COURT MARTIAL

Citation: *R. v. Pinto,* 2021 CM 5011

Date: 20210730
Docket: 202121

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal P.S. Pinto, Accused

Before: Commander C.J. Deschênes, M.J.

REASONS FOR FINDING

(Orally)

Introduction

[1] Master Corporal Pinto is facing one charge under section 129 of the *National Defence Act* (*NDA*), conduct to the prejudice of good order and discipline, for allegedly harassing then-Private Girard, by sending sexualized text messages to her cell phone, between 1 April and 31 May 2020, at or near Canadian Forces Base (CFB) Esquimalt, British Columbia. I heard the evidence during a four-day trial and will now deliver my reasons for the verdict.

Facts

[2] At the trial, the following facts were not disputed. Ms Girard enrolled in the Canadian Armed Forces (CAF) in 2017. She was posted in July 2019 as a traffic technician at the rank of private to perform her on-job training (OJT) in the shipping section at the Central Material Traffic Terminal (CMTT), CFB Esquimalt. She left the section in November of the same year to attend her basic trade-qualification course

(QL3) at CFB Borden, Ontario. After the completion of her course in April 2020, she was posted back to CFB Esquimalt into her former position at the CMTT until her release from the CAF in October 2020.

[3] The accused was the floor supervisor at the CMTT during the time that Private Girard served in the section from July to November 2019 and from April to May 2020. The CMTT is a small section comprised of only four to five members, two of which are junior ranks. As the floor supervisor, Master Corporal Pinto was the complainant's direct supervisor. Private Girard and Corporal Neufeld occupied the position of the two junior ranks within the section. Corporal Noakes-Hamilton was also serving in the section around the same time. Other than the usual day-to-day superior/subordinate relationship between Master Corporal Pinto and Private Girard, they occasionally saw each other outside of the workplace to assist one another or to socialize. For example, on one of these occasions, the complainant drove the accused to and from the airport, and on another, she stayed at his house with her spouse to care for the accused's pets in his absence. They also went to lunch at the same restaurant.

[4] In November 2019, when the complainant left for CFB Borden, she and the accused began communicating with one another by text messages via Facebook Messenger (Messenger). Private Girard was using her cell phone when communicating on this platform. Text messages were exchanged on Messenger between the two for the duration of her six-month QL3 in Borden. Concomitantly, the complainant was part of a Facebook group composed of her classmates in Borden. The complainant and other members of this group were using this electronic platform to, amongst other things, exchange or post sexualized material referred to as memes.

[5] In May 2020, the complainant reported her complaint to the military police, alleging that the accused harassed her by sending sexualized text messages to her cell phone. She provided the military police with the excerpt of text messages she had saved as she found them to be relevant to her complaint. Some of the text messages she provided contained sexualized memes that were exchanged between herself and the accused. It is not disputed that Master Corporal Pinto was the one communicating with the complainant and exchanging the sexualized messages and material provided as exhibit by the prosecution.

Issue

[6] In light of the evidence that was admitted at the trial, the contentious essential element of the charge before the Court turns on whether the accused knew, or ought to have known, that sending sexualized material to Private Girard would offend her. The determination of this case, therefore, boils down to the credibility and reliability of the witnesses.

Position of the parties

Prosecution

[7] The prosecution contends all the essential elements of the offence have been met. In fact, the accused confessed engaging in the conduct forming the basis of the charge when he provided his voluntary statement to the investigators, admitting that he sent sexualized text messages to the complainant's cell phone between 1 April and 31 May 2020. The prosecution also contends that conduct involving sending sexualized material to another person constitutes harassment. Further, citing *R. v. Williams*, 2017 CM 4017 and the Court Martial Appeal Court (CMAC) decision of *R. v. Latouche*, CMAC-431, the prosecution explains that section 129 of the *NDA* does not require proof that an accused had any intent to cause a prejudice to good order and discipline.

[8] The prosecution submitted that this case turns on whether Master Corporal Pinto knew, or ought to have known, that his conduct would offend the complainant. He contends that the power imbalance that existed at the time between the accused as a master corporal and the complainant as a private colours the facts of the case. In other words, because he was an experienced master corporal, the accused knew or ought to have known that his conduct would offend the complainant who was junior in rank. Therefore, proof of the requisite *mens rea*, which includes the intent of the accused to send the contentious text messages, was made beyond reasonable doubt.

[9] The prosecution responded to the evidence of the defence regarding the complainant being part of the Facebook group of QL3 candidates by arguing that the complainant collaborated in the group as a way to try to fit in. He also explained the complainant's lack of assertiveness of her responses contained in her text messages to the accused constituted attempts to "let him down softly". The prosecution contends that she was indeed concerned that making an unequivocal request to the accused to stop sending her sexualized material or messages would sour their relationship in a context where she was also trying to fit in at CMTT. Additionally, alluding to the evidence that the complainant confided in the accused regarding marital issues she was having during the material time of the allegations, the prosecution explained that confidence made by a subordinate to a superior does not constitute an invitation to receive sexual advances. He also submits that it is not uncommon for CAF members to see each other outside of work.

[10] In summary, in light of Operation HONOUR that was still ongoing at the time, the prosecution argues that the accused should have known not to engage in the contentious conduct with the complainant, conduct that ultimately constituted unwanted solicitation for a sexual relationship. The accused's conduct also constitutes a failure of leadership resulting in prejudice to good order and discipline. Therefore, the case against the accused has been proven beyond a reasonable doubt and the Court should find him guilty of the charge.

Defence

[11] The defence contends that the sending of sexualized material by the accused to the complainant may have been inappropriate, however, it was a legal exchange since

viewing and sharing pornographic material depicting adult participants is not an illegal act. He also submits that it is not improper for a subordinate and a superior to exchange sexualized material. Defence clarifies that whether such exchange constitutes sexual harassment is a distinct matter, hence credibility is the crux of the issue in the case at bar.

[12] In this context, defence counsel alleges identifying a number of illogical statements, contradictions and discrepancies in the complainant's testimony. For example, the complainant mentioned she did remember talking on the phone to a representative from the Sexual Misconduct Response Centre (SMRC); however, she testified not remembering whether she ever submitted a claim for the CAF-DND Sexual Misconduct Class Action Settlement as a result of her allegations against Master Corporal Pinto. The defence further contends the complainant also attempted on several occasions during her testimony to downplay the relationship she had with the accused, including when she testified going to the same restaurant, instead of saying that she went out for lunch at a restaurant with the accused. There was also the matter of her long email she testified drafting and sending to Master Corporal Pinto, asking him to stop sending her the contentious material. This email would have been evidence of high relevancy that she chose to discard. Private Girard further told the sergeant investigating her allegations that her requests to the accused to stop sending her sexualized material were solely found in the first pages of the prosecution's exhibit (Exhibit 8) adduced as evidence, and she never mentioned the existence of the long email at the time.

[13] Additionally, as the complainant did not provide the fulsome content of her exchange with the accused, there are significant concerns with the probative value of Exhibit 8. She indeed took the liberty to determine what was relevant in deciding what she was keeping and providing to the investigator when she made her complaint. Not only did the complainant choose which text messages exchanged with the accused she was keeping, she deleted everything else. The defence recognised however that the complainant did concede in cross-examination that the exchange found at Exhibit 8, which is incomplete, may have started with her asking Master Corporal Pinto about a sexual relationship she believed the accused had with another subordinate. The defence contends that regardless, there is no evidence that the communications found at Exhibit 8 took place in the workplace, a condition of application of the Defence Administrative Orders and Directives (DAOD) 5012-0. In summary, in light of the questionable credibility of the complainant, the defence argues that the prosecution did not prove beyond a reasonable doubt all the elements of the offence.

<u>The evidence adduced at trial</u>

[14] The prosecution called one witness, the complainant, in support of its case, and introduced the following exhibits:

(a) Exhibits 3 through 5 – Forms: Canadian Forces Military Police Legal Rights and Cautions, Written Statement and Audio/Video Preamble for GO 20-12009;

(b) Exhibits 6 and 7 – Following a *voir dire* on the admissibility of the statement made by the accused to a person in authority, the video recording and transcript of the interview of 8 June 2020 of the accused by Corporal Bain, Military Police, were admitted as exhibits; and

(c) Exhibit 8 – A copy of a fourteen-page electronic document containing screenshots of Messenger text messages between Master Corporal Pinto and the complainant, which was deemed admissible pursuant to sections 31.1 to 31.8 of the *Canada Evidence Act* following an admissibility hearing.

Exhibit 8 – Electronic document

[15] The time stamps found at pages 1 to 5 of the text messages exchanged indicate that the communication contained in these five pages most likely took place on the same day, as there is both a continuity and chronology of the timing and of the exchange. However, the date the exchange took place does not appear on the document. The first time stamp on page 1 indicates 09:23 and the last one on page 5 indicates 18:20. The first message appearing in the exchange reads, "Ya ya rub it in". In the second message, the complainant responded, "Hahaha you did when I was there!" The accused answered to the complainant that she gave herself a good rub. The exchange continues in the following manner in the first two pages of Exhibit 8:

"[Private Girard] What's that supposed to mean 😉 [winking face]

[Master Corporal Pinto] I'm not insinuating anything.

[Master Corporal Pinto] It just needs a good rubbing every now and then

[Private Girard] What are you talking about lol

[Master Corporal Pinto] You know 😛 [face with tongue]

[Private Girard] Lol you're bad when one of us . . . [The remainder of the complainant's reply is missing from Exhibit 8.]

[Private Girard] No lol you never gave me that impression

[Master Corporal Pinto] Are you glad I did now

[Private Girard] I just don't think you and [*sic*] would work out

[Master Corporal Pinto] What I can't burry my face in your titties

[…]

[Master Corporal Pinto]   If only you and I know about it then it's our secret

[…]"

[16] At page 3 of Exhibit 8, the accused texted a message stating that he would like to feel her "boobs". This answer is copied onto page 4. At the bottom of that page, a partial comment can be found from the accused, where he wrote: "I would love to see your . . ." The remainder of this message is missing from Exhibit 8. The first message found at page 5 is the following reply from Private Girard: "We shouldn't risk it".

[17] Pages 6 to 14 contain screenshots of photos, videos and a drawing sometimes accompanied with a text box containing a message. At the trial, this material was referred to as memes. The majority of these memes depict sexual or nudity content with sexual innuendos or comments, with some memes showing either female or male genitalia. In particular, the material found at page 11 contains twelve small photos, most of them depicting images of a male and a female engaged in vaginal penetration, with a few where other sexual activity is depicted. Two additional photos seemed to have been cropped at the bottom of this particular page in such a way that only a thin strip of the photos can be seen. There are also three memes found in these pages that are not sexual in nature. In addition, there are text boxes containing messages of a sexual nature. The screen shots of the communication show that the accused added comments to some of the material contained at pages 6 to 14. The complainant wrote a few messages as well in response to some of the accused's comments or material sent.

Statement to the military police

[18] The accused made a voluntary statement to the military police on 8 June 2020 where he admitted exchanging sexualized material with the complainant, and where he stated that communicating sexualized material to a subordinate was inappropriate.

[19] The defence called the following witnesses:

(a) Corporal Noakes-Hamilton; and

(b) Corporal Neufeld.

[20] Since the prosecution agreed, the Court ordered Corporal Neufeld to appear and give his testimony by video link in accordance with article 112.65 of the *Queen's Regulations and Orders for the Canadian Forces*, Appearance of witnesses – Video link.

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

Summary of testimonies

Ms Girard

[22] Ms Girard testified that her relationship with Master Corporal Pinto was strictly professional, although she and the accused would occasionally speak outside the workplace. She testified "becoming aware" in November 2019 that the accused "forwarded on inappropriateness" to her. When asked to specify what she meant, she explained that the accused was making comments regarding women, sexualized comments "he forwarded" to her. She then specified that Master Corporal Pinto made those comments face-to-face. This would happen a few times a week. Ms Girard had a perception that, because she was a woman, she was more sexualized to the accused. She gave one example where the accused made a comment to the effect that bigger women should not wear leggings. She also testified that the accused was added on her Facebook account as a friend after she accepted his invitation to this effect in November 2019. She accepted the invitation to become friends on Facebook because she was away on her course and she wanted them to "keep tabs on each other". She testified that this is when she started receiving inappropriate Messenger text messages of a sexual nature from the accused. She also testified not recalling who initiated the communication, but it was originally friendly, and at times, work-related subjects were also discussed.

[23] She testified that the nature of the messages changed over time with the reception of memes that became more and more sexualized in December 2019. She confirmed that Exhibit 8 was a screenshot of an exchange she had had with the accused over the course of one day sometime between December 2019 and April 2020. She explained deleting prior messages from the accused because they were not relevant. She later said that she deleted some of the material because they were very upsetting and she did not want to see them anymore.

[24] When asked by the prosecution to provide additional details, context and her impressions of the messages found at pages 1 to 5 of Exhibit 8, she testified that the conversation started with a comment about the weather in Borden, but was not sure who initiated this conversation. In particular, she testified that the accused responded, "Rub it in," because he was responding to her previous comment about the weather in Borden being nice. She explained responding, "You did when I was there," because she was making a reference to her training course. After the accused responded suggesting she gave herself a good rub, she testified that she waited about one hour before answering, "What's that supposed to mean?" She added a winking face emoji to her message in order to lighten the mood, as she did not want to create tension with the accused as he was a master corporal. She understood the rubbing comment to be a reference to masturbation.

[25] She testified that one message is missing from the exchange and could not remember its content. She also said she was unsure of what she meant when she wrote, "you never gave me that impression", and was both unimpressed and very

uncomfortable with the accused's used of the word "titties". She also used the "lol" abbreviation for "laughing out loud" in some of her responses in order to lighten the conversation, as she was mostly concerned with protecting the professional relationship she had had with the accused at the time. There was, in fact, a possibility that she would be posted back to his unit and be placed, once again, under his supervision, a possibility that eventually did materialize after the completion of her training in Borden.

[26] She explained that her message "too risky" was a reply to the accused to try to let him down softly because he was, after all, her superior. She testified feeling demeaned by the conduct of the accused in relation to him sending the contentious text messages, and was concerned that, as a master corporal, he had the authority to take formal measures against her if she said or did anything that could upset him. When asked about the timing of the messages at pages 1 to 5 of exhibit 8, she answered that, by judging from the time stamp at page 1, she was at work and the accused may have been away. She also explained that this conversation was not the first of this type, as there was a multitude of exchanges of this nature from before containing the same pattern, with her turning down the accused gently, informing him that she was not sexually interested in him. She adopted a gentle approach because she did not want to create a hostile environment for herself.

[27] She decided to report her allegations in May 2020 after speaking with Sergeant Cadotte who works on the same shift, and with a representative from the SMRC. She explained that Corporal Neufeld already knew about the text messages between her and the accused because she had spoken to him about it. She testified that the messages made her uneasy, that she felt her presence in the workplace was to just sexually please the accused. She lost respect for him. She released from the CAF largely because of the accused's conduct toward her, as she wanted to leave this behind. Therefore, when her husband applied for a job outside of the area, she decided to release because she did not want to be labelled as a CAF member posing problems.

[28] In cross-examination, the complainant testified that she had encounters with the accused outside of work on occasions simply as an extension of her kindness, and felt her relationship with him was a professional one. She confirmed no longer having any traces of text-message exchanges with the accused in her phone other than the ones introduced at Exhibit 8, the latter being the ones that she considered the worst. Additionally, she conceded that there was a continuation of the exchange found at page 5 of Exhibit 8 that she did not provide to the investigator because she felt the text messages were not relevant. She also agreed with defence counsel that, during the material time, she asked the accused how their professional relationship would be impacted if the two of them were to engage in a romantic or sexual relationship. The complainant also accepted the proposition put to her by defence counsel that she found the sexualized text sent by the accused at page 12 of Exhibit 8 to be humorous, as demonstrated by her answer to him in the exchange that followed, "Hahahaha right what a rip off". She further acknowledged sending similar sexualized humoristic memes to others and, that at some point, she also sent this type of memes to the accused. She denied creating a Facebook group for her class in Borden however, she accepted that

there might have been such group to which she was part of. She also answered being unsure of whether the Facebook group for her class shared this type of sexualized material because it was a long time ago.

[29] The complainant answered during her cross-examination that it was possible the contentious text messages from the accused were not communicated nor received while she was in the workplace. She then later testified not remembering whether she sent similar memes of a sexual nature. She did not believe she asked the accused to stop sending messages, but she did ask him to cease sending sexualized messages. She testified that she sent Master Corporal Pinto a very lengthy email telling him she was uncomfortable receiving sexualized messages from him and that she did not want these types of messages anymore. She did not save the email in question and could not remember when she sent it.

[30] The complainant also testified that during the investigation, she was queried by a sergeant from the military police as to whether she did put the accused on notice to stop sending her sexualized material. She testified telling the sergeant that she did ask the accused to stop sending her sexualized material in her messages to the accused that are found in the first five pages of Exhibit 8. However, she did not mention to the sergeant that she had sent a lengthy email to the accused telling him she was uncomfortable receiving sexualized messages from him and that she did not want these types of messages anymore.

[31] She conceded she may have texted the accused indicating she would contact him if she was to become single. She later denied submitting a claim for the CAF-DND Sexual Misconduct Class Action Settlement for CAF members victimized by sexual misconduct, then responded, when further prompted, not being sure if she did submit a claim. She conceded that she talked to the accused about her marital problems as well as about her concerns regarding her roommate having a sexual relationship with a superior. She admitted deleting all the messages she exchanged with the accused regarding her concerns or questions that were of sexual/romantic nature about herself and third parties.

Corporal Noakes-Hamilton

[32] Corporal Noakes-Hamilton testified for the defence. She explained meeting Private Girard in 2017 when she arrived at the warehouse. Her relationship with the complainant was solely work-related. Corporal Noakes-Hamilton met the accused in July 2019 when he was her supervisor. Their supervisor/subordinate relationship later developed into a friendship. She testified that she was aware Private Girard was using her cell phone to show sexualized memes at work because she showed some of the material to her. The witness had a sense that the complainant engaged in this conduct because she thought the material she was showing was humorous. She also testified being aware that the complainant was a member of a Facebook group that was sharing inappropriate memes.

Corporal Neufeld

[33] Corporal Neufeld also testified for the defence. He is posted to CFB Esquimalt but is currently on course in Borden. He met the complainant in Borden in 2019 during the traffic technician course. He had both a social and professional relationship with her. He testified meeting the accused in the summer of 2019 when they initially had a working relationship. However, a personal relationship developed since he and the accused often helped each other out. He also testified seeing the complainant showing him various memes, which included sexualized material from her cell phone while at work at CMTT. He was also aware that there was a Facebook group in Borden, but was not part of it as he does not have a social media account and had little interest in these types of activities.

<u>Analysis</u>

The charge and elements of the offence

[34] The charge before the Court alleges a violation of section 129 of the *NDA* for conduct to the prejudice of good order and discipline. The burden rests on the prosecution to prove every essential element of the offence beyond a reasonable doubt. The date, place and the identity of the accused are three essential elements required to be proven beyond a reasonable doubt. The other essential elements that need to be proven beyond a reasonable doubt for a charge under section 129 are as follows:

(a) the conduct alleged in the charge; namely, the accused harassed Private Girard by sending sexualized text messages to her cell phone;

(b) the conduct is prejudicial to good order and discipline; and

(c) that the accused had the required blameworthy state of mind.

[35] When the charge under section 129 alleges harassment such as for this case, the Court is informed of the definition of harassment as per DAOD 5012-0 which reads as follows:

> Improper conduct by an individual, that offends another individual in the workplace, including at any event or any location related to work, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable act(s), comment(s) or display(s) that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act* (i.e. based on race, national or ethnic origin, colour, religion, age, sex, sexual orientation, gender identity or expression, marital status, family status, genetic characteristics, disability, or conviction for an offence for which a pardon has been granted or in respect of which a record suspension has been ordered). Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the individual. Harassment that is not related to grounds set out in the *Canadian Human Rights Act* must be directed at an individual or at a group of which the individual is known by the harassing individual to be a member.

[36] Section 3 of the DAOD provides that conduct amounts to harassment when the following six criteria are met:

(a) It must be improper conduct by an individual;

(b) the individual knew or ought reasonably to have known that the conduct would cause offence or harm;

(c) the conduct must have been directed at the complainant (unless the harassment relates to a prohibited ground of discrimination under the *Canadian Human Rights Act)*;

(d) the conduct must have been offensive to the complainant;

(e) the conduct may consist of a series of incidents, or one severe incident which had a lasting impact on that complainant; and

(f) the conduct must have occurred in the workplace.

[37] If proven true, allegations of harassment pertaining to sending sexualized material and making a sexual advance to a complainant would amount to sexual harassment. Sexual harassment has been described in *Janzen v. Platy Enterprises Ltd.,* [1989] 1 S.C.R. 1252:

> Without seeking to provide an exhaustive definition of the term, I am of the view that sexual harassment in the workplace may be broadly defined as unwelcome conduct of a sexual nature that detrimentally affects the work environment or leads to adverse job-related consequences for the victims of the harassment. It is, as Adjudicator Shime observed in *Bell v. Ladas*, *supra*, and as has been widely accepted by other adjudicators and academic commentators, an abuse of power. When sexual harassment occurs in the workplace, it is an abuse of both economic and sexual power. Sexual harassment is a demeaning practice, one that constitutes a profound affront to the dignity of the employees forced to endure it. By requiring an employee to contend with unwelcome sexual actions or explicit sexual demands, sexual harassment in the workplace attacks the dignity and self-respect of the victim both as an employee and as a human being.

Credibility and reliability of witnesses

[38] In making the determination as to whether the prosecution proved beyond a reasonable doubt all the essential elements that I have explained above, the Court must decide which evidence it accepts, and the weight to be given to it. When making that determination, the Court must assess the reliability and credibility of the witnesses who testified in court. Credibility and reliability are two different concepts. Reliability speaks to the ability of a witness to accurately observe, recall and recount the events whereas credibility refers to the sincerity of the witness, and whether they are being truthful.

Reliability

[39] Many factors influence the assessment of the reliability of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, their capacity to remember as well as a witness's reasons to remember. Something specific, striking or unusual could have happened that helped the witness remember the details of the incident that he or she described. Due to a number of reasons including, but not limited to, the passage of time, the actual accuracy of the witness's account may not be reliable. In effect, the testimony of a credible or an honest witness may nonetheless be unreliable (see *R. v. Morrissey*, [1995] O.J. No. 639, 97 CCC (3d) 193).

Credibility

[40] Many factors also influence the assessment of the credibility of a witness. 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? The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative? Finally, was the witness's testimony consistent with itself and with the undisputed facts? A witness whose evidence on an issue is not credible cannot give reliable evidence on the same point (see *R. v. H.C.*, 2009 ONCA 56). The assessment of credibility for the trier of fact is not an easy task, and it certainly does not entail a ruling on every single detail of the answers of all witnesses.

Possible outcomes

[41] A court may accept or reject some, none or all of the evidence of any witness who testifies in the proceedings. A finding that a witness is credible does not require a trier of fact to accept all of a witness's testimony testimony. A portion of it may be accepted as true while the remainder could be deemed not credible. That said, the burden of proof with respect to all of the essential elements of the charge remains on the prosecution.

[42] The appropriate approach in assessing whether the prosecution has met its burden is to weigh the evidence as a whole, not to assess individual items of evidence in a vacuum. It is therefore essential to assess the credibility and reliability of individual testimony in light of the evidence in its entirety. This principle was recognized by the CMAC in *R. v. Clark*, 2012 CMAC 3, when it stated 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.

Presumption of innocence and the standard of proof beyond a reasonable doubt

[43] The two rules pertaining to the prosecution bearing the burden of proving guilt, and that guilt must be proven beyond a reasonable doubt, are linked to the presumption of innocence, to ensure that no innocent person is convicted. The presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence accepted at the trial, satisfied the court beyond a reasonable doubt that the accused is guilty on the charge. This is not a standard of absolute certainty, but it is a standard that certainly approaches that. Anything less entitles an accused person to the full benefit of the presumption of innocence and a dismissal of the charge.

[44] The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. 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 (see *R. v. Lifchus*, [1997] 3 S.C.R. 320). In essence, this means that even if I believe that Master Corporal Pinto is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give him the benefit of the doubt and acquit him because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt. 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 the accused guilty of the charge 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 charge set out in the charge sheet (see *R. v. Starr*, [2000] 2 S.C.R. 144, at paragraph 242).

[45] In assessing the testimonies, the Court must ask itself if the prosecution proved, beyond a reasonable doubt, all the essential elements of sexual harassment. It is important to note that, in order to meet this evidentiary threshold, corroboration of the complainant’s evidence is not required.

Complainant’s credibility

[46] I have carefully listened to and reviewed the testimony of the complainant. Although she did generally testify in a calm manner, the Court finds that most of her answers were short and sometimes vague and evasive. In fact, her testimony contained

several internal inconsistencies and was further contradicted by credible evidence admitted at the trial.

[47] The complainant testified becoming aware in November 2019 of “inappropriateness” the accused “forwarded on” to her. When asked to specify what she meant by the use of the term “forwarded”, she explained that the accused forwarded on to her sexualized comments regarding women, implying via cell phone or text messages. She then changed her evidence to say that those comments were made face-to-face at CMTT. Not only does her evidence lack consistency as to whether the inappropriate comments were first made online or in person, she testified that these face-to-face comments would have been made during the month that she had left to attend her course in Borden. She later testified that she started noticing these sexualized comments in November when she became friends with the accused on Facebook after she accepted his invitation to this effect. She later said that the sexualized Messenger conversation started in December. Her evidence as to the timing and manner in which the accused’s conduct would have started changed a few times in her evidence. In a nutshell, one version she provided in Court was that the comments were made face-to-face at the time that she most likely had already left for her course in Borden. Another version is that the sexualized text messages started in November after she accepted the accused’s Facebook friendship invitation. Then, another was that she noticed the contentious conduct in December. Of note, the prosecution conceded that the complainant had difficulties in keeping with the timeline.

[48] Additionally, although she testified the accused made these sexualized comments face-to-face several times a week, the only example she was able to provide of a sexualized comment was that bigger women should not wear leggings because it is possible to see through the fabric of the garments. She then added, “and other comments like that.” The Court once again is left to wonder if it should lend any credence to this vague claim, where the complainant is unable or unwilling to provide other specific examples of sexualized comments, as well as more details about the context and circumstances in which these comments would have been made.

[49] Furthermore, the complainant made a series of concessions during her cross-examination that further impacted the credibility of her allegations against the accused. She testified being certain that before or during the material time, she had asked the accused whether their professional relationship would detrimentally be impacted if a personal relationship was to develop between them. She also acknowledged that she found humorous one of the sexualized texts sent by the accused that is contained at Exhibit 8. Her evidence was that she did respond to the accused’s sexualized text, informing him that she found the material he sent her to be comical, as indicated at page 12 of Exhibit 8. She conceded sending sexualized material to others; more surprising is that, during her testimony, she indicated being certain that she did send such material to the accused before, or during the material time. The Court finds contradictory the complainant’s claim that she was offended by the sexual material the accused sent her when, before or around the time the exchange that took place at pages 1 to 5 of Exhibit 8, she had sent him similar sexualized material. The evidence also

shows that she was known by some, if not most of her colleagues in the workplace both in Borden while on course and at CMTT in Esquimalt, in partaking in exchanging sexualized material online and showing from her cell phone some of the material while at work.

[50] When asked in cross-examination about whether or not she made a claim for the CAF-DND Sexual Misconduct Class Action Settlement because of her allegations against the accused, she initially denied submitting a claim, then responded not being sure if she did apply. Not only did she change her evidence from denying to not remembering, it is rather difficult to believe that one could forget submitting a claim to obtain financial compensation because they were allegedly the subject of sexual misconduct.

[51] The complainant also conceded that she confided her marital problems to the accused and shared her concerns regarding her roommate having a sexual relationship with a superior. Although the Court does accept that this alone could not be construed as an invitation to sexual advances, the complainant's own evidence does show that, on several occasions, she was open to, and even initiated discussions of a sexual nature with the accused.

[52] In examining all of her evidence, her testimony is problematic in many ways. She admitted deleting all the messages she exchanged with the accused regarding concerns and issues of a sexual/romantic relationship about herself and a third party. She also testified that she only text messaged the accused about work-related questions or concerns; yet, in cross-examination, she recognized that she sent him sexualized material. Once again, not only are there important contradictions in her testimony, but she willingly admitted exchanging sexualized material with the accused before or around the time the exchange at Exhibit 8 took place. Thus, she admitted having initiated sexual conversations with him, which is indicative of her willingness to partake in this type of exchange with Master Corporal Pinto.

Complainant's credibility and Exhibit 8

[53] When asked to provide details about the type of sexualized material she received from the accused, the complainant could only refer to the messages contained at Exhibit 8, despite telling the Court that she would have received sexualized material from him every second day between November 2019 and April 2020. She also said that the undated exchange that was screen-captured at pages 1 to 5, which took place during the same day, would have been sometime in April 2020. She later testified that it took place anytime between November 2019 and April 2020. The Court finds troubling that the complainant was unable to provide a clearer or more specific answer as to the time frame the selected communication contained at Exhibit 8 unfolded. More problematic is that she testified to have intentionally deleted the multitude of communications that allegedly took place every second day between the accused and herself over a period of approximately six months because she deemed the communication to be irrelevant. The deleted communication was clearly relevant, as it would have provided the initial part of

the exchange that took place at pages 1 to 5 and would have provided the full context, frequency and nature of all the exchanges, including who initiated the conversations, who sent what to whom and so forth.

[54] In particular, the complainant testified that the communication at pages 1 to 5 was initiated by a comment about the weather. In cross-examination, she says not remembering how the conversation started. She was combative when telling defence counsel that she did not see the relevancy for this line of questioning. She then conceded that the conversation may have started with her asking the accused about a sexual relationship she believed he was having at the time with another subordinate. She immediately nuanced her answer, adding that she queried the accused because she was bothered by the inappropriateness of the suspected relationship. She then admitted purposely deleting the portion of the message showing who initiated the conversation, and how it began and unfolded, leading to the exchange found at pages 1 to 5 of Exhibit 8 because she did not believe it to be relevant. Therefore, the Court founds that the exchange between the accused and the complainant at pages 1 to 5 is missing critical portions. This excerpt may very well be taken out of context. Consequently, the impact on the weight to be given to the text messages exchange found at Exhibit 8 is significant.

[55] It is the role of the Court to assess the relevancy of the evidence. By choosing which text messages she was saving and which she was deleting and, of those she saved at Exhibit 8, which portion of the communication she was going to provide the military police in support of her allegations, she deprived the Court of its ability to examine clearly relevant evidence. The Court, consequently, does not know with certainty who initiated the sexualized communications between the accused and the complainant, only that it may have been the complainant. I, therefore, gave little weight to Exhibit 8 because it is largely incomplete. The evidence provided by the testimony of the complainant to fill the missing information in Exhibit 8 and to provide context was significantly deficient and not satisfactory, in particular because her credibility is doubtful.

Email message

[56] In the particular circumstances of the presence of a power imbalance caused by the higher rank of the perpetrator and further fuelled by an age gap between the perpetrator and the victim, it would be natural for the latter to be reluctant to approach their superior to ask them to stop their harassing conduct. For the same reason, it would also be natural for a complainant choosing to approach the superior to ask them gently or subtly to amend their behaviour in order to prevent possible retaliatory measures. That said, victims of sexual harassment do not have a positive obligation to inform the harasser that their conduct is unwelcome or to ask them to stop the harassing behaviour. Of course, when there is evidence that they did inform the perpetrator of the inappropriate conduct, one could easily conclude that the complainant was offended by the conduct and that the harasser knew or ought to have known that their conduct would offend or cause harm.

[57] Nevertheless, the Court finds problematic the issue of the missing lengthy email the complainant claimed she sent the accused where she would have asked him to stop sending her sexualized material. Although the complainant did not have an obligation to ask Master Corporal Pinto to stop sending her sexualized material, she did not mention to the investigator sending the accused a lengthy email. On the contrary, when the sergeant investigating the case contacted her and asked whether she informed the accused that she wanted him to stop sending her sexualized material, the complainant answered that she did so at pages 1 to 5 of Exhibit 8. This is an issue of credibility of the complainant, diminished by her difficult-to-believe evidence that she would have sent the accused a lengthy email that was clearly relevant to this case, deleted it, and made no mention of its existence during the investigation, even after being specifically prompted by the investigator.

[58] This does not necessarily mean that the complainant was wilfully untruthful. Testifying in court can be an emotional and stressful experience, particularly for a complainant of sexual misconduct who is asked to publicly share embarrassing and sometimes intimate personal details. Whether the complainant's rationale for selecting the text message exchange she saved and provided to the military police was to try and present herself in the best light possible in order to avoid embarrassment, or whether it was an honest mistake, or was to protect her privacy, is unimportant; the fact is that only an excerpt of a fraction of communications by text messages between the accused and the complainant was preserved by the complainant and provided to the investigators at Exhibit 8. In effect, the complainant did pick and choose the text messages and sexualized material that were exchanged between herself and the accused over a period of six months even though she claimed her concerns started back in November 2019. She even purposely eliminated the initial and ending parts of the conversation found at pages 1 to 5 of Exhibit 8, and did dispose of all other electronic communications with the accused. In fact, as mentioned before, in her testimony she conceded that she may have initiated text messages of a sexual nature with the accused. Consequently, these contradictions cause serious concerns in regard to the credibility of the complainant. Therefore, the testimony of the complainant on the materiality of the charge is not accepted.

Argument of the prosecution

[59] I do not accept the argument presented by the prosecution that the rank of the accused constitutes proof beyond a reasonable doubt of his knowledge that the conduct would offend the complainant or, rather, that he ought to have known that his conduct would cause harm. The rank disparity and age gap did create a power imbalance between the complainant and the accused. However this alone is not sufficient to prove the blameworthy state of mind of the accused in relation to the harassment charge. In fact, in *R. v. Williams*, 2017 CM 4017 cited by the prosecution, the military judge did address the extent to which the rank of the accused influenced his decision. The military judge analysed the context surrounding the conduct of the offender and how it unfolded when deciding that the *mens rea* element was proven beyond a reasonable doubt. He

also considered the demeanour of the complainant at the time. The rank and position of the accused were not decisive factors; this was only mentioned in addition to the context, after the determination that the *mens rea* was met, when he stated at paragraph 52:

> [52] In my opinion, this conduct is not even close to the line of impropriety; it leans heavily on the side of conduct that is entirely improper, especially on the part of a senior instructor occupying the functions of course warrant officer. He was so far over the line that he ought reasonably to have known the conduct would cause offence or harm.

Statement of the accused

[60] Further, although the accused admitted sending sexualized material to the complainant during the material time as particularized in the charge, nothing in the statement he made to the military police indicates that he knew, or ought to have known, that the text messages and sexualized material he sent to the complainant at Exhibit 8 would offend her. What the accused rather said to Corporal Bain is that these sexualized memes were mutually exchanged with the complainant.

[61] In light of the evidence I have accepted, I believe that the accused was sincere when making his statement to Corporal Bain. In reviewing the material he sent to the complainant as found at pages 6 to 14 of Exhibit 8, it is apparent that the material composed partly of non-sexual material, partly of graphic pornographic and nude images, constituted a poor-taste attempt at humour. For example, the pornographic material found at page 11 containing twelve small photos mostly depicting images of a male and a female engaged in various forms of sexual activity is titled, “marathon”. The whole of the evidence accepted at trial shows therefore that the accused believed he was exchanging humoristic sexualized material with a willing participant who had, at least on one occasion, initiated the sexualized communication.

[62] Master Corporal Pinto also said in his statement that exchanging sexualized material with a subordinate was inappropriate. I agree. Thus, the Court vehemently rejects defence counsel’s submission that it is acceptable for a superior and a subordinate to willingly exchange sexualized material. Unless such exchange would happen between two individuals who are in a consensual and properly disclosed relationship, it would be inappropriate for a superior to engage in this practice with a subordinate in light of both the existence of the power imbalance and the likelihood of creating an inappropriate familiarity in the workplace between those involved.

[63] Nevertheless, as I explained earlier, the conduct of the accused in the circumstances of this case did not amount to an offence under section 129 of the *NDA* as particularised in the charge sheet, because the prosecution did not prove beyond a reasonable doubt all the essential elements of the offence Master Corporal Pinto was charged with.

Conclusion

[64] In conclusion, in assessing the credibility of the complainant, I find that several discrepancies and inconsistencies in her statement put into question the reliability and credibility of her testimony. Although missing text messages exchanged prior to the exchange forming the basis of the charge would not necessarily be fatal to the prosecution's case, other concerns in the complainant's evidence, and with regards to the weight given to Exhibit 8 in the circumstances of this case, leaves me with a reasonable doubt as to the accused's guilt.

FOR THESE REASONS, THE COURT

[65] **FINDS** Master Corporal Pinto not guilty of the charge.

Counsel:

The Director of Military Prosecutions, as represented by Major C. Moorehead

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, counsel for Master Corporal Pinto, Accused