. This court finds you not guilty on charge No. 5, and guilty on charge No. 6. You may be seated.

COMMANDER P.J. LAMONT, M.J.

Counsel:

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