



COURT MARTIAL

Citation: *R. v. Palmer*, 2021 CM 3013

Date: 20211210

Docket: 202044

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal J.E. Palmer, Accused

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code of Canada*, I direct that any information arising in this trial by Standing Court Martial that could identify any person who is described during these proceedings as a complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

Introduction

[1] Corporal Palmer is charged with three service offences punishable under paragraph 130(1)(a) of the *National Defence Act* (NDA) for sexual assault contrary to section 271 of the *Criminal Code*, and preferred by the Director of Military Prosecutions on 2 October 2020.

[2] The prosecution alleged that these three offences involved the same complainant, and would have been committed between November 2018 and June 2019 at three different times and locations in Ottawa.

[3] This decision is about the finding, guilty or not guilty, regarding these three charges following a trial which took five days.

The evidence

[4] The prosecution called only one witness, which is the complainant in this case. In the course of her testimony, she drew a sketch of the parking lot at the Rideau Centre in Ottawa where the incident in relation to the third charge allegedly occurred, and it was introduced as an exhibit.

[5] Corporal Palmer decided to testify for his own defence. He introduced a number of medical documents covering July to November 2018 concerning a lower back pain injury he suffered and for which he was medically treated. He also drew a sketch of his working place where the events concerning the second charge allegedly took place, and it was introduced as an exhibit as well.

[6] Finally, the Court took judicial notice of facts and matters contained and listed in Military Rule of Evidence (MRE) 15.

The facts related to the alleged incidents

[7] A.M., the complainant in this matter, joined the Canadian Armed Forces (CAF) in 2003 with the reserve force component. In 2006, she transferred with the regular force. It is in 2012 that she decided to remuster as a Resource Management System (RMS) clerk.

[8] In 2018, she was employed as an RMS clerk at the orderly room (OR) of Canadian Forces Support Group Ottawa (CFSU (O)) with the release section. The OR was located on the fifth floor of Major General Pearkes building in Ottawa.

[9] Corporal Palmer joined the CAF as a reservist in 2001. He later transferred with the regular force in 2014 and was employed as an RMS clerk. During the summer of 2017, the accused was posted to the pay and records section at CFSU (O). He became responsible for dealing with parental benefits administration (Maternity and/or Parental Benefits Administration), more known by its acronym MATA/PATA.

[10] The complainant and Corporal Palmer both worked at the (CFSU (O)) OR and they were colleagues. Their relationship evolved and they became good friends. They were getting along well at work but they never had social activities together outside of their working hours. Essentially, during work, they were used to have a coffee together at the cafeteria or to spend, once in a while, lunch hour together for discussing.

Incident related to the first charge

[11] The complainant testified that the police investigator helped her to narrow down the period of time between mid-August and November 2018 as being the timeframe the incident related to the first charge would have happened. She is able to determine that the incident with the accused occurred in 2018, while being at work and prior to the second incident forming the subject-matter of the second charge in December 2018, but she was unable to be more specific than that. Accordingly, she said that it probably occurred in November 2018.

[12] As she mentioned during her testimony before the Court, such lack of details may be the result of her efforts to forget about what happened with the accused over the last three years.

[13] Then, it is between mid-August and November 2018 that the accused invited A.M., probably during her lunch time, to come with him for some shopping at the Rideau Centre, which is a mall located across the street in front of the building where they were working.

[14] She said they had a short walk together through a tunnel to get to the shopping centre. They went to the Hudson's Bay where Corporal Palmer wanted to try some clothes. They went in the men's section where the accused picked up some clothes and he then entered in the change room to try them.

[15] Unexpectedly, he asked her to join him in the change room and he specified that she had nothing to fear as nothing will happen, which she understood that nothing of a sexual nature would happen. She then entered in the change room while he was there.

[16] The change room was about six feet by twelve feet. A bench was on the right side. Once she entered, she went on her left. She felt uncomfortable. The accused was trying on shirts and shorts.

[17] At some point, Corporal Palmer was in line with the door and he came towards her. He put her against the wall and started to kiss her on her neck and her mouth, he touched her breast over her clothes. She asked him to stop and mentioned that it was time for them to leave. The accused backed off and she exited the change room. This event lasted about five to ten seconds. He asked her then to wait for him, which she did, and he tried other clothes. He did not buy anything and they left the store together.

[18] She was confused and torn concerning their friendship. She tried to ignore that incident and to maintain their relationship as friends like it was prior to this incident. She continued to communicate on a daily basis with Corporal Palmer.

[19] The accused testified that in June and July 2018 he participated in different modules about his primary leadership qualification (PLQ) course at the training centre in Meaford, Ontario. The purpose of this course was to qualify him for the appointment of master corporal.

[20] However, during the last module, he injured his back. He was returned to his unit at the end of the month of July because of this injury. He was put on sick leave the entire month of August and part of the month of September. He started on 10 September to work three days a week, which was usually on Tuesday, Wednesday and Thursday.

[21] He recalled that it is during the month of August 2018 that he went with the complainant to the Hudson's Bay Company at the Rideau Centre for shopping some clothes.

[22] At that time, he had a lower back injury for which he took pain medication and received physiotherapy treatments. Because of this injury, he had limitations and would walk slower than usual. He could not take the stairs because he was unable to raise his feet high enough to do so. The complainant was aware that Corporal Palmer went on his PLQ course but did not recall noticing that he had an injury when they went together to the Rideau Centre. She said that he prefers to take the stairs and did not recall him taking the elevator because of an injury. According to the accused, he took the elevator and the escalator in order to get to his place of work if need be during that period of time because of his injury.

[23] Corporal Palmer said that he got a call at home during the month of August from a colleague concerning a file and he decided to go to his place of work to sort out issues related to it. His wife drove him to his place of work, and it was planned that he would take the bus and join her later at a location in Ottawa where she had an appointment, allowing him to go back home with her.

[24] He met with his colleague, sorted out the issue about the file and found himself with an hour to kill before taking the bus. He decided to go shopping for some clothes, shirts and shorts at Hudson's Bay at the Rideau Centre. He saw the complainant and learned that her lunch plan had failed. He invited her to join him for shopping and she accepted.

[25] Because of his injury, he walked slower than usual and A.M. had to wait for him and he consistently apologized to her for that situation. He went to the men's section of Hudson's Bay, picked up some shorts and shirts and went to the change room. The complainant followed him to that place. He entered the change room while she stayed outside, texting on her phone, and he started to try on clothes.

[26] He first tried a golf shirt. He opened the change room door and asked the complainant her opinion about it. She did find it funny or did not like it and entered in the change room. She commented on how large and awesome the change room was and sat on the bench.

[27] He told the court that she leaned toward him and had a big smile on her face, she tapped on the bench, told him that it was a nice bench, they could have some fun there and it was the right height for a blowjob. He found her remark a bit exciting and sexy. In addition, he always found her physically attractive. He then replied to her that he

would like to know what it feels like. She said that they could fix that, stood up and walked towards him. She came close enough to reach him and felt his penis. He became fully erected. He told her that they cannot do this there as it was not the right place. She said “fine” and “fuck you” in a playful manner and left. She had a smirk face.

[28] He exited the change room, leaving clothes on a hook and did not buy anything. He walked back with the complainant to the escalator where they took different directions. She went back to work, while he made his way to the bus, took it and met with his wife as planned.

[29] He denied that things occurred in the manner described by the complainant in her testimony and he said that he never touched her in the way she described it to the Court.

[30] He confirmed that this incident had no impact on their friendship and that they continued to communicate daily as they were doing before it.

Incident related to the second charge

[31] According to A.M. the incident being the subject-matter of the second charge occurred at the OR’s Christmas party, probably on 21 December 2018. This event took place at the office, during a working day, around noon. Drinking alcohol was then permitted. She did not recall how many drinks she had at that time.

[32] The party was held on the fifth floor of Major-General George R. Pearkes Building in Ottawa, in the area of the reception desk.

[33] Later in the afternoon, many people had left for the day. She decided to go back to her cubicle to finish a release file prior to the Christmas block leave. She made Corporal Palmer aware of that.

[34] Her cubicle had fairly large and high walls. Inside, there was an L-shaped desk with a chair facing the door. For intimacy purposes when she would change, she could close the opening that served as a door with a curtain that she could draw.

[35] Corporal Palmer showed up later at her cubicle while she was there. He approached her and sat on a chair beside her. He said that he was going to help her with her file. They started talking. At some point, the accused directly asked her for a blowjob. She felt cornered and trapped as he was blocking her way out. He kept asking her for it, pressuring her. She laughed and repetitively said no.

[36] They had an exchange that appeared to her as being a situation where the only way out for her would be to do what he was asking to do. She was under the impression that if she complied with his request, he would then stop and leave her alone. Essentially, she understood that if she wanted to get rid of him and his demand, the only way to succeed would be to act as he wished.

[37] When he stood up to close the curtain, she froze and panicked. She said that he came back, sat beside her, asked her again for oral sex, unzip his pants and exposed his penis. She obliged the accused and performed fellatio on him. He was in a sitting position and she does not remember exactly if she remained seated or not while she was doing this. Once she was done, she cleaned herself with tissues. She recalled that the accused left and nothing else. She took the bus and went back home.

[38] Concerning this incident, Corporal Palmer did not deny that the complainant gave him fellatio. However, he totally denied the way she reported this incident to the Court, especially about the issue of consent.

[39] He confirmed that the Christmas party took place on 21 December 2018. On that morning, he was responsible with A.M. to distribute the draw tickets to the OR's members. Once they were done with that task, the complainant told him that she would pass by his office and get him for the party, which she did.

[40] They went to the party together and sat beside each other. He ate and chit-chatted with other members of the organization. At some point many people had left the office. The complainant and he were still there. The complainant stood up and invited him to come with her to her cubicle if he wanted. He accepted. They walked together to her cubicle.

[41] They entered her cubicle. She sat behind her desk and he sat on a solid chair located on the left side of the opening of the cubicle that served as a door. They talked and he played games on his cellphone while the complainant was busy with other things.

[42] Their discussion took a turn at some point where they had an exchange about blowjob and oral sex. He mentioned during this conversation that it would be great if men could walk around with their penis out and a bell attached to it. Then they would just need to ring it to get a blowjob.

[43] Then, the complainant would have made the sound "ding" like a bell, while having a big smile on her face. He decided to stand up while she still looked at him with a smile. He unzipped his pants. At that point, he thought that the complainant was bluffing more than anything else and that she would say no. He paused. She kept looking at his groin and his face. He concluded that she really wanted to perform oral sex on him.

[44] He took his penis out of his pants and said that he was really going to do this, to which she would have replied, "Yeah!" He then understood that she would perform oral sex on him.

[45] She approached him, he balanced himself against the desk and she started to perform oral sex on him. After few seconds, she told him to close the curtain at the door

to get more privacy. He went back in the same position and she continued to perform oral sex on him. According to him, she appeared as enjoying it and she seemed enthusiastic.

[46] He said that he never forced her by words, gestures or threats. It ended when he climaxed. She cleaned herself with tissues. She offered him a tissue. He cleaned himself with it and reach a bottle of hand sanitizer. He put some on his hands and on his penis. He did so because he worried he may have caught something. She saw him doing that. She looked perplex and upset according to her face. He then said, "What?" She raised her eyebrow and he understood that she was insulted. He then walked out of the cubicle and left her alone.

[47] He denied that he blocked her to prevent her from leaving the cubicle or he forced her to do what she did. For him, everything that happened was consensual and nothing else.

Incident related to the third charge

[48] The complainant said that further to the incident between her and Corporal Palmer, she lost trust in him and she had very little communication with him. According to her, their friendship took a huge step back and they were not very close friends anymore.

[49] She was posted later in a different position and office on the Quebec side of the National Capital Region. She knew that Corporal Palmer would be posted outside Canada during the summer.

[50] It is in this context that she received a text message from the accused inviting her to join him for a coffee before he left the country for some time.

[51] She felt confused about this invitation, considering on one side that she was losing a good friend, and on the other side that she did not know about his real intention about her.

[52] She texted him back and said if she accepts his invitation, nothing was going to happen between them, to which he agreed because he did not want anything from her.

[53] She then agreed to meet with him for a coffee at Second Cup in the Rideau Centre. She was happy but nervous at the same time. She wanted to believe people can be good.

[54] She met with him at this place during lunch time, at the end of June or beginning of July 2019. They sat at a table and they drank something while they were talking. Once they finished their conversation, she walked back to her car in the parking lot. He started to walk with her and he insisted on walking her back.

[55] Once they were close to her car, right beside the rear door, they proceeded with a mutual friendship hug goodbye; however, Corporal Palmer did not let her go. He started kissing her neck and touching her body through her clothes. At some point, she was standing up against her car. She was rigid and stiff. The accused fully pressed himself against her body and tried to kiss her. She felt his body and specifically his hips pushing firmly. She also felt his penis being hard.

[56] The accused's hands were on her breast, bum and hips. He was kissing her face, trying to have her kissing back. Corporal Palmer would have said that if she kissed him back, he would let her go. She kissed him back and he backed off a bit. She then went to her car.

[57] He put himself in a way to prevent her from closing the driver's door, came closer to her, took his penis out of his pants and asked her to give him a blowjob. She said that it was not going to happen. The accused backed up. She shut the door and left.

[58] She said that she felt scared and tried to de-escalate the situation in order to get out safely.

[59] The day after, she called the military police. Some military police members came to her place of work and asked her to provide a verbal and written statement. About two weeks later, she went to the military police detachment and she provided a full video-audio recorded statement.

[60] According to Corporal Palmer, he did not notice any change in his relationship with the complainant after the December incident. It did not appear to him that she looked at him differently. For him, they were still best friends. He said that he continued to see her for a morning coffee twice a week while they were still in the same office.

[61] He said that the complainant was posted in April 2019 in a different position and office and that she got promoted at the same time.

[62] He confirmed that he contacted the complainant to meet her before leaving the country, as he was posted out in July, and that he mentioned to her that nothing would happen. He said that they met over lunch hour at Second Cup Coffee in the Rideau Centre on 25 June 2019. He was wearing his combat uniform.

[63] They had no specific time limit for their friendly meeting. They got a drink and a snack and they spoke. According to him, the complainant invited him to follow her to her car in the parking lot because she had something for him.

[64] He went with her to her vehicle and once arrived, she stopped in front of the trunk of her car and opened it. She showed him, with a smile in her face, a Ziploc bag with gummies in it.

[65] Sometime before she was posted in April, the accused had a conversation with the complainant during which he expressed that he and his wife were curious to try “weed gummies”. He understood that what was shown to him in the parking lot by the complainant was in reference to this conversation and that it was “weed gummies” in the bag. She confirmed during her cross-examination that she may have used cannabis at that time. She kept this product at home and she firmly denied that she provided anything to the accused as he reported it to the Court.

[66] Being posted to the United States, Corporal Palmer was made aware that he could not bring any cannabis product with him in that country because the possession of it was criminalized over there. In short, the result for a member of the CAF being found in possession of such thing in that country would result in the end of the posting and in repatriation. Then, when he was shown the bag by the complainant of what he assumed being weed gummies, he took it, gave it back to her and he told her that he cannot have them.

[67] She took the bag back, put it in the trunk and slammed it. He testified that he then open the driver’s door for her and that he said that he was sorry. He said that she seemed upset. He gave her a goodbye hug and he realized that she was annoyed by his decision to give her back the bag. He indicated that she said “whatever” and she gave him a hug and a small kiss on the cheek. She sat in her car and told him: “take care of our little dick”. He understood that she was making fun of the size of his penis by saying that.

[68] He replied to her by calling her a “fucking slunt” with an angry tone. The term “slunt” is a derogatory slang word combining the word “slut” and the word “cunt”. She looked at him and her face showed that she was upset. She slammed the car’s door. She started the car and she left. He left too.

[69] He testified that he felt disappointed for what he said to her, knowing that it would impact on their friendship. The result was like she did not exist anymore after that incident.

[70] He firmly denied that he kissed her or touched her in the way she described it to the Court.

Positions of the parties

The prosecution

[71] The prosecution affirmed that it proved beyond a reasonable doubt all essential elements of the offence of sexual assault related to the three charges before the court martial.

[72] For the prosecution, Corporal Palmer’s testimony was illogical and self-serving. It suggested that the accused had a tendency to forget about facts hurting his case. For

each incident forming the subject-matter of each charge, he said some things that made his story incoherent.

[73] Concerning the testimony provided by the complainant, the prosecution said that it was credible and reliable because she was sincere, there was no exaggeration, she considered and answered difficult questions, she was forthright and clear, balanced and coherent. For each charge, the prosecution considers that the evidence showed that the complainant never consented to be sexually touched by the accused.

[74] In addition, about the second charge, there is no fact on which the Court can rely on to consider that there is an air of reality for considering the defence of mistaken belief in consent by the accused. As the evidence shown that no reasonable steps were taken by him, the Court should not look at it.

Corporal Palmer

[75] Corporal Palmer pleaded not guilty to all three charges before the Court as he denies having had any intent to commit such crime.

[76] Essentially, he claimed that for the first charge, he never touched the complainant in a sexual manner and she was the one who did such thing to him. For the second charge, he said that she consented to what happened as she was the one who initiated the sexual touching and her words and gestures were unequivocal about what she was willing to do to him from a sexual perspective. In addition, the fact that he made some little pauses during which she confirmed by words or gesture her consent to what was about to happen before ultimately letting her touched him for a sexual purpose is evidence which would allow the Court to consider the defence of mistaken belief in communicated consent. Finally, about the third charge, he firmly denied that anything of a sexual nature occurred between the complainant and him.

[77] Corporal Palmer reminded the Court that when it faces such situation where only the complainant and the accused testified, then it does not become a credibility contest. He suggested that he provided a clear and coherent testimony that should be sufficient to raise a reasonable doubt. In addition, he told the Court that the testimony provided by the complainant on the incident for each charge was incoherent and it did not make any sense. For him, the memory of the complainant was atrocious and her testimony is not sufficient to meet the prosecution's burden. Consequently, he asked the Court to find him not guilty on all the charges.

Some legal principles

Presumption of innocence, burden of proof and proof beyond a reasonable doubt

[78] Before this Court provides its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt; a standard that is inextricably intertwined with the principle fundamental to all Code of

Service Discipline and criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

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

[80] Two rules flow from the presumption of innocence: one is that the prosecution bears the burden of proving guilt, and the other is that guilt must be proven beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

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

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

[83] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The Court must not find Corporal Palmer guilty unless it is sure he is guilty. Even if the Court believes that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, the Court must give the benefit of the doubt to Corporal Palmer and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

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

Testimonies’ credibility and reliability

[85] Reasonable doubt applies to the issue of credibility. On any given point, the Court may believe a witness, disbelieve a witness, or not be able to decide. The Court need not fully believe or disbelieve one witness or a group of witnesses. If this Court has a reasonable doubt about Corporal Palmer’s guilt arising from the credibility of the witnesses, then it must find him not guilty.

[86] At this point, it may be useful to recall some basic principles regarding the determination of the credibility of a witness by the court, as enunciated by Watt J. in the decision of *R. v. Clark*, 2012 CMAC 3, at paragraphs 40 to 42:

[40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v. Thain*, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.

[41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at para 39; *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 9-11.

[42] Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

The evidence

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

The assessment of the accused's testimony

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

[89] Of course, if it believes the testimony of Corporal Palmer that he did not commit the offences charged, it must find him not guilty.

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

[91] If it does not know whom to believe, it means it has a reasonable doubt and it must find Corporal Palmer not guilty.

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

[93] If the Court has a reasonable doubt about Corporal Palmer's guilt arising from the evidence, the absence of evidence, or the credibility or the reliability of one or more of the witnesses, then it must find him not guilty.

The essential elements of the offence of sexual assault

[94] Corporal Palmer is charged with three charges referring to the offence of sexual assault.

[95] The offence of sexual assault is an assault within the meaning of subsection 265(1) of the *Criminal Code* which is committed in circumstances of a sexual nature, such as the sexual integrity of the victim is violated (see *R. v. Chase*, [1987] 2 S.C.R. 293 at paragraph 11).

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

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

[98] The *mens rea* is the intention 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 and it contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched.

[99] The Court must find Corporal Palmer not guilty of sexual assault unless the prosecution proves beyond a reasonable doubt that Corporal Palmer is the person who allegedly committed the offence. In addition to this essential element of the offence, the prosecution must prove specifically each of the following additional essential elements of the offence beyond a reasonable doubt:

- (a) That Corporal Palmer touched the complainant directly or indirectly;
- (b) That the touching by Corporal Palmer was intentional;
- (c) That the touching by Corporal Palmer took place in circumstances of a sexual nature;

- (d) That the complainant did not consent to the sexual activity in question; and
- (e) That Corporal Palmer knew that the complainant did not consent to the sexual activity in question.

Analysis

[100] Concerning the first charge, both the complainant and the accused provided evidence describing the same circumstances that led them to be together at the men's section at the Hudson's Bay store in the Rideau Centre. However, while A.M. affirmed to the Court that she was sexually assaulted by Corporal Palmer when she found herself in the change room, the accused claimed that it is the complainant that sexually touched him and not the contrary.

[101] Regarding the second charge, the complainant told the Court that Corporal Palmer sexually assaulted her in the way that he obliged her to perform oral sex on him. To the contrary, the accused affirmed that A.M. willingly made such thing and that such act was entirely consensual.

[102] Finally, in relation to the third charge, the complainant clearly expressed that she was sexually assaulted in a parking lot by the accused, while Corporal Palmer denied firmly and strongly that such thing happened, explaining that A.M. became upset in the same parking lot and left after he insulted her with some derogatory comment.

[103] Concerning the testimony of Corporal Palmer, he seemed to have a good memory of the three incidents. He put an account for each incident that were based on personal observations. The Court did not see any inconsistency with the events he related for each charge. He testified in a straightforward manner and did not hesitate to ask counsel to repeat a question if he had any difficulty or he was unsure to understand it.

[104] Regarding the first charge, he provided a detailed context that led him to go to Hudson's Bay. His version of what occurred in the change room with the complainant does stand by itself and the Court did not find any inconsistencies in it, nor did it appear as being incoherent.

[105] Looking at all the evidence before the Court, it must be said that the complainant confirmed the testimony of Corporal Palmer about the events that brought them to the store. It happened in an unexpected manner and it was not unusual for them to go out over lunch together and do such things as shopping.

[106] A.M.'s testimony appears credible as well to the Court. Basically, the context she related to the Court for the incident about the first charge was confirmed by the accused. However, her ability to recall and recount caused some concerns for the Court. As she said, she was able to remember large details but she had some difficulty with

small details. She admitted having difficulty to remember when the incident exactly took place, she did not remember or observe any injury the accused may have suffered at the time, she thought that the accused was at work and she did not remember him being absent for sick leave. She was unable to recall those details despite saying that they were close friends at the time. That being said, the Court does not believe that it impacts on her sincerity of her testimony on this incident, nor on the coherence of her account of what happened in the change room.

[107] It is then a situation where the Court does not know whom to believe, as the account provided by the accused and the one from the complainant appears as credible and reliable while considering the evidence as a whole.

[108] The Court is sure that something happened in the change room between A.M. and Corporal Palmer. However it is left with a reasonable doubt about if the accused intended to assault the complainant in circumstances of a sexual nature without her consent. The burden to prove all the essential elements of the offence as it is alleged in the first charge being on the prosecution, it is the conclusion that it failed to do so, and the Court must acquit Corporal Palmer accordingly.

[109] Now about the second charge, it was suggested by the prosecution that the accused provided an odd account of the events. The Court disagrees with this affirmation. There is no specific reason why people would act in a certain way or another. There is no typical way to initiate a demand for sex or to express a desire for having sex with somebody else. Even if it may appear as being strange to some people, it did certainly not make unbelievable the account made by the accused. There is no inconsistency in what he reported. Basically, he said that thing unfolds in about the same way as the complainant reported it, with the difference that it was not him who initiated the demand for oral sex, because he put such responsibility on the complainant.

[110] As well, what was reported by the complainant was in essence confirmed by the accused, with the difference being that he was the one who pressed her to perform oral sex on him without caring about her consent for doing such thing.

[111] Again, the Court is in a situation where it does not know whom to believe. Other than who took the initiative for having the complainant ending performing oral sex on the accused in her cubicle, there is not much difference in what was related by both of them on what happened on that day at the Christmas party.

[112] The Court is left with a reasonable doubt about whether the complainant did not consent to the sexual activity that took place in her cubicle with Corporal Palmer at the Christmas party. The burden to prove all the essential elements of the offence as it is alleged in the second charge being on the prosecution, it is the conclusion that it failed to do so, and the Court must again acquit Corporal Palmer accordingly.

[113] About the third charge, the accused denied that he committed any assault of a sexual nature on the complainant as described in the particulars. There is nothing in his

account that made it inconsistent or not coherent. In addition, despite denying having offered him weed gummies in the parking lot, the Court noticed that the complainant admitted being in possession of cannabis products at home at the time of this incident, which made it possible that things may have happened the way they were reported by Corporal Palmer.

[114] The complainant clearly reported that she was sexually assaulted by the accused and that she did not consent to such thing. Even though she showed a limited capacity to remember small details some time, she was able to draw roughly the parking lot where the incident occurred and to place her car on it without any problem.

[115] Another main difference in the account made by the accused and the complainant was about the status of their relationship going from January to June 2019. While A.M. qualified Corporal Palmer as becoming a stranger to her because she did not keep her relationship really alive with him, on the opposite the accused described it as it basically never changed. Other than the word of these two persons on this issue, no evidence was adduced by any party to help the Court to figure what was really the situation. Then, it is the conclusion of the Court that it could have been one situation or the other, or a bit of both, the latter meaning that their relationship was not bad or good but may have changed once the complainant was posted in a different office located in a different building than the one where the accused was working. In these circumstances, it does not support one version more than the other.

[116] It does illustrate the difficulty the Court is going through in this case. There is nothing in the evidence when it is considered as a whole, which makes the account provided by the accused able to be disbelieved, nor the one provided by the complainant. There is no important discrepancies on which the Court may rely on to come to a different conclusion. The difference in both accounts started with the reason for the accused to follow the complainant to her car in the parking lot, up to the time she left it. Between these two events, the story related by both parties differed substantially but each of them stood on its own.

[117] As such, the Court must acquit Corporal Palmer of the third charge because it is left with a reasonable doubt about if the accused intended to assault the complainant in circumstances of a sexual nature without her consent. In other words, considering that the burden to prove all the essential elements of the offence as it is alleged in the third charge is on the prosecution, then it is the conclusion that it failed to do so.

[118] Consequently, the Court concludes that the prosecution has not proven, beyond a reasonable doubt, that Corporal Palmer committed a sexual assault on A.M. as alleged in the first, second and third charge.

FOR ALL THESE REASONS, THE COURT

[119] **FINDS** Corporal Palmer not guilty of the first, second and third charges of sexual assault contrary to section 271 of the *Criminal Code*.

Counsel:

The Director of Military Prosecutions as represented by Major R. Gallant and Lieutenant(N) N.C. Watson

Captain C. Da Cruz, Defence Counsel Services, Counsel for Corporal Palmer