



## COURT MARTIAL

**Citation:** *R. v. Cadieux*, 2017 CM 3008

**Date:** 20170512

**Docket:** 201614

Standing Court Martial

4th Canadian Division Support Base Petawawa  
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Corporal S.R.L.J. Cadieux, Accused**

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

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**Restriction on Publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described during these proceedings as R.S. shall not be published in any document or broadcast or transmitted in any way.**

### **REASONS FOR FINDING**

(Orally)

[1] Corporal Cadieux is charged with one offence punishable under paragraph 130(1)(a) of the *National Defence Act*, for having allegedly committed a sexual offence contrary to section 271 of the *Criminal Code*, and he is also charged with one offence punishable under section 97 of the *National Defence Act* for drunkenness.

[2] Those two offences are related to some events that would have occurred at the end of Exercise TROPICAL DAGGER that took place in Jamaica. More specifically, the incidents about the charge of sexual assault would have happened between the complainant and the accused on the evening of 27 to 28 November 2015, in the

female's tent. The one related to drunkenness would be related to some events on the same evening and the morning after on the camp.

[3] The trial commenced on 18 April 2017 and was adjourned after four days on request from prosecution. The Court reassembled on 3 May 2017 for two days.

[4] The hearing lasted 6 days. The prosecution's case relied mainly on the testimony of the complainant and four other witnesses.

[5] Corporal Cadieux, the accused in this trial, testified.

[6] Two pictures were introduced by the prosecution: one illustrating the camp's site and another one showing a bug net similar to the one in which the complainant was laying down when the alleged incident of sexual assault would have occurred.

[7] The parties also agreed on some facts and made admissions, which read as follows:

#### “ADMISSIONS AND AGREED STATEMENT OF FACTS

1. At all material times, the accused, Corporal S. Cadieux, was a member of the Canadian Armed Forces, Regular Force, Canadian Special Operations Regiment, Canadian Forces Base Petawawa, employed as a Special Forces Operator, holding the rank of Corporal.

2. The defence admits the identity of the accused, thereby dispensing with the requirement for the prosecution to prove this element with respect to the charges.

3. The defence admits the date, time, place and jurisdiction, of the offences particularized on the charge sheet thereby dispensing with the requirement for the prosecution to prove these elements with respect to the charges.

4. The defence admits that Corporal Cadieux had contact of a sexual nature with the complainant, R.S, thereby dispensing with the requirement for the prosecution to prove this element of the first charge on the charge sheet, being the sexual assault charge.

5. The defence admits the photographs of the overhead view of the camp as well as “Bugnet” attached as Appendix 1 and Appendix 2 are accurate representations, dispensing with the requirement for the prosecution to call witnesses to testify as to their accuracy and authenticity.”

[8] Corporal Cadieux and the complainant were both members of the Canadian Special Operations Regiment (CSOR) when they participated in an exercise in Jamaica in November 2015 called TROPICAL DAGGER. It was a mentoring training mission led by the Canadian Armed Forces (CAF) component and involving forces members from Jamaica and Belize.

[9] An alcohol policy was implemented for the exercise, which did not authorize the consumption of alcohol. In addition, through a briefing to the CAF participants, the components of Operation HONOUR were reiterated in order to prevent harmful and inappropriate sexual behaviour throughout the exercise.

[10] At the end of that exercise, the chain of command had scheduled a BBQ night followed by a full day of activities in the area, in order to allow members to decompress and relax before returning to Canada.

[11] During that special period of time, the consumption of alcohol was authorized, contrary to the exercise during which no consumption of alcohol was permitted. However, members had to find and buy their own alcohol.

[12] So, on the evening of 27 November 2015, water buffalo was served for the BBQ and drinking of alcohol started. As illustrated by Corporal Cadieux himself, some people bought alcohol locally, such as beer and rum, at their own expense, and shared it with other people on camp.

[13] Essentially, there was no limit on consumption of alcohol. In essence, the chain of command relied on the common sense of people to not get drunk to the extent that people injured themselves or others or have inappropriate interaction with others. It was identified as being the “big boy rule” during the trial.

[14] Later that evening, a bonfire was made between the kitchen and the tents. There was a good atmosphere. People were drinking and partying. Quite a number of people got drunk but no incident occurred. The night slowly came to an end between midnight and 1:30 a.m., where people went to bed in their tents.

[15] Corporal Cadieux admitted that he had a significant quantity of alcohol on that night. The complainant also told the Court that she had many drinks and went to bed before being too drunk.

[16] It is during that specific period of time where Corporal Cadieux went to the female-only tent. He knocked on the door and Master Corporal Hebert, one of the females in the tent, answered. Corporal Cadieux asked if the complainant was in the tent, which was confirmed by Master Corporal Hebert. He then explained to her that he wanted to wake up the complainant to invite her to continue to party with him.

[17] It appears that the complainant was sleeping in her sleeping bag under an unzipped bug net. The accused called the complainant’s name to wake her up. Then,

according to Master Corporal Hebert, a sloppy kiss started between the accused and the complainant.

[18] Corporal Cadieux told the court that he kneeled beside the complainant and after he called her name, she took him by the back of his head, pulled it and started to kiss him. He told the court that he reciprocated that kiss up to the time she called him "Steve", he then told her that it was not Steve, it was Simon. The complainant then started to tell him to stop and pushed him out. He stood up and left the tent. He heard Master Corporal Hebert telling them to stop before waking up people in the tent.

[19] According to the complainant, she was woken up by a stable hand in her pants, on her pelvic area, while she was sleeping. She opened her eyes and saw the accused. She pushed him off and told him to stop. Corporal Cadieux got up and laughed. He told her that it was not Steve, it was Simon. He then left the tent and closed the door. She was in shock because she did not know why such a thing happened and because she never consented it happening.

[20] According to Master Corporal Hebert, she kicked him out of the tent when she heard the complainant telling him to stop. She heard him laughing with his buddies outside the tent after.

[21] The complainant put her sleeping bag on her head and tried to sleep, but she did not sleep much.

[22] On the morning, she saw the accused again in her tent. He was looking for food. He appeared to her as being drunk. He was taken out of the tent by Corporal Mitchell after being told by Warrant Officer Moureau to get out of her tent. Once outside, Corporal Cadieux apologized to Warrant Officer Moureau for his behaviour.

[23] The accused was seen after in the bus heading to Sandals Resort. He took the driver's seat while waiting and pushed the horn. He was also asking to others for food. Warrant Officer Moureau still had an eye on Corporal Cadieux. For him, the accused seemed intoxicated or hung-over, but manageable. He took from him a bottle of alcohol. The bus departed for the resort but came back with everyone in it because that activity was cancelled. While people were making other plans for the day, Warrant Officer Moureau ordered the accused to go to his tent and sleep. Corporal Cadieux was upset but complied with the order. However, he has shown the intent to take a vehicle in order to do so. Warrant Officer Moureau took the key away from him and told him to go to his tent by foot.

[24] It is some time after, in January 2016, once back in Canada, that the complainant made her complaint about what happened with Corporal Cadieux.

[25] The investigation took place, a charge was laid and charges were preferred by the prosecution in December 2016.

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

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

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

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

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

[31] 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 Corporal Cadieux 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 Corporal Cadieux and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

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

[33] Reasonable doubt applies to the issue of credibility. On any given point, the court may believe a witness, disbelieve a witness, or not be able to decide. The Court needs not fully believe or disbelieve one witness or a group of witnesses. If this Court

has a reasonable doubt about Corporal Cadieux's guilt arising from the credibility of the witnesses, then it must find him not guilty.

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

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

[36] This test was enunciated mainly to avoid for the trier of facts to proceed by establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word for word as some sort of incantation. The pitfall that this court must avoid is to be in a situation as appearing, or in reality, to choose between two versions in its analysis, as stated by the Supreme Court of Canada in its decision of *R. v. Vuradin*, 2013 SCC 38, at paragraph 21.

[37] Of course, if the Court believes the testimony of Corporal Cadieux that he did not commit any offence charged, the Court must find him not guilty of it.

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

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

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

[41] Corporal Cadieux is charged with sexual assault. Paragraph 271(a) of the *Criminal Code* reads, in part, as follows:

271. Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term of not more than 10 years . . .

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

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

[43] Paragraph 265(1)(a) of the *Criminal Code* 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;

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

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

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

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

[48] The *mens rea* is the intention to touch and knowing that the complainant did not consent to the force applied.

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

[50] The prosecution also had to prove the following additional elements about the offence of sexual assault:

- (a) that Corporal Cadieux applied force against the complainant;
- (b) that he applied intentionally the force against the complainant;

- (c) that the complainant did not consent to the force he applied;
- (d) that he knew that the complainant did not consent to the force that he applied; and
- (e) that the force that he applied took place in circumstances of a sexual nature.

[51] Corporal Cadieux is also charged with drunkenness contrary to section 97 of the *National Defence Act*, which reads as follows:

**97 (1)** Drunkenness is an offence and every person convicted thereof is liable to imprisonment for less than two years or to less punishment, except that, where the offence is committed by a non-commissioned member who is not on active service or on duty or who has not been warned for duty, no punishment of imprisonment, and no punishment of detention for a term in excess of ninety days, shall be imposed.

**(2)** For the purposes of subsection (1), the offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug,

**(a)** is unfit to be entrusted with any duty that the person is or may be required to perform; or

**(b)** behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[52] With respect to this charge, the prosecution thus had to prove, in addition to the usual essential element to be proven for both charges, that:

- (a) Corporal Cadieux was owing to the influence of alcohol or drug; and
- (b) Corporal Cadieux was unfit to be entrusted with any duty that he was or may be required to perform or he behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[53] About the sexual assault, the accused admitted many essential elements of the offence, dispensing with the requirement for the prosecution to prove the identity, the date, the place and that the contacts made by him on the complainant were of a sexual nature.

[54] The Court concludes that the prosecution has proved beyond a reasonable doubt the following essential elements of the offence of sexual assault: the identity, the date, the place and that the contacts made by him on the complainant were of a sexual nature.

[55] Then the Court is left with the determination of the following essential elements of the offence to be proven by the prosecution beyond a reasonable doubt:

- (a) that Corporal Cadieux applied force against the complainant;



- (b) that he applied intentionally the force against the complainant;
- (c) that the complainant did not consent to the force he applied; and
- (d) that he knew that the complainant did not consent to the force that he applied.

[56] After having heard all witnesses, it does appear to the Court that none of them must be disbelieved. The matter before the Court is not one related to the credibility or reliability of witnesses, but to determine if the evidence provided by the witnesses is sufficient to prove beyond a reasonable doubt all essential elements of the offence.

[57] Corporal Cadieux appeared to the Court as straightforward and with nothing to hide. He clearly described the incident, which was surprising for him.

[58] The same could be said for the complainant. She was right to be shocked by what happened. Her story was straightforward and the Court believed her when she said that she never consented to any of the act made by the accused.

[59] Master Corporal Hebert, as an eyewitness, just confirmed how things unfolded and did not appear as taking any side. She limited her testimony to what she saw, heard and was able to remember.

[60] The incident occurred in a context where the eyewitness, the complainant and the accused drank alcohol on the night of the incident. They all told the Court that they drank alcohol but were able to function to a certain level.

[61] Clearly, on that night, the way to perceive things was influenced to a certain extent by their consumption of alcohol. However, they all told the Court that they were able to recall enough, considering that what happened was unusual.

[62] Based on their testimony, the morning after, they all had a hangover, as many other members who drank on that night, which confirmed that they drank a serious quantity of alcohol the night before. However, to what extent and in what way it impacted on their respective capacity to perceive things and to remember is difficult to say. As a matter of fact the evidence is sufficient to conclude that alcohol had an impact on them. However, they were able to report to the Court what they consider being the essence of what occurred on that night.

[63] The complainant was woken up by the fact that she was touched in a specific area by the accused. It is possible that something happened with the accused before that, considering the consumption of alcohol and the possible impact it could have on her sleep and her capacity to wake up. She noticed and heard the accused referring to the fact that it was not Steve but Simon, but was unable to tell the Court for what reason he said that, confirming that something may have taken place before being awake without

noticing it. She agreed that she may have mumbled something that called for such comment by the accused, but she honestly does not know for sure.

[64] The account of the incident made by Master Corporal Hebert gave credibility and reliability to the one made by the complainant and the accused.

[65] About the hand on the complainant, the Court is of the opinion that, given the testimony of the accused, it is possible that he put his hand on her in order to keep his balance. He may have also put his hand on her with some other intent, however, his testimony raised a reasonable doubt and, consequently, this aspect of the facts has not been proven beyond a reasonable doubt by the prosecution. Then, the Court is not considering this fact as being proof that the accused applied force intentionally against the complainant.

[66] However, the accused told the Court that he reciprocated to her kiss. The Court concludes that Corporal Cadieux applied force against the complainant and that he applied the force intentionally.

[67] Also, the Court concludes that the complainant did not consent to that use of force against her by the accused. She was clearly not awake and could not consent to such use of force.

[68] However, the testimony of Corporal Cadieux is sufficient to raise a reasonable doubt about the fact that he did not know that the complainant did not consent to the force that he applied.

[69] Corporal Cadieux went to the tent without showing any intent to kiss the complainant or to do anything else of a sexual nature, which is a noticeable difference with the case law presented and discussed by the prosecution in court. He just wanted to invite her to continue to party. When he was kissed by her, he applied some force when he kissed her back, thinking that she consented. When he realized that she thought he was somebody else and she asked him to stop, he stopped, stood up and left, reflecting the fact that he did care about her intent to consent or not. For the Court, it is sufficient to conclude that there is a reasonable doubt about this essential element of the offence.

[70] Clearly, he never had the intention to kiss her when he entered in the tent or when he approached her. She initiated the kiss and he subjectively believed that she consented to kiss him. Once told to stop, he never insisted. To the contrary, he put to her that she made a mistake and he left. In addition, his belief was reasonable in the circumstances. For the Court, the prosecution failed to prove that the accused had the requisite *mens rea* in order to prove the offence of sexual assault beyond a reasonable doubt.

[71] Considering my conclusion on this essential element of the offence, I do not consider necessary to discuss the defence raised by the accused about an honest but mistaken belief in consent. However, the Court would like to point out the fact that

there was an air of reality for considering such defence, considering that the facts established a possible confusion by the complainant about the identity of the person she kissed.

[72] Then, it is the conclusion of the Court that, considering the evidence as a whole, the prosecution has not proven beyond a reasonable doubt all essential elements of the offence of sexual assault.

[73] Now, about the offence of drunkenness, Corporal Cadieux admitted some essential elements of that offence, dispensing with the requirement for the prosecution to prove them beyond a reasonable doubt. Those essential elements are the identity, the date and place.

[74] Considering the conclusion of the Court about the sexual assault charge, then the Court will consider only the facts on the morning after this incident as being relevant evidence for this charge of drunkenness.

[75] In such context, the Court is of the opinion that the prosecution failed to prove beyond a reasonable doubt, the two other essential elements of the offence of drunkenness.

[76] First, it is possible that the accused was owing to the influence of alcohol. However, it is not clear if it was because he consumed alcohol or simply because he had a hangover as many other members on that morning. Even Warrant Officer Moureau could not tell clearly for what reason Corporal Cadieux had such disturbing behaviour on that morning. There is also no conclusive evidence of when was the last time he consumed alcohol and if he did so on that morning.

[77] The Court concludes that the prosecution has not proven beyond a reasonable doubt this essential element of the offence.

[78] As expressed by Pelletier MJ in *R. v. Sloan*, 2014 CM 4004:

The offence of drunkenness is not aimed at sanctioning the consumption of alcohol or a drug. It is meant to address fitness for duty or behaviour that is disorderly or discredits Her Majesty's service.

[79] The expressions “behaving in a disorderly manner” and “discredits on Her Majesty’s service” are undefined in the provision. As mentioned at article 1.04 of the *Queen’s Regulations and Orders for the Canadian Forces (QR&O)*, words “shall be construed according to the common approved meaning given in the *Concise Oxford Dictionary*”. Then, the word “disorderly” means acting in a way that contributes to a breakdown in peaceful behaviour, and the word “discredit” means harm to the good reputation of Her Majesty’s service.

[80] The prosecution established through the evidence presented that Corporal Cadieux had some kind of disturbing behaviour by going to the female tent to request

food or to act as he did in the bus before departing for Sandals Resort. However, he was manageable, as said by Warrant Officer Moureau. Once the latter considered it could become difficult to handle the behaviour of Corporal Cadieux, he sent him to his tent in order for him to rest.

[81] Nothing in the evidence would support a finding that Corporal Cadieux behaved in a disorderly manner on that morning or that he harmed the reputation of Her Majesty's service. There is no evidence that was adduced before the Court that would lead it to conclude beyond a reasonable doubt to the existence of a breakdown in peaceful behaviour or of harming the good reputation of Her Majesty's service.

[82] Then, it is the conclusion of the Court, considering the evidence as a whole, that the prosecution has not proved beyond a reasonable doubt the offence of drunkenness.

**FOR THESE REASONS, THE COURT:**

[83] **FINDS** Corporal Cadieux not guilty of sexual assault on the first charge, and not guilty of drunkenness on the second charge.

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**Counsel:**

The Director of Military Prosecutions as represented by Major C. Walsh and Captain L.L. Scantlebury

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