



## COURT MARTIAL

**Citation:** *R. v. Oladehinde*, 2019 CM 2016

**Date:** 20190717

**Docket:** 201917

Standing Court Martial

LCol George Taylor Denison III Armoury  
Toronto, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Corporal J. Oladehinde, Accused**

**Before:** Commander S.M. Sukstorf, M.J.

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### **REASONS FOR FINDING**

(Orally)

#### **The case**

[1] Corporal Oladehinde is charged with one offence under section 129 of the *National Defence Act (NDA)*, for conduct to the prejudice of good order and discipline. The particulars of the charge read as follows:

#### **“FIRST CHARGE CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE**

Section 129 NDA      In that he, on or about 3 February 2018, at 4<sup>th</sup> Canadian Division Training Centre, Meaford, ON, did harass Private Manku.”

[2] In reaching the Court’s decision, I reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed

myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on the charge.

**Evidence**

[3] The following evidence was adduced at the court martial:

- (a) In court testimony of the prosecution's witness being that of the complainant, Corporal Manku;
- (b) In court testimony of Corporal Oladehinde (accused) testifying in his own defence;
- (c) In court testimony of Sergeant Xia, defence counsel's second witness;
- (d) Exhibit 1 - Convening order;
- (e) Exhibit 2 - Charge sheet;
- (f) Exhibit 3 - Agreed Statement of Facts;
- (g) The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence (MRE)* as well as Operation HONOUR.

[4] Pursuant to *MRE* paragraph 37(b), the accused, Corporal Oladehinde, made the following admissions for the purpose of dispensing the prosecution from having to prove these facts beyond a reasonable doubt: the identity, date and location of the alleged offence as indicated in the particulars of the charge sheet dated 20 March 2019.

**Background**

[5] In the Statement of Circumstances, filed as Exhibit 3, Corporal J. Oladehinde also admitted that at all material times (2-4 February 2018), he was a member of the Canadian Armed Forces (CAF), serving as a Class B reservist undergoing basic winter warfare training at 4 Canadian Division Training Centre (CDTC) Meaford, Ontario.

[6] Corporal Oladehinde testified that he joined the CAF in December 2015 as an intelligence operator and is currently serving as a Class B reservist. At all material times, the complainant, Corporal Manku was also a Reserve Force member of the CAF, serving in Intelligence Information and Exploitation, undergoing the same basic winter warfare training at CDTC Meaford, Ontario.

[7] Both the accused and the complainant are members of the same unit, being 2 Intelligence Company and attended a field exercise in Meaford on the weekend of 2-4 February 2018. The field exercise was part of a winter warfare course which was the

first and only course that the two took together. The charge before the court emanates from an incident that occurred during this field exercise.

**Operation HONOUR and reasonable doubt**

[8] Operation HONOUR was referred to during the testimony and representations made by counsel. For a number of reasons, most importantly because of the views expressed by the complainant, Corporal Manku, during her testimony, the Court feels it is helpful to clarify Operation HONOUR and its reporting process. Quite frankly, it is a complicated process and not well understood. The balancing of complainants' rights with those of an accused is not an easy task.

[9] When asked to explain how the incident affected her, Corporal Manku stated:

“More than I thought it would. I was pretty fine originally. I felt like a bad thing had happened to me, but it wasn't—it was the actions of an individual, which happens, it's unfortunate, but it happens. But then, there were so many delays, and it went up my chain of command, it went to the MPs, it went back to my unit. It's been a year and half and I've just been sitting and waiting, and I think that has been—it added so much. It wasn't a very big wound to begin with, but it just festered and it has really—not even shaken, it has really ruined my trust in the organization and I just don't feel safe. I don't feel safe in the organization and I don't feel like anyone is looking out for me.”

[10] Sadly, the above comments by Corporal Manku are repeated, in various ways, in almost every case that I have presided over with respect to charges emanating from alleged conduct contrary Operation HONOUR. It is not the incident itself that causes the greatest stress on complainants, but rather it is the effect of reporting it and the complainants' perception of how they are perceived and treated within their unit that complainants find the most stressful.

[11] Firstly, Operation HONOUR provides direction to the chain of command on how it must deal with alleged inappropriate conduct when it is reported. It is imperative that the chain of command and the military police (MP) believe complainants when they report conduct that makes them feel uncomfortable. If victims are not believed, allegations will not be taken seriously and incidents will not be properly investigated. It will often take time for complainants to fully open up to the police, and when an investigation begins, it often becomes clear that there may be other victims or similar incidents that have gone unreported.

[12] The reporting of even minor incidents is important for many reasons. I am going to repeat the message I conveyed in *R. v. Barrieault*, 2019 CM 2014:

[11] ... If you look at our military ethos, it requires courage and bravery. The bravery and the courage you displayed in coming forward shows that you belong in uniform. Your chain of command listened to you and took your concerns seriously. I

heard you [. . .]. We need both men and women who are strong and willing to come forward to report even minor misconduct, so we can become better collectively as an armed force. The serious misconduct is easy to report, as there is no ambiguity. [. . .] Yet, the court also recognizes that these minor incidents are also the most difficult for members to report.

[12] We are trained to be strong and convince ourselves that the minor stuff does not affect us. As an institution we have to accept that it is the small stuff that matters. If we can control it, then the more serious misconduct will be pre-empted. Having said that, not all misconduct is the same and institutional attempts to provide a one size fits all response are counterproductive and serve as a disincentive for anyone to report. Conduct that falls short of being criminal or a violation of the Code of Service Discipline, must still be addressed, but not every transgression should end up in a court martial or lead to the administrative release of a member. We must all be cognizant of the fact that flexibility, discretion and good judgement are all keys to eliminating harmful conduct.

[13] In short, a failure to address even the smallest instance of inappropriate conduct is exactly what threatens and undermines the military ethos, values, norms and ethics expected of every CAF member. If left unchecked, minor misconduct can lead to heightened reprehensible conduct. However, dealing with the small stuff is not easy particularly when there's an institutional attempt to treat everything the same.

[14] In the military justice system, the National Investigation Service or the chain of command lay charges on the basis of "reasonable grounds to believe" that an offence has been committed. Prosecution only proceed to court martial if the case meets the slightly higher standard and the Crown's screening standard being "a reasonable prospect of conviction". These screening processes take time and demand a level of diligence. The prosecution in this case proceeded because Corporal Manku brought a credible complaint forward.

[15] However, in order to support a conviction in a court martial the increased commitment to addressing inappropriate conduct must not detract from the right of the accused to be treated fairly pursuant to the same Canadian criminal law that we all serve to protect.

[16] In other words, notwithstanding what happened at the early stages of an investigation, the decision to lay charges, or with the decision to prosecute, Corporal Oladehinde comes before this Court presumed to be innocent. Consequently, at court martial, the strength of the evidence must go further and the prosecution must establish the elements of the offence to a criminal standard of proof beyond a reasonable doubt.

[17] Testifying at a court martial regarding the conduct that made a complainant feel uncomfortable is the most difficult part. A court martial will be the first time the prosecution's evidence and the complainant's version of events will be challenged. This is done through cross-examination by defence counsel. It also is the first time the accused puts forward his version of events and his own defence. In *R. v. Osolin*, [1993] 4 S.C.R. 595, Cory J. reviewed the relevant authorities and, at page 663, explained the

purpose of cross-examination and the important role it plays in the adversarial process, in the context of a criminal trial.

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence. [References omitted.]

[18] Vigorous cross-examination by the defence is not intended to harass or humiliate a complainant who comes forward. It is a necessary part of the criminal proceedings.

[19] That presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty on the charge before it.

[20] So, what does the expression "beyond a reasonable doubt" mean? The term "beyond a reasonable doubt" is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320, paragraph 39):

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[21] In essence, this means that even if I believe that Corporal Oladehinde is probably guilty or likely guilty, that would not be sufficient. If the prosecution fails to satisfy me of his guilt beyond a reasonable doubt, I must give him the benefit of the doubt and acquit him.

[22] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Corporal Oladehinde guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charges set out in the charge sheet. (see *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, paragraph 242).

### **The charge and elements of the offence**

[23] The charge before the court alleges a violation of section 129 of the *NDA* for conduct to the prejudice of good order and discipline. As stated above, defence counsel has conceded the elements of identity, time and place. Hence, I conclude that they have been met. The elements left to be proven beyond a reasonable doubt for the charge are as follows:

- (a) the conduct alleged in the charge; namely, the accused harassed Corporal Manku;
- (b) the fact that the conduct is prejudicial to the good order and discipline; and
- (c) that the accused had the wrongful intent.

[24] The first issue for this Court to decide is whether the particulars as detailed in the charge were proven beyond a reasonable doubt. The onus is on the prosecution.

[25] The definition of harassment as per Defence Administrative Orders and Directives (DAOD) 5012-0 reads as follows:

**harassment** (*harcèlement*)

Improper conduct by an individual, that is directed at and offensive to another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, marital status, family status, disability, pardoned conviction and conviction for which a record suspension has been ordered). Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual. (Based on the *Policy on Harassment Prevention and Resolution*, Treasury Board)

[26] DAOD 5012-0, identifies the six following criteria in section 3:

- (a) improper conduct by an individual;
- (b) the individual knew or ought reasonably to have known that the conduct would cause offence or harm;
- (c) directed at another individual;

- (d) offensive to that individual;
- (e) was a series of incidents, or one severe incident which had a lasting impact on that individual; and
- (f) occurred in the workplace.

[27] In assessing the criteria of harassment and the admissions made by counsel, the evidence supports the fact that if the alleged incidents occurred they did so in the workplace. Next, under the DAOD, the Court assessed whether the accused knew or ought reasonably to have known that the alleged conduct would cause offence or harm. The prosecution asked the accused if he was aware of the expectations set out in Operation HONOUR and when questioned by the prosecution as to whether he believed that the facts as alleged would be a violation, he agreed.

### **Uncontroversial evidence**

[28] The winter warfare field exercise held at CDTC Meaford, Ontario unfolded without incident, until the evening of 3 February and early morning hours of 4 February 2018. The winter exercise was the practical application of what they had learned in the classroom and included practical exercises on winter first aid, navigation, campsite operations, survival shelter and general winter survival skills. During the exercise portion, each of the sections were required to build a survival shelter.

[29] The complainant, Corporal Manku, testified that she knew Corporal Oladehinde as a co-worker, and that their interactions, before the incident, were minimal, polite and purely on a professional level. Although they were both members of the same unit, there had never been any romantic interest expressed between them.

[30] Corporal Oladehinde similarly testified that he had a cordial and professional relationship with Corporal Manku with minimal interaction. He also admitted that he never had a romantic interest in her.

[31] On the Saturday of the weekend exercise (3 February), one of the tasks was to learn how to construct a temporary shelter to protect oneself if stranded in the winter cold. Corporal Manku described how they constructed the survival shelter. Using a toboggan, they foraged for material in the woods, found long branches that they could pile to create a loose wall. They then, laid a tarp over the wall to provide additional protection against the wind. The task was to learn how to create a temporary shelter to protect oneself from the extreme cold. The shelter was described as having an angled effect, with one side open and three sides closed. The shelter itself was estimated to be about six feet wide and four feet deep. The wider six-foot side served as the entrance. Both Corporals Manku and Oladehinde described the survival shelter as small. Corporal Oladehinde said that it was only about three feet tall so you could not stand up in it.

[32] After the section completed the shelter, the section was challenged to see if they could sleep in the shelter. Unbeknownst to each other, both Corporal Manku and Corporal Oladehinde separately volunteered to spend the night in the shelter. They both wanted to challenge themselves. Inside the small shelter, both of them had their weapons, air mattresses, sleeping and bivi bags. Corporal Manku explained that her rucksack was outside of the shelter, while Corporal Oladehinde explained that his was inside, but his snowshoes were outside, although close to the fire.

[33] Corporal Manku described that around 2220 hours, on the evening of 3 February 2019, both herself and the Corporal Oladehinde went to ground, meaning they prepared to go to sleep in the shelter, which was located in very close proximity, estimated by the witnesses to be about five metres or fifteen feet from the main tent where the other course candidates were staying. Corporal Manku described that she and Corporal Oladehinde discussed how they were going to have to sleep close together to stay warm as that they were afraid that they would fall asleep and freeze to death as it was a very cold and windy night, with temperatures in the -20 Celsius range. She described how they had had a long day and were exhausted so in her view, her main concern was that they would fall asleep, the fire would go out and they would freeze.

[34] Sergeant Xia gave them advice on how to prepare. They were advised that there was a possibility that the fire might go out and that they might need to restart it. He described the preparation and cooperation he observed between Corporals Manku and Oladehinde as collaborative. He told the court that they both came up with ideas on how to reinforce the shelter, such as using their ground sheets to block out the wind.

[35] They both stated that they had discussed the concept of sharing body heat and agreed that they would sleep in separate sleeping bags, but close together. Corporal Manku testified that their plan was to get up periodically to check the fire. The fire was located by the entrance to the shelter. It was estimated by Corporal Manku to be about one square foot. Corporal Oladehinde described that they were sleeping side by side, neck to neck, a few feet apart, lying downwards at the back of the shelter, with feet towards the fire.

[36] In short, they were nestled closely together shoulder to shoulder, on air mattresses, in their separate sleeping and bivi bags, in a shelter that was approximately four feet in width. There was not a lot of space. In addition, inside the shelter, they had their weapons and at least one rucksack. The only source of light was from the fire. Corporal Manku admitted that it was a small cramped shelter and that if you both rolled towards the middle, you would be face to face.

[37] What happens next is where the evidence diverges.

### **Assessing conflicting versions of events**

[38] In the case before me, there are no other eyewitnesses, nor physical or other corroborative evidence to support the allegations. Despite the different thresholds of



proof that occurred earlier in the process, in a court martial, notwithstanding the charge, the criminal level of proof is similar to a criminal court downtown, the presumption of innocence is paramount. Consequently, a court must not fall into the trap of believing that a complainant must automatically be believed. To do this transfers the burden of proof from the prosecution to the defence. It is not the responsibility of Corporal Oladehinde to prove he is innocent. Such an expectation would be an error of law and would violate the presumption of innocence.

[39] On the other hand, there is no legal impediment to a court convicting an accused based on uncorroborated evidence of a single complainant. However, in order to do this, the evidence must be capable of standing on its own when measured against the required standard of proof for a criminal conviction.

[40] With respect to the facts giving rise to the charge before the Court, the accused and the complainant gave diametrically opposed versions of what transpired.

[41] In her testimony, the complainant expressed concerns about being believed. She stated:

On the one side, if you believe me and he did do it, then what am I going to do if it happens—if I have to deal with this again and I have to go through this process again. From the other side, if you—you know—if you decide today that he's not—that he's innocent, that he didn't do it, then I guess I'm the liar here and why would you want a liar working for you and why would I want to work for an organization that didn't trust me.

[42] That comment expresses a misunderstanding of our Canadian judicial process. It is important to emphasize that this court martial is not an inquiry to determine what exactly happened, nor should it attempt to determine which version of the facts is most credible or should be believed. In other words, the court must avoid deciding the case based on the more credible version of the two accounts. A court may accept or reject, some, none or all of the evidence of any witness who testifies.

[43] In assessing a case with competing versions of what happened, credibility is a central issue and in a case where the accused has testified, the Supreme Court of Canada (SCC) recommends that the issue be considered in three steps, commonly referred to as the “*W.(D.)* instruction” found at *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at page 758.

- (a) first, if I believe the evidence of Corporal Oladehinde, I must acquit;
- (b) second, if I do not believe the testimony of Corporal Oladehinde, but I am left in reasonable doubt by it, I must acquit; and
- (c) third, even if I am left in doubt by the evidence of Corporal Oladehinde, I must ask myself whether, on the basis of the evidence, which I do

accept, I am convinced beyond a reasonable doubt by that evidence of his guilt.

[44] In *R. v. H. (C.W.)*, (1991) 68 C.C.C. (3d) 146 (B.C.C.A.), Wood J.A. suggested an addition to the second part of the three-part test set out in *W.(D.)*. At page 155 of *H.(C.W.)*, His Lordship said:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

### **Court's assessment**

#### ***Issues***

[45] In light of the admissions made by the accused, the critical issues for this court martial to decide are:

- (a) is the court convinced beyond a reasonable doubt that one or all of the alleged incidents occur as described?
- (b) if one or all of the incidents occurred, did they rise to the level of harassment?
- (c) if the particulars of the offence as drafted were proven beyond a reasonable doubt, were they prejudicial to good order and discipline?

#### **Position of the prosecution**

[46] The prosecution submitted that Corporal Manku's version of the events is the most reliable and accurate and the true version of the events. It is the prosecution's position that the accused's conduct rose to the level of harassment against the complainant and she is credible and should be believed. Further, the prosecution argued that the alleged conduct was prejudicial to good order and discipline.

#### **Position of the defence**

[47] The position of the defence is that the accused entered these proceedings presumed to be innocent and that Corporal Oladehinde's evidence is credible and should be believed. He argued that this case is about the application of the *W.(D.)* test and that the prosecution has not proven the alleged conduct beyond a reasonable doubt. He argued that there are two contradictory versions offered and there is clearly reasonable doubt. He argued that proof beyond a reasonable doubt requires a high level of certainty and based on the totality of the evidence, reasonable doubt is present.

### **Analysis**

[48] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offence, I now turn to address the legal principles.

[49] As I explained earlier, the onus is on the prosecution to prove the particulars as alleged. In conducting my analysis, I proceeded first in assessing the evidence and credibility of the one prosecution witness, being the complainant, and determining whether the particulars of the charge have been made out.

### ***Corporal Manku's evidence regarding the incidents***

#### **First incident – breathing incident**

[50] Corporal Manku testified that after putting herself to sleep, the next thing she remembers is waking up with the accused's face touching and pushing or pressing kisses on the left side of her face, on her cheek. She said that she woke up due to the smell of his breath and the feeling of something on her face. Under cross-examination, she stated that his face was on top of her, his hands were inside the sleeping bag. When asked why she did not tell the MPs that she smelled his breath or did not describe the pulling back with the kisses or pressing kisses to the MPs, she said that they did not specifically ask her.

[51] When asked to describe the events further, she said that he was lying to the left of her and when she woke up, his face was hovering over hers, and his lips were on the left side of her face along her cheek bone and her cheek. She testified that she told him "No", then turned around and pulled her sleeping bag over her head and tried to go back to sleep. She testified that it was about 2 or 3 kisses that he had pushed towards her.

[52] She said that because of where she was lying, he turned over so he sort of pulled back, then he kissed her again. It was not all one interaction. At no time, did their sleeping positions change. She stated that she was still asleep and she just wanted him to go away and wanted to go back to sleep. After she said "No", she pulled her sleeping bag over her head and turned away.

[53] When asked if the accused was asleep, she stated apparently not because he was on top of her, with his face on top of her face, so he must have woken up at some point to do that.

[54] Under cross-examination, she stated that she woke up with his face against hers, highlighting that her testimony was slightly different before the court then the statement that she provided to the MPs. She was not argumentative, and adopted what she had said earlier. During the incident, she confirmed that the accused did not speak and she did not hear anything back in response.

[55] Under cross-examination, she confirmed that the shelter was roughly 60 inches in width, small and cramped, however, when defence counsel asked whether his face

would be close to her, she denied it. When pressed, she acknowledged that if they both rolled to the middle, they would be face to face. She agreed that we do not always know what we do when we sleep. When asked if you were both lying face to face, they would be closer than the 60 inches and she agreed.

[56] Corporal Manku confirmed that the only contact she had with the accused was with his face and he did not try to touch her with his hands or any other body parts. When she turned over and covered her head, she stated that he went back to sleep until they woke up again from the cold.

### **Second incident – request for a kiss**

[57] Corporal Manku testified that they both woke up a second time, but this time, it was due to the cold. She explained that they both sat up in their sleeping bags trying to get the fire going. Corporal Oladehinde grabbed the closest long branch and stoked the fire. She testified that after he stoked the fire, he asked something to the effect of “How about a kiss goodnight?” She explained that she felt he had chosen an inappropriate time to express his desire and that she was repulsed by his poor judgement and taste. She explained that she was much more awake the second time. She told the court, she said “No”, pulled her sleeping bag over her head again to go back to sleep.

[58] Under cross-examination, she confirmed that she remained in her sleeping bag while Corporal Oladehinde stirred the fire and when he was done, he placed the stick on the other side of him. She confirmed that she did not stir the fire at all. When asked if she was prepared to stir the fire, she explained that Corporal Oladehinde was already doing it.

[59] When asked about the lighting during this second incident, she confirmed that there was only the firelight. Under cross-examination, she confirmed that the only words exchanged was his request for a kiss.

[60] She testified that when Corporal Oladehinde made that request, she felt exasperated as he had already woken her up once with him trying to kiss her and she rejected him then and then he asked if he could kiss her a second time. She felt it was the epitome of unprofessionalism, of poor taste and she could not understand why someone would do that. She explained that she was exhausted as they were physically drained from the events of the day. She explained that, up until that point, she had no issues with the accused, but she felt that all he was thinking about was having some form of relationship with her.

### **Third incident – temple kiss**

[61] A few hours later, Corporal Manku stated that she awoke a third time, from a kiss to her temple. She stated that at that point, she just wanted the night to be over. She said that he pressed his lips against her left temple and then pulled away. She stated she

said “No” again and turned around, pulling her sleeping bag over her head. She said that it was closer to morning as the next time they woke up it was dawn.

[62] Under cross-examination, she confirmed it was dark as the fire was dying, but this time, they did not stoke it. She could not say how Corporal Oladehinde’s body was positioned. She could not see his face, but said she could see his lips. Once again, she stated that he did not say a word either before, during or after the alleged kiss to her temple.

[63] When asked whether his lips could have touched her accidentally, she said “No” but then when pressed she admitted that it was possible in a winter shelter for another to invade another individual’s personal space. She then confirmed that the accused never touched her with his hands when he allegedly kissed her temple. When asked whether she moved her sleeping bag away from the accused, she stated “No” as there was no room.

[64] Under cross-examination, she confirmed that it was only his face and lips that made brief contact with her and that after every incident, they both went back to sleep. She confirmed that outside of the alleged kisses, at no time, did he try to touch her, impose himself on her, use physical force, nor try to stop her from leaving the shelter.

[65] Corporal Manku told the court that she reported the incidents to her chain of command the next week.

### ***Sergeant Xia’s evidence***

[66] Sergeant Xia stated that he has served in the CAF for ten years with the reserves and the Governor General’s Foot Guards. He was a section commander for the winter warfare course and he had about eight members in the section, including the accused and the complainant.

[67] He testified that the interaction he witnessed between the accused and complainant was completely normal. He described that as a group, they built the improvised shelter, and then he offered the candidates the opportunity to sleep in it to have a more interactive learning experience.

[68] His instructions to the two of them included telling them that he was in the tent only five metres away if they needed him and reminded them to stay warm, keep the fire going and let him know if there were any issues. He checked on them throughout the night to make sure that the fire was still burning. He estimated that between 2200 hours until about 0200 hours, he checked on them five or six times. He stated that in the shelter, he saw Corporal Manku on the left and Corporal Oladehinde on the right. At one point, he noted that their fire was going out and he put wood on it. He stated that he noticed a bit of shuffling in the sleeping bags. He confirmed that he did not hear any conversation between the two of them.

[69] He testified that he awoke the next morning around 0600 hours and when he checked on them they were fine, but a bit tired.

[70] He described that candidates were taught to stay close together to share body heat to warm up.

*Accused's evidence*

[71] Corporal Oladehinde explained to the court that prior to going to ground, the entire section went to the shelter to build a fire. Once it was done, the other candidates went back to their tent and Sergeant Xia helped Corporal Oladehinde and Corporal Manku build a wind block. He stated that Sergeant Xia explained to them the importance of keeping the fire going because it would dwindle through the night and he told them to be wary of the potential need to start it again. He explained that Corporal Manku and himself worked collaboratively to prepare the shelter for the evening.

[72] After they both fell asleep, Corporal Oladehinde stated that the first time he woke up, he just looked at the fire, which was still burning and then went back to sleep. The second time he awoke, he noticed the fire was dying and he nudged Corporal Manku on his right-hand side as he needed help to get it going as he was not sure whether they would have to restart it. He testified that he conferred with the complainant and told her they had to do something about it. She was unwilling to get out of her sleeping bag, as was he, but she did not have any idea how to keep it going, so she went back to sleep, as he said he would take care of it. He pulled a long stick out of the shelter and kindled the fire, to keep it going. He then placed the stick back on his left-hand side and went back to sleep.

[73] The third time he woke up, the fire had gone out so he told the court, he woke up Corporal Manku and he asked if they could share body heat and she said "Yes." So, he wiggled closer to her. He stated that the only part of their bodies exposed was their head. When asked how she responded, he said that she responded with words to the effect, "I guess we will have to."

[74] Corporal Oladehinde testified that the only source of light was the fire. When the fire was alive, you could see physical features. He stated that without the fire, you could not see anything and it was pitch black. He stated that the only time he touched Corporal Manku was in the sharing of body heat. He stated that it was the daylight that woke him up as well as noise coming from the main tent. When he woke up, he said that he woke Corporal Manku and fist pumped her congratulating her that they had made it through the night and she reciprocated it.

[75] He told the Court that after they woke up, they talked a bit and had to interact afterwards because we had to pitch their tents several times during the last day. In describing his interactions with her the next morning, he described them as cordial, professional and respectful.

[76] When asked about the concept of body heat sharing to keep warm, he explained that it was taught in basic training as well as during the winter survival training.

### **Credibility of the witnesses**

[77] It is not unusual that that evidence presented before the Court is contradictory. Witnesses may have different recollections and perceptions of the events and the Court has to determine what evidence it finds credible and reliable.

[78] Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a Court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking or relatively unimportant and, therefore, understandably more difficult to recollect?

### ***Credibility of Sergeant Xia***

[79] I found Sergeant Xia to be a credible witness. He did not display bias towards either side and testified in a straightforward manner providing evidence that was meaningful in corroborating facts with respect to the instructions provided to both the accused and the complainant on how to stay warm in winter conditions as well as the benefit of sharing body heat.

### ***Credibility of Corporal Manku***

[80] The complainant testified in a clear and straightforward manner. She was not argumentative and she expressed herself in a very articulate and thoughtful manner. She admitted to being absolutely exhausted on the evening in question, but she still provided detailed and consistent recollection of what unfolded. She resisted suggestions by the defence that would have strengthened her case. When something was possible, she admitted it. I found her credible.

### ***Credibility of the accused***

[81] The accused testified in a straightforward, logical and detailed manner. His narrative was likely and plausible. There is nothing that came out in the evidence or under cross-examination that negatively affected his reliability and credibility.

[82] His testimony was coherent and believable. Overall, I found the accused to be credible and honest in his assertions. There were no glaring inconsistencies in his version of events.

### **Analysis of the facts**

[83] The evidence on the three incidents before the court is clearly contradictory and as I stated earlier, I found both the complainant and the accused credible. A finding that a witness is credible does not require the judge to accept all the witness's testimony without qualification. Credibility is not co-extensive with proof (see *R. v. Clark*, 2012 CMAC 3, paragraph 47).

[84] Further, a finding that a witness is credible does not mean that all his or her testimony is reliable. In fact, a witness may be completely sincere and speaking to the truth as the witness believes it to be but he or she may have completely different perceptions of the same event. Due to a number of reasons including, but not limited to, the passage of time, memory, their state of wakefulness or the lighting, the actual accuracy of the witness's account may not be reliable. So, in effect, the testimony of a credible or an honest witness may nonetheless be unreliable (see *R. v. Morrissey*, [1995] 97 CCC (3d) 193).

[85] In reviewing all the facts that arose from the testimony, both the complainant and the accused testified to waking up three times. Based on what was recounted, the court cannot be sure that the parties are describing the same three incidents. For example, Corporal Oladehinde described a third incident, close to morning where they both woke up and the fire was out. In that incident, they were both freezing and he testified that he asked to move closer to share body warmth which Corporal Manku responded that he could. When challenged by the prosecution whether Corporal Manku's response gave him confidence to test his limits in terms of getting closer to her, or by asking for a kiss, he denied it. However, the court noted that all the alleged incidents are described differently by both the complainant and the accused. Corporal Manku was clear in her testimony that Corporal Oladehinde asked for a kiss during the second incident, when they were trying to revive the fire whereas the court noted that Corporal Oladehinde testified that he made the request to share body warmth the last time he awoke, just before dawn when the fire was out. Further, in her testimony, Corporal Manku stated that the only time Corporal Oladehinde spoke to her was in the second incident when they both awoke cold and needed to stoke the fire.

[86] The court approached the evidence first from the perspective of the complainant. Allegations of the first and third incidents are limited to Corporal Oladehinde touching the side of Corporal Manku's cheek or temple using his lips. She described that he was pushing kisses towards her, which the court found to be an odd description. In the first incident, she described that she woke up to the smell of Corporal Oladehinde's breath and a feeling on her face. She then described Corporal Oladehinde as hovering and pushing kisses on her. We heard testimony that they were both lying shoulder to shoulder, but it is unclear whether they are on their backs or their stomachs or their sides. She then described that Corporal Oladehinde pulled back and then kissed her again. She stated that they were both lying down in their sleeping bags, but that their positions had not changed as they were still cramped in. She was challenged by defence on this and she explained that his face was on top of her face. However, this seems inconsistent with the fact that he kissed her on the side of her cheek and the fact that they were lying shoulder to shoulder, without their positions changing. I would think



that he would have had to change position, lying on his side or his stomach in order to do what was described. There was no evidence on the record that could provide the court with a level of certainty as to how they were both positioned or lying when she awoke to his breath and a touch on the face. Were they lying face to face as defence counsel suggested? Further, Corporal Manku stated she was still somewhat asleep and did not want to deal with it right there and then and she simply remembers pulling her sleeping bag over her head and turning over going back to sleep. Given her state of sleepiness, does she have the most accurate memory of what transpired? She told the court that she rolled over, presumably onto her side, but there was no evidence as to how Corporal Manku was lying.

[87] Under cross-examination, Corporal Manku admitted that in a sheltered environment, it was possible that one could violate the other's personal space. She explained that her head was about 60 centimetres from Corporal Olandehinde's head which means that they were located very closely to each other. She also admitted that it was possible that they could have touched accidentally.

[88] The lack of reaction from Corporal Oladehinde to the alleged touching of the cheek or temple lends support to the fact that he was asleep during the alleged touching incidents 1 and 3. In weighing all the evidence, and the combination of both versions, I find that it is plausible that the first and third instances were accidents. It is possible that in the very confined area, their faces may have touched. It is also possible that Corporal Oladehinde moved closer to the complainant in his sleep instinctively seeking warmth while breathing very close to her. She described his action as "pushing" kisses towards her, which could have been the effect of him breathing very close to her face while asleep. Further, the court cannot be certain whether he may have moved closer in an instinctive response to warm up given the freezing cold winter night or is he one of those sleepers who naturally sprawls out to fill all available space. The fact that there was no conversation, his hands stayed in his sleeping bag and there were no attempts by him to otherwise touch Corporal Manku with his hand or any other parts of his body suggest that it was unlikely that his actions were a concerted attempt to test the limits with the complainant.

[89] As a result, since I find that it is entirely plausible that incidents 1 and 3 resulted from accidental touching, and applying the *W.D.* test, I am left with reasonable doubt that these two incidents occurred as alleged.

[90] This leaves the second incident of the alleged request for a kiss that must be assessed. The Court noted that in her testimony, Corporal Manku described how she and Corporal Oladehinde engaged in conversation collaborating together as they prepared to stay warm before they went to ground. This was confirmed by Sergeant Xia in his testimony. When they woke up the second time, she described a similar collaborative approach to stoking the fire. She described how they got it going again and what Corporal Oladehinde did in getting a long stick to stoke it. She explained that they were both sitting up in their sleeping bags facing the fire which would have been at their feet. She described herself as much more awake than in the first incident.

[91] Under direct examination, she testified that the two had engaged in conversation on how to get the fire going. However, in cross-examination, when she had the opportunity to refresh her memory with her MP statement, she stated that after they went to ground, the only verbal exchange they had were words to the effect, “How about a kiss goodnight?” In the court’s view, this narrative does not seem logical and is inconsistent with the narrative in her earlier testimony.

[92] The suggestion that both she and Corporal Oladehinde sat there together freezing, in the winter night with the wind blowing, being completely mute while attempting to revive the fire, seems inconsistent with the collaborative approach she described. On the other hand, if there was no collaborative effort to revive the fire, then it is possible that Corporal Oladehinde’s testimony on this point makes sense. He told the court that after he told Corporal Manku that he would stoke the fire, she went back to sleep. If that is the case, I am left with reasonable doubt and I am not sure who to believe regarding the alleged request for a kiss.

[93] In short, while the Court made every effort to attempt to resolve the conflicting evidence on each of the three incidents bearing on the guilt or innocence of the accused, after careful consideration of all the evidence, this Court is unable to decide whom to believe, and therefore it must acquit.

**Conclusion on the charge**

[94] I am left with reasonable doubt that the incidents described above occurred as described and as such, I cannot conclude that they rise to the level of harassment. As such, the particulars of the charge are not proven and there is no requirement for the Court to conduct further analysis.

**FOR THESE REASONS, THE COURT:**

[95] **FINDS** Corporal Oladehinde not guilty of the first and only charge on the charge sheet.

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**Counsel:**

The Director of Military Prosecutions as represented by Captain C.R. Gallant and Captain S.Z. Zeewari

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Corporal J. Oladehinde