



## COURT MARTIAL

**Citation:** *R. v. McFarlane-Mascoll*, 2022 CM 5012

**Date:** 20220609

**Docket:** 202142

General Court Martial

Canadian Forces Leadership and Recruit School  
Saint-Jean-sur Richelieu, Quebec, Canada

**Between:**

**Private S. McFarlane-Mascoll, Applicant**

-and-

**Her Majesty the King, Respondent**

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

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**Restriction on Publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as “V.S.”, shall not be published in any document or broadcast or transmitted in any way.**

**This does not apply to the disclosure of this information in the course of the administration of justice when it is not the purpose of the disclosure to make the information known in the community.**

**DECISION ON A MOTION BY DEFENCE THAT NO PRIMA FACIE CASE  
HAS BEEN MADE AGAINST THE ACCUSED ON A CHARGE**

(Orally)

### Introduction

[1] Private McFarlane-Mascoll is charged with one count of sexual assault pursuant to section 130 of the *National Defence Act (NDA)*, an offence contrary to section 271 of

the *Criminal Code*. It is alleged that in March 2020, he committed a sexual assault on V.S., another member of the Canadian Armed Forces (CAF), while in the Saint-Jean Garrison, Saint-Jean-sur-Richelieu. The prosecution called three witnesses, the last witness to testify being V.S., the complainant, who was allowed to testify via video link. The defence chose not to cross-examine V.S.

[2] At the close of the prosecution's case, the accused presented a no prima facie motion with regard to the charge on the basis that the prosecution had failed to introduce any evidence concerning the essential element of identity of Private McFarlane-Mascoll as the perpetrator of the alleged sexual assault.

[3] Thus, the issue is whether the defence demonstrated, on a balance of probabilities, that no evidence was introduced to link the person referred by the witnesses as either Private McFarlane-Mascoll or just “McFarlane” and the accused sitting in the courtroom. Said somewhat differently, I must decide if there is some evidence proving the element of identity upon which a properly instructed jury, or panel at a General Court Martial (GCM), could rationally conclude that the accused is guilty beyond a reasonable doubt.

**Has the defence demonstrated, on a balance of probabilities, that no evidence was introduced to link the person referred by the witnesses to as either Private McFarlane-Mascoll or just “McFarlane” and the accused sitting in the courtroom?**

[4] Relying on *R. v. Farrant*, 2015 CM 4008 and *R. v. Drew*, 2022 CM 3005, the defence contended that the witness of the alleged offence is required to identify the accused person in the courtroom as being the perpetrator of the crime in order to prove the element of identity. In the case at bar, not only the complainant did not identify the accused in the courtroom, she provided no physical description of the perpetrator, such as race, height or hair colour. She could not even provide the rank of her assailant. She only identified and referred to the perpetrator as “McFarlane”, someone who was “another TRP person”.

[5] Further, the evidence revealed the complainant had no relationship with the accused. No biographical evidence was provided by the prosecution. The defence contended that the testimony by video link does not entail special rules for courtroom identification. In other words, the regime for testimonial aids in the *Criminal Code* does not constitute a gateway to nullify the prosecution’s burden to prove the essential element of identity. There were other means to elicit the evidence of identity from the complainant while testifying by video link, for example, the angle of the camera could have been adjusted to allow her to view the accused, a still photo could have been presented to her, or she could have been asked to provide a description of the perpetrator.

[6] Finally, no evidence was provided to prove the chain of continuity of the complainant’s stained blanket where Private McFarlane-Mascoll’s DNA was found. Indeed, several days had elapsed between the moment the complainant tried to spot-

clean the stains she found on the blanket, and when the latter was seized for analysis. The defence contended that there is a huge leap to make to infer that the blanket analyzed was the same blanket the complainant referred to in her testimony. The forensic analysis only proves the presence of the accused's DNA on the blanket, not that he was the perpetrator of the alleged sexual assault. Also significant is that the complainant never indicated that there were stains on the blanket. Therefore, the accused contended that he has demonstrated, on a balance of probabilities, that the prosecution has failed to adduce sufficient evidence to prove the identity of the accused as the perpetrator. A reasonably instructed panel would not find the accused guilty. A direct verdict of acquittal should be rendered.

[7] The prosecution contended that there is some evidence of identity. The complainant referred to the perpetrator by the name of the accused. She identified him as "McFarlane", an individual on Training Reintegration Program (TRP) occupying a room on the same floor, living in a pod across the hall. Counsel for the prosecutor explained that Aviator Boucher, V.S, and the accused all knew each other from TRP. He contended that a name constitutes some evidence of identity. Additionally, the complainant found spots on the fire blanket before it was seized. There is a reasonable inference that can be made that the fire blanket analyzed was the same from the alleged sexual assault. Therefore, there is some evidence before this Court proving the identity of the accused as the perpetrator. Lastly, the prosecution recognized that the use of testimonial aids to protect vulnerable witnesses from further trauma does not dispense the obligation of the prosecution to prove the essential element of identification.

*The applicable principles relating to no prima facie motions*

[8] The law applicable to courts martial relating to no prima facie motions is found in *Queen's Regulations and Orders for the Canadian Forces* 112.05, at paragraph 13:

(13) When the case for the prosecution is closed, the judge may, of the judge's own motion or upon the motion of the accused person, hear arguments as to whether a *prima facie* case has been made out against the accused person, and:

- (a) if the judge decides that no prima facie case has been made out in respect of a charge, the judge shall pronounce the accused person not guilty on that charge; or
- (b) if the judge decides that a *prima facie* case has been made out in respect of a charge, the judge shall direct that the trial proceeds on that charge.

[9] Note (B) to article 112.05 provides guidance in this regard:

(B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

[10] Note (B) essentially incorporates the principles that apply in courts of criminal jurisdiction. In *R. v. Fontaine*, 2004 SCC 27, at paragraph 57 the Supreme Court of Canada (SCC) established that:

The case against the accused cannot go to the jury unless there is evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty beyond a reasonable doubt.

[11] That rule was more recently reiterated by the majority in *R. v. Barros*, 2011 SCC 51, at paragraph 48 to the effect that:

A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction.

[12] The test is the same whether the evidence is direct or circumstantial, (see *R. v. Monteleone*, [1987] 2 S.C.R. 154). Where the prosecution's case is based entirely on direct evidence, the judge's task is straightforward; if the judge determines that the prosecution has presented direct evidence as to every element of each offence, the application must be denied. The only issue will be whether the evidence is true, and that is for the trier of fact to decide, (see *R. v. Arcuri*, 2001 SCC 54 at paragraph 22).

[13] Where proof of an essential element depends on circumstantial evidence, however, the judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the prosecution. Some limited weighing of the evidence may be permitted, but only to the extent of determining whether the evidence is reasonably capable of supporting the inferences urged by the Crown. The judge neither asks whether she would draw those inferences nor assesses credibility. The issue is only whether the evidence, if believed, would reasonably support an inference of guilt, see *Arcuri* at paragraphs 23 and 30. As stated in *Monteleone* page 161:

It is not the function of the trial judge to weigh the evidence to test its quality or reliability once a determination of its admissibility has been made. It is not for the trial judge to draw inferences of fact from the evidence before him. These functions are for the trier of fact, the jury.

#### *The prosecution's case*

[14] Being mindful of these principles when considering the accused's motion, I have considered the evidence introduced by the prosecution. First, Aviator Boucher, testified that she was the course senior on 13 March 2020. It was a difficult night because the students had just been informed that they were not allowed to leave the school as a result of the imposition of COVID restrictions. Aviator Boucher attended the mess around 2000 hours and interacted with V.S. whom she observed to be intoxicated. Concerned for her well-being, she walked V.S. back to her room, put her to bed, locked the room door from the inside and left. Aviator Boucher testified that she did not see Private McFarlane-Mascoll at the mess that evening. She explained when she first

arrived at TRP, that she bonded with the accused over the fact that they were both new to the program. Initially, she hung out with him a lot, but toward the day of the alleged sexual assault, their interactions had decreased. She identified Private McFarlane-Mascoll in the courtroom during her testimony. Following this courtroom identification, she was asked to describe Private McFarlane-Mascoll, and she answered that he was black, tall, with a shaved head.

[15] Lieutenant Landry testified and said that she briefly socialized with the complainant that night at the mess. After the mess closed, Lieutenant Landry went back to her pod, the one she shared with V.S. V.S. came to join her in the bathroom and she was crying a lot. She did not provide evidence regarding the identity of the accused.

[16] V.S. testified that she went to the mess around 2000 hours on 13 March 2020 with some friends and confirmed that she was intoxicated that night. She also confirmed that her intoxication led her course senior to walk her upstairs to bring her to her room located in a pod with four other rooms. These other rooms were occupied by female-only candidates who may or may not have been in their room at the material time. V.S. testified that after the course senior left her room, she got up and went to the adjacent common room where the two fire pickets were socializing. She testified that “McFarlane” arrived in the common room and “addressed the fire pickets”, telling them he was going to take V.S. to her room. He then told the complainant that he was looking for her. She testified not recalling what rank “McFarlane” held at the time. She testified that McFarlane wrapped one arm around her shoulders and helped her to her room. He seemed possessive. He asked her to use her key to unlock the pod, which she did, and they entered the pod. Her bedroom door was open with the light on. He just stood in the doorway. She sat on her bed and was going to take her combats boots off. She testified that he came in the bedroom. Her mind was very fuzzy, and she thought he was going to leave. The door of the pod was closed, but the bedroom door was still open with the lights on. “McFarlane” picked her up and put her in her bed. He started unbuttoning and unzipping her pants and pulling them down completely with her underwear at the same time, putting her clothing on the floor. He had closed the door and turned off the light and took off his clothes. She then described a series of sexual acts forced on her, which included bites of her inner labia followed by the perpetrator’s numerous attempts to penetrate her vagina and anus with his penis, and later pushing her head on his genitals. He ignored her pleas that he was hurting her and continued the sexual activity. She testified that the events lasted about two hours.

[17] Later that same night after the preparator’s departure, V.S. put all her sheets and fire blanket in the laundry bag. She testified that the bed was made when the sexual assault took place, so the acts were performed on the fire blanket and pillowcase. The next day, she tried to wash everything. She spot-cleaned the fire blanket because she was afraid it would shrink in the wash. There was “stuff” on the blanket, and she wanted to air it to get rid of the smell.

### *Analysis*

[18] Having considered the evidence before me, I find that the prosecution has introduced sufficient evidence to prove the date, place, and that the perpetrator touched the complainant directly; that the touching was intentional; that the touching took place in circumstances of a sexual nature; that the complainant did not consent to the sexual activity in question; and that the perpetrator knew that the complainant did not consent to the sexual activity in question. I also find that there is evidence proving the element of identity upon which a properly instructed jury, or panel at a GCM, could rationally conclude that Private McFarlane-Mascoll is guilty beyond a reasonable doubt.

[19] Firstly, although she did not provide a description of the perpetrator and did not identify him in the courtroom, the complainant did give the name “McFarlane” as the individual who allegedly sexually assaulted her. She also testified that McFarlane was someone she knew as another TRP person and explained that McFarlane’s room was located in a pod on the other side of the hall from hers, also in the TRP section. Only those on the TRP occupied a room in this section. V.S. provided evidence that the perpetrator was someone familiar to her, someone who shares a portion of the same last name as the accused and whose room was located in the same section. As stated in *R. v. Webster*, 2016 ONCA 189 at paragraph 6:

The identity of names a complainant identifies as her assailant and the person charged, constitutes some evidence of identity. It is all the more so, when the name is accompanied by an address and other biographical details.

[20] Other than the complainant’s evidence, there was extrinsic evidence adduced in court that served to prove the identity of the accused as the perpetrator. Aviator Boucher identified Private McFarlane-Mascoll in the courtroom, someone who was also a member of TRP with whom she bonded and frequently socialized with. Additionally, the complainant testified that she observed “stuff” on the blanket where the sexual assault took place. The accused admitted that a blanket was seized from the complainant’s room on 17 March 2020, that a sample from the visible stain on it was analyzed and that the forensic analysis revealed that the DNA collected from the visible stain on the blanket was his, likely a sample of cells from saliva or from skin. Although the presence of the accused’s DNA on the fire blanket found in the complainant’s room constitutes circumstantial evidence that Private McFarlane-Mascoll was the perpetrator, I find that, considering the whole of the prosecution’s evidence, in particular the name provided by the complainant with the familiarity she had with the person she referred to as “McFarlane”, as well as the identification in court of the accused by Aviator Boucher, is evidence that, if believed by a properly charged panel acting reasonably, would justify a conviction.

[21] As for the prosecution’s omission to ask V.S. to identify the accused in the courtroom, the complainant testified by video link in order not to see the accused during her testimony. I agree with counsel that this method of providing testimony in court does not negate nor diminish the obligation of the prosecution to prove the identity of the accused as the perpetrator, and that such evidence can be adduced through means other than from the complainant’s seeing and pointing out the accused in the courtroom. Nevertheless, it is a well-established fact that complainants called to testify in open

court are likely to experience stress and even suffer trauma, having to provide intimate sexual details in relation to the aggression they reported while having to face the alleged perpetrator. For this reason, amongst others, complainants should be accommodated in order to allow them to provide an accurate recounting of the events. In any event, the weight to be given to the complainant's testimony is a determination to be made by the trier of facts.

### **Conclusion**

[22] In sum, I have found that the video link testimony of V.S., considered with the whole of the evidence, provides some evidence of identity of the accused as the perpetrator. Therefore, the defence has failed to demonstrate, on a balance of probabilities, that no evidence was introduced to link the person referred by the witnesses to as either Private McFarlane-Mascoll or just "McFarlane" and the accused sitting in the courtroom.

### **FOR THESE REASONS, THE COURT:**

[23] **DENIES** Private S. McFarlane-Mascoll's motion.

[24] **DIRECTS** that the trial proceeds on that charge.

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### **Counsel:**

Captain C.M. Da Cruz, Defence Counsel Services, Counsel for Private S. McFarlane-Mascoll, Applicant

The Director of Military Prosecutions as represented by Major C.R. Gallant and Captain T.B. Mock, Counsel for Respondent