COURT MARTIAL

Citation: *R. v. August,* 2018 CM 3013

Date: 20180817
Docket: 201762

Standing Court Martial

St-Jean Garrison
St-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private J. August, Accused

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

Restriction on Publication: By court order, 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that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

DECISION ON A MOTION OF NO PRIMA FACIE

(Orally)

[1] Private August is charged with three service offences punishable under paragraph 130(1)(a) of the *National Defence Act* for sexual assault contrary to section 271 of the *Criminal Code.*

[2] It is alleged that those offences would have been committed at the Canadian Forces Leadership and Recruit School (CFLRS), St-Jean-sur-Richelieu, province of Quebec, on or about 13 November 2016.

[3] As set out in the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), at the close of the prosecution's case, the defence is entitled to move for a not guilty verdict on the basis that the prosecution has not presented a prima facie case, i.e., a case containing evidence on all essential points of a charge that, if believed by the trier of fact and unanswered, would warrant a conviction.

[4] This morning, at the close of the prosecution's case and pursuant to QR&O paragraph 112.05(13), the accused, through his counsel, presented a motion of no prima facie with regard to the first charge on the charge sheet on the basis that the prosecution had failed to introduce before this Standing Court Martial any evidence concerning two essential elements related to the *actus reus* of sexual assault.

[5] The statement of the offence and the particulars of the first charge, read as follows:

> "AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, SEXUAL ASSAULT, CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*
>
> *Particulars*: In that he, on or about 13 November 2016, at the Canadian Forces Leadership and Recruit School, St-Jean-sur-Richelieu, province of Quebec, did commit a sexual assault upon J.J."

[6] The evidence introduced by the prosecution before this court martial in relation to this specific charge is composed essentially of the testimony of the complainant, J.J., some pictures, a plan of the sleeping quarters at CFLRS, and Private August's course schedule. The Court also took judicial notice of items listed and contained in article 15 of the *Military Rules of Evidence*.

[7] This type of motion, at the close of the prosecution's case, is different from a request for an acquittal based on reasonable doubt. The latter situation is that there may be some evidence upon which a jury, properly instructed, might convict, but that it is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt is not called into play until all the evidence is in, reasonable doubt cannot be considered unless the accused has either elected not to call or has completed his evidence.

[8] The governing test for a directed verdict was set out by Ritchie J. in the *United States of America v. Shephard*, [1977] 2 S.C.R. 1067. Some subsequent decisions such as *R. v. Charemski*, [1998] 1 S.C.R. 679 and *R. v. Fontaine*, 2004 SCC 27 provided some clarification about that test.

[9] The Court may not take into account the quality of the evidence in determining whether there is some evidence offered by the prosecution on each essential element of each charge, so that a properly instructed jury could reasonably decide on the issue; not that it would or should, but simply could.

[10] At the end of the day, the test to be applied is the one mentioned by Fish J., who delivered the decision for the Supreme Court of Canada in *Fontaine* at paragraph 53, and I quote:

> Accordingly, as McLachlin J. explained in *Charemski*, *supra*, 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. [Emphasis in original.]

[11] The burden of proof rests on the accused to demonstrate on a balance of probabilities that this test is not met. The test is the same whether the evidence is direct or circumstantial. The application of this test varies according to the type of evidence in the prosecution's case. Where the prosecution's case is based entirely on direct evidence, application of the test 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.

[12] The only issue will be whether the evidence is true, and that is for the trier of fact to decide. Where proof of an essential element depends on circumstantial evidence, the issue at trial is not simply whether the evidence is true. Rather, if the evidence is accepted as true, is the inference proposed by the prosecution the correct one? The judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the prosecution.

[13] The judge neither asks whether he would draw those inferences nor assesses credibility. The only issue is whether the evidence, if believed, could reasonably support an inference of guilt.

[14] The offence of sexual assault is enunciated at section 271 of the *Criminal Code* and reads in part as follows:

> 271 Everyone who commits a sexual assault is guilty of
>
> (a) an indictable offence and is liable to imprisonment for a term of not more than 10 years …

[15] In *R. v. Chase*, [1987] 2 S.C.R. 293, at page 302, McIntyre J. provided the definition of a sexual assault:

> Sexual assault is an assault within any one of the definitions of that concept in s. 244(l) [now section 265(l)] of the *Criminal Code*, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.

[16] Subsection 265(l) of the *Criminal Code* reads, in part, as follows:

> 265. (1) A person commits an assault when

> (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

[17] 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, that the accused committed the *actus reus* and that he had the necessary *mens rea*.

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

[19] Consent involves the complainant's state of mind. Is it the voluntary agreement of the complainant that the accused did what he did in the way in which he did it and when he did it? In other words, did the complainant want the accused to do what he did? A voluntary agreement is one made by a person, who is free to agree or disagree of his or her own free will. It involves knowledge of what is going to happen and voluntary agreement to do it or let it be done.

[20] Just because the complainant did not resist or put up a fight does not mean that he or she consented to what the accused did. Consent requires knowledge on the complainant's part of what is going to happen and a decision by that same person, without the influence of force, threats, fear, fraud or abuse of authority, to let it occur. The *mens rea* is the intention to touch, and knowing that the complainant did not consent to the force applied.

[21] The position of the applicant, the accused in this matter, is that the prosecution has not adduced any evidence on two essential elements of the offence for the first charge, more specifically, concerning the *actus reus*. These essential elements are: that Private August touched directly or indirectly J.J.; and that the touching by Private August took place in circumstances of a sexual nature.

[22] The prosecution submitted to the Court that it offered some circumstantial evidence reasonably capable of supporting the inferences proposed by the prosecution through the witness and the exhibits before the Court on these two essential elements so that a properly instructed panel could reasonably decide on the issue.

[23] In order to make a determination on the issue put before me by the applicant about this charge, I must determine if the applicant demonstrated, on a balance of probabilities, that there is no evidence at the time of the commission of the alleged offence to the effect that Private August touched directly or indirectly J.J. and that such touching took place in circumstances of a sexual nature.

[24] The evidence can be summarized as follows: J.J. went to bed in the early morning of 13 November 2016 after a long day in Montreal where he drank some alcohol. He was dressed in green military-issued long underwear, top and bottom. He had a “weird sex dream” where he was forced to masturbate. He felt that he grabbed a person’s wrist above his genitals. He woke up, opened his eyes and found that he was

on his back, his blanket removed, and that he had an erection. There was nobody in his cubicle when he woke up. Another recruit came some moments after into his cubicle, naked, with a towel on. He recognized Private August, who he had seen a few times previously at the smoke pit and, more specifically, of the afternoon on the day before. Private August was calm and he was smiling. He told J.J. that he was screaming while sleeping and wondered if he was okay. J.J. replied he wanted to go back to sleep. Private August left and J.J. went back to sleep. J.J. identified the accused in court as being the person he saw in his cubicle and running away later while chased by C.K. J.J. woke up later because C.K. chased Private August on the floor. J.J. was told by C.K. about what has just happened to him and J.J. realized that what he thought was a dream was not. J.J. told the Court he felt like he was being attacked by somebody. He was ashamed and embarrassed. He started to shake and cry. He called the green desk to have military police come. He identified the clothes left on the floor as the ones worn by Private August. Private August admitted that they were his clothes.

[25] Is there any evidence that Private August touched directly or indirectly J.J.? The prosecution has not presented any direct evidence as to this essential element of the offence. J.J. never mentioned that somebody touched him directly or indirectly in the circumstance he reported to the Court, nor did anybody tell the Court that this was the case.

[26] About the circumstantial evidence, the prosecution suggested that if a number of facts are considered true by the Court, they are reasonably capable of supporting the inference that J.J. was touched. These facts are: the "weird sex dream" J.J. was having; the feeling J.J. had that he was grabbing a wrist above his genitals; J.J. was on his back, his blanket removed, and having an erection; Private August appeared in J.J.'s cubicle moments after he woke up.

[27] The Court concludes that this evidence is not reasonably capable of supporting the inference proposed by the prosecution. The only correct inference that can be drawn from this set of facts, is that, as proposed by counsel for the accused, he was touching himself and masturbating. The sexual dream experienced by J.J. was about him being forced to masturbate. In order to interpret such a dream to determine if it means that J.J. could have been touched by somebody else in reality, clearly, the trier of facts would have needed the assistance of some additional evidence, such as the one provided by an expert to make such a finding.

[28] In addition, despite the fact that it was clear that Private August was not residing in the same area as the complainant, the prosecution spent a lot of time demonstrating that the area where J.J. and other complainants resided at the time was open and easily accessible. The Court cannot see any evidence that would lead it to conclude that Private August was not authorized to be where he was at the time of the alleged incident involving J.J.

[29] In addition, it must be remembered that Private August returned to the Mega Complex building, on Sunday, 13 November 2016, at approximately 0350 hours, which

is not so much time before the alleged incident that would have taken place in relation to J.J.

[30] The prosecution submitted the decision of *R. v. K.W.B.*, 2011 BCPC 0491. I would say that this decision was about a 9-year-old child who was sexually assaulted by a person who entered the home and the bedroom and exited after committing this crime. The dream to which the judge referred to in the decision was a clear and consistent description of sexual acts that a 9-year-old child compared as being a bad dream. Such a situation cannot be compared with the facts of this case, where the dream described by J.J. has no relation whatsoever with a sexual assault. Consequently, this decision is not very helpful for the Court to make a determination on this application.

[31] It is the conclusion of the Court that the accused demonstrated on a balance of probabilities that there is no evidence to the effect that Private August touched directly or indirectly J.J. at the time of the commission of the alleged offence.

FOR ALL THESE REASONS, THE COURT:

[32] **GRANTS** the application regarding the first charge.

[33] **FINDS** Private August not guilty of the first charge for sexual assault contrary to section 271 of the *Criminal Code*.

Counsel:

The Director of Military Prosecutions as represented by Major A. van der Linde and Lieutenant(N) C. Porter

Major F. Ferguson and Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Private J. August