



## COURT MARTIAL

**Citation:** *R. v. Luis*, 2022 CM 4010

**Date:** 20220617

**Docket:** 202124

Standing Court Martial

Halifax Courtroom Suite 505  
Halifax, Nova Scotia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private M. Luis, Offender**

**Before:** Commander J.B.M. Pelletier, M.J.

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**Restriction of publication: Pursuant to section 179 of the *National Defence Act*, I direct that any information obtained in relation to the proceedings of the Standing Court Martial of Private Luis which could identify anyone as a victim or complainant, including the person referred to in the charge sheet as “F.M.”, shall not be published in any document or broadcast or transmitted in any way.**

**This order does not apply to disclosure of such information 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.**

### **REASONS FOR FINDING**

(Orally)

#### **Introduction**

[1] Private Miguel Luis is facing two charges under the Code of Service Discipline relating to his interaction with a colleague, F.M., while they were undergoing basic military training on the same platoon at the Canadian Forces Leadership and Recruit School (CFLRS) in Saint-Jean-sur-Richelieu, Quebec, in February 2020. Both have since been released from the Canadian Armed Forces (CAF) but the accused remains

liable to be dealt with by this Court under section 60 of the *National Defence Act (NDA)*. He will be referred throughout these reasons as Private Luis as he shall be deemed to have the same status and rank that he held immediately prior to ceasing to be a subject of the Code of Service Discipline. Other witnesses will be referred to by the status they had at the time of testifying before this Court.

[2] The first charge, laid under section 130 of the *NDA*, alleges that on 26 February 2020, Private Luis sexually assaulted F.M. contrary to section 271 of the *Criminal Code*. The second charge alleges that between 24 and 26 February 2020 Private Luis did harass F.M., committing the offence of conduct to the prejudice of good order and discipline, contrary to section 129 of the *NDA*.

### **Evidence**

[3] The prosecution called three witnesses. Besides the complainant, F.M., Aviator Jamie Boniface and Mr Saul Franklin, also former colleagues from the same platoon on basic training, were called to discuss some of their interactions with both protagonists on 24 and 26 February 2020.

[4] Witnesses from the prosecution introduced a number of documents, mainly pictures of the locations where the events are alleged to have taken place. The Court took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence (MRE)*, including the version of Defence Administrative Orders and Directives (DAOD) 5012-0, *Harassment Prevention and Resolution* which was in force at the time of the events in February 2020.

[5] The defence called the accused as its sole witness.

### **The narrative of the relevant facts**

#### ***The testimony of F.M.***

[6] The complainant and Private Luis first met at Montreal Airport on 15 February 2020 after they had travelled by air to attend basic training in Saint-Jean-sur-Richelieu and were told to wait at the airport to be transported by bus to CFLRS with a number of other candidates, including Aviator Boniface. Their basic military training course itself started on Monday, 17 February 2020 with a number of briefings. Those dealt with matters of dress and deportment, including orders governing harassment. On the second day of the course, while attempting a physical fitness test, F.M. suffered a serious injury which required her transport to the hospital and her subsequent hospitalization following complications. She was released back to CFLRS on 24 February 2020 and from there was essentially excluded from training activities with other members of her platoon as she was confined to a wheelchair. Her routine required her to spend significant periods of time in what has been described as the blue break room, along with any other member of her platoon also excluded from training for whatever reason.

[7] It is in that room that the first incidents of harassment on the part of Private Luis are alleged to have happened.

[8] First, on 24 or 25 February 2020, as F.M. opened her water bottle to take a sip, a foul smell she had tried to remove previously was still present and emanated in the room. She testified that the smell was noted by Private Luis and, as she apologized for it, she was told by Private Luis that she should be used to gross things in her mouth and hitting the back of her throat. At the same time, Private Luis' hand motioned towards his genitals. She said she was disgusted. She told Private Luis that it was gross and not to say stuff like that.

[9] F.M. related a second episode when she said she heard Private Luis comment about her being "easy" and "damaged". She did not like that and did not want him to expand any further, so she told him it was rude and that she did not want to hear it any more. However, he felt the need to continue to refer to her as being "damaged" and "easy" on numerous occasions that day and subsequently F.M. explained what she believed was the origin of the remarks, in an earlier conversation when she had mentioned being in a terrible relationship. This was the justification given by Private Luis to tell her she was "damaged" as being somebody that was troubled, had been hurt, and had issues. As it pertains to her being "easy", she said Private Luis had referred to another member who was willing to have sex with anyone, somehow associating her to such an attitude, as if she could be easily convinced to have sex. She did not like that remark, thought it was rude and asked him to stop. However, he did not and repeatedly continued to call her "easy" and "damaged". She recalls that on one occasion, Mr Franklin was present and Private Luis would have tried to get his attention by suggesting that F.M. would be an "easy lay" but Franklin would not entertain such a discussion.

[10] F.M. recounted a third incident, where Private Luis had made a joke to Mr Franklin about using a fake fifty-dollar bill he had in his wallet, then starting to take out business cards from his wallet and showing the cards to her. At one point, he took out the business card for a centre offering abortion services and tried to give it to her, reiterating that she was damaged and easy, hence that she would likely have a need to use a card like this someday. She said seeing the card triggered a strong emotional reaction from her as she had suffered a miscarriage prior to basic training. She said she would have been visibly upset, in tears and shaking. She told Private Luis that she did not find it funny, it was not a joke, that she did not want the card and that he should stop and put the card away. Yet he kept showing the card to her.

[11] F.M. complained of a fourth incident, on 26 February 2020, when out of the blue Private Luis had asked her how many people she had slept with, saying he had slept with three or four but had sexual activity with many more and asking her how many of those people she thought had accused him of rape. She replied that she did not want to engage in that conversation but Private Luis continued, providing details about two of those stories, bragging about how he threatened or blackmailed the women involved in not submitting complaints, appearing to be proud of what he had done. Once again, she

said the subject was sensitive for her, she became anxious, started shaking, and became a little teary eyed because of her own personal experiences. She told him to no longer talk about those types of conversations with her and to stop.

[12] F.M. testified that they were then interrupted by a staff member entering the blue break room, asking them to proceed upstairs to their quarters to join another member who had been ordered to rest for the remainder of the work day, asking them to ensure that person would come down with them for food at the next meal. The staff member pushed F.M.'s wheelchair through the hallway but soon Private Luis took over, giving her his crouches to carry, touching her needlessly on the shoulder while pushing the wheelchair. They proceeded to the elevators and then to her cubicle, a sleeping space assigned to her as one was assigned to all other members of her platoon on the ninth floor of the building. Once there, F.M. was left alone with Private Luis. As they were discussing in her cubicle, she testified that Private Luis insisted on placing a foot on her bed while telling her about his problems with his girlfriend, at one point almost stroking her leg. She said she was not really participating in the discussion, but after noticing his foot touching her leg, she told him that he was not allowed to touch or be on her bed because it would not look good if a staff member observed them. Private Luis replied that nobody was around, nobody would be able to know what they were doing up there, it was just them. She said she became uncomfortable at that point and moved out of her bed, stating she needed to go check her spine in the washroom, an excuse to get away.

[13] F.M. testified that she then went to a female-only washroom, clearly labelled as such and located in the vicinity of her cubicle on the ninth floor. She went without using her wheelchair as the wheelchair had been parked in a room farther way from her cubicle than the washroom. Once inside the washroom, with the door closed, she said she positioned herself in front of a full-length mirror to lift her shirt and lower her pants in order to be able to look at her injury. She said she then saw Private Luis. He had cracked opened the door to the washroom and was looking at her, mentioning that he wanted to see the wound on her back. She said she then replaced her clothing and told Private Luis he was not allowed to come in and he complied. She then went out and saw Private Luis standing on the other side of the door.

[14] Upon leaving the washroom, F.M. said she went back to sit once again on her bed, in a position somewhat similar than what she had adopted before, with the exception of her feet which were then angled to the right in the bed so that they did not extend fully and space remained on the bed to her left. Private Lewis sat back on the chair located near the foot of her bed, but this time pulled the chair closer to her. She testified that Private Luis started to talk about how they could have sex and nobody would know. She replied again no, adding that they could get in trouble. She said that Private Luis then tried to move from the chair to sit on her bed but she refused to allow that. However, Private Luis leaned forward and placed his hand on her left thigh as he was talking about nobody being up here and that they could have sex and nobody would know, they would not get charged, it would be okay. She felt like he thought he could just keep asking and eventually she would say yes. He moved his hand up her thigh

towards the area between her legs, slowly moving his hand inwards, stopping when he got up to where the outside of his hand was touching the crevice near her vaginal area from the outside of her pants. Throughout, he was looking at her up and down and kept saying that they could have sex and no one would notice.

[15] F.M. testified that she then told Private Luis that she needed to go to the washroom and that he should get the other member who had been ordered to rest for the remainder of the work day so he could wake up and be ready to go with them to supper.

[16] She said she then left for the same female-only washroom as before, this time she really needed to use the facilities. She entered the middle toilet stall, took down her pants and started urinating. She then heard Private Luis talking once again about being alone and them possibly having sex without anyone knowing, so she started looking for feet under the door of the stall. She then noticed Private Luis's feet and, looking up, saw that he was staring at her through the space between the door and the stall, visible on the fourth picture contained in the package of photos produced as Exhibit 5. When she saw him she panicked, stopped peeing, pulled up her pants and opened the stall door. She observed at that point that Private Luis had already made his way out of the washroom and the door was held open by a stopper. She said she told him, pointing to a female-only sign, that this was a female-only washroom and reiterated that he was not allowed in. Private Luis replied that he would go wherever he wanted.

[17] F.M. then washed her hands, Private Luis got her wheelchair for her and as she sat, he said once again that they were alone, placing his hand briefly on her left thigh. He then wheeled her to the room leading to the elevator while he got the other member to come with them to attend supper.

### ***The testimony of the other prosecution witnesses***

[18] Aviator Boniface testified about meeting F.M. at Montreal Airport on 15 February 2020 and getting along well with her. At dinner the evening of 26 February 2020, she sensed there was something wrong with her friend as she was not talking to anyone and appeared sad. She asked her how she was and got a head shake in reply, so she made sure to go see her before lights out that evening. While speaking to her, she noticed F.M. becoming increasingly upset and crying. When asked whether her friend was eager to go home, Aviator Boniface answered that she had heard F.M. make a remark before 24 February 2020 to that effect, but in her opinion, her friend wanted a career in the CAF and was more worried about going home than eager as indeed, she was worried as to where she would go when she returned home.

[19] For his part, Mr Franklin provided confirmatory evidence relating to two of the incidents of negative interaction which F.M. relayed in her testimony. He did describe the occasion when Private Luis showed cards from his wallet. Although he did not see the last card shown, he heard Private Luis say to F.M. that this is something she might need, that it would suit her personality. Mr Franklin did observe F.M. become visibly uncomfortable and heard her say that she was not that type of person. He said Private

Luis nevertheless “pushed the joke” and showed the card maybe half a dozen times, trying to get a reaction from F.M.. Mr Franklin said he subsequently asked F.M. for information about the card but she would not entertain that conversation, saying that the issue was too sensitive for her.

[20] Mr Franklin also testified about hearing a conversation about F.M. being “easy” or “easy going”. He said that observing the situation at the time, he could not determine if Private Luis was half-serious or half-joking. He said he could not recall word for word what was said, but believes Private Luis was inferring that F.M. was a person with low standards. He heard her reply that she has standards and that she was not easy, describing the tone she used as a “joking tone”.

### *The testimony of the accused*

[21] Following the close of the prosecution’s case, the accused took the stand in his defence. His examination-in-chief was very brief, lasting about eight minutes. In relation to the first charge, Private Luis responded with a clear no to the one question asked by his counsel as to whether he had touched F.M. when she was lying in bed.

[22] In relation to the harassment allegations in the second charge, Private Luis was essentially asked two questions for each allegation made by F.M., namely whether given words or actions were said or made and if so, he was asked about the circumstances. Private Luis admitted commenting on the smell of F.M.’s water bottle, but does not remember what he said exactly and answered no when asked if he had made any reference about her being used to have smelly things in her mouth. Private Luis admitted directing comments to F.M. as to her being damaged. He explained that he did so in relation to her obvious physical state, she was in a wheelchair, but also in relation to her mental state on the basis of what she had related to him in relation to a difficult relationship with a boyfriend. Private Luis also made remarks about her being “easy” but explained that it was a joke. He did admit offering her the business card of what was described as an abortion clinic, but explained that he thought the card might be helpful to F.M. in light of her past with her boyfriend and her miscarriage, inferring that he honestly thought offering the card could help. He produced the card as an exhibit. He also admitted telling F.M. that he had been accused of rape in the course of a discussion he had with her about their past experiences.

[23] Private Luis answered negatively when he was asked whether he had ever entered a female-only washroom during basic training. In cross-examination, he admitted to putting his feet up onto F.M.’s bed to relieve pressure from his injured knee, as he was then in crutches. He readily admitted following F.M. to the female-only washroom on one occasion, the only occasion he said she went to the washroom while they were both on the ninth floor together on 26 February 2020, but stated that he did so to ensure she was okay and never walked in the washroom.

[24] Private Luis stated that he was told by F.M. that she wanted to go home during one of the conversations they had in the blue break room.

[25] On cross-examination, Private Luis was confronted with a statement he provided to investigators of the military police on 5 March 2020, when he told them that he never called F.M. “easy” or “damaged” and when he denied making sexual jokes. He acknowledged promising his mother that he would be careful not to get into trouble in the military because he had a habit of making sexual jokes. In re-examination, Private Luis said he lied to military police investigators because he was scared at the time and did not want to get in trouble.

### **The assessment of the evidence**

#### ***The position of the parties and the proper frame of analysis***

[26] Both parties agree that this is a factual case. The prosecution submits that its evidence, mainly the testimony of F.M., is credible and that I should accept her version and convict Private Luis as all elements of both offences have been proven beyond a reasonable doubt. On the other side of the courtroom, the defence argues that I should be left with a reasonable doubt by the testimony of F.M. given the change in demeanour between her direct and cross-examination, some inconsistencies and contradictions in her testimony, as well as a motive to both exaggerate the impact of the jokes by Private Luis had on her and to fabricate an assault in order to facilitate obtaining an early compassionate release from the CAF.

[27] Defence counsel is right about what this case is about, namely whether the prosecution has discharged its burden of proving the guilt of Private Luis beyond a reasonable doubt on both charges. I now wish to elaborate on the two notions which support this statement, namely the presumption of innocence and the proof beyond a reasonable doubt.

#### ***Presumption of innocence and proof beyond a reasonable doubt***

[28] Indeed, these two notions are fundamental to findings for Code of Service Discipline and criminal offences.

[29] In this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent.

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

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

[32] The requirement of proof beyond a reasonable doubt applies to each and every essential element of the offence. It does not apply to individual items of evidence. The Court must decide, looking at the evidence as a whole, whether the prosecution has proven Private Luis' guilt beyond a reasonable doubt.

[33] Reasonable doubt also applies to the issue of credibility. On any given point, the Court may believe a witness, disbelieve a witness, or not be able to decide. The Court need not fully believe or disbelieve one witness or a group of witnesses. If this Court has a reasonable doubt about Private Luis' guilt arising from the credibility of the witnesses, then I must find him not guilty.

### ***The assessment of credibility***

[34] The Court may accept or reject, some, none or all of the evidence of any witness who testified in these proceedings. Neither credibility nor reliability is an all-or-nothing proposition. A witness can be deemed reliable on some aspects and unreliable on others. It is a given, however, that to support a conviction, testimony must be reliable and capable of sustaining the burden of proof on a specific issue or as a whole. The Court must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except the presumption of innocence.

[35] Rendering a verdict is not a question of deciding whether the Court believes the defence's evidence or the prosecution's evidence. In those areas where the evidence of the accused contradicts the evidence of prosecution witnesses, the method that I must follow in order to respect the fundamental principle obliging the prosecution to prove the guilt of the accused beyond a reasonable doubt is as provided by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at page 758 as follows:

First, if I believe the evidence of the accused, I must acquit.

Second, if I do not believe the testimony of the accused but I am left in reasonable doubt by it, I must acquit.

Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.



[36] I must add that if, after careful consideration of all of the evidence, I am unable to decide whom to believe, I must acquit.

***The credibility of the accused***

[37] The testimony of Private Luis was very brief and straightforward by design. He was providing fast and short answers such as yes or no and correct or incorrect, depending on how the questions were put to him. He showed some embarrassment when initially answering no to a question about his feet up on F.M.'s bed while he evidently meant to say "yes" to having his feet up but "no" to touching her. Afterwards, he paused on occasion before offering answers, especially in cross-examination. Yet the formatted nature of the examination-in-chief and the way Private Luis chose to answer questions with minimal information in both direct and cross-examination generates concerns on my part as to his credibility.

[38] As it pertains to the substance of his testimony, it cannot be said, in the circumstances, that this evidence is obviously implausible, entirely unsupported or inconsistent, whether internally or externally. In fact, his testimony is obviously externally consistent with evidence offered by prosecution witnesses when he admits making certain statements attributed to him. An accused taking the stand and alleging in part that a complainant's story is fabricated, as is the case for the sexual assault in this trial, should not be expected to offer much balance in his testimony.

[39] In the circumstances, I cannot reject Private Luis' testimony based on the substance of his evidence. The way he testified concerns me but it is not sufficient in itself to reject his testimony. However, that is not the end of the analysis.

[40] Indeed, as stated by both parties, the lies that Private Luis told investigators when giving a statement do have a negative effect on his credibility, as it shows he has attempted to mislead authorities in the past. It also lends some credence to the suggestion by the prosecution that he conceded in his trial testimony on matters for which the evidence of F.M. was corroborated by the testimony of Mr Franklin, although Private Luis also admitted having engaged in other conversations that were not corroborated.

[41] The previous lies to investigators, combined with the manner in which Private Luis was interrogated and answered questions in court, generate a credibility concern for me. However, I also believe, as a main concern, that the exculpatory evidence offered by Private Luis must be rejected because of the strength of the prosecution's evidence. As stated by Doherty J. of the Ontario Court of Appeal in *R. v. D. (J.J.R.)*, 2006 Carswell Ont 7552, 215 C.C.C. (3d) 252 (C.A.), at paragraph 53:

An outright rejection of an accused's evidence based on a considered and reasoned acceptance beyond a reasonable doubt of the truth of the conflicting evidence is as much an explanation for the rejection of an accused's evidence as is a rejection based on a problem identified with the way the accused testified or the substance of the accused's evidence.

[42] It is appropriate therefore to turn to the prosecution's evidence before concluding on the credibility of the evidence offered by Private Luis.

***The credibility and reliability of prosecution witnesses***

[43] I find that prosecution's witnesses were credible and generally reliable. They did not exaggerate the facts, admitted when their memory would not allow reaching firm conclusions and testified without demonstrating animosity towards the accused, thereby showing balance. I do not have any concerns about how prosecution's witnesses chose to answer questions. They, especially F.M., appeared thoughtful and careful in providing accurate answers.

[44] The evidence of Mr Franklin about the business card incident was particularly striking to me as to the corroboration he added to the testimony of F.M., especially when he mentioned that Private Luis referred to the card "maybe half a dozen times", that he "pushed the joke trying to get a reaction" despite F.M. being visibly uncomfortable and that he did not stop until interrupted. In addition to corroborate in substance the allegation of F.M., that evidence makes the explanation of Private Luis, to the effect that he was offering the card to F.M. to be helpful, entirely implausible. When one's help is refused more than once, making the intended recipient of the help visibly uncomfortable, and when the recipient's patience is pushed to get a reaction, the help can no longer be presumed to have been offered in good faith. It is evidentially done to cause harm. This is a third reason why the explanations of Private Luis on his interaction with F.M. are not credible to me.

[45] In addition, there is, of course, the testimony of F.M. who I found to be an entirely credible witness. She was visibly anxious about testifying, which is understandable given the personal nature of her testimony. I do not agree with the suggestion made to her in cross-examination that she was anxious because she was lying and incidentally, she responded to that suggestion convincingly by stating she was telling the truth. She was particularly emotional and teary, especially when first turning to different subjects in her testimony, but I found these tears to be genuine and understandable. She was less emotional in cross-examination but I do not agree with the suggestion that this was an abrupt change in attitude that should cause credibility concerns. The witness had already been through all of the episodes of negative interactions at the time of cross-examination and was asked short questions about some of them. She was also asked about other matters of a more technical nature such as dates and the content of her initial statement. It is understandable that there were less reasons for her to become emotional in that context during cross-examination.

[46] As it pertains to the fact that the allegations relating to touching of the thigh were written on as additions in the margin of the written statement F.M. gave to authorities, her explanations in that regard were convincing to me. She was stressed at the time of writing that statement, had to organize her thoughts and, although I was not shown the sheet of paper on which the statement was written, apparently had to go back

to insert details in margins. She was very clear, however, that this was one statement given on one occasion. I also fail to see inconsistencies in her testimony as to dates when she would have gone back home. She did say she would have gone back home between 1 to 12 March but did not know which date. When it was suggested to her in cross-examination that it may have been the first of March, she said, upon reflection, that she did not believe so. Even if this could be considered a contradiction, it was on facts accessory to the core of the infractions, hence not significant. I also disagree with the submission to the effect that F.M. was contradicted by Mr Franklin on the issue of how many conversations involved the use of the term “easy”. She stated the term was used on numerous occasions, including one of the times that Franklin was there. The fact that Mr Franklin could recall only one such use is therefore consistent with F.M.’s testimony.

[47] In relation to motive to lie, I remain entirely unconvinced that F.M. would have been tempted to lie to authorities about having been assaulted in order to obtain a more expeditious return home from the CFLRS. This allegation is entirely unsupported by the evidence, beyond the fact that F.M. obtained her release from the CAF on or about 12 March 2020, while Private Luis had to wait until October of the same year. Yet, their personal situation was different. For one thing, F.M. had suffered a significant injury which confined her to hospital care for a week starting on day two of her recruit course. She subsequently became extremely anxious about staying at CFLRS, in large part because of her negative interaction with Private Luis, as she said in her testimony. For his part, Private Luis has not been injured nearly to the same extent and there is no evidence as to what his wishes or request had been in relation to an early release from the CAF. Acknowledging that the defence has nothing to prove, it remains that allegations of motives to lie must find some grounding in facts before they can justify putting into question the credibility of an otherwise credible witness. There is no such grounding here, only a naked assertion calling exclusively for speculation.

[48] I agree with the prosecution that I have no reason to doubt the plausibility of F.M.’s evidence. She did explain why she was not assertive in telling Private Luis to go away when he was bothering her and I find these explanations convincing. She was vulnerable at the time, confined to a wheelchair and dependent on others to move about and have discussions during the day. She said she did not like and avoided conflicts, a statement I found to be entirely consistent with her demeanour during her testimony and entirely credible. F.M.’s evidence was supported by independent evidence in part, as mentioned earlier, and was both externally and internally consistent. It was also balanced, as F.M. seemed to take her time to remember things before answering questions and did not hesitate to indicate when her memory did not allow precise conclusions, all the while trying to be accurate and not exaggerate any aspects, as evidence by her testimony on the slight touch which occurred when she was back in her wheelchair on the ninth floor, an incident she downplayed.

[49] Her evidence was also, to an extent, corroborated by the testimony of Aviator Boniface, whose contribution is limited to state that shortly after the alleged incidents on the ninth floor, F.M. seemed withdrawn and sad even from some distance away.

Aviator Boniface offered evidence consistent with the conclusion that something significant had just occurred on the ninth floor. This evidence is entirely compatible with the version of events given by F.M., even if its weight is not determinative.

[50] The bottom line is that I do believe F.M. entirely. I also believe the other prosecution witnesses.

### ***Conclusions on credibility***

[51] As stated earlier, my task is not to choose between versions of events, especially between F.M. and Private Luis. The bottom line is that do not believe Private Luis given my concerns about his credibility as highlighted above. His version does not leave me in reasonable doubt about the fact that the events took place as described by prosecution witnesses. On the basis of the whole evidence which I accept I am convinced beyond a reasonable doubt by that evidence that the event occurred as described by F.M.

[52] That conclusion is key in concluding that the accused should be found guilty of both charges. I will now turn more specifically to the analysis of the elements of these charges and explained why it is the case. I will begin with the second charge of harassment, as it provides a complete overview of the context of the entire interaction between the protagonists, and will facilitate the subsequent analysis of the first charge for sexual assault.

### ***Analysis of the second charge for conduct to the prejudice of good order and discipline***

#### ***Elements of the offence***

[53] There is no debate to be had about the elements of identity, time and place for this offence, as they were established by F.M. and Mr Franklin in their testimony and were not contested. The elements that are left to be proven beyond a reasonable doubt by the prosecution in relation to the second charge are:

- (a) the conduct alleged in the charge, namely that Private Luis did harass F.M.;
- (b) the fact that the conduct is conduct to the prejudice of good order and discipline; and
- (c) the required wrongful intent on the part of Private Luis.

#### ***Position of the parties***

[54] The prosecution submitted essentially that the improper comments and conduct attributed to Private Luis in relation to F.M. are sufficient in themselves to conclude that harassment occurred and, therefore, all elements of the definition of “harassment” at

DAOD 5012-0 are proven. The defence, for its part, submits generally that the prosecution has failed to prove the offence to the required standard, namely that the evidence is insufficient to demonstrate beyond a reasonable doubt that the conduct of Private Luis is conduct to the prejudice of good order and discipline under section 129 of the *NDA*. I have confirmed with defence counsel at the end of submissions on findings that, as it pertains to the interactions that Private Luis admitted to, it is the harassing nature of the exchanges and the intent of Private Luis to cause harm that is being questioned.

### *Analysis*

#### **The conduct alleged in the charge**

[55] There is no contention to the effect that the scale by which the conduct of Private Luis should be assessed as it pertains to the second charge is provided by DAOD 5012-0, a well-known order that applies to all members of the CAF as well as to civilian employees of the Department of National Defence. Prosecution witnesses, as well as Private Luis himself, confirmed that he and all members of his platoon had been briefed on the rules prohibiting harassment in the CAF during the first few days of their basic training course, that they knew there was zero tolerance for this kind of behaviour and that orders pertaining to harassment were available to be consulted as required.

[56] The circumstances of this case are therefore similar to those in *R. v. Williams* 2017 CM 4017, a case which discussed in some detail the analysis required when a charge alleges that an accused has harassed another person and in doing so committed the offence of conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*. *Williams* was decided in a context of uncertainty following the Court Martial Appeal Court (CMAC) decision of *R. v. Golzari*, 2017 CMAC 3, which had come down only a few months earlier, an appellate decision which generated significant debate by counsel in their submissions at the hearing in *Williams*. The *Williams* decision should therefore be read as an attempt at bringing clarity on certain issues, notably the burden to be met in proving the offence under section 129, in the context of harassment allegations. Since then, *Williams* was referred to in the case of *R. v. Renaud*, 2019 CM 4021, another case dealing in part with two harassment charges, worded singularly, including one pertaining to a conduct that was found not to meet the definition of harassment but nevertheless constituted conduct to the prejudice of good order and discipline. At paragraph 49 of *Renaud*, paragraph 58 of *Williams* is mentioned with approbation, to the effect that the Court's knowledge regarding harassment must be educated by DAOD 5012-0. The analysis in *Renaud* was subsequently confirmed as having been correct and conform to previous appellate decisions on appeal, see *R. v. Renaud* 2020 CMAC 5, at paragraph 12. The statement found at paragraph 58 of *Williams* was also more recently referred to as appropriate at paragraph 44 of the more recent CMAC case of *R. v. Duquette*, 2021 CMAC 10. I trust therefore that *Williams* is good law and can be applied to the analysis here.

[57] The substance of the analysis which cumulated at paragraph 58 of *Williams* is to the effect that in determining whether a proven harassing conduct is prejudicial to good order and discipline, a trier of facts' knowledge in the field of harassment must be based on DAOD 5012-0. That order defines harassment as "an improper conduct that offends another individual in the workplace, that the accused knew or ought reasonably to have known would cause offence or harm." In addition, section 3.6 of DAOD 5012-0 lists six criteria taken from the constituting elements of that definition, which must be met for harassment to have occurred.

[58] I have no hesitation in finding that the facts related earlier, as it pertains to the words directed by Private Luis at F.M. in the blue break room, pertaining to the water bottle remark to the effect that she should be used to gross things in her mouth and hitting the back of her throat; that she was damaged; that she should endure tales of how Private Luis was accused of rape but threatened or blackmailed the women involved in not submitting complaints despite her refusal to partake or be submitted to such words; were individually and collectively instances of improper conduct by Private Luis. I believe F.M. when she states that that conduct in the workplace offended her. I also have no hesitation to conclude that the conduct harmed her, even if I cannot assess to what extent. I also believe her when she states that she expressed her disapproval to being subjected to these words. Consequently, I have no hesitation to find that Private Luis knew or ought reasonably to have known his conduct would cause offence or harm in light of what F.M. expressed both by words and through her physical reaction to the comments. That would be enough to make up the offence on the second charge, but there is more.

[59] The insistence of Private Luis to hand a business card of a centre offering abortion services to F.M., reiterating that she was "damaged" and "easy", hence that she could need such services, over her strong negative physical reaction and her verbal objections to the effect that it was not funny, with the knowledge that she had suffered a miscarriage, was an entirely improper conduct. Private Luis should have thought better before offering the card in the first place but in any event, he should have known at the first refusal that he needed to stop and put the card away. Yet he kept showing the card, as confirmed by Mr Franklin. In doing so, he kept causing offence and harm. In itself, this event would have been sufficient to ground a charge of having harassed F.M.

[60] As it pertains to the events which occurred in the blue break room, the only doubt I am left with pertains to the intent to cause harm in relation to the statement to the effect that F.M. was "easy". Indeed, she admitted actively participating in a discussion about her past sexual experiences, specifically admitting having thrown a number to Private Luis about how many sexual partners she might have had in the past in the course of their discussion. Mr Franklin said that when F.M. insisted in saying that she had standards, she was doing so using a "joking tone". In the circumstances, I may have been left with a reasonable doubt about whether Private Luis knew or ought to have known that his improper conduct would cause harm and acquitted if this were the only allegation supporting the harassment charge. However, it is not. Any doubt about this one aspect of one of the interactions between the protagonists is irrelevant in this

case as to the finding I must make about a charge, which is substantiated by a number of other allegations.

[61] Moving now to the analysis of the events on the ninth floor, the main and most outrageous instance of improper conduct is, of course, the intrusion of Private Luis in the female-only washroom while F.M. was sitting on a toilet in a stall, urinating. I accept F.M.'s testimony to the effect that Private Luis was standing right at the stall door, looking at her through the space separating the door and the stall. It is difficult how anyone engaging in such conduct in the circumstances could not reasonably have known that the conduct would cause offence or harm. In fact, an incident of this nature in the workplace is exactly what is referred to in the fifth criteria at section 3.6 of DAOD 5012-0 as "one severe incident" which has the real potential to leave a lasting impact on a victim or complainant.

[62] The other events which occurred on the ninth floor, namely the insistence of Private Luis to place his foot on F.M.'s bed, the first washroom intrusion to observe F.M. looking at her injury in the mirror and the words exchanged at the time appear, of course, of lesser gravity, but they are not for that reason insignificant. This is especially the case for the words uttered repeatedly by Private Luis to the effect that there was no one around and he and F.M. could have sex without anyone knowing. I have to agree with the submission and evidence of the prosecution to the effect that I could infer from these facts that Private Luis engaged in this improper conduct hoping that F.M. would say yes, eventually. That is exactly what sexual harassment is and why it is prohibited in the workplace given its potential to cause harm, not only to the target of the conduct, but also to the work environment with resulting negative consequences on operational effectiveness, productivity, team cohesion and morale, as explained at DAOD 5012-0.

[63] In summary, in line with my findings on the credibility of the witnesses and the strength of the evidence, I find that Private Luis engaged in improper conduct by the words he said and by his actions, directed at F.M. This conduct, entirely in the workplace, was offensive to her. Private Luis knew or ought reasonably to have known his conduct would cause offence or harm. I must therefore find Private Luis has harassed F.M.

### **The conduct to the prejudice of good order and discipline**

[64] As alluded to earlier when I referred to court martial and CMAC jurisprudence, I find that the law stated at paragraph 58 of *Williams* has been accepted as true and reliable to the effect that when a breach of the "non-harassment" standard defined in DAOD 5012-0 has been found to have occurred, then prejudice to good order and discipline can be inferred, as foreseen at paragraph 129(2) of the *NDA*. That is all the analysis that is required as it pertains to the question of whether the conduct of Private Luis has been proven to be "Conduct to the prejudice to good order and discipline" under section 129 of the *NDA*.

### **The required wrongful intent**

[65] Paragraphs 62 and 63 of *Williams* are sufficient to deal with this issue. Indeed, in *R. v. Latouche*, CMAC 431 on 2 August 2000, the CMAC held that section 129 of the *NDA* does not require the prosecution to prove that an accused had any intent whatsoever to adopt a conduct to the prejudice of good order and discipline. It is the underlying violation that is relevant in determining what *mens rea* is required for a finding of guilt pursuant to section 129.

[66] In this case, I did find that Private Luis knew or ought reasonably to have known that his conduct would cause offence or harm in my analysis of the underlying violation of the applicable non-harassment obligation found in DAOD 5012-0. As stated in *Williams*, this is the extent of the analysis required for *mens rea*. I must conclude that Private Luis had the required wrongful intent to be found guilty of the second charge under section 129 of the *NDA*.

### **Conclusion**

[67] I find that Private Luis did harass F.M. and consequently the second charge of conduct to the prejudice of good order and discipline under section 129 of the *NDA* has been proven beyond reasonable doubt.

### **Analysis of the first charge for sexual assault**

[68] As stated earlier, the accused is facing one charge of sexual assault. To be entitled to a conviction, the prosecution must prove a number of elements that are well-known. As mentioned before in relation to the second charge, there is no debate to be had about the elements of identity, time and place for this offence, as they were established by F.M. and Mr Franklin in their testimony and not challenged. The elements that are left to be proven beyond a reasonable doubt by the prosecution in relation to the first charge are that Private Luis voluntarily touched F.M., in circumstances of a sexual nature, when F.M. did not, in fact, consent to the touching in her own mind and knowing that F.M. had not affirmatively communicated her voluntary agreement to the touching by words or conduct or being reckless or willfully blind in this regard.

[69] The prosecution submits that it has proven all of these elements beyond a reasonable doubt by the credible testimony of F.M., corroborated in a small measure by the evidence of Aviator Boniface who testified about the demeanour of F.M. immediately after the offence. For its part, the defence denies that any touching took place on the basis of the testimony of Private Luis and, understandably, does not submit any alternative argument on other essential elements of the offence.

[70] As stated and explained earlier, I do not believe the testimony of Private Luis. His denials are not credible to me. His testimony does not leave me in reasonable doubt and I am convinced beyond a reasonable doubt, on the basis of the evidence which I



accept, that the second interaction between Private Luis and F.M. while she was sitting on her bed in her cubicle at the CFLRS on 26 February 2020 did occur as she described.

[71] I do find that Private Luis placed his hand on F.M.'s thigh as he was talking about the fact that they were alone, could have sex and nobody would know. He moved his hand up her thigh towards the area between her legs, slowly moving his hand inwards, stopping when he got up to where the outside of his hand was touching the crevice near her vaginal area from the outside of her pants. Throughout, he was looking at her up and down and kept saying that they could have sex and no one would notice. I accept the testimony of F.M. to the effect that she did not consent to this touching and that she had to essentially escape the situation by telling Private Luis that she needed to go to the washroom and that he should get the other member who was resting so he could come down with them for supper as previously directed by the staff.

[72] That testimony convinces me that Private Luis voluntarily touched F.M. without her consent. The circumstances of the touching were unquestionably of a sexual nature given the area of the body that was touched and the nature of the words accompanying the touching, essentially attempting to convince F.M. to engage in sexual intercourse. I am convinced that Private Luis knew that F.M. had not affirmatively communicated her voluntary agreement to the touching by words or conduct. There was nothing in F.M.'s conduct which would allow concluding otherwise, especially given the events which occurred immediately prior to that second interaction in her cubicle, namely the refusal of F.M. to have Private Luis place his foot on her bed, her lack of agreement to engage or even consider engaging in sexual activity even if no one would know, and her refusal to show him her back injury in the washroom. The defence does not assert any belief on the part of Private Luis that F.M. consented to the touching and any such argument would not constitute a defence given the absence of steps to ascertain consent to the specific touching that occurred and the fact that Private Luis was being reckless or willfully blind with regard to the need to obtain consent for the touching which occurred.

[73] I do not believe any further analysis is required in the circumstances. I must find Private Luis guilty of sexual assault under the first charge.

**FOR THESE REASONS, THE COURT:**

[74] **FINDS** Private Luis guilty of the first charge for sexual assault and of the second charge for conduct to the prejudice of good order and discipline.

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**Counsel:**

The Director of Military Prosecutions as represented by Majors M. Reede and A.M. Orme

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Private M. Luis