



COURT MARTIAL

Citation: *R. v. Cookson*, 2023 CM 2002

Date: 20230131

Docket: 202216

Standing Court Martial

Canadian Forces Base Edmonton
Edmonton, Alberta, Canada

Between:

His Majesty the King

- and -

Corporal R. Cookson (retired), Accused

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

REASONS FOR FINDING

(Orally)

The case

[1] The allegations before the Court flow from an incident that unfolded between two professional work colleagues and friends in July 2019.

[2] Corporal Cookson originally faced two different charges. The first charge was for disobedience of a lawful command, contrary to section 83 of the *National Defence Act (NDA)* and the second charge was for conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*. After the testimony of the first witness, the prosecution informed the Court that based on that witness's evidence, he would not introduce any further evidence on the first charge, and he invited the Court to dismiss it. The Court advised counsel it would find Corporal Cookson not guilty of the first charge.

[3] The remaining charge reads as follows:

“SECOND CHARGE
Section 129 *National Defence Act*

**CONDUCT TO THE PREJUDICE OF
GOOD ORDER AND DISCIPLINE**

Particulars: In that he, on or between 8 and 17 July 2019, at CFB Edmonton, did harass MCpl K. Cameron, by showing her an image of genitalia.”

[4] The only evidence before the court on the second charge came from two witnesses, being Corporal Cookson himself, and the complainant being Master Corporal Oliver (whose surname at the time of the incident was Corporal Cameron). The facts underlying this second remaining charge are relatively straightforward and I noted that for the most part, there was consistency between the testimony of both the complainant and the accused.

[5] Both Master Corporal Oliver and Corporal Cookson testified that they were serving together as professional colleagues and friends. They both described what I would classify as a healthy platonic relationship where they enjoyed sharing smoke breaks together, getting coffee and the occasional lunch. They both admitted that their friendship did not extend outside of the workplace. They shared jokes, discussions about their interests such as geo-caching, fishing, motorcycling, gaming as well as sharing interesting tidbits they discovered on SnapChat, Reddit etc.

[6] Corporal Cookson told the court that he found Master Corporal Oliver to be a caring and supportive person. They both confirmed that Corporal Cookson had discussed his personal life and the difficulties he experienced in his prior relationships and in the dating world.

[7] The alleged incident unfolded during a smoke break, where the two of them were seated in Corporal Cookson’s jeep to avoid what was assessed as inclement weather of some sort. During that smoke break, Corporal Cookson admitted that he asked the complainant to view a photo that he had on his phone which was that of his penis. What led to the sharing of this intimate photo on his phone, during that smoke break is where the evidence diverges, and the Court had to determine what evidence it found most credible and reliable.

[8] Corporal Cookson testified that prior to showing the complainant the photo, they were discussing his insecurities in the dating world, and he asked her if she was willing to look at the image, to which she agreed.

[9] The complainant admitted that Corporal Cookson had asked to show her something, but she told the court, that she had been given no indication that it was going to be a photo of his penis. Although she could not recall the exact conversation that led

to the sharing of the photo, she testified to being caught off guard and recalling that getting a photo of a penis “didn’t fit with the flow of the conversation.”

[10] After this incident, she told the court that she tried to just act like nothing happened. This was confirmed in the testimony of Corporal Cookson that their relationship continued as per normal.

[11] In reaching the Court’s decision, I reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on the charge.

Presumption of innocence

[12] The presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty of the charge before it.

[13] So, what does the expression “beyond a reasonable doubt” mean? The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320, paragraph 39):

A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[14] In essence, this means that even if I believe that Corporal Cookson is probably guilty or likely guilty, that is not sufficient. If the prosecution fails to satisfy me of his guilt beyond a reasonable doubt, I must give him the benefit of the doubt and acquit him.

[15] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Corporal Cookson guilty of the charge before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but more than probable guilt for the charge set out in the charge sheet (see *R. v. Starr*, 2000 SCC 40, [2000] 2 S.C.R. 144, paragraph 242).

The law

Section 129 of the NDA – conduct to the prejudice of good order and discipline

[16] The remaining charge before the Court alleges a violation of section 129 of the *NDA* for conduct to the prejudice of good order and discipline. Based on the unrefuted evidence before the Court, I have no problem concluding that the elements of identity, time and place have all been met. Neither of the witnesses could confirm the

exact date and time, but it was uncontested that the incident occurred during the summer of 2019 while they were having a smoke break and during a regular workday.

[17] The elements left to be proven beyond a reasonable doubt are as follows:

- (a) the conduct alleged in the charge; namely, Corporal Cookson did harass Master Corporal K. Cameron, by showing her an image of genitalia;
- (b) the fact that the conduct is prejudicial to good order and discipline; and
- (c) that Corporal Cookson had the wrongful intent.

[18] In order to prove that the alleged conduct is prejudicial to good order and discipline, there are several paths to do so:

- (a) firstly, the prosecution could prove the accused violated an established policy or order that the accused had actual or deemed knowledge of;
- (b) secondly, the prosecution can prove the offence was committed if there is actual or direct evidence of prejudice to good order and discipline based on objective criteria of prejudice or likelihood of prejudice; or
- (c) thirdly, absent evidence of actual prejudice, the prosecution can prove prejudice by inference. As part of an inferential reasoning process, a military judge must, based on his or her experience and general service knowledge, ask whether the proven conduct in this case can be considered conduct to the prejudice of good order and discipline. The military judge, using his or her knowledge and experience, must ask whether, on the totality of the evidence, in the circumstances of the case, prejudice to good order and discipline could be inferred from the facts as proven. This reasoning process would consider all the contextual circumstances of the case.

Analysis

[19] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offences, I now turn to address the legal principles.

Credibility of the witnesses

[20] Given that the event in question took place two and a half years ago, it is not unusual that the witnesses will not remember every detail. In this case, both witnesses provided relatively similar recollections of the events that occurred both before and after the incident, but their individual versions of the incident before the court is where the evidence most significantly diverges.

[21] Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking or relatively unimportant and, therefore, understandably more difficult to recollect? There are other factors that come into play as well.

[22] A Court may accept or reject, some, none or all the evidence of any witness who testifies in the proceedings.

Assessing conflicting versions

[23] In assessing a case with competing versions of what happened, where credibility is a central issue and the accused has testified, the Supreme Court of Canada (SCC) has provided guidance to trial judges in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 commonly referred to as the *W.(D.)* test.

[24] To assist judges in identifying reasonable doubt in the context of conflicting testimonies, in *W.(D.)*, the SCC recommends that a trial judge consider the exculpatory evidence of the accused in three steps. The three steps are:

- (a) first, if I believe the exculpatory account advanced by the defence, obviously, I must acquit;
- (b) second, if I do not believe the exculpatory account advanced by the defence, but I am left in reasonable doubt by it, I must acquit; and
- (c) third, even if I am not left in doubt by the exculpatory account advanced by the defence, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[25] Further, in *Regina v. C.W.H.*, [1991] BCJ No 2753 (QL), Wood J.A. suggested an addition to the second part of the three-part test set out in *W.(D.)*. At paragraph 24 of *C.W.H.*, his Lordship said:

If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

[26] A court martial is not an inquiry to determine what happened. We may never know. It serves only to determine whether the prosecution has proven the elements of the offence beyond a reasonable doubt. The *W.(D.)* framework aims to prevent a conviction where reasonable doubt exists.

[27] Of course, the above tests taken alone are oversimplifications of the analysis that a trial judge must undertake. And quite often the judge has to apply the *W.(D.)* test at various stages, with respect to the critical elements or vital points of the decision-making process such as the elements of the offence or the “elements of a defence”.

[28] What this means is that if there is evidence on vital issues where the accused is believed, then it could raise a reasonable doubt on what the prosecution is required to prove beyond a reasonable doubt to secure a conviction (see Paciocco, David M. “Doubt about Doubt: Coping with *R. v. W.(D.)* and Credibility Assessment” (2017), 22 *Can. Crim. L. Rev.* 31). The vital issue in this case is whether the complainant consented to view the intimate image of Corporal Cookson.

[29] In this case, although much of the evidence from both the accused and the complainant mirrors the other, the evidence on the sharing of the intimate photo is diametrically opposed. My assessment will be dependent on the reliability and credibility of the evidence given by the witnesses. The appropriate approach in assessing the standard of proof is to weigh all the evidence and not assess individual items of evidence separately.

Analysis

Was the alleged conduct particularized in the charge proven beyond a reasonable doubt?

[30] The first issue for this Court to decide is whether the particulars as detailed in the charge were proven beyond a reasonable doubt. In other words, did Corporal Cookson harass Master Corporal K. Cameron, by showing her an image of genitalia? The onus is on the prosecution.

[31] Defence Administrative Orders and Directives (DAOD) 5012-0 sets out the order that applies to officers and non-commissioned members of the Canadian Armed Forces (CAF) on harassment.

[32] In court martial precedents, military judges have adopted the following six criteria set out in section 2 of the DAOD (see paragraph 34 of *R. v. Scott*, 2018 CM 2026) in determining whether the conduct complained of amounts to harassment:

- (a) improper conduct by an individual;
- (b) the individual knew or ought reasonably to have known that the conduct would cause offence or harm;
- (c) conduct was directed at the complainant;
- (d) the conduct must have been offensive to the complainant;

- (e) the conduct may consist of a series of incidents, or one severe incident which had a lasting impact on the complainant; and
- (f) the conduct must have occurred in the workplace.

[33] In their respective submissions, counsel agreed that the six criteria set out within the DAOD are to be applied in assessing whether the particulars in the charge rise to the level of harassment.

[34] As mentioned above, it was uncontested that Corporal Cookson did in fact share an intimate photo of his penis with the complainant. Consequently, the ultimate issue for this Court to determine is whether the sharing of that photo amounted to harassment. Given that the accused, Corporal Cookson has testified, I will begin firstly with his testimony on why he shared the photo.

Corporal Cookson's testimony

[35] Corporal Cookson's testimony on what led to the sharing of his intimate image to the complainant suggested that he had been told in his past relationships, the size or length of his penis was not adequate. He had become good friends with the complainant and viewed her as very supportive to him.

[36] He testified as follows;

“Q. Do you remember what led up to the showing of the image? A. It was—we were talking about things that affect relationships and my concern was based on what I've been told in the past. That my size was not adequate for my past relationships.

Q. And when you talk about size, what were you talking about when you—can you explain what you meant by size when you were having that conversation with Corporal Cameron? A. Length.

Q. Of what, sorry? A. My penis.

Q. Okay. And so can you walk us through again what you recall of how that conversation played out? A. So we were having the conversation of relationships and I had my phone, I had a picture of my penis on the phone and I asked her if she'd be willing to give me her honest opinion of the size. And to look at the picture, she told me yes, and then I handed her the phone and she looked at it. I looked away as she was looking at it, I was embarrassed about showing her. But I wanted—I knew she would give me an honest opinion based on our friendship. And that would be enough to know that it was adequate or wasn't from what her response was.

Q. Okay. So you've told us she had the phone, you were looking out, then what happens? A. It was, it felt like a really long time in my mind, it felt

like a while of her looking at it and then she handed the phone back. I put the phone away, she said that I had nothing to worry about and that it would be their issue if that was the issue with the problem. And yeah, I had nothing to worry about.

Q. You told us that you asked her if she wanted to see the photo. How certain are you that you asked her before showing it to her? A. I'm 100 percent certain that I asked her as with anything that—with that level of imagery discretion I always asked anyone if I'm in a relationship or starting a new relationship or anything, I always ask them before I send any photos or send or show them anything. I always ask for consent.

Q. Okay. Sorry, so you are giving us an example of in the past what your habit is, so you are certain that you asked on this occasion? A. Yes, ma'am.

Q. And what words if any do you recall now saying to Corporal Cameron prior to showing her the image? A. I asked her if she'd be willing to give me an honest opinion on the image and my size.

Q. Okay. And how sure are you that Corporal Cameron knew it was a penis that she was going to look at? A. Very certain. I definitely told her what it was. I wouldn't have showed her if she didn't agree to want to see it.

Q. Okay. And just again, what did she say after you asked her? A. She said that I had nothing to worry about and that it would be the partner, it would be the person that I'm seeing's issue in respect to size, if it was a problem or not.

Q. Okay. Let me just reframe that. Why do you believe that she consented to viewing the image? A. I wouldn't have showed it to her otherwise.

...”

[37] Corporal Cookson testified that he received a positive response back from the complainant and that she did not appear shocked or surprised.

“Q. How did you think Corporal Cameron would react when she saw the image? A. At that time I had no confidence, so as a—for her to be a supportive friend to me I believed that she would give me her honest answer.

Q. Did you have any reason to believe that seeing that image would upset Corporal Cameron? A. No.

Q. How much longer did you stay in the car after she looked at the photo?

A. I believe we were in there briefly; I finished my smoke and had put it out in my ashtray. I believe I put it out before the image was passed to her, but I believe we left the vehicle shortly after.”

[38] In general, I found that the accused had a good memory of the events that unfolded in relation to the charge. I was sensitive to the humility he displayed in taking the stand to recount his version of events.

[39] I found most of his testimony to be believable. He was not hesitant to admit facts that were unflattering. He remained very calm and testified in a manner that I thought was very clear and straightforward. He was never argumentative, and he provided a helpful perspective of exactly what he was thinking at the time he showed the photograph to the complainant, and he provided his explanation for why he did.

[40] He was specifically asked why he felt comfortable sharing such an intimate photo with the complainant, and he replied as follows:

“Q. And why did you feel comfortable asking Corporal Cameron to look at that intimate image of yourself? A. I believed that I had built a strong enough relationship with her that I could confide in her for that level of—acknowledge or friendship with me. We have talked—or had talked about her relationships as well, I believe that she was seeing somebody at that time.”

[41] In short, Corporal Cookson’s evidence was that based on the strong relationship he had with the complainant, he felt he could confide in her. As a result, he showed the complainant the photo of his penis believing he would get her honest opinion on the sufficiency of the length of his penis. In considering all the evidence, I find that Corporal Cookson’s stated motivation for sharing the image does not seem consistent with the evidence before the court. The complainant was a good friend, they had a platonic relationship and there appears to be no evidence to suggest that as much as she cared for him, as a friend, despite her consistency in providing him continual support, that she would ever be interested in providing her feedback on the size of his manhood.

[42] The unrefuted evidence was that the photo was a zoomed in view of an erect penis without any backdrop for an appropriate measure to be made or to permit anyone to draw a frame of reference. I accept that in his view, he may have been genuinely seeking her feedback on his size, but if that was the case then the penis should have been appropriately sized against a measurable. It was not. There was no ruler or other basis to compare the length of his penis. I was troubled as to how he could even expect to receive such reliable or honest confirmation on the sufficiency of his size, based on a zoomed in photo. It simply seems illogical. Based on the nature of the photo, I can only infer that he was looking to impress the complainant and he was not seeking an honest opinion but rather, he was simply fishing for compliments, which he received.

[43] Further, the complainant was no expert on this subject, and she was not in a relationship with him, so the assumption that she could provide any meaningful feedback is far-fetched.

[44] Under cross-examination, the prosecution very successfully received Corporal Cookson's confirmation that he knew at the time of the alleged offence, that the sharing at work of intimate or sexually explicit photos such as "dick pics" are prohibited. He also acknowledged that the incident unfolded during the workday and on base.

"Q. So you would have known at that time it was a campaign to end sexual harassment in the workplace? A. Correct.

Q. You would have known it was wrong to show dick pics at work in 2019? A. Yes.

Q. When this incident occurred you were in uniform? A. In, yes.

Q. You were on base? A. Correct.

Q. You were in the reg force at the time? A. That's correct.

Q. And this occurred during your workday, you're not sure when but around mid-day? A. Correct.

Q. Okay. And you were in the parking lot outside of where you actually work, your workplace, is that correct? A. Yes.

Q. At that point based on your familiarity with OP HONOUR, you would have known it was wrong to view, access, display or distribute images of a sexual nature, is that correct? A. That's correct."

[45] However, Corporal Cookson expressed the view that since he was seated in his private vehicle, he considered it to be a private moment. In short, the essence of his position is that the workplace standard did not apply in his personal vehicle. I have some concerns with this position as he was still at work, on the base, but more specifically in the presence of a professional work colleague and friend who was deserving of the utmost of respect.

[46] Although his personal motivations might have been very clear to him and he felt both justified and safe in sharing the photo with Corporal Cameron, I find no evidence to support the fact that the messaging he thought he was sending was as transparent to Corporal Cameron. Corporal Cookson and the complainant were simply workplace friends, and it was noteworthy in the evidence that this friendship did not extend outside of the workplace or work hours. He also told the court that the complainant was aware that the image she was being asked to view was that of a penis. However, the complainant's evidence runs in direct contrast to this position. The complainant told the

court she was not aware she was being asked to view an image of a penis. I find that seeking the consent of a friend and colleague to provide feedback on your intimate parts is never acceptable and is a breach of the bond of trust that exists in the relationship. The act of anyone seeking a workplace colleague's feedback on their intimate parts is never appropriate.

[47] I noted that Corporal Cookson's testimony suggested that this was not the first time that he shared intimate photos with others. Under direct examination, when he was asked how certain he was that he had obtained the complainant's consent, he replied by comparing the consent obtained to the same way he had asked others in the past with whom he was in a relationship with or was starting a relationship prior to sharing such imagery. However, in this case, the evidence was uncontested that the complainant was nothing more than a trusted workplace colleague and friend. She was not in a relationship with him so she would not be expected to pick up on any of the cues or messaging he was sending in that context. Why would she have any interest in viewing the image? Aside from Corporal Cookson's assertion, I find no evidence before the court to suggest that she was interested in viewing a photo of that nature. They had a platonic relationship and had only viewed things between them that were not explicit. When he offered to show her something on his phone, why would she believe that it would be a photo of a penis, more particularly his? It also seemed convenient that he happened to already have a photo of himself on his phone. Her agreement to look at a general image should not be confused with consent to view a photo of his intimate part.

[48] After reviewing the evidence as a whole and closely considering all the evidence of Corporal Cookson and applying the *W.(D.)* test to the issue of consent, I came to the conclusion that I do not believe the exculpatory account advanced by the defence. Consequently, I turn next to review the testimony of Master Corporal Oliver.

Master Corporal Oliver's testimony

[49] In her testimony, Master Corporal Oliver acknowledged that they had discussed Corporal Cookson having problems with respect to his prior relationships, but she adamantly refuted any suggestion that they ever had a conversation regarding Corporal Cookson's penis size nor was she ever made aware that he wanted her to view a photo of his penis. With respect to these facts, Master Corporal Oliver's relevant testimony was as follows:

“Q. Okay. So once you sat in the jeep, please describe what happened next? A. We were basic—we were just chit chatting, talking about probably basic day to day stuff, having a smoke and yeah, that's when he said he had something to show me. And like because we would look up stuff on Reddit and online and whatever, show each other shit all the time. But yeah, he showed me a picture of a penis. I had asked like, oh is this yours or like kind of shocked and he had confirmed that it was and I'm sure I probably said things to like basically just try to get out of the situation. You know, you kind of go into—just trying to—like you don't want to make a scene. So I'm sure, I don't know, we just ended up—so

basically yeah, he, after he confirmed I probably made some comments like, oh okay, oh all right then. You know, well, I don't know, you just kind of go on autopilot to get out of a situation.

Q. Okay. I want to go back to just the start of this incident as you described it, when he said he had something to show you. What was the lead on from your perspective into him showing you this? A. I'm not, I don't quite understand, sir.

Q. Like, what was the discussion leading into this that prompted him to show you this, from your perspective? A. I don't recall. We would talk about just dumb stuff we were reading online, usually. You know, we would talk about current events, what about the pay raise coming, you know, like, it didn't fit with the flow of the conversation.

Q. So from your perspective there was no, it was kind of an abrupt—?
A. Yeah, yeah.

...

Q. But from your perspective there was no lead into it at that point ? A. No.

Q. You said he showed you a picture of a penis that he confirmed to be his, what was specifically in the frame of the picture. Can you describe that for the court? A. Predominantly a penis. I mean, it was like that's all you basically saw, like it was zoomed in. I can't even recall the colour of pants, like, it was drawn out and laid on top I guess you could describe, but.

Q. But mainly a picture of a penis? A. Mainly it was, yeah.

Q. As opposed no person or anything in the photo? A. No, exactly.

Q. And you said you felt like you went into an autopilot to try to get out of the situation, how did you get out of that situation? A. I think I complemented him. And then just went to go back inside.”
[Emphasis added.]

[50] Under cross-examination by defence counsel, Master Corporal Oliver testified as follows:

“Q. So going back to, you mentioned earlier in your testimony, you chit chatted with Corporal Cookson and over the course of time you've said that you talked about various things, correct. Talked about your day, the work, personal lives and interests, correct? A. Yup.

Q. Sorry, I just couldn't hear you? A. Yes, ma'am.

Q. And I believe you shared things of your interests like geo-caching?
A. Yes, ma'am.

Q. And he talked maybe about gaming, his interest in gaming? A. Yeah, we talked about gaming, talked about his son, talked about like getting into fish, motorcycling, like we, yeah, like check out the new SnapChat filters together, like, yeah.

Q. Okay. And you talked about personal lives, and he might have talked about his difficulties in the dating world. Sorry I know you are nodding to me, just because she's transcribing? A. Yeah.

Q. He talked about his dating in the dating world? A. Yes, ma'am.

Q. Sorry, he talked about his difficulties in the dating world, yes was the response. Okay. And at the time July 2019, by that time did you get the impression that Corporal Cookson considered you to be someone he could confide in, someone, a friend? A. Yeah. I would have considered us friends, yes.

Q. Did you get the impression that he might have considered you to be a supportive person? A. It would be reasonable to suspect, to assume that, yes.

...

Q. And you don't remember what you were discussing before Corporal Cookson showed you the image, that's what you said? A. Correct, I do not recall.

Q. And it's possible that Corporal Cookson had no malicious intent in showing you the image, correct? A. Anything is possible, ma'am. I don't know if I'd agree with that.

Q. It's possible that you—it's possible that Corporal Cookson was not trying to see if you were interested in him by showing the image? A. Was that a question, sorry.

Q. Yes. It's possible that Corporal Cookson was not trying to gauge your interest in him by showing you the image, it's possible? A. Sure it's possible.

Q. Okay. And it's possible that prior to showing you the image, he might have mentioned his dating failures at the time? A. Sure, that's possible.

Q. It's possible that he mentioned having rejection in the dating world at the time? A. I don't recall. I do recall him discussing difficulties with his ex and how that had soured some of his dating.

Q. Okay. Prior to showing you the image, is it possible that he said something to you about being insecure about his penis size? A. I don't recall.

Q. Okay. Is it possible he was—he had expressed to you that he was feeling worried if that was the reason for his relationship failures? A. I highly doubt it.

Q. Okay. Is it possible that he asked you if you would mind looking at the photo of his penis and telling him what you thought? A. That's not how he phrased it.

Q. Is it possible he was asking—it's possible that before showing you the image he asked if you would be willing to look at the image? A. He asked to show me something, there was no specification that it would be a penis or it would be his penis."

[51] Later, under re-examination by the prosecution, Master Corporal Oliver clarified that she does not recall the size of Corporal Cookson's penis ever being a point of discussion between them:

"Q. During my friend's cross-examination you indicated, or it was asked to you that whether it was possible that Corporal Cookson was telling you that he was insecure about his penis size when you were in the jeep. You said you don't recall. Can you explain what you mean by you don't recall, you don't recall it happening then, happening ever, what was your answer? A. Yes, sir. I don't recall it ever being a point of conversation discussing his penis size.

Q. At any time? A. No, sir.

Q. Thank you. You were also asked is it possible he told you that he was worried about his penis size being the reason for his relationship failure and you said "I highly doubt it", can you tell the court what you meant by "I highly doubt it"? A. I highly doubt that he had discussed that with me.

Q. At that time or any time? A. At any time that I can recall."
[Emphasis added.]

[52] Except for the circumstances surrounding the sharing of the intimate image, where the testimony is diametrically opposed, I found the evidence of the complainant and the accused to be very consistent with one another. In addressing the incident before the court, I found the complainant to be forthright, honest, and believable. She

was not hesitant to admit when she did not recall something nor to admit when something else was a possibility. I did not find that she over exaggerated the events that had unfolded, nor did she appear to try to colour any of the earlier or later interactions she had with Corporal Cookson and herself any differently.

[53] Based on her testimony, she found the mere act of Corporal Cookson sharing this photo to be offensive and made her second guess herself.

“Q. And you said next that you were kind of shocked, can you describe for the court what you mean by you were shocked? A. I wasn’t expecting to be shown that image. You kind of again, you kind of go through this mental checklist in your head of, oh I was like, maybe I wasn’t clear that I was seeing somebody. Like maybe I accidentally, maybe there was signals there and maybe things go misinterpreted and there was like maybe they thought I was interested or like you know, you don’t want to necessarily jump to malicious intent. You know, you always want to think the better of somebody and that maybe there was a misunderstanding.”

[54] It was one severe incident which had a lasting impact on her. Although she was having a smoke break with Corporal Cookson, they were colleagues, simply on a break from work and on the base where they serve which I find in this context amounts to their workplace.

[55] In assessing whether the alleged conduct did harass the complainant, I find that the sharing of the intimate photo to a workplace colleague, even if it is under some purported concept of consent is highly improper and never acceptable. Although the complainant agreed to view the photo, I find no evidence to suggest that she ought to have known that it would be a photo of Corporal Cookson’s erect penis. I noted that Corporal Cookson did not provide any specific references to exactly what he said before he asked her to view it. I accept the complainant’s testimony that the photo itself was out of character with the conversation that they were engaged in.

[56] Corporal Cookson admitted that he was aware that the sharing of such intimate or explicit photos is prohibited, and that doing so would cause offence or harm. Any conduct of that type immediately breaks down the foundation of trust upon which we serve together. It is clear on the evidence that despite recognizing that the complainant was a trusted friend who had been kind and supportive to him, he crossed a boundary that should have been respected and he sought her opinion to help sooth his own inadequacies.

Was the alleged conduct prejudicial to good order and discipline?

[57] Given the nature of the DAOD 5012-0, and its accompanying statements, when conduct rises to the level of harassment, there is prejudice to the workplace. Paragraph 3.5 of the DAOD reads as follows:

3.5 Harassment in certain forms is not only against the law, but also erodes mutual confidence and respect for individuals and can lead to a poisoned work environment. As a result, operational effectiveness, productivity, team cohesion and morale are placed at risk.

[58] The court is of the view that the prejudice identified within the DAOD is buttressed by the *viva voce* evidence before the court from Master Corporal Oliver. The evidence suggests that after the incident, she purposely acted as if nothing had happened, and the evidence of Corporal Cookson confirmed that was in fact the case. However, she also admitted in her testimony that she had to seek counselling and mental health support to help her move on and focus on her career.

[59] She trusted Corporal Cookson, they were professional colleagues and good friends with an implied duty of trust between them. By asking the complainant to provide him honest feedback on his perceived inadequacy, he crossed a boundary of an implied obligation of mutual respect. Although she might have been able to soldier on, once that trust was lost, the bonds are weakened making it more difficult for her to trust anyone else. She has every right to be offended and feel betrayed.

[60] As I explained in *Scott*, one of the underlying principles to unit effectiveness in the CAF is teamwork, where every member's contribution is valued regardless of their role. Conduct or behaviour that undermines the trust and mutual confidence that is necessary for all members to successfully serve together is prejudicial to good order and discipline.

[61] As a result, pursuant to the Court Martial Appeal Court (CMAC) decision in *R. v. Golzari*, 2017 CMAC 3 based on evidence before the Court and the reasons provided herein, I can easily infer that the conduct of Corporal Cookson led to the prejudice of good order and discipline.

Did Corporal Cookson have the wrongful intent?

[62] The CMAC, in *R. v. Latouche*, 2000 CMAC 431, held that section 129 does not require the prosecution to prove that an accused had any intention to adopt conduct that was prejudicial to good order and discipline. Rather, it is the actual conduct (or *actus reus*) that is relevant in determining the *mens rea* required for a finding of guilt. If he intended to do what he did, then that is sufficient.

[63] It does not matter what his purpose was for showing then Corporal Cameron the photo, nor does it matter whether he intended to cause any harm. The Court has found that he knew or ought to have known that his conduct would cause offence or harm. The mere sharing of the photo itself was sufficient to meet that criterion.

Conclusion

[64] I am convinced beyond a reasonable doubt that the act of Corporal Cookson showing Corporal Cameron an image of genitalia rose to the level of harassment and consequently, prejudice to good order and discipline flowed from the conduct.

FOR THESE REASONS, THE COURT:

[65] **FINDS** Corporal Cookson not guilty of the first charge, but guilty of the second charge.

Counsel:

The Director of Military Prosecutions as represented by Major C.R. Gallant

Lieutenant-Commander F. Gonsalves, Defence Counsel Services Counsel for Corporal R. Cookson