COURT MARTIAL

Citation: *R. v. Buist*, 2021 CM 2022

Date: 20211110
Docket: 202055

General Court Martial

Her Majesty's Canadian Ship *Carleton*
Ottawa, Ontario, Canada

Between:

Sergeant D.C. Buist
Applicant

- and -

Her Majesty the Queen
Respondent

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court orders that any information that could disclose the identity of the person described during these proceedings as the victim or complainant, including the person referred to in the charge sheet as "X.Y.", shall not be published in any document or broadcast or transmitted in any way, excepting when disclosure of such information is necessary in the course of the administration of justice, when it is not the purpose of that disclosure to make the information known in the community.

DECISION ON WHETHER THE DEFENCES OF HONEST BUT MISTAKEN BELIEF IN COMMUNICATED CONSENT AND/OR SELF-DEFENCE WILL BE PUT TO THE GENERAL COURT MARTIAL PANEL

(Orally)

Introduction

[1] Sergeant Buist is charged with an offence contrary to section 130 of the *National Defence Act* (*NDA*); that is, sexual assault, contrary to section 271 of the *Criminal Code*.

[2] At the conclusion of the evidentiary stage of this trial, counsel for the defence signaled his intention to rely upon both the defence of honest but mistaken belief in communicated consent (HBMBCC), as well as self-defence. The Court sought representations from both the prosecution and defence counsel to determine whether either of these defences should be put to the panel of the General Court Martial (GCM) in closing arguments, as well as in my final instructions.

Air of reality

[3] First, this Court must determine whether either the defence of HBMBCC and/or self-defence has an air of reality on the basis of what is known as the *Cinous* test, which was set out by the Supreme Court of Canada (SCC) in the case of *R. v. Cinous*, 2002 SCC 29. The SCC stated at paragraph 86 that "whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true" is a question of law that requires the judge to determine whether the evidence adduced in the trial is sufficient to give rise to the defence.

[4] The *Cinous* test is uniformly applicable to all defences including the two defences requested by the defence; self-defence and HBMBCC. Although the elements to establish the success of the individual defences are different, the threshold test for the determination as to whether it has an air of reality is the same.

[5] Firstly, I must review all the evidence and decide if it is sufficient to warrant putting the defence to the panel. In assessing the viability of the potential defences, I must view the evidence in its most favourable light and assume that the evidence relied upon with respect to those defences is true. In doing this, I must not make a determination on the credibility of witnesses, weigh the evidence, nor make findings of fact nor draw determinate factual inferences.

[6] Secondly, if I decide that it meets that threshold, I must put the defence to the panel who will weigh it and decide whether it raises reasonable doubt.

[7] Any defences that do not have an air of reality must be removed from consideration by the panel to avoid confusing panel members and muddying their deliberations.

Honest but mistaken belief in communicated consent

[8] The SCC established in the case of *R. v. Osolin,*1993 4 S.C.R. 595 that in order for there to be an air of reality to the defence of HBMBCC, there must be:

(1) evidence of lack of consent to the sexual acts; and

(2) evidence that, notwithstanding evidence of lack of consent, the accused honestly but mistakenly believed that the complainant was consenting.

[9] In the Court Martial Appeal Court (CMAC) decision of *R. v. Gagnon*, 2018 CMAC 1, the CMAC confirmed that in assessing whether a defence has an air of reality, the presiding military judge has a duty to determine whether one of the statutory bars in section 273.2 of the *Criminal Code* is present (see *Gagnon*, paragraph 12 by Trudel J.A. and paragraphs 74 and 97 by Bell C.J.). If one of the statutory bars is present, then there will be no air of reality to a defence of HBMBCC.

[10] Section 273.1 of the *Criminal Code* defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question" and specifies that no consent is obtained for the purpose of section 271 where a number of situations are present. A mistaken belief based on such a situation cannot ground a finding that the HBMBCC is open to the accused. This is confirmed in the reasons of the majority of the CMAC in *Gagnon*, which quotes with approval Professor Hamish Stewart to the effect that "[t]he defence of mistaken belief in consent is available if the accused has an honest belief in communicated consent that is not tainted by the various factors listed in ss. 273.1 and 273.2." (see *Gagnon*, paragraph 27).

[11] The statutory limitations for the application of the defence at section 273.2 of the *Criminal Code* reads as follows:

> **Where belief in consent not a defence**
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> 273.2 It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
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> **(a)** the accused's belief arose from:
>
> **(i)** the accused's self-induced intoxication,
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> **(ii)** the accused's recklessness or wilful blindness, or
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> **(iii)** any circumstance referred to in subsection 265(3) or 273.1(2) or (3) in which no consent is obtained;
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> **(b)** the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting; or
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> **(c)** there is no evidence that the complainant's voluntary agreement to the activity was affirmatively expressed by words or actively expressed by conduct.

[12] Applying the Supreme Court of Canada guidance set out in the case of *R. v. Park*, 1995 2 S.C.R. 836, in his reasons at paragraph 78 of *Gagnon*, Bell CJ concluded that when the sole issue is one of credibility, the defence of HBMBCC should not be put to the panel:

> Normally, where the versions of events as to what occurred are diametrically opposed, there can be no air of reality to the defence of honest but mistaken belief in consent, and a judge should refuse to put the defence to the jury. This will normally arise where the acceptance of one version necessarily involves the rejection of the other; the sole issue is one of credibility (consent or absence of consent) and the defence of mistaken belief in consent should not be put to the jury. However, it must always be borne in mind that a jury may decide to accept all or none of a witness's testimony, or accept parts of it in conjunction with other versions.
> [Citations omitted]

[13] However, if it is possible for the panel to accept parts of the complainant's evidence and parts of the accused's evidence, to find that there is a scenario—a third version of events—that supports a defence of HBMBCC, I must leave the defence with the panel on the basis of *Park*.

The facts

[14] Below is a summary of those facts that bear on the issue of consent from the versions of the complainant and Sergeant Buist.

[15] Most of the facts are relatively straightforward. The complainant and Sergeant Buist were work colleagues attending a two-week course in Cookeville, Tennessee, United States. They were sharing a hotel room that had two separate beds. The evening before the alleged incident, they both went out socializing with two colleagues and stayed out until approximately 0230 hours when they returned to their hotel room to go to sleep. Both witnesses testified to consuming a significant amount of beer, being too drunk to drive a vehicle as they took a Lyft back to their hotel, but coherent enough to order a ride share, walk and carry on a conversation. They both testified to being in roughly the same shape. Neither testified that the other was slurring their words.

[16] Their beds were situated next to each other, with an aisle between the two beds where X.Y. had placed his boots. Both witnesses testified that although the curtains were closed, there was some light coming in to their room from the parking lot lights. The complainant described the lighting as comparable to a full moon night or light similar to dusk, where one could see enough to pick out certain things.

[17] They both independently testified to going to bed at approximately 0330 hours in their respective beds, both wearing boxers. X.Y. fell asleep first, as Sergeant Buist was still in the bathroom. X.Y. testified that since Sergeant Buist snores, they had an arrangement to let X.Y. fall asleep first or he would not otherwise get any sleep.

[18] Sergeant Buist testified that he was sound asleep when he awoke at approximately 0415hrs to find X.Y. naked in his bed, spooning him with an erection. He told the Court that he heard X.Y.'s voice saying, "Darren, want to smash this girl" in a whisper, using an erotic voice. Sergeant Buist testified that X.Y. had his arm around him and was spooning him and explained that it was hearing X.Y. saying his name that woke him up. He could feel X.Y.'s chest on his back and X.Y. thrusting himself into Sergeant Buist's boxers. He explained that he reached back to feel what was rubbing up against him and felt X.Y.'s penis in his hand, which was amplified with X.Y.'s thrusting. Sergeant Buist testified that he was shocked and it appeared clear to him that X.Y. was in his bed to have sex with him. But he also explained that the entire thing happened very fast, unfolding in approximately ten to fifteen seconds. He described his own touching of X.Y. as an immediate reaction to what was unexpectedly happening to him. He also testified that he did not aggressively squeeze X.Y.'s genitals.

[19] The complainant X.Y. admitted that he awoke at approximately 0420 hours in Sergeant Buist's bed. X.Y described having "a man's hand grabbing his penis and squeezing it until it

hurt." He described it as a similar force to someone squeezing a finger until it turns purple. He also described a pounding on his pubic bone. Under cross-examination, X.Y. also confirmed his earlier statement when he described the touching as stroking of his penis and pounding on his pelvic bone.

[20] X.Y. testified that both he and Sergeant Buist were under the covers when the alleged incident happened and that he was not wearing his boxers, which he later found close to his boots. Under cross-examination, he denied having any memory as to how his underwear was removed or how he found himself naked in Sergeant Buist's bed.

[21] X.Y. testified that upon waking, he thought that maybe it was a dream or it was his girlfriend in bed with him. He explained that when he figured out what was going on, he jumped out of Sergeant Buist's bed back into his own bed, yelling, "What the fuck!" He estimated that the touching lasted less than five seconds.

[22] Under cross-examination, X.Y. admitted that he had sleepwalked at least two or three times before, including during an incident where his girlfriend's mother found him naked on a washer and dryer.

[23] In a prior statement, X.Y. explained that he might have been sleepwalking and also suggested the potential that he might have gone to the bathroom and upon return, got into the wrong bed. Under cross-examination, he was questioned on whether he would generally use the bathroom while sleepwalking and he stated he does not remember anything when he is sleepwalking.

[24] Both X.Y. and Sergeant Buist testified that after X.Y. left Sergeant Buist's bed that neither of them said anything, however, they both agreed that Sergeant Buist did send X.Y. three different text messages.

Submissions

[25] In the course of the hearing to determine whether the defence of HBMBCC should be put to the panel, I solicited comments from counsel on three distinct areas:

(a) did the evidence show two diametrically opposed versions that could bar the defence within the meaning of *Park*?;

(b) did Sergeant Buist believe that X.Y. consented to the sexual touching considering the meaning of consent under section 273.1 of the *Criminal Code*?; and

(c) were any of the statutory limitations set out at paragraph 273.2(b) of the *Criminal Code* engaged?

Position of the parties

Did the evidence show two diametrically opposed versions that could bar the defence within the meaning of Park?

[26] As for the first question, the test is that set out at paragraph 26 of *Park* which reads as follows:

> To summarize, when the complainant and the accused give similar versions of the facts, and the only material contradiction is in their interpretation of what happened, then the defence of honest but mistaken belief in consent should generally be put to the jury, except in cases where the accused's conduct demonstrates recklessness or wilful blindness to the absence of consent.

[27] The defence argued that other than their individual descriptions of awakening, there is parity between the two versions of what transpired in the evidence given by both X.Y. and Sergeant Buist. Defence argued that there is very little divergence in the evidence. Further, he argued that the complainant cannot say in any meaningful way what occurred before he woke up. X.Y.'s version of events only begins when he was touched by Sergeant Buist, who admitted that he touched X.Y.'s penis. There is no contradiction. Defence argued that the version of Sergeant Buist is not challenged and there is a similarity between the two versions.

[28] Conversely, the prosecution argued that the defence of HBMBCC should not be put to the panel because the versions of X.Y. and Sergeant Buist are so different. She strongly argued that with respect to the gravamen of the offence, the versions of X.Y. and Sergeant Buist are so opposed that they simply cannot be spliced together. She explained that the complainant described a forceful gripping of his penis, whereas the accused said that his hand was met with X.Y.'s thrusts.

[29] The prosecution argues that the analysis as to whether and how the penis was touched is what matters and she says that they simply cannot be reconciled. She argued that where there are opposing versions, then the issue to be decided is a matter of consent or lack of consent and therefore, it is a matter of credibility as to what the panel accepts or not.

[30] She argued that in order for the panel to get to the stage where they would consider HBMBCC, they have to accept the complainant's version that he did not consent.

[31] Further, the prosecution argued that the Court is not dealing with two people who are talking about the same thing but have different perceptions. Rather, she submitted that Sergeant Buist's version is different because he denies that he applied the type of force described by X.Y.. In her view, the nature of their descriptions is sufficiently different that they cannot be reconciled. As an example, she described that Sergeant Buist testified that when he touched X.Y.'s penis, he felt it was welcome given that X.Y. thrusted forward. Whereas X.Y. described the touch as a more aggressive squeezing. Based on the evidence heard in court, it was notable that X.Y. described that same touching of his penis differently as compared to the portrayal given in his previous statements. The reality is, due to the incredibly sensitive and private nature of the touching of an erect penis, the interpretation of what that touching means to either of them is naturally coloured by the perspective of the individuals implicated. It is not up to the Court to assess which version is more credible, but rather, the Court is to look to see if there is some evidence, if believed, and that could support the defence.

[32] Further the prosecution argued that since this assessment goes to credibility, which must be assessed by the panel, such a defence should not be left with the panel. She argued that if the panel accepts what Sergeant Buist says they will not need to consider the defence of HBMBCC. As I explained in the introduction, the members of the panel will only need to analyze HBMBCC defence if they believe that the prosecution has proven beyond a reasonable doubt that the sexual activity occurred without X.Y.'s consent. However, just because the panel must be satisfied that the prosecution has proven that the alleged sexual activity took place without X.Y.'s consent as a precondition before they consider the defence of HBMBCC, does not mean that the defence is not independently viable.

[33] The prosecution also relies upon the case *R. v. Flaviano,* 2013 ABCA 219, where the fact situation in that case was one where there was an agreement as to the sexual acts performed, yet the complainant testified that she said "no" initially and then, faced with the aggressive actions of the accused, she complied and did not say "no" or "stop" again. On the other hand, the accused testified that she readily accepted his initial offer for sexual activity and that things progressed from there with no indication of withdrawal of consent from the complainant, which he said would have made him stop.

[34] *Flaviano* was an appeal from a judge-alone trial where the trial judge had found that the accused was not to be believed and consequently, that the Crown had proven absence of consent beyond a reasonable doubt but then acquitted on the application of the defence of HBMBCC. As described by the Court of Appeal of Alberta at paragraph 27:

> That meant that even after effectively rejecting, as false, the respondent's evidence that the complainant immediately agreed to his sexual requests, the trial judge thought she should consider whether he nonetheless "honestly" believed the complainant had communicated her consent. A moment's reflection will illustrate the inherent difficulty in such an undertaking.

[35] However, even if the Court was to accept the prosecution's position that the two versions were diametrically opposed, on the specific and rather unique facts of this case, there may still be an air of reality to the defence, provided that the two stories are not mutually exclusive.

[36] The prosecution argued that X.Y. awoke and when he realized that a man was touching his penis, he immediately jumped out of the bed. However, the Court noted that X.Y. also testified both emphatically and forcefully that he does not remember what transpired prior to that point. Although I would agree that the mere assertion by an accused that he or she believed that the complainant was consenting is not sufficient by itself to support this defence, in this case, X.Y.'s testimony provides evidence of his own ambiguous conduct which corroborates the testimony of Sergeant Buist. X.Y. testified that he originally thought what was happening to him was a dream or that it was his girlfriend touching him. X.Y. was not asked to expand on what that meant, but it is not outside the realm of human experience to say that while he was sleeping and thinking he was with his girlfriend, he might have responded physically in a welcoming manner to the first touches to his penis. What the Court is left with is simply a different interpretation of the actual touching of X.Y.'s penis put forward by X.Y. and Sergeant Buist who view the touching from differing perspectives. The alleged incident spans a very short time period ranging from as little as five seconds to as long as fifteen seconds.

[37] It is this Court's view that it is distinctly possible for the panel to splice together a version based on some of the evidence of both the accused and X.Y., with respect to the encounter, and settle upon a reasonably coherent set of facts supported by the evidence that is capable of supporting the defence of HBMBCC.

Did Sergeant Buist believe that X.Y. consented to the sexual touching considering the meaning of consent under section 273.1 of the Criminal Code which is the voluntary agreement of the complainant to engage in the sexual activity in question?

[38] As for the second question, the defence argued that Sergeant Buist was the only one that was unconscious as he was awakened by X.Y. getting into his bed naked, with an erection spooning him.

[39] He further argued that the accused did not abuse a position of authority, but there was evidence that they had a similar chain of command within Canadian Special Operations Forces Command and that on the course they were colleagues who referred to each other by their first names.

[40] Defence further argued that when X.Y. eventually extracts himself from Sergeant Buist's bed, other than the texts that Sergeant Buist testified he sent to ensure that X.Y. knew that he was okay with everything, nothing further occurred. The Court noted that although Sergeant Buist left open the possibility that X.Y. could return if he wanted to, this invitation was neither forced nor followed up with. Once X.Y. did not respond, Sergeant Buist fell back to sleep.

[41] Despite the Court asking for submissions on this issue, the prosecution did not submit any further arguments.

Were the statutory limitations of the Criminal Code engaged?

[42] For its part, the defence took the view that although there is evidence in this case that all parties were consuming alcohol on the evening in question, such that neither X.Y. nor Sergeant Buist were capable of driving, they also testified that neither of them were so intoxicated that they were incapacitated in their decision making.

[43] The prosecution put forward no meaningful representations or arguments with respect to any alleged recklessness or willful blindness by Sergeant Buist.

Reasonable steps

[44] The prosecution argued that if the Court does find that there is an air of reality to the HBMBCC, then the requirement to take reasonable steps would negate the defence.

[45] She argued that both X.Y. and Sergeant Buist were platonic colleagues who were attending a course together and if Sergeant Buist found X.Y. in his bed under the circumstances that unfolded, that he should have pressed pause and confirmed verbally with X.Y. to ensure that

he was consenting. She argued that this was not what was done and Sergeant Buist's immediate response to touch the complainant's penis negates his reliance on this defence.

[46] Conversely, defence argued that Sergeant Buist testified that he reached back with his hand to check what was transpiring and his hand touched X.Y.'s penis, which was met by the thrusting action of X.Y.. He admitted that the interaction was followed up with the text messages sent by Sergeant Buist in an effort to help both parties understand what occurred. Defence argues that the text messages confirm what was in Sergeant Buist's mind and what he was thinking.

[47] With respect to the requirement to take reasonable steps, defence argued that it depends on what is reasonable in the circumstances and must be informed by the nature of the actions that the accused awoke to. In short, Sergeant Buist awoke in the middle of the night, in the privacy of his own bed by someone naked, whispering his name, spooning him and cuddling him with an erection. The allegations before the Court arise from the fact that the accused reached behind him and touched X.Y.'s penis for a matter of seconds which he said was an instinctive reaction to the penis that was pressed up against him.

[48] Defence refuted the prosecution's suggestion that given the circumstances, Sergeant Buist should have taken additional steps to shove X.Y. away as Sergeant Buist should have known that X.Y.'s actions were out of character.

[49] The submissions beg the question of what is a reasonable step in the circumstances present in this case. How does a person actually stop another man who enters his bed uninvited and pushes his naked body part up against him? It is arguably for this reason counsel for Sergeant Buist advocated that self-defence should also be considered by the panel. Although defence acknowledged that, based on the accused's testimony, the vitality of this defence is a strain, he did argue quite persuasively that the latitude of reasonable circumstances that underpins self-defence is highly relevant to the HBMBCC in this particular case.

[50] In other words, the crux of defence's submission focuses primarily on what is the reasonable response by a member responding to this sort of violation of one's personal space in a place. The reasonable steps required must indeed be contextual.

[51] Defence further asserted that if the prosecution is suggesting that since Sergeant Buist arguably knew X.Y. was not homosexual and should have immediately taken extra steps to confirm what was happening, then this alone cannot inform the actions that unfolded on that day. The evidence before the Court was that Sergeant Buist himself was a closeted bi-sexual and in the context of the events, it was he who awoke to find X.Y. naked in his bed. X.Y. testified that he "might have been" dreaming and possibly thinking he was with his girlfriend. I am mindful of the fact that the entire interaction took mere seconds and unfolded at an intersection of time when both men were awakened suddenly in the middle of the night and this must inform the circumstances known to Sergeant Buist.

[52] Courts martial have repeatedly found that when a member is away and serving in a military environment, their bed space is sacrosanct. In this case, there is no mistaking the fact

that it was X.Y., who entered Sergeant Buist's bed uninvited and not the reverse. This distinction is very important.

[53] Based on courts martial jurisprudence, an assessment of what steps are reasonable would be completely different if Sergeant Buist was the one who entered the bed of X.Y. uninvited. As the presiding judge in both *R. v Cooper*, 2018 CM 2014 and *R. v. Cadieux*, 2019 CM 2019 courts martial, I dealt with varying facts related to the violation of sleeping members, which are distinguished primarily by the fact that in both of those cases it was the offenders who unlawfully entered the personal bed space of each of the complainants. I found that it was the intrusion of their personal bed space which was the most concerning and consequently not only deserving of protection, but it was a space that needed to be safeguarded. As mentioned earlier, in the military context, the fact that the protection of a sleeping member in his or her bed space is sacrosanct, courts have required a heightened reasonable steps requirement.

[54] In *Cooper* I wrote, at paragraph 32, "When service members serve away from home in confined quarters, they are always vulnerable and there is an implied expectation of trust. It is sacrosanct." A year later, at paragraph 19 of *Cadieux*, I wrote: "Based on the facts of this case, when an individual is sleeping and unconscious and has no reason to expect another individual to be beside their bed, in their bed, beside their cot or in their bunk aboard a ship, an unequivocal communication of consent is required on first contact."

[55] However, this case is distinguishable as it was the complainant X.Y. who entered the bed space of Sergeant Buist completely uninvited. Consequently, I do not find that this same heightened reasonable steps requirement can be applied in this case, as suggested by the prosecution.

[56] It is arguably for this reason that the defence counsel has argued that self-defence is also an appropriate defence to be considered by the panel. I will address this next.

Self defence

[57] In this case, Sergeant Buist awoke in his own bed to a naked X.Y. spooning him, with X.Y.'s erect penis pressed up against him. It is clear in law that a sleeping person is not in a position to consent and consequently, when Sergeant Buist awoke, he himself was a victim of at least an assault.

[58] Strangely, it is Sergeant Buist's instinctive reaction in response to this assault of X.Y.'s presence in his bed as he pressed up against Sergeant Buist, which forms the subject matter of the charge before the Court. Counsel for Sergeant Buist argued that if Sergeant Buist's response to the assault for which he is the victim is the subject of the charge before the Court, then he should be able to rely upon the protections set out at section 34 of the *Criminal Code* for self-defence. Relying on past precedents, when such a set of facts unfolds, he argued that a more violent reaction is both available and permitted under the law of self-defence, provided that the use of force in response is proportionate and appropriate in the circumstances.

[59] In requesting that self-defence be put to the panel, defence relied upon the case of *R. v. Stamp*, 2014 CanLII 7353 (NL PC), where the accused responded with a head-butt to a complainant who accosted him sexually while in the bathroom. He argued that the jurisprudence of self-defence recognizes the right of an individual to instinctively react with force when one is threatened or to repel an assault, such as the receipt of an uninvited guest in one's bed. In essence, defence argued that the facts of this case are similar to those set out in *Stamp*.

[60] Conversely, the prosecution argued that there is no suggestion in the accused's own evidence that he reacted to protect himself in touching the complainant's penis.

[61] The defence of self-defence comes from section 34 of the *Criminal Code* which reads as follows:

> 34.(1) A person is not guilty of an offence if
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> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;
>
> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
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> (c) the act committed is reasonable in the circumstances.
>
> **Factors**
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> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
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> (a) the nature of the force or threat;
>
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
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> (d) whether any party to the incident used or threatened to use a weapon;
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> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
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> (f.1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
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> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[62] Section 34 of the *Criminal Code* contains three essential ingredients. To rely on section 34, all three ingredients must be met. If, after considering all of the evidence, all three of these

ingredients are present, then Sergeant Buist can rely upon it. The three ingredients of section 34 are:

(1) Sergeant Buist believed on reasonable grounds that *X.Y.* used force or made a threat of force against him;

(2) Sergeant Buist committed the act that constitutes the offence of sexual assault for the purpose of defending or protecting himself from that use or threat of force; and

(3) the act committed by Sergeant Buist was reasonable in the circumstances.

[63] Even if I find that these three ingredients in subsection 34(*1*) of the *Criminal Code* were present, Sergeant Buist cannot rely on self-defence if the force used or threatened by X.Y. was for the purpose of doing something that X.Y. was required or authorized by law to do in the administration or enforcement of the law, unless Sergeant Buist believed on reasonable grounds that X.Y. acted unlawfully. This is not applicable here.

[64] In reviewing the above required ingredients and the limitations to section 34, I find that there are some facts that could support such a defence. In his in-court testimony, X.Y. asserted that Sergeant Buist reacted violently, squeezing his penis so hard that he compared it to having one's finger squeezed forcefully enough that it turns purple. Was this the result of his instinctive reaction to X.Y.'s penis being pressed up against him? Such a response might actually be considered mild by individuals who awoke to the same situation that Sergeant Buist did.

[65] Although Sergeant Buist testified to being shocked waking up to the presence of X.Y. in his bed and admits to reaching back and touching X.Y.'s penis, it is Sergeant Buist's conduct after the incident in sending X.Y. text messages that seems to have upset X.Y. the most. Sergeant Buist described sending the text messages in his attempt to diffuse the situation because he assumed X.Y. was embarrassed about what he did. This is evidenced by the first two messages that he sent to X.Y., stating "coo coo" (presumably meaning "cool cool"), and then "cool with it". After some time, he sends a third message suggesting that X.Y. could return if that is what he wanted, however, Sergeant Buist neither forces the issue nor does he pursue X.Y.

[66] However, this post-conduct invitation extended by Sergeant Buist must not overshadow what was otherwise his instinctive reaction that unfolded in the fleeting seconds when both men were respectfully awakened to each other's presence within their intimate realm. There is no evidence of any predatory behaviour in this case. Consequently, it is improper to suggest that the conduct or instinctive reaction of one member who is awoken in this situation is more deserving of respect than the other's reaction. The situation in which both men found themselves was both complicated and sensitive and as I explained at paragraph 87 in *Cadieux*, "Keep in mind that any sleeping victim who wakes up with someone in their bunk will be traumatized. It is the worst violation that any member could ever feel, so the impact on the victim will always be significant." Based on the evidence presented in court, I find that both men awoke to a harsh realization of being in bed with someone that they did not expect to be with.

[67] This is the crux of the issue before the Court. Both men rightfully feel victimized having awoken to something they were not expecting, and the level of blameworthiness to be apportioned is not straightforward.

[68] With respect to self-defence, it is clear that Sergeant Buist believed and reacted to the force applied by X.Y. when he entered his bed and pressed his naked body up against Sergeant Buist. Force simply means physical contact or touching and it does not have to involve physical violence.

[69] Although Sergeant Buist did instinctively react by touching or squeezing X.Y.'s penis, there is no evidence before the Court that this was done for the purpose of defending himself (or others) or that it was for no other purpose. This is where the defence lacks evidence to support its viability.

[70] Importantly, during submissions the Court asked defence counsel if he was putting forward the defence of self-defence more to inform the reasonable circumstances which are set out within section 34, to which he agreed this is where it has merit. Section 34, which is drafted specifically to inform instinctive reactions or actions taken under stress to repel potential offences, sets out the relevant circumstances to be considered which in the context of this case would include:

> (a) the nature of the force or threat of force made by X.Y*;* and
>
> (b) the extent to which the use of force was imminent and whether there were other means available to Sergeant Buist to respond to the potential use of force.

[71] Although there is no viability for the defence of self-defence itself based on the evidence before the Court, the context of the reasonable circumstances does assist in the context of the unique aspects of this particular case.

[72] Sergeant Buist stands charged for sexual assault based on his reaction to an assault for which he was first the victim. Arguably, if it was not for the way that Sergeant Buist responded to the presence of X.Y. invading his personal bed space, X.Y. could himself be facing a charge of sexual assault. Consequently, I find it troubling that this fact seems to have been lost in the midst of the current prosecution and I find that it must inform the reasonable steps requirement.

Conclusion

[73] Although I do not find the defence of self-defence to be viable, with respect to the defence of HBMBCC, I find that it is distinctly possible for the panel to splice together a version based on some of the evidence of both Sergeant Buist and X.Y. with respect to the encounter, and settle upon a reasonably coherent set of facts supported by the evidence that is capable of supporting the defence of HBMBCC. I further find that there is no statutory limitation that prevents the defence of HBMBCC from being put to the panel for consideration.

FOR THESE REASONS, THE COURT:

[74] **FINDS** the defence of self-defence is not viable, and

[75] **FINDS** the defence of HBMBCC may be put to the panel.

Counsel:

The Director of Military Prosecutions as represented by Major A. Dhillon and Lieutenant-Commander J. Besner

Mr Michael Johnston, 200 Elgin St Suite 800, Ottawa, Ontario, Counsel for Sergeant D.C. Buist