



COURT MARTIAL

Citation: *R. v. Gibbons*, 2018 CM 4002

Date: 20180117

Docket: 201753

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal C.C. Gibbons, Accused

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

REASONS FOR FINDING

Introduction

[1] Corporal Gibbons is facing one charge under section 129 of the *National Defence Act (NDA)*, as a result of his alleged actions as a student on a Developmental Period (DP)-2 course in the summer of 2016 at Canadian Forces Base (CFB) Borden in relation to a fellow student. The charge alleges that between 14 July and 22 August 2016, he harassed Corporal Mann contrary to Defence Administrative Orders and Directives (DAOD) 5012-0, Harassment Prevention and Resolution, such conduct constituting conduct to the prejudice of good order and discipline.

[2] It is understood that Corporal Gibbons is now retired from the Canadian Armed Forces (CAF). Yet, for the purpose of the Code of Service Discipline, he is deemed to have the same status and rank that he held immediately prior to his retirement by virtue of section 60(3) of the *NDA*. Consequently, I have addressed the accused as Corporal Gibbons throughout this trial and will continue to do so in these reasons.

Evidence

[3] The Prosecution called five witnesses to prove its case: Corporal Mann, three other students on the course, namely Corporals Donovan, Doerksen and Hasson and the course supervising officer (CSO), Sergeant Jalbert. In addition, the prosecution introduced the following documents as exhibits:

- (a) the version of DAOD 5012-0, which was in force at the time of the events in the summer of 2016;
- (b) a document entitled Policy Adherence Certification, signed by Corporal Gibbons on 20 July 2016, early in the DP-2 Course, to the effect that he was made aware of – and provided adequate access to - a number of documents including the policy on harassment at DAOD 5012-0; and
- (c) a transcript of text messages exchanged between Sergeant Jalbert and Corporal Doerksen on 9 August 2016, following a complaint made by Corporal Mann after some of his effects had been tampered with in his room.

[4] For its part, the defence called four witnesses. Master Corporal Dexter and Sergeant Ferland, the two instructors who had direct interaction with the approximately 10 students in the early portion of the course testified, followed by two other students, Corporals Cooper and Palmateer.

[5] The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence (MRE)*.

Issues

[6] The *viva voce* evidence heard in the course of this trial included the narrative of four incidents involving Corporal Mann, three of which pertain to damages caused to his personal property which made him feel targeted during the DP-2 course. These involved: first, an occasion when someone during the night or early in the morning urinated on components of a game console he used in his room, causing irreparable damage; second, Corporal Mann described a physical altercation with Corporal Wiggan, a member of the course; third, Corporal Mann described an incident where the lock on the closet in his room was glued shut, as well as a deodorant and a protein container located in that closet; finally, Corporal Mann described an incident involving the paint being scratched on the side of his car, likely by an individual using a key. Both parties agree that the responsibility for these events cannot be assigned to the accused, Corporal Gibbons. However, they submit that these occurrences provide context to other events that transpired impacting those present on the DP-2 course in the summer of 2016. For instance, the testimony unequivocally reveals that immediately upon finding his closet glued, Corporal Mann attended Corporal Gibbons' room and engaged in an angry

exchange, accusing Corporal Gibbons, in the presence of several course mates who were playing videogames, of being the perpetrator.

[7] Acknowledging this context, both parties identified the issue in this case as being whether or not it has been proven beyond a reasonable doubt that Corporal Gibbons verbally harassed Corporal Mann between 14 July and 22 August 2016. These reasons will summarize and analyze the evidence in addressing this issue.

The facts

[8] Those who testified provided some background on the DP-2 course held in the summer of 2016 at the Royal Canadian Electrical and Mechanical Engineers (RCEME) School on CFB Borden. All the students on that course were Electronic-Optronics Technicians (EO TECH). Most had joined the CAF in the same period of time and had undergone successive phases of training at the same time, albeit not all at the same places as it pertains to training that is not occupation specific. They were in the process of completing the apprenticeship phase, the Qualification Level (QL) 5 course, after two years of on-the-job training following the QL3 or DP-1 course completed in September 2014, also in Borden. The DP-2 course was made up of approximately 10 candidates who were no stranger to each other when the course started around mid-July 2016 as most have done their DP-1 course together earlier. Most were in their early to mid-twenties at the time of the course.

[9] Corporal Mann testified first. He described his career progression and current posting in Gagetown. The DP-2 course was very hands-on, with about 30 to 40 percent of the time spent in the classroom, the rest being made up of work on the equipment. All students were housed and fed on base, sleeping two per room located next to each other on one floor of a barrack block on base.

[10] Corporal Mann described what he considered to be the three main incidents involving him in the course, namely, the urine on his game console equipment, the physical altercation with Corporal Wiggan, and the gluing of his closet. He then spoke about his relationship with Corporal Gibbons, mentioning that they first met on the ten-month DP-1 course in 2014 but never worked together outside of training on DP-1 and DP-2 courses. He said that on the DP-2 course they did not get along, as Corporal Gibbons was belittling him on a daily basis to the effect that he was doing a “shit job”, was “a fag”, was “sucking cocks” and should not be in the army. He said Corporal Gibbons made some sort of derogatory comments to him on a daily basis although they tended to avoid each other and have had to work together only once or twice during the DP-2 course, at the beginning. That was not new: similar comments were made to him by Corporal Gibbons during DP-1 two years earlier. Asked by the prosecutor to focus on the DP-2 course and provide details, Corporal Mann testified that he could not remember exactly what was said but that the manner of speaking was harsh, dismissive of him and, from his point of view, was intended to cause him distress. On being asked how he felt about being called a “fag”, he mentioned that it was Corporal Gibbons’ way to diminish him in some way. Corporal Mann mentioned that his course mates would

certainly have heard the comments made by Corporal Gibbons, which occurred mainly at the location of the course as he avoided Corporal Gibbons otherwise. He thought his course mates did not want anything to do with the issue. None of them reacted when remarks were made except on one occasion when Corporal Doerksen appeared to twitch at a “fag” remark made by Corporal Gibbons when they were at the Light Armoured Vehicle (LAV) maintenance facility.

[11] Corporal Mann testified the negative comments towards him stopped at a time when a unit disciplinary investigation (UDI) looking into how he had been treated had commenced, presuming that Corporal Gibbons must have felt he had less leeway than he had before. Following the damage done to his car, Corporal Mann was moved to a different floor than his course mates in barracks. He said that it made him feel lonely and ostracized. He said that he tried to put up with Corporal Gibbons’ behaviour for a while but at one point felt too distressed and went to the course staff to complain.

[12] In cross-examination, Corporal Mann acknowledged that despite having reviewed before testifying the numerous statements he had made in August and September 2016, he was having difficulties remembering details of what occurred, especially dates. He corrected statements made in direct examination as it pertains to the month and year of the DP-1 and DP-2 courses as well as the date that the damage on his car was caused, in September, not August. He was confronted with a statement he had made in September 2016 to the effect that the alleged harassment had occurred mainly at the mess hall or at barracks away from the staff, which contradicted what he had said in direct examination to the effect that the remarks constituting harassment were made mainly in the classroom environment. He stated that he was mistaken in his earlier testimony and that what he had included in the earlier statement must more closely reflect the truth as it was made closer in time to the time of the events. Corporal Mann acknowledged not liking Corporal Gibbons and agreed that he had said to others on the DP-1 course that he hated Corporal Gibbons. Confronted with the suggestion that he had said to others that he wanted Corporal Gibbons kicked out of the army, Corporal Mann did not remember saying these words. In relation to his statement to the effect that he tried to put up with the comments until he felt it was too much and went to the staff, it was suggested to Corporal Mann that he went to the staff to complain immediately after the glue incident and then did not mention the comments by Corporal Gibbons. He reiterated that both the glue and comments were the tipping point for him, which led him to complain to the staff.

[13] Corporal Donovan was the second witness called for the prosecution. He was Corporal Gibbons’ roommate during the DP-2 course. His recollection of events was limited but he did mention that Corporals Gibbons and Mann did not get along at all and that their interaction was at times openly unfriendly, albeit professional, Corporal Gibbons plainly and simply asking Corporal Mann not to be around him. He mentioned that Corporal Gibbons also made remarks of a more personal nature, not speaking directly to Corporal Mann but dialoguing in an unfriendly manner and had used at times the word “fag”. Corporal Donovan had difficulties describing with any precision the interactions, other than to say it was unfriendly and the product of someone who is

either homophobic or who does not realize the impact of words. He said that he was told by Corporal Gibbons not to hang around with Corporal Mann, that it was a bad idea. Corporal Donovan testified that he thought this was a fair comment given that Corporal Mann was seen as a detrimental influence in the group. However, he kept interacting with Corporal Mann as he did not want to make an enemy.

[14] On cross-examination, Corporal Donovan said many pranks were made during the DP-2 course and added that he found them funny. He said there was name-calling and cursing, which may include the word “fag”, not to refer to a homosexual but in a humorous way. He said that harsh remarks relating to jobs and tasks had the positive effect of encouraging him and others to do better. He heard Corporal Mann say during DP-1 that he hated Corporal Gibbons. Also, Corporal Mann confided to him that he wanted Corporal Gibbons taken off the course and expelled from the CAF. He was of the view that Corporal Mann was trying to portray himself as a victim and trying to use the system to his advantage, adding that at the time of the investigation his perception of events was influenced by his emotional state which made him perceive matters as worse than they were, especially that pressure was, in his view, placed on him and others to provide evidence incriminating Corporal Gibbons.

[15] Sergeant Jalbert testified third. He was the CSO on the DP-2 Course in July 2016. He described what his functions entailed, including taking care of disciplinary and administrative matters involving students. He described the briefings provided early in the course and introduced the Policy Adherence Certification, signed by all of the students to confirm they were made aware of – and provided adequate access to – a number of documents including the policy on harassment. In relation to the gluing incident, Sergeant Jalbert mentioned that one evening while at home he received a phone call from Corporal Mann complaining about his stuff having been tampered with. His reaction was to text Corporal Doerksen, another student on the course, essentially to seek his involvement in putting a stop to ongoing pranks being done by his course mates and passing the word on to them that he is “pissed and would consider further action if it does not stop”. He produced a transcription of the text messages exchanged. Despite mentioning a number of potential actions in his text messages to Corporal Doerksen, Sergeant Jalbert did not take action personally. He delegated follow-up action to Master Corporal Dexter. He had liaisons and discussions sometime later concerning the state of a unit disciplinary investigation (UDI) which had been undertaken and was conducted by a senior non-commissioned officer outside of the course’s chain of command.

[16] On cross-examination, Sergeant Jalbert said he could not recall if Corporal Mann had mentioned to him on 9 August 2016 that he was subjected to improper comments. However, he acknowledged that nothing about improper comments was mentioned in the text exchange he subsequently had with Corporal Doerksen. He admitted on the basis of his text exchange that a certain level of banter was expected in a course but that it became an issue if it was out of control or no longer mutual. He stated that if instructors were aware of improper language between students they were expected to report that to him. No reports were made to that effect.

[17] The prosecution's fourth witness was Corporal Doerksen. At the time of the DP-2 course he was almost 30 years old, having served in the artillery as a master-bombardier before becoming EO TECH in 2013. For that reason and in consideration of his privileged relationship with Sergeant Jalbert, he was nicknamed the "course dad". He testified about the incidents involving damages to the property of Corporal Mann, expressing disappointment that his course mates would behave that way. He was shown the transcription of his text message exchange of 9 August 2016 with Sergeant Jalbert and commented on some of the entries, especially as it pertains to his observations that Corporal Mann was not having fun. He said that Corporal Mann was comfortable speaking to him and had told him he was uneasy with course mates playing pranks and using harsh words towards him, especially Corporal Gibbons. Corporal Doerksen testified having told Corporal Gibbons to be careful about his language, towards the end of the DP-1 course and twice during the DP-2 course, to no avail. When asked to provide examples and details about instances of verbal abuse by Corporal Gibbons, Corporal Doerksen was unable to provide much detail, although he did mention two events in particular. The first was early in the course. Corporal Mann was known to have a strong body odour. When Corporal Gibbons went to sit near him in the back row of the class, he said, "It smells like something died in here." Many laughed at the remark and Corporal Doerksen thought those words were funny in the circumstances. The second occasion was qualified as more serious. Although Corporal Doerksen admitted having no recollection of the details of what was said exactly, he remembered Corporal Mann mentioning that he enjoyed a certain off-beat activity. Shortly thereafter he said he heard a remark by Corporal Gibbons to the effect that "only fags would like things like that" or words to that effect.

[18] Corporal Doerksen said that the group was very much divided with a dominant clique headed by Corporal Gibbons, which he found unfortunate because, as much as Corporal Mann was different in many ways, he was entirely manageable as a member of a team.

[19] In cross-examination, Corporal Doerksen admitted warning Corporal Gibbons to be careful about Corporal Mann as he was a bit whiney and could turn against him. He agreed that Corporal Mann had told him that his aim was to get Corporal Gibbons thrown out of the army. He did acknowledge that Corporals Mann and Gibbons clearly did not get along but he did not remember actually hearing Corporal Mann say he hated Corporal Gibbons. He acknowledged being put in an awkward position by the extra load placed on him by Sergeant Jalbert as he really was not one of the guys and felt some pressure for failures in behaviour within the group. In relation to a statement given on 26 September 2016, Corporal Doerksen acknowledged hearing Corporal Mann confide to him two days earlier that "Gibbons is fucked now", in reference to the ongoing harassment case. Corporal Doerksen wrote in that statement and confirmed in his testimony that, in his opinion, Corporal Mann was making it his mission to get Corporal Gibbons in trouble and out of the military.

[20] Corporal Hasson was the fifth and last witness for the prosecution. He was Corporal Mann's roommate during the DP-2 course, although his interaction with him was minimal as Corporal Mann was not the kind of guy he would hang out with. He confirmed that Corporals Mann and Gibbons did not get along and interacted strictly when necessary for the purpose of the course. He remembered one instance when Corporal Mann was told by Corporal Gibbons, "Unless it is strictly related to the course, don't talk to me." He said Corporal Gibbons never said anything to him about Corporal Mann but that Corporal Mann said to him of Corporal Gibbons during DP-2, "I fucking hate him, I'm gonna get him kicked out of the military one time." On cross-examination, Corporal Hasson testified that following the start of the unit disciplinary investigation (UDI), direction was given to Corporals Gibbons and Mann to stay away from each other and not interact. Yet he observed Corporal Mann forcing interaction, for instance by sitting at a table in the mess hall next to Corporal Gibbons, which caused the latter to move away, sometimes with other course mates. He said that Corporal Gibbons parked away from Corporal Mann's car, only to find Corporal Mann's car next to his the next day. He said he never witnessed Corporal Gibbons harassing anyone.

[21] The defence called both Master Corporal Dexter and Sergeant Ferland. They were the instructors for the early part of the DP-2 course in July 2016. Master Corporal Dexter received the initial formal complaint from Corporal Mann in relation to the glue incident, a task delegated by Sergeant Jalbert. There was no mention of any inappropriate language used by Corporal Gibbons in that complaint. Both instructors testified to the effect that even if there was some swearing going on at times, they did not witness any abusive language between students, although it may have occurred outside of their presence. Sergeant Ferland said he expected course members to work and help each other as this is how it is done in the military.

[22] Corporals Cooper and Palmeteer also testified for the defence by videolink from Gagetown and Edmonton respectively. Corporal Cooper was Corporal Mann's roommate on DP-1 and recalls Corporal Mann stating that he hated Corporal Gibbons. In relation to the damage done to Corporal Mann's car, Corporal Cooper testified that Corporal Mann was very upset and wanted to get physical with Corporal Gibbons, who was not present on base, having left for Owen Sound. A mention was made by Corporal Mann about having Corporal Gibbons kicked out of the course for what he had done to his car. Both Corporals Cooper and Palmeteer acknowledged the absence of a relationship between Corporals Mann and Gibbons and the fact they were trying to stay away from each other. Corporal Cooper also mentioned the kind of comments that would be made from time to time. When mistakes were made by one or another, words such as "you really fucked up" were frequent. Yet, in his view, these words were not offensive: he saw them as an invitation to do better and never thought such comments could constitute harassment.

The assessment of the evidence

The proper frame of analysis

[23] The role of this court is not to make a general judgement on the performance or character of Corporal Gibbons or anyone else who is referred to in the narrative provided by various witnesses but to come to findings by analyzing the actions of the accused in light of the charge before me, no less and no more.

Presumption of innocence and proof beyond a reasonable doubt

[24] In this frame of mind as it relates to the charge, it is important to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, two notions fundamental to findings for Code of Service Discipline and criminal trials.

[25] 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.

[26] 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.

[27] 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 Gibbons 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 Corporal Gibbons and find him not guilty because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

The assessment of credibility

[28] As recognized by counsel, the Court cannot come to conclusions as to guilt in this case without analyzing the credibility of witnesses. Indeed, the defence submits that the conduct described by Corporal Mann did not occur or, alternatively, did not rise to the level of gravity required to constitute harassment. Consequently, the finding I have to make on the charge will depend on the manner in which the evidence of Corporal Mann is assessed, in light of the rest of the evidence.

[29] The assessment of credibility turns on a myriad of considerations, some personal to the trial judge's impressions born from experience, logic and an intuitive sense of the matter. The Supreme Court of Canada (SCC) said in *R. v. R.E.M.*, 2008 SCC 51 that "it may be difficult for a trial judge 'to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.'" Indeed, "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization."

[30] I will assess the evidence by looking first at reliability, specifically contradictions or corroboration by other evidence which may reveal defects in the witness's ability to perceive, recall or communicate the evidence. I will also be evaluating credibility by paying attention to any internal inconsistencies in the witness's account of events and by the presence of or any lack of consistency in a witness's account over time which may be considered to impeach credibility, but generally not to bolster it. I will assess external consistency with other evidence and the inherent plausibility of the witness's account, including any motive to lie or lack thereof. Finally, I will consider a witness's demeanour while giving testimony and endeavour to apply the same level of scrutiny to the evidence of all witnesses. Most importantly, I will resist instinct and emotion in favour of reason and dispassionate analysis.

[31] In arriving at credibility findings, I must keep in mind that I 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 understood, 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. Reasonable doubt applies to the issue of credibility. If this Court has a reasonable doubt about Corporal Gibbons' guilt arising from the credibility of the witnesses, then it must find him not guilty.

Analysis

The credibility and reliability of witnesses

[32] I find that Corporal Mann testified in a straightforward manner, despite being nervous. He admitted when his memory would not allow reaching firm conclusions and conceded matters in cross-examination that would appear to diminish the strength of his position as the complainant, especially as it pertained to having said that he hated Corporal Gibbons. However, I have concerns about the reliability of his testimony as it pertains to details. He had to be reminded of the months and dates of his trade courses. He also had to acknowledge a significant inconsistency in his testimony as it pertains to the occasions when and where improper comments were directed to him: he initially testified that comments were made in the class environment, offering as explanation the

fact that he did not interact with Corporal Gibbons away from the course, while in a statement filed shortly after the events, he had complained that the incidents occurred outside of class, where staff could not witness them.

[33] I am especially troubled by Corporal Mann's difficulties in providing any details about specific instances of when the words or expressions he complained of would have been uttered. The only occasion that was finally described with some detail was in reference to questions about how course mates reacted to what was said by Corporal Gibbons. He then related and described an occasion when he witnessed Corporal Doerksen react.

[34] I am also concerned about the plausibility of what he said about daily instances of verbal abuse directed at him, referring to statements such as "you are doing a shit job", "you suck cocks" and "you should not be in the army" given that no member of the class who testified was ready to provide details of how such words were spoken in an abusing way, with the notable exception of Corporal Doerksen who testified hearing Corporal Gibbons say "Only fags like stuff like that" and Corporal Donovan who heard the word "fag" being spoken unkindly but was unable to provide any reliable detail about the precise context. Corporal Mann appeared to explain his incapacity to provide details on specific instances of abusive statements directed at him by Corporal Gibbons by stating that those were so frequent that it became something that did not print in his memory. It is difficult for me then to comprehend, especially after seeing members of the course and staff testify before me, that none of them had the decency to report this abusive language or testify about it in this trial, if it happened so frequently. Consequently, I have plausibility concerns about Corporal Mann's account of the frequency of Corporal Gibbons' recourse to abusive language. Corporal Mann's testimony may reveal some exaggeration. This concern is compounded by the evidence suggesting that Corporal Mann had stated, on numerous occasions, not only that he hated Corporal Gibbons but also that he would get him kicked out of the course and the CAF. This is an indication of a motive to lie in the course of the investigation and at trial when one may well feel compelled to carry on with the version adopted earlier.

[35] As a consequence, I have developed significant doubt about the credibility of Corporal Mann and I feel it would be improper to find any essential contested elements of the offence proven on the basis of his testimony alone.

[36] As it pertains to the testimony of other prosecution witnesses, I do feel that they were generally credible. Although they were nervous and challenged by the task of testifying, they did not exaggerate the facts, admitted when their memory would not allow reaching firm conclusions and testified without demonstrating animosity towards the accused. One exception to this assessment would be in relation to Corporal Donovan, who appeared to have the hardest time describing the context for words that he said he heard uttered by Corporal Gibbons. I have to conclude, as the prosecution asked me to do, that he was not credible. I make that assessment on the basis of his numerous evasive answers. He cannot be relied on as it pertains to the evidence against Corporal Gibbons. As for Corporal Doerksen, I found to the contrary that he was highly

credible in stating the things he remembered. He was also very honest in stating what he could not remember, which were many things, as with other prosecution witnesses.

[37] I note that the prosecution's witnesses' task was not easy, as the prosecution's case appears grounded on generalities rather than specific events. It makes the task of witnesses extremely difficult especially more than 18 months after the events.

[38] In terms of credibility of defence witnesses, I have no significant concerns, even if I note that the students who testified appeared to be siding with Corporal Gibbons as they were his friends on the course. Despite that, I have not detected a tendency to voice arbitrary negative comments about Corporal Mann.

The elements of the offences

[39] There is no issue raised as to the sufficiency of the evidence on the elements of identity, time and place for the offence. The elements that are left to be proven beyond a reasonable doubt by the prosecution in relation to the charge as follows:

- (a) the conduct alleged in the charge, namely, that Corporal Gibbons did harass Corporal Mann contrary to DAOD 5012-0;
- (b) the fact that the conduct is conduct to the prejudice of good order and discipline; and
- (c) the required wrongful intent on the part of Corporal Gibbons.

First issue: did Corporal Gibbons harass Corporal Mann?

[40] The question of whether Corporal Gibbons harassed Corporal Mann is to be answered on the basis of the definition of "harassment" as it appeared in DAOD 5012-0 at the time of the alleged offence, a well-known order that applies to all members of the CAF and a directive applicable to civilian employees of the Department of National Defence. That definition requires four things to be proven in order to find harassment on the part of Corporal Gibbons:

- (a) Corporal Gibbons must have manifested an improper conduct;
- (b) that conduct was directed at another person in the workplace;
- (c) the conduct was offensive to another person in the workplace; and
- (d) Corporal Gibbons knew or ought reasonably to have known that the conduct would cause offence or harm.

Position of the parties

[41] The prosecution alleges that the improper comments attributed to Corporal Gibbons in relation to Corporal Mann are sufficient in themselves to conclude that harassment occurred and, therefore, all four elements of the definition of harassment at DAOD 5012-0 are proven. For its part, the defence submits that the accused's conduct has not been proven to the required standard of proof beyond a reasonable doubt and, alternatively, that such conduct was not improper enough to constitute harassment in the circumstances of the case.

Analysis

[42] As stated and for the reasons explained in my findings on the issue of credibility, I have a significant doubt about the credibility of Corporal Mann which prevents me from finding beyond reasonable doubt that any conduct attributed to Corporal Gibbons on the basis of his testimony alone did, in fact, occur. This leaves the two incidents testified about by Corporal Doerksen.

[43] The remarks made by Corporal Gibbons about the smell in the classroom cannot lead to a finding that harassment had occurred. The incident as described by Corporal Doerksen leaves me with a reasonable doubt as to whether the conduct was improper enough to fit the definition of harassment in the circumstances of the course. Furthermore, it cannot be concluded beyond a reasonable doubt on the basis of Corporal Doerksen's testimony that these remarks were directed at Corporal Mann and that they were offensive to him. In the absence of evidence from Corporal Mann on that incident, in the context of this case, I cannot find these remarks constitute harassment.

[44] This leaves the other instance of conduct on the part of Corporal Gibbons that could rise to the level of gravity required to constitute harassment which Corporal Mann alluded to in his testimony and was corroborated in the testimony of Corporal Doerksen. It relates to a discussion when Corporal Mann mentioned enjoying a certain off-beat activity and shortly thereafter a remark was made by Corporal Gibbons to the effect that "only fags like stuff like that".

[45] I do believe that if it is proven to the required standard that this conduct occurred and was directed at Corporal Mann in the workplace, it would meet the other two requirements of being offensive to another person in the workplace and also be the kind of conduct that Corporal Gibbons knew or ought reasonably to have known would cause offence or harm. It may be argued that evidence the word "fag" was uttered by Corporal Gibbons should suffice to conclude that his conduct was deplorable. Yet, even if I agree it is so, my role in this trial is to find whether the specific conduct alleged by the prosecution constitutes harassment and whether that specific conduct has been proven beyond a reasonable doubt. This includes being convinced of what was said and that it was directed at Corporal Mann, even if the words heard may not have been uttered at Corporal Mann directly.

[46] As stated by counsel, the issue is whether the evidence is sufficient to prove the conduct beyond a reasonable doubt. It will be the case if the evidence of Corporal Doerksen, a witness I found credible, convinces me that the conduct occurred, not could have occurred or is likely to have occurred. The standard is high.

[47] To arrive at a conclusion on that issue, I have listened and re-listened to the evidence of Corporal Doerksen. It is worth reproducing this evidence. First in direct examination, as he was being examined by the prosecutor, Major Moorehead:

“Q. Okay, and you said that you told Corporal Gibbons that what he was saying to Corporal Mann was unacceptable. So what was he saying?
A. It’s been too long, sir. I can’t give verbatim answers, simply my emotional feeling at the time. That’s how I felt. There’s nothing that pops up verbatim at all. Yeah—it’s a vague outline of the meaning of the conversation, that’s all I can really give . . .

Q. What was the outline then? A. The one situation of a verbal altercation that pops out the most was inside the classroom in the LAV barn doing LCST. Corporal Mann was talking about something that he liked, which was a little more out of the ordinary than most people. And a couple of minutes later, Corporal Gibbons said something to the term of “Only fags like stuff like that.”

Q. And what did you think Corporal Gibbons meant when he—by that comment? A. Corporal Gibbons disliked Corporal Mann. He made it very apparent and—but he’s cautious with what he said at all times because he would never talk directly to Corporal Mann. He avoided him, he avoided talking to him, but he’d always keep him within ear distance to hear things that were negative comments.

Q. So, who did Corporal Gibbons say this “only fag likes something like that” comment? A. I don’t even think he was directing it towards anybody, sir. I don’t think.

Q. Where was Corporal Mann at the time? A. Probably two tables forwards, on his phone.

Q. Where was the rest of the course at the time? A. I think there was a couple people within the LAV barn and there was probably six of us in the classroom.”

[48] Then in cross-examination, defence counsel touched on this issue as follows, questioned by Major Bolik:

“Q. Now, you told my friend that Corporal Mann was talking about liking something that is a little off-beat. And that a couple of minutes later, Corporal Gibbons said something to the effect of “only fags like that”. Do you recall saying that? A. Yes, sir.

Q. You also mentioned that Corporal Gibbons was on the phone at the time? A. I mentioned that, sir?

Q. It is my recollection. What was Corporal Gibbons doing? A. From my knowledge, sitting at the desk with the rest of us.

Q. But he wasn't talking to Corporal Mann? A. As I stated in my previous things, Corporal Gibbons would never direct any of his comments directly at Corporal Mann. He would make them very apparent that he was directing them towards him, to the rest of the group. We all knew his intent of who he was identifying with his comments.

Q. But you said it was a couple of minutes after you guys had—you and Mann had the conversation. A. The one—which scenario, sir?

Q. About Corporal Mann liking something off-beat. A. Yes.

Q. You were talking to Corporal Mann—a couple of minutes later, that was your testimony . . . A. After that conversation, yes.

Q. A couple of minutes afterwards? A. To my—best of my knowledge, yes.

Q. All right. So Corporal Gibbons could have been commenting about something else that happened in those couple of minutes? A. Absolutely, he could have, sir.

Q. Say again. A. I said absolutely, he could have.”

[49] From this extract of the only testimony I find credible in relation to the conduct alleged, it is apparent that the witness is uncertain first about what was said exactly and second about whether the comment he attributes to Corporal Gibbons was directed to Corporal Mann. That uncertainty was not expressed as a result of being somehow tricked or confused on cross-examination, it was apparent even in direct examination.

[50] As stated, I must decide if I am convinced beyond a reasonable doubt that Corporal Gibbons uttered these words and directed them at Corporal Mann in the workplace. In light of the evidence I just quoted, I remain with a doubt as to these elements and consequently on whether the conduct of Corporal Gibbons constitutes harassment as charged.

Conclusion and disposition

[51] Regardless of how much sympathy I may have for Corporal Mann and how deplorable the words used by Corporal Gibbons may have been, I must find that the prosecution has failed in proving that the conduct of Corporal Gibbons amounted to harassment. Consequently, the charge of conduct to the prejudice of good order and discipline under section 129 of the *NDA* has not been proven beyond reasonable doubt.

FOR THESE REASONS, THE COURT:

FINDS the accused, Corporal Gibbons, not guilty of the only charge for conduct to the prejudice of good order and discipline.

Counsel:

The Director of Military Prosecutions as represented by Major G.J. Moorehead and Lieutenant (N) L.M. Morrison

Major A.H. Bolik, Defence Counsel Services, Counsel for Corporal C.C. Gibbons