



COURT MARTIAL

Citation: *R. v. Cadieux*, 2019 CM 2011

Date: 20190522

Docket: 201872

Standing Court Martial

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

Between:

Her Majesty the Queen

- and -

Corporal S. Cadieux, Accused

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

REASONS FOR FINDING

(Orally)

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, directs that any information that could identify the complainant or victim in these proceedings shall not be published in any document or broadcast or transmitted in any way.

The case

[1] Corporal Cadieux is charged with one offence under section 130 of the *National Defence Act* (NDA), that is to say, sexual assault contrary to section 271 of the *Criminal Code* of Canada and a second offence under section 97 of the NDA for drunkenness. The particulars of the two charges read as follows:

“FIRST CHARGE	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF
Section 130 <i>National</i>	THE NATIONAL DEFENCE ACT, THAT IS TO SAY,

Defence Act

SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF
THE *CRIMINAL CODE OF CANADA*.

Particulars: In that he, on or about 27 November 2015, at or near Paradise Park, Savannah LA Mar, Jamaica, did sexually assault R.S.

SECOND CHARGE
Section 97 *National
Defence Act*

DRUNKENNESS

Particulars: In that he, on or about 28 November 2015, while deployed on exercise Tropical Dagger, at or near Paradise Park, Savannah LA Mar, Jamaica, was drunk.”

[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 each of the charges.

Evidence

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

- (a) In court, testimony of the prosecution witness being that of the complainant, R.S. as well as:
 - i. Master Corporal C.M. Derible;
 - ii. Master Corporal J.E. Hébert; and
 - iii. Master Warrant Officer N. Moureau.
- (b) In court testimony of Corporal Cadieux (accused) testifying in his own defence;
- (c) Exhibit 1 - Convening order;
- (d) Exhibit 2 - Charge sheet;
- (e) Exhibit 3 - Admissions made by the Defence Military Rule of Evidence 37(b);
- (f) Exhibit 4 - Agreed Statement of Facts;
- (g) Exhibit 5 - Photograph of a bug net;

- (h) Exhibit 6 - Photograph of location of Forward Operating Base (FOB) Paradise; and
- (i) The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence (MRE)*.

[4] Pursuant to *MRE* 37(b), for the purpose of dispensing the prosecution from having to prove these facts beyond a reasonable doubt, the accused, Corporal Cadieux, made the following admissions:

- “a. The identity for both alleged offences, as indicated in the particulars of the two charges found in the charge sheet dated December 13th, 2016;
- b. The dates of both alleged offences, as indicated in the particulars of the two charges found in the charge sheet dated December 13th, 2016; and
- c. The place of both alleged offences, as indicated in the particulars of the two charges found in the charge sheet dated December 13th, 2016; and
- d. That Corporal Cadieux had contact of a sexual nature with the complainant, R.S.”

Background (summarized primarily from an Agreed Statement of Facts)

[5] The Canadian Armed Forces (CAF) has a long-term mentoring and training engagement with the counterterrorism and operations group of the Jamaican Defence Force (JDF). The Canadian Special Operations Regiment (CSOR) was tasked with the responsibility to run the first iteration of an exercise to support the engagement. It was termed Exercise TROPICAL DAGGER (Exercise). The objective of the Exercise was for the CSOR to train, advise and assist in the provision of joint collective training and mentoring of regional Special Operations Forces (SOF), which includes the JDF and the Belizean Defence Force (BDF). The Exercise ran on a yearly basis.

[6] At all material times to this case, the accused, Corporal Cadieux, was a member of the CAF, regular force, CSOR, Canadian Forces Base (CFB) Petawawa, Ontario. He was employed as a Special Forces operator.

[7] At all material times to this case, the complainant, R.S., was a member of the CAF, regular force, CSOR, CFB Petawawa, Ontario. She was employed as the resource management support clerk for the 2 Special Operations Company, CSOR. She had just recently been posted to CSOR and the Exercise was her first international deployment/exercise.

[8] The two charges before the court emanate from the Exercise that occurred in the last three weeks of November 2015, which was the fourth iteration of the Exercise in Jamaica. The Exercise unfolded on a camp called FOB Paradise located on a local resident's private estate called "Paradise Park" on the outskirts of the town of Savanna la Mar, Jamaica.

[9] Major Eric Ross, a member of the CSOR, was the Task Force (TF) Commander for the Exercise. The TF was comprised of approximately 80 CAF members from CSOR and 427 Special Operations Aviation Squadron (SOAS).

[10] Operation HONOUR, released by the Chief of the Defence Staff in August 2015:

"is the Canadian Armed Forces' (CAF) mission to eliminate harmful and inappropriate sexual behaviour in the Canadian military.

Operation HONOUR is based on the principles that:

every man and woman who serves their country deserves to be treated with dignity and respect – anything less is simply unacceptable

any attitudes or behaviours which undermine the camaraderie, cohesion and confidence of serving members threatens the CAF's long-term operational success."

[11] All environments of the CAF are responsible for implementing the principles of Operation HONOUR into their daily business. Prior to deploying to the Exercise, the Commander of the Canadian Special Operations Forces Command (Comd CANSOFCOM) released his guidance with respect to his expectations vis-à-vis Operation HONOUR. His guidance was also at the forefront of the planning process of the Exercise.

[12] In addition to the concerns from Operation HONOUR, there was acknowledgement that there had been alcohol-related incidents in past iterations of the Exercise. For these reasons, Comd CANSOFCOM and the Commanding Officer of the CSOR ordered the Exercise to be "dry", i.e. no consumption of alcohol permitted, except for last two days at the end of the Exercise.

[13] In addition to the no alcohol policy, the chain of command briefed all Canadian participants on Operation HONOUR and the CAF policy intended to prevent harmful and inappropriate sexual behaviour. In furtherance of their concerns, the chain of command established an all-female tent. This had not been the practice in previous exercises. Access to the all-female tent was restricted, with males only being permitted to enter after they knocked, stated their reason for entry and were authorized to enter.

[14] With respect to the CSOR component of the TF, it was comprised of two detachments of SOF operators and one Exercise Control (EXCON) group.

[15] The EXCON group was responsible for the setup and coordination of the collective training events to ensure the training objectives were achieved. It was also responsible to provide safety support and insert “injects” during the training events. Corporal Cadieux was a member of the EXCON group during the Exercise.

[16] FOB Paradise was built with modular tents and sea containers that mainly consisted of living/sleeping accommodations for the JDF, the BDF and the TF, washrooms and shower facilities, supply, equipment storage, gym, briefing area, dining and kitchen areas and a Tactical Operations Centre.

[17] All of the female members of the TF, including R.S., the complainant, had their living/sleeping accommodation in a single modular tent located on the premises of FOB Paradise. The tent was described by witnesses as having a hard door that latched when it closed and that the tent was equipped with an air conditioning unit that was always functioning. Witnesses testified that the sound of the air conditioner did not impede normal conversation. Inside the tent, there were no dividers or walls, but each member had a military cot used as her bed, which was equipped with a bug net over it. The military beds were placed in two rows, with one cot on each side. There were approximately ten females staying in the all-female tent, of which two were from CSOR and the remaining women from SOAS. R.S.’s cot was located approximately one or two metres from the door.

[18] The members of the EXCON group, including Corporal Cadieux, also had their living/sleeping accommodations in modular tents located about 200 metres away, just outside of the boundaries of FOB Paradise. The EXCON group’s living/sleeping accommodations were separated from the FOB, so that they could perform their duties and keep the planning of events secret from the primary training audience.

[19] The Exercise unfolded without incident, until the “end of exercise” (ENDEX) order was given to the TF. Following the ENDEX, a group of distinguished guests and some senior members of the TF attended a reception at the High Commission of Canada to Jamaica’s estate, which was located in the town of Kingston, Jamaica. Between 1700 and 1730 hours, the senior members of the TF, which included Major Ross and then-Warrant Officer Moureau, departed by helicopter to attend the reception, returning back to FOB Paradise sometime between 2230 and 2300 hours.

Barbecue and bonfire event - 27 November 2015

[20] While the reception was occurring at the High Commissioner’s estate, Major Ross authorized the rest of the TF to hold a barbecue and bonfire event at FOB Paradise, with partners of the JDF and the BDF. The event was organized at FOB Paradise to minimize security risks of going into town. Witnesses testified that the barbecue began around 1630 hours.

[21] Major Ross authorized his personnel to consume alcohol during the event. He did not order any restriction or limit on the quantity or type of alcohol. Prior to the event starting, Major Ross authorized his personnel to go to town to purchase alcohol. He also contributed a small amount of his personal money to a “fund” used to purchase alcohol for his personnel.

[22] Prior to departing to attend the luncheon, Major Ross provided verbal guidance to the senior members of the TF who were left behind at the barbecue and bonfire event. His guidance was to make sure: (1) no one got drunk; (2) no one got injured; and (3) to watch out for inappropriate sexual conduct in light of the Comd CANSOFCOM’s guidance concerning Operation HONOUR.

[23] At approximately 2230 to 2300 hours, when Major Ross returned to FOB Paradise, he noticed that there were about six to ten individuals sitting on Pelican cases just outside of the living/sleeping accommodations. He asked the senior members present how the event had gone and was informed that there were no significant incidents to report.

[24] At approximately 2300 hours, Major Ross spoke with Corporal Cadieux. In his observation, Corporal Cadieux appeared to be lucid, not slurring his speech and he could articulate adequately.

[25] Major Ross socialized and conversed until about 0130 hours, on 28 November 2015, going to sleep when the rest of his personnel had turned in. During that time, Major Ross did not notice anyone who appeared to be inappropriately drunk.

[26] Major Ross does not recall seeing R.S. from the time he returned to FOB Paradise until he went to sleep.

Cultural day - 28 November, 2015

[27] On 28 November 2015, a cultural day was planned to permit the JDF to promote to the Exercise participants, areas of their country for cultural exchange purposes. The cultural day consisted of at least two distinct events; there was a bus tour to the Appleton Estate’s Distillery and a bus ride arranged to bring personnel to the local Sandals resort.

Operation HONOUR and reasonable doubt

[28] Operation HONOUR was briefly referred to earlier. For a number of reasons, the Court feels it imperative to clarify the direction provided under Operation HONOUR, its reporting process as well as the varying evidentiary thresholds applied at the various stages, leading up to the disposition of a case before a court martial.

[29] Firstly, Operation HONOUR provides direction to the chain of command on how it must deal with inappropriate incidents that they become aware of. It is imperative that the chain of command and the military police believe victims when they report conduct that makes them feel uncomfortable. If victims are not believed at the time of reporting, the allegations will not be taken seriously and incidents will not be properly investigated. It will often take time for victims 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.

[30] In a military context, even minor incidents of inappropriate touching are completely unacceptable and must be stopped. 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.

[31] 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. Prosecutions only proceed to courts martial if the case meets the slightly higher standard and the Crown’s screening standard of there being “a reasonable prospect of conviction”.

[32] However, in order to support a conviction in a criminal case, 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. So in other words, notwithstanding what happens in the early stages of an investigation and the decision to lay charges, Corporal Cadieux comes before this Court presumed to be innocent. And the same Canadian law and standard of proof that applies if he was to be tried in a court in downtown Pembroke applies to him in this court martial. What this means is at court martial, the strength of the evidence must go much further and the prosecution must establish the elements of the offence to a standard of proof beyond a reasonable doubt.

[33] This means that a court martial must not fall into the trap of believing that a sexual assault complainant is always truthful or that when they come forward they must be believed. To do this, would in effect transfer the burden of proof from the prosecution to the defence. This would be an error of law and would violate the accused’s presumption of innocence.

[34] Corporal Cadieux entered these court martial proceedings presumed innocent. 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 charges before the Court.

[35] 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.

[36] In essence, this means that even if I believe that Corporal Cadieux 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.

[37] 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 Cadieux 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).

First charge – sexual assault

Uncontroversial evidence

[38] The complainant, R.S., testified that she knew Corporal Cadieux strictly on a professional basis as they served in CSOR together. Although she was friendly with him and they worked in the same building, there had never been any romantic interest between them, nor was there any evidence before the Court to suggest that either of them were interested in a romantic relationship.

[39] The complainant testified that on the evening in question, she attended both the barbecue and the bonfire. She was wearing civilian clothes, which she described as ripped capri jeans, with a shirt that went down to her elbows. She testified that the barbecue started around 5 p.m., but that she had a few drinks starting at 4:30 p.m. and that she ate a full plate of food at the barbecue. During the bonfire, she stated that there were many people talking, drinking, socializing and listening to music and she socialized with lots of people, describing herself somewhat as a social butterfly. She does not recall having any interaction with Corporal Cadieux throughout the evening. When questioned on how much she drank, she estimated about eight drinks, possibly as many as ten, but clarified that she had no more than one drink per hour. She told the Court that before the barbecue, she consumed mostly mixed drinks, being vodka mixed with juice. She had a glass of wine and one or two beers at dinner and then rum and Coke at the bonfire. She stated that people brought her drinks directly, but she did not feel that the drinks she consumed were beyond the regular strength that she was used to consuming.

[40] Corporal Cadieux similarly testified that he had a friendly relationship with R.S., but also admitted that there had never been any romantic interest between the two of

them as they were simply friendly co-workers. He testified that because he was working with EXCON, when ENDEX was called, EXCON still had work to do to close up the tasks. When they completed the tasks, they joined the others in the festivities. He does not specifically recall the barbecue as he showed up later, but he does recall them being served supper.

[41] He stated that there was wine being served with supper and he himself did a run with the JDF driver to pick up alcohol. He recalls drinking a mix of hard alcohol and beer. He remembers offering a rum and Coke to both Master Corporal Derible and R.S. He stated that during the bonfire, he got sick and vomited. He described that, at that time, he was suffering from a serious hiatal hernia and the alcohol and spicy foods he consumed that evening created acid reflux and upset his stomach. He told the Court that he had delayed a necessary surgery to close a hole in his diaphragm and to staple his stomach. He had the surgery done when he returned to Canada.

[42] Corporal Cadieux testified that earlier that year, there was a training accident where he personally injured one of his brother operators. After the accident, he was so distraught that he sought his release from the CAF, but decided to stay with CSOR until the accident had been dealt with it. He had been devastated by the accident and could not sleep at night. As a result, during the Exercise, he took sleeping pills. While he was working on the Exercise, he was served with documents regarding the pending court martial related to the accident. He had a lot going on with him on an emotional and very personal level.

[43] By all accounts, the evening festivities slowly came to an end between midnight and 0130 hours on 28 November. All the parties admit to having consumed a significant amount of alcohol.

[44] R.S. testified that around midnight, she returned by herself to the all-female tent to put herself to bed. She noted that the chain of command had returned from their social and people were starting to wrestle, etc. She thought it was a good time to end the night before trouble started and she wanted to be ready to enjoy the cultural day planned for the next morning. She estimated that there were approximately 20 people up when she went to bed. When asked to assess her level of intoxication, on a scale of 0 to 10, 0 being completely sober and 10 being blackout drunk, she assessed herself to be a 7.

[45] When she returned to the tent, R.S. testified that she believed the lights were off. She also told the Court there were others such as Master Corporal Derible who were already sleeping. R.S. explained that she changed into her pajama pants, described as black with polka dots, with a waistband and she was wearing no underwear. She said she slept in the same shirt she had worn to the barbecue. She testified that although it was her normal practice to zip up her bug net, she does not remember zipping it up that night. She also explained that she had installed her bug net backwards which meant that her head was situated at the narrower portion of the bug net, rather than the wider portion. She remembers setting her alarm for 7 a.m. the next morning so she could participate in the cultural day.

[46] Around 1:30 a.m. when the party had waned, Master Corporal Hébert returned to the all-female tent. Shortly thereafter, Corporal Cadieux knocked on the door of the all-female tent and Master Corporal Hébert answered. Corporal Cadieux asked Master Corporal Hébert where he could find the complainant's cot. As Master Corporal Hébert considered both Corporal Cadieux and R.S. to be friends, she showed him. Corporal Cadieux approached the complainant's cot, knelt or bent down beside it and called R.S.'s name loud enough that Master Corporal Hébert could hear it.

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

R.S.'s evidence about the sexual activity

[48] R.S. testified that after putting herself to sleep, the next thing she remembers is waking up with the accused on top of her with his hand in her pants. She said he was laughing and saying something to the effect, "It is not Steve, it is Simon." She does not recall anyone entering the tent or calling her name as she said she was asleep.

[49] When asked to describe the events further, she insisted that when she woke up, all she remembers is that Corporal Cadieux's hand was in her pants, touching her pubic hair. She stated that she could feel most of his hand, but the second she felt it on her pubic hair was when she woke up and told him to stop. She clearly identified him as his face was in front of her and he was recognizable particularly when he stated, "It is not Steve, it is Simon."

[50] She testified that she pushed Corporal Cadieux off, but cannot recall whether she used one or both hands. She stated that the accused got up and stood at the end of the cot. After he left, she pulled her sleeping bag over her head and went back to sleep. Although she stated the touch to her pubic area lasted only a few seconds, she was adamant that she did not agree to any touching whatsoever. She did not recall anyone in the tent reacting or saying anything to either her or Corporal Cadieux.

[51] She testified that when she woke up the next morning, she felt fine. She told her tent mates that she awoke in the middle of the night to find the accused on her cot. She stated that she was in shock, but felt she could speak with her tent mates in an effort to try and make sense of what happened. It was at that time that R.S.'s tent mates described additional details that they witnessed or had learned from others.

Accused's evidence about charge 1

[52] Corporal Cadieux testified that he knocked on the door of the all-female tent to invite R.S. to come out with them to have more drinks. He stated that other members went to recruit partygoers from other tents. He stated that Master Corporal Hébert, showed him where R.S.'s cot was located.

[53] When asked why he only wanted to invite R.S., he explained that most of the other women were from other units and he knew R.S. better as they were from the same unit. He said he remembers the lights being off, but clarified that the tent was sufficiently illuminated since there was light reflecting off the junction boxes where the power cords join together.

[54] He told the Court that he kneeled next to R.S.'s cot as she lay in her sleeping bag with the bug net open. When questioned on why he was sure what position he was in, he stated that he was pretty sure that he was kneeling on one knee as that would have been his common position for shooting.

[55] He said he called R.S.'s name a couple of times, loud enough so she could hear it, but he tried not to disturb the whole tent. He denied touching her in his efforts to wake her up.

[56] Next, Corporal Cadieux said R.S. grabbed him by the back of his neck and pulled his head towards her kissing him. He stated that it happened very fast and shocked him, but he kissed her back. He testified that he did not expect to be kissed, he did not want to be kissed and was sort of confused at first. He stated it was a strong kiss, with both their tongues involved. Given the way R.S. pulled him in, the accused said he believed R.S. was fully awake.

[57] He told the Court that the kissing went on for a few seconds and then she called him Steve and he became more confused. He said that he stopped right away and said, "It is not Steve, it is Simon" as he thought at that point she was mistaking him for someone else. He told the Court that when R.S. said "stop" he stopped, but also admitted that R.S. may have pushed him back.

[58] He said that when R.S. pulled him in for the kiss, that he put his hands on the cot to stabilize himself from losing his balance. He denies lying on top of her or putting his hand down her pajamas. He does not recall where his hands were during the incident, but stated they possibly were on the top of the sleeping bag or on the cot.

[59] He testified that it was also possible that Master Corporal Hébert told him to "get the fuck out", but he does not recall her coming to the bed space of R.S.

[60] He recalls that when he exited the tent there were several people outside. He admitted that upon exiting the all-female tent he told these individuals what happened, and they laughed at the fact that R.S. had kissed him and called him Steve. After the incident, which occurred between 1:30 and 2 a.m., he continued to party and consume alcoholic beverages with his friends.

Master Corporal Hébert's evidence

[61] Master Corporal Hébert testified that she returned to the all-female tent between 1:30 to 2 a.m. She estimated that she too consumed a significant amount of alcohol

which she described as 10 to 12 Red Stripe beers throughout the evening. She stated she had a 6-pack under her chair, but also got some beer from a tent. During the evening, she testified that she felt mellow and relaxed and would rate her level of intoxication as about a 5 on a scale of 0 to 10. She told the Court that when she got back to the all-female tent, the lights were on and that she could see everything. She testified that when she returned, R.S. was in her proper cot and appeared to be sound asleep, as she showed no movement and her eyes were closed.

[62] She testified that while she was preparing for bed, she heard a knock on the door from Corporal Cadieux wanting to know where R.S.'s cot was located. She said, she showed him R.S.'s cot and returned to her own cot, located at the other end of the tent. She stated that she was doing her own thing and not paying attention to what was happening, but she did hear Corporal Cadieux calling R.S.'s name trying to wake her up. She stated that he was reaching over R.S.'s cot, which she described for the Court as having straight legs, folded and bent over. She then started to hear sloppy kissing, which she described to be of the similar sound as a child eating fruit with a mouth open or a child sucking on a soother. She indicated she saw movement with R.S.'s sleeping bag and then heard R.S. say "Stop" or "Stop it," which she estimated occurred about three times. She stated that R.S. said "Stop" in what she described as a panicked or pressing tone, which caused her to go immediately to R.S.'s cot to tell Corporal Cadieux to "get the fuck out" as they were all trying to sleep. She testified that the entire interaction took approximately two to three minutes maximum. She testified that after the incident, R.S. was still in her sleeping bag and she did not inquire how she was feeling.

[63] After the incident, Master Corporal Hébert testified that on her way to the bathroom, she witnessed Corporal Cadieux outside the tent laughing with approximately 10 to 12 other members. She stated that Corporal Cadieux was telling them that R.S. had kissed him while saying another guy's name. Master Corporal Hébert originally testified that she did not hear R.S. say another guy's name, but learned what was said when she overheard Corporal Cadieux telling his friends outside of their tent. However, when her memory was refreshed, she admitted that she had heard R.S. mumbling something just before she said "Stop" and that based on what she overheard outside the tent, she assumed that R.S. was mumbling another man's name.

[64] Master Corporal Hébert also testified that she could not physically see what occurred because Corporal Cadieux had his back to her. However, she did state that from what she heard, the kissing sounded like two people actively involved, but she also stated she did not believe that R.S. was fully awake.

[65] During cross-examination, she testified that the next morning, she observed some of the women telling R.S. what had occurred. In Master Corporal Hébert's opinion, based on R.S.'s facial reaction, it did not appear that she knew what had taken place and seemed both confused and disgusted. After having her memory refreshed, Master Corporal Hébert confirmed that R.S. had said words, to the effect of "Oh my God. Really? Like, that happened?"

First charge - sexual assault

Position of the prosecution

[66] It is the prosecution's position that the complainant R.S. did not consent to any sexual activity with Corporal Cadieux and that she is credible and should be believed. The prosecution argued that Corporal Cadieux knew that R.S. did not consent and the force applied was of a sexual nature. The prosecution further argued that R.S. was incapable of consenting because she was sleeping and unconscious and, furthermore, the evidence suggests she was confused with respect to the identity of the person she was with.

[67] It is the prosecution's position that the defence of mistaken belief in consent is not available to the accused because the accused was reckless, wilfully blind and failed to take reasonable steps.

Position of the defence

[68] The position of the defence is that the complainant consented to the sexual activity and that Corporal Cadieux's evidence is credible and should be believed. Defence argued that Corporal Cadieux did not enter the women's tent for a sexual purpose and that when he attempted to awaken R.S., it was her who initiated the first contact. The defence argued that the accused simply reciprocated the kiss. He further argued that when R.S. mumbled another man's name, the accused took reasonable steps; he stopped, corrected her and said, "It is not Steve, it is Simon." Defence also argued even if not believed, that the accused's testimony should give rise to a reasonable doubt. Alternatively, defence argued that Corporal Cadieux had a mistaken belief in consent.

Charge number 1

The elements of sexual assault

[69] In the case of *R. v. Ewanchuk*, [1999] 1 S.C.R. 330, the Supreme Court of Canada (SCC) set out the elements the prosecution must prove in a sexual assault prosecution. In *Ewanchuk*, the SCC 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*", which is the mental intent.

[70] Proof of the *actus reus* of sexual assault requires:

- (a) **the application of force**, which the SCC in *Ewanchuk* recognized as any degree of force including touching is sufficient;

- (b) **the force must be sexual.** There is no mental element associated with it being sexual. Rather, the test is whether the conduct in question, visible to a reasonable observer, can be considered to be of a “sexual” nature. (see *R. v. Chase*, [1987] 2 S.C.R. 293)
- (c) **the touching must be without the consent of the complainant.** For the purpose of this portion of the test, consent involves only the complainant’s internal state of mind. This element of the *actus reus* does not factor in what the accused was thinking at the time or his perception of the complainant’s state of mind as that is considered under the mental component, which is the *mens rea*. It is helpful to ask: did the complainant want the accused to do what he did? It is as simple as that. 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 to them.

[71] The second basic element that the prosecution needs to prove is the *mens rea*, which is the intention of the accused to touch, knowing of or being reckless of or wilfully blind to a lack of consent, either by words or actions from the person being touched.

[72] Based on the admissions by Corporal Cadieux, there is no dispute regarding the elements concerning identity, date, location, as well as the occurrence of a sexual act or sexual touching.

Issues

[73] In light of the admissions made by the accused, it is clear that some form of sexual contact occurred. Therefore, the critical issues for this court martial to determine are the following:

- (a) Did the prosecution prove beyond a reasonable doubt the complainant’s absence of consent? In other words, did the prosecution prove that R.S. did not consent to the sexual act or acts in question;
- (b) If the prosecution proves beyond a reasonable doubt that the complainant did not consent, then I must assess whether Corporal Cadieux can rely upon the defence of an honest, but mistaken belief in consent. The defence of honest but mistaken belief can be raised where it is established that the accused believed that R.S. affirmatively communicated consent through her words or actions. In order to raise the defence, the accused bears the evidentiary burden of pointing to some evidence that supports his belief that the complainant communicated her consent and that it did not arise from his own self-induced intoxication, his recklessness or wilful blindness and he took reasonable steps, in the

circumstances known to him in order to ascertain that R.S. was consenting.

- (c) There are three sub-issues that must be complied with before I can determine that there is an air of reality to the defence:
 - (a) Firstly, did Corporal Cadieux believe that R.S. consented to the sexual activities?
 - (b) Secondly, was Corporal Cadieux's belief honest and unrelated to his self-induced intoxication or to his recklessness or wilful blindness? These circumstances are explicitly set out in section 273.2 of the *Criminal Code* and when they exist, they serve as a statutory bar prohibiting an individual from relying upon the honest but mistaken belief in consent as a defence;
 - (c) Further, based on the statutory limitation set out in section 273.2(b) of the *Criminal Code*, the court must determine whether the accused took reasonable steps in the circumstances known to him to ensure he had R.S.'s valid consent?

[74] If the accused discharges his or her evidentiary burden that there is an air of reality to the defence, the defence is left with the trier of fact, and the prosecution then bears the persuasive burden of disproving the defence beyond a reasonable doubt.

[75] So basically what is at issue is R.S.'s evidence that she did not consent to any sexual activity and Corporal Cadieux's knowledge of that lack of consent. Given the evidence at trial, these issues are inextricably linked to the credibility and/or reliability of the witnesses.

Issue 1: Did the prosecution prove the complainant's absence of consent for the sexual act(s) in question?

[76] On the facts of this case, consent and capacity to consent are live issues, so the Court must first assess if the prosecution has proven beyond a reasonable doubt that the complainant, R.S., did not consent or alternatively that she lacked the capacity to consent.

[77] It is important to remember that the burden of proof remains on the prosecution, even in a case such as this one where the complainant does not recall very much. Corporal Cadieux does not bear the burden of proving that R.S. consented.

Credibility of the witnesses

[78] Given that the event in question took place well over three years ago, it is not unusual that that evidence presented before the Court is contradictory. Witnesses may

have different recollections of the events and the Court has to determine what evidence it finds credible and reliable.

[79] 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? There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence or is the witness impartial?

[80] Pragmatically, when there are no other witnesses, nor physical or other corroborative evidence to support an allegation of sexual assault, the prosecution faces particular challenges. Nonetheless, there is no legal impediment to a court convicting an accused based on uncorroborated evidence of a single complainant. In assessing the facts, trial judges must avoid deciding the case based on the more credible version of the two accounts.

[81] The *viva voce* evidence, which is the live testimony before the Court, consisted of the complainant, R.S., Master Corporal Derible, Master Corporal Hébert and Master Warrant Officer Moureau as well as the testimony of Corporal Cadieux, the accused, who testified in his own defence. A court may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.

[82] With respect to the first charge of sexual assault, the main witnesses, Master Corporal Hébert, the complainant R.S., as well as the accused were all intoxicated to varying levels. Intoxication in the context of this case, affected the Court's assessment of the reliability of some of the evidence and the Court needed to assess the evidence of all three witnesses in order to make a determination of what evidence as a whole it should believe.

[83] In a landmark case, of *R. v. W.(D.)* [1991] 1 S.C.R. 742 (S.C.C.), the SCC provided trial judge's guidance in applying the reasonable doubt concept. The *W.(D.)* framework applies not just to the determination of finding in a case, but it should also be applied in the determination of vital issues, which may mean the "elements of the offence" or the "elements of a defence". (see Justice Blair in *R. v. D.(B.)*, 2011 ONCA 51, 70 C.C.C. (3d) 197 at paragraphs 96, 114 and Justice M.A. Code, "Applying the *W.(D.)* Framework: What has Changed?" at para 9)

W.(D.) analysis

[84] When the accused gives evidence, the following three directions in *W. (D.)*, must be followed by a trier of fact:

First, if you believe the evidence of the accused, . . . you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt . . . of the guilt of the accused.

[85] In *R. v. H. (C.W.)* (1991), 68 C.C.C. (3d) 146 (B.C. C.A.), 1991 CanLII 3956, another direction was suggested at paragraph 24:

I would add one more instruction in such cases, which logically ought to be second in the order, namely:

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

[86] Most recently, in *R v. Ryon*, 2019 ABCA 36, the Alberta Court of Appeal fine-tuned the *W.(D.)* analysis and is paraphrased as follows:

- (a) The *W.(D.)* analysis applies only to exculpatory evidence whether presented by the Crown or the defence that either negates an element of the offence or establishes a defence (other than a reverse onus defence);
- (b) The burden of proof is on the Crown to establish the accused's guilt beyond a reasonable doubt and that burden remains on the Crown so that the accused person is never required to prove his innocence, or disprove any of the evidence led by the Crown. (Subject to the caveat that this does not apply to defences, such as that found in section 16 of the *Criminal Code*, where the onus rests with the proponent of the defence.)
- (c) In that context, if the Court believes the accused's evidence denying guilt or any other exculpatory evidence to that effect, or if it is not confident it can accept the Crown's version of events, it must acquit. (Subject to defences with additional elements such as an objective component).
- (d) While the Court should attempt to resolve conflicting evidence bearing on the guilt or innocence of the accused, if, after careful consideration of all the evidence, the Court is unable to decide whom to believe, it must acquit.
- (e) Even if the Court completely rejects the accused's evidence or other exculpatory evidence, the Court must carefully assess the evidence it does believe, and decide whether that evidence persuades the Court beyond a reasonable doubt that the accused is guilty.

[87] As Charron J. wrote for the majority in *R. v. Dinardo*, 2008 SCC 24 (SCC), at paragraph 23, the assessment of credibility does not always follow the three distinct analytical steps in *W. (D.)*. Rather it depends on the context. In a case such as this,

which turns on credibility, I must direct my mind to the decisive question of whether Corporal Cadieux's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt.

[88] Due to the nature of the evidence in the case at hand, and since there is conflicting evidence at critical stages of the analysis, I applied the *W.(D.)* analysis in assessing conflicting evidence matters that were "crucial to the determination of the ultimate issue" of guilt." (see *R. v. Mayuran*, 2012 CSC 31, 2012 CarswellQue 5812 (sub nom. *R. v. Mayuran*) [2012] 2 R.C.S. 162, 284 C.C.C. (3d) 1, 94 R.R. (6th) 1 at para 42 (*Mayuran*)).

[89] 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 and the charges.

Credibility of the accused

[90] The accused testified in a straightforward and detailed manner. He was humble and did not hesitate to admit facts that were embarrassing or which cast him in a negative light. It is clear that he has been through a lot. He displayed a mature sense of humility in responding to challenges by the prosecution.

[91] Overall, I found the accused to be credible and honest in his assertions, but, despite this finding, I was not prepared to accept all his testimony without qualification. In other words, credibility is not an all or nothing proposition and it is not coextensive with proof. (see *R. v. Clark*, 2012 CMAC 3 (CanLII), paragraph 47).

[92] What this means is that although I found the accused to be credible, this did not automatically mean that I found all his testimony reliable. In fact, I believe that the accused was completely sincere and speaking to the truth as he believes it to be. However, due to a number of reasons including, but not limited to, the passage of time, memory, as well as his intoxication at the time of the incident, the actual accuracy of the accused's account on many issues was not completely reliable. (see *R. v. Morrissey*, 1995 CanLII 3498 (ON CA), [1995] O.J. No. 639, 97 CCC (3d) 193)

[93] For example, on several occasions, the prosecution questioned the accused as to why his current testimony was inconsistent with the evidence he provided during his first trial. With few exceptions, he accepted his earlier testimony and refrained from being confrontational. The fact that this occurred several times, demonstrates that for many reasons and with the passage of time, his memory had faded.

[94] As another example, under cross-examination, he was challenged on his testimony that he wanted to revive the festivities. Although the accused testified that others were going to other tents to canvas interest, his own evidence appears to be inconsistent with this. Other than the accused's assertion, there were no witnesses or

any evidence before the Court to support this party recruitment effort. Further, the accused's actions do not validate this position. If one was in fact recruiting for increased participation, it would seem logical to invite as many people as possible. The accused did not do this.

[95] In spite of the fact that Master Corporal Hébert was one of the last women to retire for the night and she had just returned to the tent, he did not invite her nor did he ask her if there were other women, such as Master Corporal Derible who might be interested. There was evidence before the Court that Master Corporal Derible and the accused had interacted earlier in the evening and had chatted for quite a while because they had a common friend. Curiously, the accused only wanted to know where R.S.'s cot was located. Whether he consciously intended it or not, his actions lend support to an exclusive interest in R.S. rather than the interest of recruiting as many party goers as possible to revive the party. Based on his testimony, he knew R.S. had been drinking and he had to be aware that she had retired almost two hours earlier.

[96] Although much of the factual evidence of both the accused and R.S. can be reconciled, R.S.'s allegation that she woke up with the accused lying on her and with his hand in her pants, touching her pubic hair is where their evidence diverges. Since this alleges sexual activity and the facts may be crucial to the determination of the ultimate issue of guilt, I assessed the accused's version of these facts via the *W.(D.)* instruction.

[97] Based on the whole of the evidence, there were two actions of sexual touching that attracted the Court's attention. The first action was the kissing, which the accused admitted in his testimony. Unfortunately, the complainant could not provide any reliable evidence related to the kissing. Master Corporal Hébert, a third party and witness was able to provide some evidence to support that kissing did in fact take place.

[98] The second alleged sexual touching was that the accused was lying on R.S. with his hand in R.S.'s pajamas, touching her pubic hair. In his testimony, the accused denied this. Master Corporal Hébert was not in a position to physically see what occurred in this respect and is unable to validate these facts.

[99] Under cross-examination, the accused testified that he was kneeling by R.S.'s cot calling her name trying to wake her up. He said R.S. grabbed him by the hair and the head, pulled him towards her and started to kiss him. He described it as being one action or motion and asserted that when R.S. pulled him in, he may have put his hand near her pelvic area in an effort to stabilize himself. He could not say exactly where his hands were, but explained that his hands may have been on the cot, on the sleeping bag and he also left open the possibility that when R.S. pulled him in for a kiss, he lost his balance and touched her in the pelvic area as he tried to maintain his balance.

[100] Upon a closer review, the Court noted that that the accused inferred that he favoured kneeling as it was his common shooting position. Relying upon my own military experience, when a soldier favours a certain shooting position, the general

inference is that position would keep him or her most balanced for shooting in stressful situations, including combat.

[101] If R.S.'s action of pulling the accused towards her for a kiss, did in fact destabilize the accused, as suggested, then arguably that would have occurred immediately when she pulled him in. This is inconsistent with the evidence as a whole. Master Corporal Hébert testified that the sloppy kissing went on for several minutes before R.S. told the accused to stop. R.S. The timing that accompanies the accused's assertion simply does not make sense. However, if Corporal Cadieux did become destabilized as he described, he may have fallen onto R.S. with his upper body, which could be consistent with the fact that R.S. stated that the accused was lying on her. In her testimony, R.S. stated that it was the actual touch to her pubic area that awoke her and not the fact that the accused was lying on her.

[102] This court martial is not an inquiry to determine what exactly happened, or whose version of the facts is more credible or is to be believed. In weighing the evidence, I am not prepared to accept, without reservation, R.S.'s complete version of events with respect to sexual touching either. Based on the testimony of R.S. and others, R.S. was asleep, so the reliability of her evidence on exactly what awakened her also raises concern. It is clear that something woke her up quite abruptly, but I cannot assume her version of the facts is more truthful or has more merit than that of the accused. I believe that if the accused fell forward as he described, he may have found himself with the weight of his upper body lying on her.

[103] In applying the *W. (D.)* instruction to the element of sexual activity or contact, although I do not accept all the accused's evidence, I must ask myself whether, on the basis of the evidence which I do accept, that this fact with respect to sexual touching has been proven beyond a reasonable doubt by the prosecution. Since I do not know who to believe with respect to what sexual touching or activity took place, for the purposes of the remaining analysis, I do accept that the accused was lying or leaning on R.S, however, I will limit the extent of sexual touching exclusively to the kissing.

Absence of consent

[104] As described earlier, the absence of consent is subjective and is determined by reference to the complainant's internal state of mind. The complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct she may have displayed. The Court must assess whether the totality of the complainant's conduct is consistent with her claim of non-consent.

Credibility of R.S.

[105] R.S. testified clearly with respect to the evidence that she could recount, and when she was uncertain she said so. She testified in a clear, honest and straightforward manner. She admitted to being intoxicated on the evening in question, but she provided

truthful, detailed and consistent recollection of what had unfolded at the barbecue and the bonfire before she called it a night and returned by herself back to the all-female tent. When defence counsel confronted her about the fact that she might have blacked out and just could not remember, she was clear and convincing that she had not. She could clearly account why she made the conscious choice to leave the festivities, she described the steps she followed in putting herself to sleep, setting her alarm for the next morning and the fact that she did not bother to zip up her bug net. I found most of her evidence to be both internally consistent as well as consistent with the evidence as a whole.

[106] R.S. unswervingly stated that she awoke to Corporal Cadieux on top of her with his hand in her pants. She was challenged by defence on this and she stood her ground, never wavering or changing her version of what she remembered. Defence questioned how her version could physically have occurred given the set-up of the cot, with the bug net over the cot and the fact that she testified to going to sleep in her sleeping bag inside her ranger blanket under the bug net. Both the accused and R.S. testified that the bug net was unzipped and since R.S. had installed her bug net backwards, her face was at the narrower part of the opening.

[107] When Exhibit 5, (Photo of the bug net on the cot) is closely examined and compared to the evidence of the accused, it is very plausible that the accused was lying on R.S. with his upper body. He testified that he had been kneeling beside the cot and may have fallen forward when he was destabilized. When the height of the cot is compared to his height, he could very easily have been lying on R.S. with his upper body. With the bug net installed backwards, there was plenty of room for him to move and make contact with her because the larger portion of the bug net was open at the lower part of the cot. In fact, based on the consistency of all the evidence, I believe that the accused was kneeling, as he testified to, but that at some point he was leaning or lying on R.S. with the weight of his upper body.

[108] In short, I found R.S. also to be a credible witness, but due to her level of intoxication and the fact that she testified to being asleep for most of the incident, her evidence was extremely limited in terms of its reliability. As I explained in the Court's assessment of the accused's credibility, I was not sure who to believe and therefore in terms of sexual contact, I gave the accused the benefit of the doubt and only accepted that he was lying on R.S. and that kissing occurred.

Credibility of Master Corporal Hébert

[109] I found Master Corporal Hébert to be a credible witness. She did not display bias towards either side and testified in a straightforward manner, providing evidence that was meaningful in corroborating important facts on the alleged incident. By her own admission, she was also intoxicated. I noted some inconsistencies between her testimony and that of both the accused and R.S., but none of these inconsistencies were critical in determining the essential facts and elements of the offence. As an example, Master Corporal Hébert stated that the lights were on when the accused asked to enter

the tent, whereas the accused stated that they were off, but that you could see based on the lighting emanating from the connection boxes. In any case, it was clear that there was some visibility.

[110] I did note that Master Corporal Hébert stated that she recalled Corporal Cadieux wearing his combat clothing, his CADPATs, when he was leaning over R.S., whereas Master Warrant Officer Moureau testified that the morning after, Corporal Cadieux was wearing the same civilian clothes he had been wearing the evening before, being jeans. These discrepancies were not critical to my assessment of the case, but they serve as excellent examples of the frailties of memory affected by both the level of intoxication and the time that has elapsed since the incident.

Analysis of the facts

[111] During the court martial, when R.S. was asked in direct examination whether she voluntarily agreed to have Corporal Cadieux touch her, she unequivocally stated no. The whole of the evidence before the Court was clear that Corporal Cadieux and R.S. were never romantically involved and although they knew each other professionally from work, there was no reason to believe that either of them had a romantic or sexual interest in the other.

[112] However, both Corporal Cadieux and Master Corporal Hébert gave some evidence that is potentially capable of raising a doubt that R.S. did not consent. Corporal Cadieux stated that R.S. initiated the kissing and Master Corporal Hébert testified that by what she heard, the kissing sounded consensual. As such, the Court was required to conduct a complete analysis. The accused made an admission that he had contact of a sexual nature with the complainant. Hence, it is clear that contact of a sexual nature occurred and that when combined with the accused's testimony, the contact admitted is passionate kissing.

[113] The prosecution submitted that the complainant was incapable of consenting because she was sleeping. Master Corporal Hébert confirmed that when she returned to the tent, she believed that R.S. was asleep as there was no movement in her cot and her eyes were closed. She stated that when Corporal Cadieux requested permission to enter the tent, she had no concerns in letting him in as they were both from the same unit and she assumed that they were friends.

[114] The accused testified that when he entered the tent, he had no intention of making sexual contact as he simply intended to wake R.S. to have her come back as they attempted to revive the party. As explained earlier, I do not think this storyline makes sense. I do accept that the accused may not have intended to awaken R.S. for a sexual purpose, but for reasons I explained earlier, I am also not convinced that he was recruiting interested members to continue the party.

[115] Master Corporal Hébert stated that the accused repeated R.S.'s name loud enough that she could hear him, and she estimated that her own cot was located approximately ten metres from R.S.'s cot.

[116] There was also a variance in testimony, about whether the accused was standing and leaning over R.S., or kneeling. The consistency in the evidence from the accused and Master Corporal Hébert was that the accused was actually leaning over R.S.'s cot in some capacity. Whether Corporal Cadieux was kneeling or standing, it is clear that he was leaning over her cot in some fashion. R.S. testified that the accused was on top of her when she awoke, which is not inconsistent because he could have been leaning on top of her from the kneeling position.

[117] The accused testified that while he was trying to awaken R.S., R.S. grabbed him and pulled his head towards her and kissed him. In his opinion, he simply reciprocated the kiss. He also stated that when R.S. did this, he lost his balance and was not sure what he did with his hands, etc.

[118] Master Corporal Hébert testified that although Corporal Cadieux's back was to her, she originally thought the kissing was consensual and because of that she actually found it personally very awkward. When questioned how she knew the sleeping bag was moving when there was a bug net over it, she explained that you could hear the sleeping bag rustle as it moved.

[119] R.S. testified that she was sound asleep and woke up to find the accused on top of her with his hand in her pants, laughing and saying words to the effect, "It is not Steve, it is Simon." After Corporal Cadieux left, R.S. testified that she pulled her sleeping bag up over her head and went back to sleep.

[120] Based on the testimony of Master Corporal Hébert and Corporal Cadieux, there is some evidence that gives rise to the question of whether or not R.S. consented to the kissing. Fortunately, the SCC has provided direction on how courts should deal with this type of situation. In *R. v. Hutchinson*, [2014] 1 S.C.R. 346, 2014 SCC 19, the majority reasons penned by McLachlin C.J. and Cromwell J. suggest a two-step approach in conducting an analysis where there is some evidence that could raise doubt on consent.

[121] Firstly, pursuant to section 273.1 (1), the trial judge should:

... determine whether the evidence establishes that there was no 'voluntary agreement of the complainant to engage in the sexual activity in question.' ... If the complainant consented, or her conduct raises a reasonable doubt about the lack of consent, the second step is to consider whether there are any circumstances that may vitiate her apparent consent.

[122] Based on the facts of this case, the Court must proceed to examine subsection 273.1(2) as it existed in 2015, which lists the circumstances when consent is vitiated:

(2) No consent is obtained, for the purposes of sections 271, 272 and 273, where

- (a) the agreement is expressed by the words or conduct of a person other than the complainant;
- (b) the complainant is incapable of consenting to the activity;
- (c) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
- (d) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
- (e) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

[123] What is clear in law is that the complainant must have the capacity to consent to the sexual activity in question. The SCC has been very clear that consent requires a complainant to provide actual “active consent throughout every phase of the sexual activity.” Lalonde, J. summarizes the law with respect to similar facts in the case of *R. v. D.*, 2015 ONSC 491:

[36] In the case at hand, while the Complainant’s intoxication and fatigue played a role in how deep she was sleeping; the Court finds that she was initially unconscious, and therefore incapable of consenting, *because she was asleep*. Section 273.1 provides that no consent is obtained if the complainant is incapable of consenting to the activity. As *R. v. A.(J.)* confirmed, ‘the definition of consent for sexual assault requires the complainant to provide actual active consent throughout every phase of sexual activity. *It is not possible for an unconscious person to satisfy this requirement*’ (*R. v. A.(J.)* at para 66). Those who are asleep at the time sexual touching commences lack the requisite consciousness to consent. Touching of a sexual nature that occurs in the absence of consent is sexual assault.

[Emphasis in original]

[124] However, difficulties present themselves when a complainant, due to the excessive drinking of alcohol and being deeply asleep, does not have much of a reliable memory of the events in question. In a case such as this, R.S. testified that all she remembers from the incident is waking up with the accused on top of her with his hand in her pants, and him laughing saying, “It is not Steve, it is Simon.” She stated that at that point, she was confused and really did not know what was going on, but told the accused to “Stop” and pushed him off. These two pieces of unrefuted evidence alone provide significant support to the complainant’s claim of non-consent.

[125] In the case of *R. v. Al-Rawai*, 2018 NSCA 10, the Court said:

To establish incapacity to consent, the Crown must prove that the complainant did not have an operating mind capable of understanding the nature and quality of the act, the identity of the person with whom the activity is to occur and understanding she could agree or decline to engage in or continue the sexual activity.

[126] In conducting my analysis, in light of the doubt raised by the accused and Master Corporal Hébert regarding R.S.'s consent, I looked not just at R.S.'s evidence that she did not consent, but I also examined the evidence of the surrounding circumstances including any circumstantial evidence that would permit an inference to be drawn that either R.S. did or did not voluntarily agree to engage in sexual activity with the accused or alternatively lacked the capacity to do so.

[127] Several witnesses testified that R.S. had to be told what had unfolded during the incident. Master Corporal Hébert testified that when the girls in the tent, explained to R.S. what had unfolded, she heard R.S. state something to the effect, "Oh my God. Like, that actually happened?" She told the Court she could tell by R.S.'s facial expressions that she was disgusted and really did not remember or know what had transpired.

[128] There was no pre-existing relationship between the two, nor was there any flirting or interest expressed by either of them in pursuing a romantic relationship. By her actions, R.S. had returned to the all-female tent, set her alarm and was asleep on her cot under a bug net, nestled in her ranger blanket and sleeping bag, her protection against any outside influence.

[129] The consistency in the evidence suggests that the complainant had been asleep for almost two hours when the accused entered the tent. The evidence also suggests she was in a deep sleep, which is supported by the accused's own admission that he had to repeatedly call her name in his attempt to awake her.

[130] I accept the complainant's testimony that she was asleep immediately prior to and during the kissing, and as a result, she was incapable of consenting to the sexual activity of kissing. The totality of R.S.'s conduct is consistent with her claim of non-consent. Even if I believe that R.S. was the one who initiated the kissing, my assessment is not compromised by this fact. By order of the commanding officer, the tent, where she slept, precluded the entrance of men. She had made a conscious decision to leave the party, put herself to sleep in what was designed and she believed to be a safe spot. She had reasonable expectation that she could sleep peacefully and privately without interference.

[131] I am perplexed by the fact that anyone would believe it is acceptable to enter an all-female tent at 1:30 to 2 a.m. in the morning for any reason, let alone to invite and canvass a sleeping individual's interest in returning to a party. R.S. was not expecting the accused, nor should she have been. I accept and believe the complainant's evidence that when she awoke, the accused was on top of her in some way. Although, I am not convinced beyond a reasonable doubt that the accused put his hand in her pants, as I explained earlier, his testimony did leave open the fact that he may have touched her. Moreover, the Court noted that once the complainant became aware of what was going on, she reacted with a sense of urgency, clearly communicating her non-consent, transmitted by a sense of panic in telling the accused to "Stop" while pushing him off her. This evidence is supported by Master Corporal Hébert's testimony that she reacted

immediately going to R.S.'s bed space. This evidence was not disputed or refuted by either Corporal Cadieux or Master Corporal Hébert.

[132] There is undisputed evidence of intervention by Master Corporal Hébert, telling Corporal Cadieux to “Fuck off,” as they were all trying to sleep. However, the Court noted that R.S. testified that she does not remember Master Corporal Hébert intervening. She testified that after the accused left, she pulled her sleeping bag over her head and went back to sleep. The totality of the evidence suggests that the period when R.S. was awake and conscious was short, but it is also suggestive that she may not have ever really fully woken up. This evidence is buttressed by the fact that the next morning, R.S. recalled waking up with Corporal Cadieux in her cot, but she has no memory of him entering the tent, calling her name, the kissing, nor does she even have any memory of Master Corporal Hébert coming forward and intervening. In a case where a complainant awakes and finds herself in a situation with an accused kissing and touching her, that person is unconscious as a result of being asleep and is not capable of rendering consent.

Steve or Simon?

[133] Even if the Court was to believe that the complainant, R.S., was the one who initiated the kissing and was awake, the accused's own admission and his post-incident conduct were consistent with the fact that R.S. did not know that it was him she was kissing. The common law recognizes that if the complainant is deceived about the identity of the participant, there is no consent (see *The Queen v. Clarence* (1888), 22 Q.B.D. 23 (Cr. Cas. Res.) and its progeny; *R. v. Cuerrier*, [1998] 2 S.C.R. 371 at paragraph 118; *R. v. Mabior*, [2012] 2 S.C.R. 584 at paragraph 39). I am not suggesting that the accused ever intended to deceive R.S., but rather, it is clear that based on his own evidence, for the large part of the incident, R.S. was not awake, nor was she aware of the identity of the person she was kissing.

[134] In order to provide valid consent, R.S. must possess the capacity to appreciate the identity of the person with whom she was engaged in sexual activity. A complainant lacks the requisite capacity to consent if the prosecution establishes beyond a reasonable doubt that, for whatever reason, the complainant did not have an operating mind capable of knowing the identity of the person and understanding that she could agree or decline to engage in, or to continue the sexual activity.

[135] R.S. awoke from her deep sleep, drowsy and half asleep, and until that point, she had not been given the chance to consent. Her immediate gesture to push the accused off and say “Stop” with a sense of panic are evidence that she was not consenting.

[136] In summary, in assessing the issue of R.S.'s non-consent, the Court took into account the totality of the evidence, including any ambiguous or contradictory conduct by R.S. as well as her statement regarding a “Steve” that confirmed she was not aware of the identity of the person she was with. The Court finds that the evidence does not

raise a reasonable doubt about R.S.'s assertion that she, subjectively, did not want the sexual touching to take place.

[137] Once again, in terms of satisfying non-consent for the purposes of proving the act, the *actus reus*, it does not matter what the accused believed as his perception of the complainant's state of mind is irrelevant at this stage of the analysis.

[138] Having found that the complainant did not consent to the sexual activity that took place on her cot, the *actus reus* has been proved beyond a reasonable doubt, the Court now turns to an assessment of the *mens rea* which considers the evidence from the perspective of the accused. (See *Ewanchuk*)

Mens rea

[139] Since sexual assault is a crime of general intent, the prosecution is only required to prove that the accused intended to touch the complainant and that he knew or was reckless of or wilfully blind to the complainant's lack of consent in order to satisfy the *mens rea* requirement. (see *Ewanchuk*)

[140] In this case, the accused asserted that he held an honest but mistaken belief in consent as he believed that the complainant had communicated consent to engage in the kissing. (see *Ewanchuk* at paragraph 23). The common law recognizes that the defence of mistake of fact removes culpability for those who honestly but mistakenly believed that the complainant had communicated consent to the accused.

Position of the parties with respect to the defence of honest but mistaken belief in consent

Defence

[141] The accused's position is that he did not have a culpable mental state, *mens rea*, and therefore did not commit the alleged offence. He argued that he had an honest but mistaken belief that by her actions, R.S. consented to the sexual activities.

Prosecution

[142] Conversely, the prosecution argued that based on the facts of this case, the accused's reliance on the defence of mistaken belief in consent is statutorily barred by section 273.2 of the *Criminal Code*. Section 273.2 provides that there is no defence where the accused's mistaken belief arose from intoxication, recklessness, wilful blindness, or the failure to take reasonable steps to determine that the complainant consented.

Law

[143] The defence of mistaken belief in consent arises where the complainant has not consented to the sexual activity, but the accused was operating under a mistaken belief that the “complainant had affirmatively communicated by [either] words or conduct her agreement to engage in sexual activity with the accused.” (see *Ewanchuk* at paragraph 49)

[144] In *R. v. Gagnon*, 2018 CMAC 1, upheld by the SCC, the Court Martial Appeal Court (CMAC) unanimously held that a defence of honest but mistaken belief in consent is not valid without specifically considering evidence relating to each of the statutory conditions set out in section 273.2 of the *Criminal Code* (paragraphs 12, 59; see also *R. v. Barton*, 2017 ABCA 216; 354 C.C.C (3d) 245)

[145] Section 273.2 reads as follows:

Where belief in consent not a defence

273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where

- (a) the accused’s belief arose from
 - (i) the accused’s self-induced intoxication,
 - (ii) the accused’s recklessness or wilful blindness; or
 - ...
- (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[146] In applying the *W.(D.)* instruction to the facts of a case involving the defence of a mistaken belief in consent, it is generally appropriate to begin with an analysis of the evidence of the accused. I must direct my mind to the decisive question of whether the accused’s evidence, considered in the context of the evidence as a whole, raises a reasonable doubt about his guilt.

Accused’s evidence

[147] The accused testified that he did not enter the tent for a sexual purpose and it was the complainant who initiated sexual contact by kissing him. However, the accused further testified that although he was confused and shocked by the kiss, he reciprocated it. Independent evidence of Master Corporal Hébert supports this fact. R.S. has no memory of the kissing and her evidence is of no assistance in this regard. Master Corporal Hébert testified that the whole incident only took a few minutes, but Corporal Cadieux testified that the entire incident took less than a minute.

[148] Notwithstanding the divergence of the evidence on whether the accused was on top of R.S. and put his hand down her pants or touched her on top of the sleeping bag, it was uncontested in the whole of the evidence that the accused did engage R.S. in passionate kissing. Consequently, that the first component of *mens rea* is established as the accused admitted he intended to return the kiss.

Issue 2: Can Corporal Cadieux rely upon the defence of an honest, but mistaken belief in consent?

Sub issues: Is there an air of reality to the defence?

[149] As a matter of law, this defence should not be considered by the trier of fact unless it has satisfied an air of reality test, which is “whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true.” (*R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, at paragraph 86; see also *R. v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702, at paragraph 14.

[150] The trial judge must consider the totality of the evidence and assume the evidence relied upon by the accused is true. Hence, in assessing the air of reality, I accepted all the evidence in the most favourable light to the accused.

[151] Subsection 265(4) of the *Criminal Code* codified the common law rule on the sufficiency of evidence a trial judge uses in determining whether the defence can legally be raised, and sets out the analysis that the trial judge must undertake when faced with this defence. Although some trial judges, sitting alone have found that he or she may bypass the *air of reality* test, this Court felt it helpful to use it as a threshold test before beginning a more fulsome assessment of all the evidence. Subsection 265(4) entitles the trier of fact “to consider the presence or absence of reasonable grounds for that belief” when assessing the honesty of the accused’s belief. Subsection 265(4) states:

Where an accused alleges that he believed that the complainant consented to the conduct that is the subject-matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused’s belief, to consider the presence or absence of reasonable grounds for that belief.

[152] Recently, the SCC decision of *Gagnon*, held that the defence based on honest, but mistaken belief in consent cannot be considered by the trier of fact without first considering the statutory limitations provided by section 273.2 of the *Criminal Code*. Hence, there will be no air of reality to the defence if one of the statutory bars set out in section 273.2 of the *Criminal Code* is present. If there is no air of reality for any reason, then the defence should not be considered by the trial judge.

[153] In order to determine whether there is sufficient evidence to give an air of reality to the defence, I reviewed the evidence in light of the following sub issues:

- (1) Did Corporal Cadieux believe that R.S. consented to the sexual activities?
- (2) Was this belief honest and unrelated to his self-induced intoxication or to his recklessness or wilful blindness? (See section 273.2, *Criminal Code*)
- (3) Was the statutory limitation of paragraph 273.2(b) of the *Criminal Code* requiring reasonable status engaged?

Issue 1: Did Corporal Cadieux believe that R.S. communicated consent to the sexual activities?

[154] In support of this defence, defence argued that the complainant did communicate consent because she initiated the sexual contact. He argued that R.S. and the accused were both engaged in mutual French kissing that was consensual. Master Corporal Hébert who overheard what was occurring, was at first of the opinion that the kissing was mutual.

[155] In short, there is some evidence, favourable to the accused, that supports his belief that R.S. communicated consent to engage in the sexual activity of passionate kissing. Hence, the Court must proceed next to conduct an analysis of whether the defence is statutorily barred by Parliament under section 273.2 of the *Criminal Code*.

Issue 2: Was this belief honest and unrelated to the accused's self-induced intoxication or to his recklessness or wilful blindness?

[156] Corporal Cadieux admitted to drinking that evening. Although counsel did not ask the accused to rate his own level of intoxication, based on the evidence, I could infer that he was not intoxicated to a level that he did not know what he was doing as he was able to provide a relatively consistent and detailed description of what unfolded. However, when asked if he would go to the live fire range with his level of intoxication, Corporal Cadieux stated he would not.

[157] Having said this, the prosecution argued that Corporal Cadieux's judgement was impaired by his consumption of alcohol, as his ability to observe and his inhibitions were lowered. The testimony of the accused and the whole of the evidence supports this. For example, it is not really clear how a bright soldier as he is, could clearly rationalize to himself that it was okay to enter an all-female tent without an invitation, in the early hours of the morning? Although he knocked, in the context of Operation HONOUR, the establishment of an all-female tent was meant to ensure that the women are not readily exposed to this type of interference. It is clear that his judgement failed that evening beginning foremost with his decision to enter the all-female tent. Perhaps Master Corporal Hébert should not have provided him entry, but she trusted him and granted him entry, based on an expectation that he did not want to enter for an improper purpose.

[158] In the middle of the night, after entry, the accused finds himself kneeling beside the cot of a female member, someone who he only has a professional relationship with. The evidence suggests she was in a deep sleep, at the end of an intensive military exercise and a night of drinking. The accused testified that he honestly believed that she woke up from a deep sleep to embrace him and engage in passionate kissing, despite never having shown a romantic interest in him. If he was so lucky that this is what R.S. wanted, a trusted member would stand back and ask ensure that the person was in fact awake and this was what she wanted.

[159] In *Sansregret v. The Queen*, [1985] 1 S.C.R. 570, 18 CCC (3d) 223, the SCC considered the concepts of “recklessness” and “wilful blindness”. At page 233, McIntyre J. defined recklessness as being “the conduct of one who sees the risk and who takes the chance.” At page 235, the concept of wilful blindness was discussed as follows:

Wilful blindness is distinct from recklessness because, while recklessness involves knowledge of a danger or risk and persistence in a course of conduct which creates a risk that the prohibited result will occur, wilful blindness arises where a person who has become aware of the need for some inquiry declines to make the inquiry because he does not wish to know the truth. He would prefer to remain ignorant. The culpability in recklessness is justified by consciousness of the risk and by proceeding in the face of it, while in wilful blindness it is justified by the accused’s fault in deliberately failing to inquire when he knows there is reason for inquiry.

[160] To establish recklessness as to consent, the prosecution needed to prove that the accused knew there was a possibility that the complainant was not consenting, but proceeded without regard to that possibility. (See *Pappajohn v. The Queen*, [1980] 2 S.C.R. 120 at paragraph 490). The accused was also acutely aware of the concerns generated by Operation HONOUR, the increased level of diligence imposed on members, the duty of all members to report breaches and the duty of the chain of command to take active steps to avoid harmful and inappropriate conduct. He testified that he was shocked and confused by the kissing, and despite his knowledge that fraternization was not permitted and the presence of Master Corporal Hébert, who at the time was senior in rank, and the other female members, he engaged in passionate kissing with someone he was not in a relationship with. Earlier that evening, he had been warned by Major Ross not to get “too touchy” with another woman on the Exercise. The accused’s testimony suggests that he engaged R.S. despite the risks associated with his conduct.

[161] Further, after he was ordered by Master Corporal Hébert to leave, the accused exited the tent and proceeded to brag to his friends about what happened, making fun of and mocking the complainant about what had occurred. Although he described it as funny in a dark humour sort of way, his actions supports the fact that he had acted recklessly, with no regard for the complainant and her tent mates. In doing so, he displayed disrespect to both R.S. and Master Corporal Hébert. Master Corporal Hébert trusted him, let him in and he betrayed that trust.

[162] The prosecution also asserted that in the alternative, Corporal Cadieux was wilfully blind. Wilful blindness arises where it is obvious in the circumstances that there is no true consent, but the accused does not take steps to confirm the lack of consent because he wants to believe that there is consent. Under cross-examination, he confessed that he had been sexually aroused by the kissing and despite the fact that he was aware that R.S. was acting completely inconsistent with what he understood to be the circumstances of their relationship, he proceeded anyway.

[163] Given that the accused was unable to awaken R.S. just seconds before, it should have been obvious to him that he needed to take steps to ensure that R.S. was fully awake and not sleeping. He chose not to make such an inquiry likely because he wanted to believe that she was interested, awake and consenting.

Issue 3: Is the statutory limitation of paragraph 273.2(b) of the Criminal Code engaged?

[164] In passing legislation, Parliament established that the honest but mistaken belief defence is only available to an accused if the accused took reasonable steps, under the circumstances, to ascertain the complainant's consent for each sexual act in the course of their activities. Paragraph 273.2(b) reads as follows:

the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[165] In *R. v. Barton*, 2017 ABCA 216, the Alberta Court of Appeal advised at paragraph 259:

Reasonable steps depend on the circumstances and these may be as many and varied as the cases in which the issue arises. That said, we reject the view that reasonable steps can equal no steps whatsoever. An accused's asking himself whether he should take a reasonable step is not itself a reasonable step. To suggest that reasonable steps means *no steps* flies in the face of the definition of "consent" under s 273.1(1) and Parliament's requirement under s 273.2(b) that an accused must have taken reasonable steps to ascertain *consent* in order to advance the defence of mistaken belief in consent. This idea resurrects yet again the debunked theory that unless and until a woman objects to, or resists, sexual activity, she is consenting to that activity.

[166] The Court must ask whether the accused's belief is supported by any evidence that the accused took reasonable steps to ascertain consent to the sexual activity in question. What amounts to reasonable steps must be considered in the context of the circumstances known to the accused at that time. It is a quasi-objective test and is somewhat akin to the accused having done his due diligence in the circumstances.

[167] In this case, the question of whether the accused took reasonable steps with respect to the kissing is considered against the background of being on an international operation, the existence of Operation HONOUR, the relationship between the accused

and the complainant, as well as evidence about verbal and non-verbal conduct of the complainant that evening.

[168] In short, R.S. and the accused were colleagues, friendly with each other, both posted to an elite unit, working in the same building at CFB Petawawa, in Canada. There was no verbal, nor non-verbal conduct that evening that suggested that either of them was interested in anything romantic. They were professional colleagues who quite frankly owed a duty to each other to ensure that neither of them got into any trouble particularly when one of them was vulnerable. That is what soldiers, sailors and airmen and women do.

[169] It would be virtually impossible for any member of the CAF not to be aware of the concerns behind the imposition of Operation HONOUR, nor the duty it placed on every member, male or female, to be hypervigilant in identifying, preventing, intervening and reporting inappropriate conduct.

[170] The accused was well aware that R.S. had been drinking as he testified to providing her with rum and Coke at some point during the evening. He also confirmed that R.S. did not invite him to the tent. Based on these circumstances, all known to the accused, the steps that this Court considers reasonable in the circumstances should have been heightened and of the highest standard.

[171] However, at the air of reality stage, I must ask myself whether the accused took some steps and although, I believe that what would be considered reasonable in the circumstances should have been at the highest level, I am not concerned with the sufficiency of the steps at this stage.

[172] Defence argued that when Corporal Cadieux heard R.S. mumble the name of Steve, he did take steps when he quickly and appropriately corrected her by saying that "It is not Steve, it is Simon." Although this might be true, it is not entirely clear on the evidence whether this preceded or followed R.S. waking up and telling him to stop.

[173] Based on the facts of this case, an unequivocal communication of consent would have been required immediately, on first contact as the evidence suggests R.S. was sleeping and unconscious. Steps taken by the accused several minutes later after having been engaged in several minutes of passionate kissing does not satisfy the reasonable steps requirement. The accused needed to ensure that R.S. was indeed awake and interested in kissing him, not anyone named Steve or anyone else for that matter, as soon as the passionate kissing began. In my view, the alleged step was a little too late and would not be sufficient to absolve the accused of the requirement to take steps to ascertain consent at each step.

[174] In my view, the defence of honest but mistaken belief in consent is not available to Corporal Cadieux as I do not believe that he took reasonable steps to ascertain R.S.'s consent on initial contact. Corporal Cadieux approached R.S. when she was asleep, fully aware that she had consumed an excessive amount of alcohol during the evening.

She was in a very vulnerable state, asleep in her own personal space where she had every right to expect to be safe.

[175] The purpose of an all-female tent was to ensure that like their male colleagues, the female soldiers and airwomen, were entitled to sleep in peace without fear of unwanted interaction. Any reasonable person in Corporal Cadieux's circumstances would have taken steps to ensure that R.S. was fully awake. Corporal Cadieux took no such precautions. By his own admission, he had no reason to believe that R.S. was expecting him or wanted him there or that she wanted to kiss him. For whatever reason, he did not even try to speak with her or attempt to ensure that she was fully awake before he engaged in intense kissing and then lying or leaning on top of her.

[176] As explained earlier, the evidence before the Court was sufficient to prove R.S.'s non-consent beyond a reasonable doubt. Although it is enough for this Court to find that any one of the disqualifying factors set out in section 273.2 exists, in order to determine that the accused cannot avail himself of the mistaken belief defence, the evidence suggests that there are several statutory bars that all prohibit the accused's reliance on that defence.

[177] In light of all the circumstances of the incident, in the early morning hours, after an evening of festivities where alcohol was served, the accused who was intoxicated, found himself in the all-female tent, kneeling beside the cot of a sleeping colleague, who by her own admission was intoxicated herself. The accused testified that he made repeated attempts to awaken her from a deep sleep. The Exercise was over and although she had set her alarm for the next morning to participate in the cultural activities, she had no reason to believe that anyone would wake her for work, duty or any other purpose.

[178] Even if the Court accepts that Corporal Cadieux may not have originally intended to awaken R.S. for sexual purposes or even if I accept that R.S. initiated the kissing, Corporal Cadieux's decision to forge ahead with passionate kissing was reckless and wilfully blind as to whether R.S. was fully awake and consenting.

[179] Further, in the context of her being his colleague, alone and sleeping in her bed, he did not take reasonable steps, under the circumstances, to ascertain her full agreement with the passionate kissing.

[180] When I apply the *W.(D.)* test, to the accused's evidence, even if I believe the accused thought she was consenting, the Court must still measure the evidence against the bars set out by Parliament in section 273.2 of the *Criminal Code*. (see *R. v. Dippel*, 2011 ABCA 129 at paragraph 13)

Conclusion on the charge of sexual assault

[181] I find that the prosecution has proven beyond a reasonable doubt that Corporal Cadieux did not have an honest but mistaken belief in consent. The defence of honest

but mistaken belief in the complainant's consent is not available to the accused as it was vitiated by his recklessness, wilful blindness and the fact that he did not take reasonable steps, in the circumstances known to him at the time, to ascertain that the complainant was consenting to sexual touching.

[182] In conclusion, I find that the prosecution has proven beyond a reasonable doubt, all the elements of the offence of sexual assault.

Charge number 2 - Drunkenness

Facts

[183] R.S. testified that the morning of the cultural day, 28 November 2015, Corporal Cadieux came into the all-female tent without seeking permission, asking the female members for alcohol and food. She estimated that it was in the morning, before they left for the bus to go to the Sandals resort, which departed around 9 a.m. She recalled that Warrant Officer Moureau, as he was at the time, yelled at Corporal Cadieux to get out of the tent, but that Corporal Cadieux did not respond or react. She stated Corporal Cadieux stayed in the all-female tent for approximately 5 minutes before someone entered the tent to escort him out. She was able to observe Corporal Cadieux and in her view, he was drunk and slurring his words. She said that he looked tired and was kind of stumbling around. When asked where she would rate his level of intoxication, on a scale of 0 to 10, she rated him at approximately a 9.

[184] Master Corporal Derible also testified that on the morning in question, Corporal Cadieux entered the all-female tent and many of the women were not happy as he was not supposed to be there. She testified that he was barely there for five minutes before someone came in to remove him. She also recalled hearing someone calling Corporal Cadieux to get out of the tent. She stated she was close enough to Corporal Cadieux to observe him, see his face and hear him speak. In her opinion, in rating his level of intoxication, on a scale of 0 to 10, she would classify him as being a 3 or 4. However, she also told the Court that he was stumbling and was not able to walk in a straight line. When asked to describe Corporal Cadieux's behaviour, she said that she could tell he was drunk because he kept asking her for bacon, which she suggested is often desired by someone drunk.

[185] Under cross-examination, Corporal Cadieux confirmed that he went into the tent searching for alcohol to bring on the bus. He also confirmed that he was feeling the effects of the alcohol from the night before. Although he described having a hangover, he also admitted that because he had taken sleeping pills, it could have been a mix of the two. He also explained that the alcohol, the sleeping pills and the long hours in 40 degree heat, intensified the effects.

[186] When Corporal Cadieux was asked on cross-examination whether he drank that morning from a bottle of vodka, being Grey Goose, he said he could not recall, but it was possible. He stated his intent was to drink on the way to the resort. Master Corporal

Derible testified that Corporal Cadieux sat next to her on the bus headed to the Sandals resort. She testified that he had vodka in his bag and she saw him take a drink out of the bottle while on the bus.

Master Warrant Officer Moureau's evidence

[187] Master Warrant Officer Moureau who was Corporal Cadieux's overall supervisor on the EXCON, and was also double hatted as the Company Sergeant Major (CSM) for the Exercise, witnessed Corporal Cadieux enter the all-female tent on the morning of 28 November 2015, prior to the cultural visits. He stated that he opened the door to the tent, and told Corporal Cadieux to get out, but then noticed shortly thereafter, that he had not left. He testified that Corporal Mitchell noticed that Master Warrant Officer Moureau was getting agitated by Corporal Cadieux's non-compliance, so Corporal Mitchell went into the tent to get Corporal Cadieux out. Although Corporal Cadieux does not recall hearing Master Warrant Officer Moureau yelling at him to get out of the all-female tent, he did remember when Corporal Mitchell came in to get him.

[188] Master Warrant Officer Moureau testified that when Corporal Cadieux finally left the all-female tent, he apologized to him and said words to the effect, "The Simon you see here, is not the Simon you know. Master Warrant Officer Moureau told the Court that Corporal Cadieux was slurring his words, his eyes were bloodshot and he was still wearing the same T-shirt and jeans from the barbecue the night before.

[189] When asked by the prosecution to rate Corporal Cadieux's level of intoxication on a scale from 0 to 10, Master Warrant Officer Moureau said, "Maybe a 6." Master Warrant Officer Moureau stated that he was not concerned about Corporal Cadieux going to the Sandals resort because it was a closed and private resort and he figured that he would simply go there and sleep it off for the day.

[190] As they started to load the buses to go to the Sandals resort, Master Warrant Officer Moureau testified that Corporal Cadieux sat in the JDF driver's bus seat, beeping the horn. He stated that Corporal Cadieux was told to get to the back of the bus. Corporal Cadieux confirmed for the Court that he had sat in the driver's seat and was simply joking around telling everyone to get on the bus. As he explained, he worked in a very high-stress job so he used humour to get through the day.

[191] Next, Master Warrant Officer Moureau stated that he noticed that on the bus, Corporal Cadieux had a bottle of Grey Goose vodka in his bag and he told him to get rid of it. He stated that Corporal Cadieux got off the bus and got back on with a water bottle. He stated that he did not check what was in the water bottle, but confessed that he had doubt that what he was drinking from the bottle was not water, but he had no proof.

[192] When the bus finally headed to the resort, he stated that Corporal Cadieux was obnoxious on the bus and the other people on the bus were annoyed by his demeanour.

[193] Master Warrant Officer Moureau told the Court that when they learned that they could not enter the Sandals resort, they decided to go to Margaritaville, which was a public resort. Since Master Warrant Officer Moureau did not want the others to have to babysit Corporal Cadieux, he decided to leave him back at the camp. He told the Court that when he told Corporal Cadieux, Corporal Cadieux was upset and got into the rental car to drive back to EXCON. Master Warrant Officer Moureau stated that he told the accused that he was not driving and took the keys away from him. In his testimony, the accused thanked Master Warrant Officer Moureau for not letting him drive.

[194] With respect to the incidents that occurred on the morning of 28 November 2015, Corporal Cadieux testified that he clearly understood the policy for entering the all-female tent. He described that the protocol as requiring a male to knock on the door, wait for someone to open the door and then either request permission to go in or have someone come out.

[195] Corporal Cadieux also testified that since he was having problems sleeping, he was taking sleeping pills and when he went to bed, in the early hours of 28 November 2015, after the festivities, on top of having drank a significant amount of alcohol, he had also taken a sleeping pill or pills. He told the Court that when he awoke, he realized that from the mixture of alcohol and sleeping pill, he urinated in his sleeping bag.

[196] He also confirmed that on the morning of 28 November 2015, he entered the all-female tent looking for alcohol which he said was to drink at the all-inclusive resort.

Essential elements of the offence of drunkenness

[197] In order to prove the offence of drunkenness, the prosecution must prove, the identity of the accused, date and place of the offence, and the fact that owing to the influence of alcohol or drug, the accused is unfit to be entrusted with any duty that he is or she may be required to perform or he behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service. In his admissions, the accused admitted identity, place and date of the offence. Hence, the remaining elements that must be proved beyond a reasonable doubt are that the accused 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.

[198] As a starting point, it has well been established in jurisprudence at both the court martial and CMAC levels that being intoxicated from alcohol or a drug is not, in and of itself, an offence under the *NDA* .(see *R. v. Simard*, 2002 CMAC 6 (CanLII), (2002), 6

C.M.A.R. 270 at paragraph 3; *R. v. Yanchus J.A.*, 2016 CM 1014 (CanLII) at paragraph 60; *R. v. Barkley R.E.*, 2006 CM 23 (CanLII) at paragraphs 7-8)

[199] However, the challenge faced by a trier of fact is deciding at what point, intoxication leads to conduct that is prohibited in terms of section 97 of the *NDA*, the offence of drunkenness.

[200] Based on the facts, Corporal Cadieux was not expected to be called to perform any duty that day. Hence, the relevant paragraph was 97(2)(b) of *NDA* which requires the prosecution to prove that Corporal Cadieux behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service. The appropriate test is set out in *R. v. Sloan*, 2014 CM 4004. As stated by Pelletier M.J., at paragraphs 14 to 15:

[14] 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. It reflects the fact that no member of the military is exempted from the obligation to show respect to anyone, let alone refrain from violence despite any level of intoxication.

[15] The attendance at commemorative events or military celebrations which sometimes involve the availability of alcoholic beverages is part of military life. The persons attending are generally going to these events, such as military balls, to have a pleasant time. They should not be subjected to violence or disrespect.

[201] In attempting to identify the type of conduct that fits within section 97 of the *NDA*, it is helpful to review the various definitions of the offence's terminology within the *Concise Oxford English Dictionary* (COED).

[202] The term "disorderly" in the context used in section 97 is defined as:

"involving or contributing to a breakdown of peaceful and law-abiding behaviour."

The term "disorderly conduct" is defined as:

"unruly behaviour constituting a minor offence."

The term "unruly" is defined as:

"disruptive; difficult to control."

The term "law-abiding behaviour" involves obeying the laws of society.

The term "society" is defined as:

"the aggregate of people living together in a more or less ordered community, being a particular community of people.... regarded

as forming a distinct group.”

The term “law” is defined as:

“a rule or system of rules recognized by a country or community as regulating the actions of its members and enforced by the imposition of penalties.”

Position of the prosecution

[203] The prosecution argued that Corporal Cadieux’s conduct owing to the influence of a drug or alcohol is not contentious as Corporal Cadieux admitted he was drunk. The evidence suggests that on the morning of 28 November 2015, the accused was slurring his words, stumbling and asking for food and alcohol. Further, he argued that we know from Master Corporal Derrible’s testimony that he was drinking vodka on the bus that morning and asking for bacon. The prosecution argued that there is no doubt that he was under the influence of alcohol and/or a drug.

[204] He further argued that evidence suggests that the pattern of actions that morning show that the accused behaved in a disorderly manner. He states that the sexual assault itself, that occurred in the early hours of that morning, the accused’s conduct later that morning entering the all-female tent without authorization, not responding to then-Warrant Officer Moureau’s request to exit the all-female tent, sitting in the bus honking its horn, being obnoxious and disrupting others on the bus to the Sandals resort, but more importantly, when a decision was made that the accused would not go to the public resort of Margaritaville, the accused while intoxicated got into the rental vehicle with his keys intending to drive.

Position of the defence

[205] Counsel for Corporal Cadieux argued that the drunkenness charge revolves around the morning of the cultural day and had nothing to do with the sexual assault allegation. He referred the Court to paragraph 53 of the Agreed Statement of Facts where Major Ross confirmed that when he returned that evening, that Corporal Cadieux was lucid and not slurring his words. He argued that on the whole of the evidence, there is a strong inference that Corporal Cadieux was not intoxicated, per se, on that evening.

[206] He further argued that the chain of command had not placed a limit on the quantity of alcohol to be consumed and in fact they had helped to pay for some of the alcohol that was consumed. He argued that the fact that Corporal Cadieux was removed from the bus was unpleasant, but that his action of sitting in the bus driver’s seat, beeping the horn was only a jovial gesture breaking up the tension in a high-stress environment. He argued that Corporal Cadieux was removed from the bus for being unpleasant, but that alone does not rise to the level of drunkenness.

Analysis

[207] In addition to the test set out by Pelletier M.J. in the case of *Sloan*, and upon review of the definition of “disorderly” as well as the definitions of the affiliated terms set out in the COED, I have no trouble concluding that in order for the prosecution to prove that a member has behaved in a disorderly manner, that it must prove that the specific conduct, owing to the influence of alcohol or a drug, the member was either difficult to control or he or she violated the laws, protocols or standards expected of him or her in the circumstances.

[208] The prosecution led a significant amount of evidence that the accused was drunk on the morning of 28 November 2015, as well as his obnoxious and unacceptable conduct. As defence counsel argued, it is clear that a drunkenness charge requires more serious conduct than simply being intoxicated. I agree completely with him.

[209] On the facts of this case, there was a great deal of speculation as to whether the decision to remove the accused from the cultural visit to Margaritaville was more preventative or speculative in nature given that Margaritaville was a public resort. It was not entirely clear on the evidence but there was some suggestion that the decision was proactive and based on the fact that the accused was becoming too difficult to control.

[210] However, there were two specific incidents that attracted the Court’s attention where the Court is satisfied beyond a reasonable doubt that the incidents took place as described and as such, they merit closer examination.

[211] The first incident was when the accused violated the TF policy by entering the all-female tent on the morning of 28 November 2015, in flagrant disregard of its purpose to control the entrance of men. Further, despite his CSM yelling at him to get out, the accused did not respond until Corporal Mitchell entered the tent to escort him out. All witnesses described the accused as having signs of intoxication, with blurred eyes and/or stumbling. Corporal Cadieux admitted in his testimony that he did enter the tent in search of alcohol.

[212] The second incident occurred when Corporal Cadieux got into the rental vehicle with the keys intending to drive the vehicle back to EXCON.

[213] Based on Corporal Cadieux’s testimony, he was clearly affected by the combined effect of alcohol and drug, being a sleeping pill, as well as a hangover. Bell C.J. confirmed at paragraph 33, in the CMAC decision in *Cadieux* that:

It is common knowledge that excessive drunkenness may lead to a state of being “hangover”. Conduct which otherwise meets the definition of drunkenness cannot, in my view, be disregarded because it might arise from the state of being hungover. The causal link between drunkenness and the state of being hungover is simply too direct for any other approach. . . . In my view, such situations would clearly arise “owing to the influence of alcohol” (see *Simard* at para. 3).

[214] In short, regardless of the fact the accused described his state as being hungover, he admitted being under the influence of the combined effects of alcohol and the sleeping pills. I have no doubt that if he was not suffering from the combined effects, he would not have entered the all-female tent, contrary to the policy. In fact, earlier that morning he followed the proper procedure.

[215] Based on Master Corporal Hébert's testimony, we know the accused consumed alcohol that morning, and was still suffering the effects of the previous evening's alcohol and sleeping pill mix. Hence, with respect to the second charge, being drunkenness, the Court is satisfied that the prosecution has demonstrated beyond a reasonable doubt the essential elements of the identity, the date and the place of offence and the fact that on the morning of 28 November 2015, Corporal Cadieux was under the influence of alcohol and sleeping pills.

[216] With respect to whether or not his conduct was disorderly or not, there was no ambiguity in Master Warrant Officer Moureau's testimony that the accused was not in the required sober state to drive a vehicle, which the accused testified to thanking him for intervening. The poor judgement the accused exercised simply when he got into the rental car, while impaired, with the intention to drive is problematic. The simple act of getting into the driver's seat of a car, with the keys to the vehicle, while under the influence of alcohol or a drug is normally sufficient to attract jeopardy in a criminal context and that in and of itself meets the disorderly test of the offence of drunkenness.

[217] Hence, the Court finds that the prosecution has discharged its burden regarding the essential element of the accused's disorderly conduct. The accused's conduct, as described by the witnesses, is blameworthy as the accused flagrantly disregarded the policy and protocol that had been put in place for the respect of all-female members of the task force, by entering their tent, unannounced and later, he got into a rental car with the keys and the intention to drive while he was impaired.

[218] As a result, in view of all the evidence, the Court finds that the prosecution demonstrated beyond a reasonable doubt all the essential elements of that charge and thus finds the accused guilty of drunkenness.

FOR THESE REASONS, THE COURT:

[219] **FINDS** Corporal Cadieux guilty of the first charge, of sexual assault, contrary to section 271 of the *Criminal Code* and guilty on the second charge of drunkenness contrary to section 97 of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois

Mr D. Hodson, Defence Counsel Services, Counsel for Corporal S. Cadieux