COURT MARTIAL

Citation: *R. v. Martin*, 2022 CM 5024

Date: 20221109
Docket: 202164

Standing Court Martial

Canadian Forces Base Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

His Majesty the King

- and -

Petty Officer, 1st Class J.T. Martin, Accused

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

REASONS FOR FINDING

(Orally)

I. Introduction

[1] The accused, Petty Officer, 1st Class (PO 1) Martin, is charged with three offences pertaining to events that allegedly took place while aboard His Majesty's Canadian Ship (HMCS) *Harry DeWolf*. The first and second charges, laid pursuant to section 129 of the *National Defence Act* (*NDA*), allege conduct to the prejudice of good order and discipline in relation to harassment on the basis of race that would have taken place between 1 January 2020 and 31 March 2021 toward Sailor, 2nd Class (S2) Brady (first charge), and S2 (now Sailor, 1st Class) Parsons (second charge). The third charge, ill-treated a person who by reason of rank was subordinate to him, contrary to section 95 of the *NDA*, alleges that between 1 and 31 March 2021, the accused struck the leg of S2 Brady with his knee. At the trial, the accused testified, admitting to making all but one comments that form the basis of the impugned conduct of the first and second charges. He disputed however that his conduct was improper. He also claimed that he did not have the required blameworthy state of mind. He denied the alleged conduct in

the third charge. I must therefore determine if the prosecution has proven beyond a reasonable doubt all the essential elements for each charge. In particular, I must decide, for the first and second charges, whether the accused's conduct between 1 January 2020 and 31 March 2021, respectively toward S2 Brady and S2 Parsons, constitutes harassment based on race. For the third charge, the issue to decide is whether I believe the accused when he claims that he did not strike the leg of S2 Brady with his knew.

Background facts

[2] In order to make the appropriate finding, I have considered the following facts. In July 2020, the Royal Canadian Navy (RCN) received delivery of HMCS *Harry DeWolf*, a warship first of her class to operate on the East Coast. HMCS *Harry DeWolf* is a patrol ship that has a combined eating area, or cafeteria, for all ranks. The core crew serving aboard is composed of sixty-five crew members.

[3] During the year prior to the delivery of the ship, the crew of HMCS *Harry DeWolf* was serving at the ship's shore office in Halifax, developing knowledge of the functioning and capability of the ship, preparing standing operating procedures and receiving computer-based training.

[4] The accused, an experienced boatswain (bos'n), was posted as the buffer of the HMCS *Harry DeWolf* sometime between June and November 2019. As such, he was in charge of the Deck department, which is composed of between fifteen and seventeen bos'ns. Master Sailor (MS) Phillips and MS Johns were the immediate supervisors of more junior bos'ns. They reported to Petty Officer, 2nd class (PO 2) West, the assistant buffer who reported to the accused. The next level of reporting for the department was to an officer, a Lieutenant(N) Brown.

[5] S2 Parsons was posted to HMCS *Harry DeWolf* in March 2020 as sailor, 3rd class (S3), until March 2021 when he was taken off the ship. He first served at the shore office for a few weeks, then he, along with the rest of the crew, was working from home as a result of the restrictions imposed in relation to the COVID-19 pandemic. He started reporting on-board the ship around July 2020 with the rest of the crew. S2 Brady was posted to HMCS *Harry DeWolf* in January 2019 when he was an S3 and left the ship in March 2021. Because of the nature of the first and second charges, it is important to note, for context, that S2 Parsons, S2 Brady and PO 2 West were the only Black crew members on board HMCS *Harry DeWolf* at the material time.

[6] The impugned conduct forming the basis of the alleged harassment of the first charge was in relation to name-calling S2 Brady "Lips" on an almost daily basis, and referring to him on two separate occasions as Black celebrities, and on another occasion making a vulgar reference to the anatomy of an animal while in the boat maintenance workshop. The impugned conduct forming the basis of the alleged harassment of the second charge was in relation to telling S2 Parsons on one occasion that if he dropped the net, the accused would drop him. There was a second comment made where the accused would have referred to S2 Parsons as "Hot Chocolate" in front of other

subordinates. The third charge relates to an incident that would have occurred in the cafeteria on-board HMCS *Harry DeWolf*.

Positions of parties

[7] Both parties contended that this case revolved around credibility of the witnesses. The prosecution claimed that all the essential elements were proven beyond a reasonable doubt that the accused engaged in harassing conduct based on race toward S2 Brady and toward S2 Parsons. It was also contended that the essential elements for the third charge were met.

[8] The defence in turn contended that there was no harassment toward either of the complainants because the comments made by the accused were both innocent and grossly exaggerated by the majority of the prosecution's witnesses.

[9] Specifically for the first charge, the defence argued that the name-calling "Lips" was used by the accused when speaking to crew members of all ranks, except for the commanding officer (CO), regardless of ethnicity. Further, the references to "Mr T" and to "Wesley Snipes" when addressing S2 Brady were meant to be humorous. The accused did not make the vulgar comment in the boat maintenance workshop. For the second charge, the comment in relation to dropping S2 Parsons was meant to be sarcastic while the comment "Hot Chocolate" directed at S2 Parsons was intended to be a compliment to a person with a dark complexion. As for the third charge, the accused denied hitting S2 Brady with his knee.

[10] Addressing the credibility of the witnesses to support his contention that their testimony about the accused's conduct was exaggerated, the defence argued that S2 Brady and S2 Parsons were not credible because S2 Brady has a conviction for lying, while S2 Parsons was nervous during his testimony and fidgeted in his chair, which are clear physical signs of deceit. Their respective letter prepared by a third party and addressed to the RCN leadership, entitled "Statement of Incidents", support his theory because the letter referred to "Systemic Racism and Institutional Discrimination" when describing the incidents that led to the three charges.

[11] He further contended that the testimony of S2 Loranca was not credible because his evidence regarding the number of times the accused would have referred to S2 Brady as "Mr T" was both inaccurate and exaggerated and the witness refused to admit that he did exaggerate. On the other hand, the defence contended that PO 2 West, who testified that he did not observe any improper conduct from the accused toward S2 Brady, was deemed a very credible witness. In a nutshell, the defence contended that two junior sailors "ganged up" on the accused.

II. Did the accused's conduct toward S2 Brady between 1 January 2020 and 31 March 2021 constitute harassment based on race, in that the conduct was improper and that the accused knew or ought reasonably to have known that the conduct would cause offence or harm?

Applicable law

[12] Turning to the applicable principles, the first charge alleges a violation of section 129 of the *NDA* for conduct to the prejudice of good order and discipline. The burden rests on the prosecution to prove beyond a reasonable doubt every essential element of the offence. The date, place and the identity of the accused are three essential elements required to be proven beyond a reasonable doubt that are generally common to all charges. The other essential elements that need to be proven beyond a reasonable doubt for a charge under section 129 are as follows:

(a) the conduct alleged in the charge; namely, that the accused harassed S2 Brady on the basis of race;

(b) the conduct is prejudicial to good order and discipline; and

(c) the required blameworthy state of mind.

[13] When the charge under section 129 alleges harassment as in this case, the Court is informed of the definition of harassment as per Defence Administrative Orders and Directives (DAOD) 5012-0. The DAOD defines harassment as an improper conduct by an individual, that offends another individual in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises objectionable comments that demean, belittle, or cause personal humiliation or embarrassment, and any act of intimidation or threat. It also includes harassment within the meaning of the *Canadian Human Rights Act*, i.e., based on race. Harassment is normally a series of incidents but can be one severe incident which has a lasting impact on the victim.

[14] The DAOD provides that conduct amounts to harassment when the following six criteria are met:

(a) improper conduct by an individual;

(b) individual knew or ought reasonably to have known that the conduct would cause offence or harm;

(c) if the harassment does not relate to a prohibited ground of discrimination under the Canadian Human Rights Act, the conduct must have been 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 that complainant; and

(f) the conduct must have occurred in the workplace.

[15] The context within which the alleged incident occurred is important. Repeated conduct is required to establish racial harassment, although one severe incident may constitute harassment. The contextual analysis includes, amongst other things, a consideration of the nature of the conduct at issue, the workplace environment and the pattern and type of prior personal interactions between the alleged offender and the complainant.

[16] Further, when a breach of the harassment policy has been established on the basis that the evidence established that harassment did occur, courts martial have concluded in the past that prejudice to good order is also proven beyond a reasonable doubt.

[17] When the Court examined the evidence to determine whether the prosecution has met its burden of proof beyond a reasonable doubt, it must assess the credibility of the witnesses. When an accused testifies, it is not a matter to decide which testimonies between the prosecution's witnesses and the accused's are preferred. Rather, the test is first to determine whether the testimony of the accused is believed. If it is not, the next question to decide is whether the testimony of the accused leaves the Court with a reasonable doubt about the guilt. If it does not, the Court must determine whether the accused's evidence, considered as a whole with the rest of the evidence, leaves a reasonable doubt about his guilt. The burden to prove the case against an accused's person never shifts. The presumption of innocence remains unless proven guilty.

Evidence

[18] I have considered the evidence of the prosecution. S2 Parsons was the first witness for the prosecution. He testified that in November 2020, he heard the accused say to S2 Brady, "Check you out, Mr T". This would have happened on the mezzanine deck of the ship, as S2 Brady and S2 Loranca, dressed to go out during a port visit in Newfoundland, were walking toward the stairs. S2 Parsons was a few feet away from the accused and S2 Brady when he heard the comment. S2 Parsons believed that the reference to Mr T, whom he knew for being a celebrity from the 1980s, was made because S2 Brady is Black and because he was wearing a chain around his neck on this occasion. S2 Parsons found no resemblance to Mr T otherwise. He perceived the comment based on race to be offensive. He also testified hearing the accused called PO 2 West "Lips" on one occasion while he, S2 Parsons, was at the helm on the bridge.

[19] S2 Brady then testified and told us that while he was serving as a member of the crew of HMCS *Harry DeWolf*, the accused made several offensive and Black characterization comments directed at him. The accused's impugned conduct started in August 2020 and continued until S2 Brady left the ship in March 2021. The conduct included the accused calling him "Lips" almost every working day, instead of referring to him by name and rank. S2 Brady understood the comment to refer to him as a Black male since he construed having big lips to be a racial characteristic. He found this name calling to be offensive. S2 Brady heard the comment also being directed at PO 2 West. Initially, he felt the comment was off-putting and he simply dealt with it.

[20] Additionally, on one occasion in November 2020 in Newfoundland, during a briefing while in the combat office, just before watch and in the presence of S2 Loranca and S2 Parsons, S2 Brady testified that the accused referred to him as “Mr T”. S2 Brady testified that he knew who Mr T was, and believed the reference was made because he is a Black man and because he was wearing a “dainty chain”. S2 Brady testified that, as the chain was sticking out of his shirt, PO 1 Martin asked him to tuck the chain away for safety reasons, saying, “Hey Mr T, tuck your chain in”. He testified that the accused also told him that he was not saying that because S2 Brady is Black. S2 Brady felt the accused had no respect for how he, S2 Brady, may have perceived the comment, which he found offensive.

[21] On another occasion during the same month, while on-board the rigid hull inflatable boat (RHIB) with other naval staff prior to the boat being launched, S2 Brady had put on his sunglasses as they were the only protection from wind and water he had with him. The accused saw him and said, “Who is there in the back, Wesley Snipes?” S2 Brady recognised the name Wesley Snipes as the actor from the movie “Blade”, whose character wears sunglasses at nighttime. On this occasion as well, S2 Brady believed the comment was made as a reference to him being a Black man. He viewed this comment as offensive, but he just shook it off.

[22] S2 Brady also referred to another comment made by the accused when the latter came into the boat maintenance workshop as the crew was securing for sea, just before the November sail. S2 Brady was already there in the presence of a civilian worker. As the accused came into the workshop, he would have told S2 Brady that he had “bigger lips than a cow’s cunt”. Nothing else was said, and the civilian worker left. S2 Brady felt embarrassed and humiliated, particularly because the offensive comment was made in front of a civilian worker. He believed that the comment referred to his physical racial characteristic as a Black man and that once again, the accused had a complete disregard for the possible harm caused to him by his vulgar comment. Overall, S2 Brady felt that the accused’s comments directed at him were racists and contributed to spoiling his experience in the military. As time went on, and the conduct toward him persisted, he felt overwhelmed. S2 Brady felt upset by the conduct and the situation that it created. This experience was his introduction to the Navy.

[23] In cross-examination, S2 Brady agreed that it was possible the “Lips” comment could have been made by the accused to other shipmates. He further confirmed that he and S2 Parsons are work friends, but do not socialize outside of work. He admitted to the existence and content of his conduct sheet, which shows two convictions for absence without leave that occurred in November and December 2019, and one conviction for lying to one of the master sailors from the Deck department. S2 Brady also explained that in April 2021, he dictated a statement of incidents to a third party who wrote the statement on his behalf. The statement was prepared following a meeting with himself, S2 Parsons, a commodore, and other members of the RCN leadership. He acknowledged that the letter referred to “Systemic Racism and Institutionalized Discrimination”.

[24] As for S2 Loranca's evidence, he testified that he is a bos'n and was posted on HMCS *Harry DeWolf* in January 2019 as a member of the Deck department. He explained that during his service as a crew member of the ship, he heard the accused call S2 Brady "Lips" on several occasions. The conduct started in the shore office, then continued when they were moved to serve on-board, with the derogatory comments directed at S2 Brady increasing in frequency. S2 Loranca interpreted the comment "Lips" as relating to the person's physical racial characteristics. He also heard the "Mr T" comment directed at S2 Brady but was not sure exactly when and where it was made, either in the shore office or on-board. He believed the comment was made because S2 Brady was wearing a gold chain around his neck. He also understood the comment to refer to the colour of the skin of S2 Brady. He believed it happened only once, maybe twice, but was unsure. He found the comments unprofessional, although the conduct did not affect him directly. In cross-examination, he agreed that in his statement of April 2021, he wrote that the "Mr T" comment may have been made on several occasions.

[25] The last witness to testify for the prosecution was PO 2 West who told the Court that he joined the Deck department of HMCS *Harry DeWolf* in December 2018 and eventually shared with the accused an office offshore and then on-board the ship. He confirmed that he attended the briefing on hateful conduct in December 2020. The briefing included a two-hour video followed by a presentation. He understood the purpose of the briefing to assist crew members in identifying hateful conduct. The briefing included explanations on micro-aggressive behaviour. He testified that the accused was absent during the viewing of the first half of the video but returned to view the remainder. He recognized PO 1 Martin's signature on the training sign-up sheet.

[26] PO 2 West also explained that while at another unit, the accused received and signed in the presence of a witness in September 2016, a document titled "Annex P - CCFA/CCFP Joining orders. This document sets out the chain of command's expectations regarding compliance with CAF rules, regulations and orders for all newcomers to their new unit. It is provided by the member's supervisor upon arrival to the unit so the newcomer can read the document, sign it and possibly be queried about his or her understanding of the document's content.

[27] PO 2 West further testified that he never heard the accused make inappropriate comments toward S2 Brady or S2 Parsons. In cross-examination, he told the Court that he saw or interacted with the accused almost every minute of the day during duty hours. He also testified that PO 1 Martin would use the expression "Lips" frequently toward him, toward all crew members both lower and higher ranks, except for the CO, and to anyone who was too chatty or not listening.

[28] The accused testified in his defence. He confirmed that he has been serving in the military for about eighteen and a half years and was familiar with the DAOD on harassment prior to the incidents forming the basis of the charges. He also remembered the briefing on hateful conduct. He admitted using the term "Lips" at work, sometimes

daily, depending on the day, and use it with all ranks, all trades, and all sailors for anyone who is too talkative.

[29] PO 1 Martin also admitted that on one occasion, when stepping into the combat office passageway as he entered the forward compartment, he told S2 Brady "Okay, Mr T, let's put your chain away and carry on with your day" because he noticed S2 Brady wearing a gold chain over his uniform. The accused stated that he was merely making a comparison of a person of colour with another person of colour who was a celebrity, but then claimed that this comment had nothing to do with S2 Brady's race. The accused further admitted that while in port in Newfoundland, he made the "Wesley Snipes" comment to S2 Brady. He explained that he did so because S2 Brady was dressed nicely to go ashore, wearing sunglasses and a black jacket. Finally, the accused denied making the vulgar comment in the boat maintenance workshop.

Analysis

[30] Considering the evidence, I find that the prosecution has proven beyond a reasonable doubt that the accused did harass S2 Brady based on race. Except for the denial of making the vulgar comment in the boat maintenance workshop, the accused's testimony generally corroborated the evidence of the prosecution. PO 1 Martin admitted making the comments of "Lips", "Mr T" and "Wesley Snipes" to S2 Brady but justified his actions by explaining that he did not deem the comments to be offensive or did not intend for them to be offensive because they were not racially charged. As a result of this admission, the Court has no difficulty finding that the prosecution has proven beyond a reasonable doubt the essential elements that pertains to identity, date and place, and that making most of the comments which constitute the impugned conduct did take place in the workplace on almost a daily basis. It also was not disputed that the comments were directed at S2 Brady. The evidence also proved beyond a reasonable doubt that although he did say that he brushed it off initially, S2 Brady, one of PO 1 Martin's most junior subordinates, found the accused's impugned conduct to be offensive, because the accused's comments directed at him were embarrassing, belittling, and overwhelming. He felt that the conduct tarnished his experience in the Navy.

[31] In addition to the accused's admission to these essential elements, and while it is true that S2 Parsons, S2 Brady and S2 Loranca could not give an exact date for some of the events forming the basis of the first charge, they were able to give a credible timeframe related to certain incidents with port visits or tasks they were assigned to perform at the time the improper conduct took place. Their testimony was consistent on key aspects of the case. They did not exaggerate the incidents; on the contrary, they were objective and unemotional when they described the events; they appeared to have a genuine will to tell the truth. They said so when they were unsure. S2 Brady and S2 Parsons clearly stated that, except for the name-calling "Lips", the other two comments were made only once each. Further, S2 Brady was forthcoming about his conduct sheet. He did not deny or try to justify his actions that led to being charged and resulting in convictions. He admitted that he committed the offences, provided context to the lie,

and accepted his conviction. The conviction for lying to a superior is not sufficient, on its own, to discredit his testimony in court. As for S2 Loranca, he generally corroborated the testimony of S2 Brady and S2 Parsons and admitted that he may have been mistaken on the number of times he heard the "Mr T" comments.

[32] As for the credibility issue raised by the defence in relation to the statement of incidents of S2 Brady and S2 Parsons that the defence continually referred to, the Court has very little information in this regard. I infer from the evidence before me that a meeting between S2 Brady and S2 Parsons with members of the RCN leadership took place following the reporting of the accused's conduct. The leadership present at the meeting seemed to have provided directions and expectations to S2 Brady and S2 Parsons regarding the content of the document they were asked to prepare. S2 Brady and S2 Parsons were also asked not to discuss the incidents in question. The evidence shows that the document only addresses the incidents leading up to these trial proceedings in broad terms. The document seems to be part of an informal process involving the two complainants who were sharing their perspective on what they viewed were systemic issues related to racism in the CAF. As a result, I must conclude that the existence of the document prepared by the complainants is insufficient to conclude that there was exaggeration or collusion between the prosecution's witnesses.

[33] Turning to whether the conduct was improper, I do not accept the defence's claim that the comments were not racially based, that the accused did not intend his comments to be racially based, or that the comments were meant to be humorous.

[34] First, I find the accused's evidence that he did not intend his comments to be racially based not credible. When he testified, he downplayed his conduct. He also provided an inconsistent testimony regarding his claim that the comments were not intended to be racially based; he initially stated that he referred to S2 Brady as "Mr T" because S2 Brady had a gold chain. However, at the same time he admitted that the reference was made because both S2 Brady and Mr T are Black. He later denied the reference to "Mr T" to be based on race.

[35] Even if I was to accept the accused's evidence that the comments were not intended to be racially based, such intention does not negate any of the essential elements the prosecution is required to prove beyond a reasonable doubt because his claim that he did not know or believed that his comments constituted harassment equates to a claim that he was ignorant of the law. Ignorance of the law is not a recognized defence in Canada.

[36] Secondly, harassment in the form of racial reference is often camouflaged behind the guise of humour. It remains, nonetheless, harassment. The accused's intent for making references to "Mr T" and "Wesley Snipes" when addressing S2 Brady may have been acceptable to the accused because he believed them to be humorous. However, his views on what constitutes racial comments have little relevance in the circumstances.

[37] Further, I find the accused's claim that name-calling S2 Brady "Lips" not to be a racialized conduct since it was also directed at other non-Black shipmates difficult to believe. The evidence supporting this contention was unconvincing, to say the least. Both the accused and PO 2 West testified in vague, general terms on this aspect. They did not provide any specific instances for the use of this expression with others. The only credible evidence received in Court regarding the use of this nickname by the accused was provided by the other three prosecution's witnesses who all testified that they heard the accused addressing only either PO 2 West or S2 Brady in that manner. PO 2 West testified that he himself was being called "Lips" by the accused, but he could not identify anybody else he observed being the subject of the nickname. No other witnesses testified hearing the nickname being directed at other shipmates.

[38] Even if I was to accept the accused's evidence that he used the expression "Lips" with other shipmates regardless of their race and ranks when they were too talkative, such contention does not excuse the behaviour, and certainly does not negate the fact that this conduct of name-calling S2 Brady constitutes improper conduct as per DAOD 5012-0.

[39] The reference to S2 Brady as "Lips" in the workplace, on a nearly daily basis, constitutes an improper conduct. Name-calling a subordinate instead of referring to them by their name is inappropriate and unprofessional. It is belittling, reducing the person receiving the comment to be equated to mere objects or animals, depending on the nickname used. Similarly harmful is name-calling a subordinate by referring to their physical racial characteristics. Such conduct constitutes harassment within the meaning of the *Canadian Human Rights Act* because the conduct has the effect of distinguishing or discriminating the person based on their race. In sum, the evidence shows that PO 1 Martin addressed S2 Brady by the nickname "Lips" on a continuous and almost daily basis for an extended period. I find that S2 Brady's inference that the expression "Lips" directed at him was used because he was a Black man to be a reasonable inference in the circumstances.

[40] I also find the comments regarding the resemblance to Mr T and Wesley Snipes directed at S2 Brady constituted a conduct that was improper. The reference to the two celebrities was made mainly because S2 Brady is a Black male. The reference may also have been used by the accused because of the renowned outfits of these two celebrities, the fact of the matter is that the accused compared S2 Brady to two celebrities based on their race. The comments were offensive to S2 Brady and formed part of the overall impugned conduct.

[41] Even though I have already found the conduct of the accused to be improper in the context of the elements required to prove harassment, I have considered whether the evidence supports that the accused did make the vulgar comment to S2 Brady while in the boat maintenance workshop in front of a civilian worker. Having serious concerns with the accused's credibility regarding his explanation for his conduct, I do not accept his denial of making the vulgar comment to S2 Brady. During his examination-in-chief, the accused continually downplayed his actions and attempted to justify them. Although

he does not have to prove his innocence, I simply do not accept his denial. Conversely, the circumstances where the comment was made, as provided by the testimony of S2 Brady, with the overall credibility of his evidence, provide sufficient guarantees of credibility for his account of this incident. The context he provided aligns with the accused's continuous pattern of improper conduct toward S2 Brady. Having accepted the testimony of S2 Brady as credible in its entirety, I believe S2 Brady's evidence that the accused made the vulgar comment.

[42] This leads me to the last essential element to prove harassment, that the accused knew, or ought to have known, that his conduct was offensive. I simply do not believe the accused's implied defence that he did not know his conduct was offensive. PO 1 Martin is an experienced CAF member with over eighteen years in the service, who has continually committed to familiarize himself, and abide by, regulations, CAF orders and rules. He has attained a senior non-commissioned officer rank and admitted being familiar with the DAOD on harassment. He has received the required training prior to the incidents in question. In addition, the circumstances in which the comments were made in the workplace, the nature of the comments, alluding to the racial characteristic of the subordinate they were directed at, and their frequency, are circumstances that strongly support the conclusion that the accused knew or ought to have known that his conduct was offensive. Indeed, the evidence proves that his conduct was aimed at tormenting S2 Brady.

[43] Having found that the accused's testimony corroborated key aspects of the prosecution's case, and that the excuses he provided for his conduct not to be credible and, in any event, not constituting a valid defence for his conduct, I conclude that the prosecution has proven beyond a reasonable doubt that he did harass S2 Brady on the basis of race.

Conclusion

[44] In summary, PO 1 Martin's testimony generally corroborated the prosecution's evidence on most of the essential elements to prove that harassment took place. I do not accept the explanations or justifications he provided in support of his conduct. The justifications he provided do not constitute a viable defence in law. It matters not that PO 1 Martin believed his conduct was acceptable. In fact, it simply shows that he was insensitive to the harm he was causing to his junior subordinate. The improper conduct directed at S2 Brady was a continuous and repeated conduct that was offensive, and the accused knew or ought to have known would cause offence. I therefore find that the prosecution has proven beyond a reasonable doubt that PO 1 Martin harassed S2 Brady based on race.

III. Did the accused's conduct toward S2 Parsons between 1 January 2020 and 31 March 2021 constitute harassment based on race, in that the conduct was improper and that the accused knew or ought reasonably to have known that the conduct would cause offence or harm?

Applicable law

[45] As for the second charge, the same essential elements described for the first charge must be proven beyond a reasonable doubt, with the difference that the alleged conduct was directed at S2 Parsons.

Evidence

[46] Examining the evidence as it pertains to this charge, I have considered S2 Parsons's testimony. S2 Parsons described a comment the accused made around July or August 2020 while on the mezzanine deck. S2 Parsons asked the accused if he should lower or drop the nets. The accused answered, "If you drop those nets, I will drop you". S2 Parsons felt threatened by the accused.

[47] S2 Parsons described another incident that would have occurred between July and March the following year in the aviation office when the accused was with other subordinates. While giving S2 Parent a task to perform, S2 Parsons heard the accused instructing S2 Parent to "take Hot Chocolate with you", referring to S2 Parsons who was in the doorway of the aviation office. S2 Loranca was also present. S2 Parsons understood the comment to mean: "Take the Black guy with you", a comment that was directed at him. The accused then added, "You guys did not hear that". S2 Parsons felt the "Hot Chocolate" reference was offensive. He felt belittled and ostracized. The effect of the comment was aggravated by the accused's suggestion to his subordinates to disregard a racially charged comment. S2 Parsons explained that he would have accepted the accused's apology following the comment. But it never came. Instead, when S2 Parsons raised his concerns with the accused, the latter replied, "Do what you want with it".

[48] S2 Loranca testified that he remembered hearing the accused making the "Hot Chocolate" comment in the aviation office during "some sort of meeting". The comment was directed at S2 Parsons. S2 Loranca believed S1 Brownlee, now-S1 Fleck, S1 Henderson, and S2 Brady were also there. After the meeting was adjourned, S2 Parsons asked him why he was "Hot Chocolate" to which S2 Loranca answer he did not know. S2 Loranca also testified that he was not upset because the comment was not directed at him, but he observed that S2 Parsons was.

[49] The accused admitted telling S2 Parsons "If you drop those nets, I will drop you" and explained that he was sarcastic. He also explained that the "Hot Chocolate" comment directed at S2 Parsons was made during an orders Group, but he could not remember the context of the conversation at the time. PO 1 Martin testified that after he made the comment, he realized it could be construed as having a sexual connotation. This prompted him to suggest to his subordinates that they did not hear the comment. The accused agreed that S2 Parsons raised his concerns with him. He responded, "You can do what you want with it" because his comment "Hot Chocolate" was meant to be a compliment to a person with a dark complexion.

Analysis

[50] Although the accused generally corroborated the evidence of the prosecution, admitting he directed the two comments to S2 Parsons in the workplace, and although the evidence proved beyond a reasonable doubt that S2 Parsons found the conduct offensive, I find that the prosecution failed to prove beyond a reasonable doubt that the accused's conduct toward S2 Parsons constitutes harassment based on race as defined in the DAOD.

[51] First, as part of my analysis, I have considered the testimony of the accused who again claimed that the two comments were not based on race, or at least that he did not intend them to be because he was sarcastic in one case, and offering a compliment in the other. I do believe the accused when he said that he knew the reference of S2 Parsons to "Hot Chocolate" might have been inappropriate, but I do not believe the reason given by PO 1 Martin for the inappropriateness, being the perceived sexual connotation. If that were the case, logically, the accused would have apologized to S2 Parsons or would have discussed it with him. Instead, the accused answered S2 Parsons, "Take it as you want" when he raised his concerns. This response rather shows defiance when confronted. His explanation for making a compliment to S2 Parsons makes no sense. In any event, he did admit that he chose this expression because S2 Parsons has a dark complexion. Further, the accused's suggestion to his subordinates that they did not hear anything is consistent with the knowledge that the comment was indeed inappropriate, regardless of whether it could be perceived by others as racial or sexual in nature. Thus, even if his evidence was accepted, it would not negate the fact that the "Hot Chocolate" comment directed at S2 Parsons was based on race. The comment was therefore inappropriate and racially based.

[52] While I do believe that the comment was inappropriate, the prosecution failed to prove that the alleged conduct consisted of a series of incidents, or of one severe incident which had a lasting impact on that complainant. Indeed, the evidence does not convince me that the other comment, the one made to S2 Parsons about dropping the net, was improper, or based on race, because the Court received little to no evidence about the context in which the comment was made. The comment itself is not a racial comment. It refers to an action. Although it was inappropriate to suggest he would drop S2 Parsons if the later dropped the net, the comment was made in the context of providing instructions as to how to perform a task safely or correctly. Absent evidence related to the contextual backdrop in which the comment was made – indeed, there could have been some urgency in relation to safety or potential damage to the equipment at the time, prompting the accused to adopt these very abrupt or threatening words – I cannot conclude that the comment form parts of a series of incidents of improper conduct based on race. While the comment may have been perceived as threatening, absent evidence that it was made in relation to S2 Parsons's race, and not having the full context in which it was made, I must conclude that the comment did not amount to an incident of improper conduct that was based on the race of the complainant.

[53] Therefore, the comment referring to S2 Parsons by the term “Hot Chocolate” constituted one isolated incident. By itself, the brief comment does not meet the definition of harassment because the conduct did not consist of a series of incidents. There is also no evidence that the comment made constituted one severe incident which had a lasting impact on the complainant. S2 Parsons was offended when he was referred to by this name and remembered it vividly. However, he did say that he would have accepted an apology as satisfactory to end the matter. He was not emotional when he testified, he was calm and composed. He continued progressing in the CAF. Further, S2 Loranca testified that he was not offended by the conduct. Therefore, while inappropriate, since the brief comment does not constitute a conduct that consisted of a series of incidents, and since no evidence was adduced to prove that it constituted one severe incident that had a lasting impact on the complainant, the comment does not meet the totality of the criteria of the definition of harassment.

Conclusion

[54] In sum, the two comments admittedly made to S2 Parsons were unacceptable. However, I find that there is insufficient evidence to find that the conduct alleged in the statement of particulars meets the definition of harassment, because one of the two comments made was not based on race while the other, by itself, did not constitute a series of incidents, or one severe incident with a lasting impact on the complainant. In the circumstances of this case, a special finding to reflect the conduct proven and the harassment conduct described in the particulars cannot be ordered because the difference between the facts proved and the conduct alleged in the statement of particulars would prejudice the accused in the conduct of his defence. Consequently, I find him not guilty of this charge.

IV. Did the accused strike the leg of S2 Brady with his knee?

Applicable law

[55] Finally, I must assess the evidence with regard to the third charge. The offence of abuse of subordinates is found at section 95 of the *NDA*, which states:

> Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.
> [Emphasis added.]

[56] In addition to proving the identity of the accused as the person who committed the act, as well as the date and place of the offence, the following essential elements must be proven beyond a reasonable doubt:

(a) that the accused struck or otherwise ill-treated another person. “Strikes” means that a blow is struck with the hand or fist or something which is held in the hand. Violence other than striking, such as butting with the

head, and kicking, is included, for the purposes of section 95 of the *NDA*, under "ill-treatment";

(b) the person was subordinate to the accused by reason of their rank; and

(c) finally, requisite blameworthy state of mind. The prosecution would have to prove that the accused deliberately adopted the conduct forming the basis of the charge, and that the accused knew the person was lower in rank to him or her. For example, evidence that the accused was their supervisor at the time of the offence would establish that he knew the person was subordinate.

[57] To explain this offence in greater details, in *R. v. Sergeant A. Quinn*, 2000 CM 65, Military Judge Menard discussed ill-treatment of subordinates in terms of "unwanted physical contact" constituting a failure of "persons placed in positions of trust [to] meet the highest standard of personal conduct" (paragraph 6) and a failure to "lead by example" (paragraph 8). Also, causing physical pain is not an essential element for this charge to be proven. See also *R. v. Duhart*, 2015 CM 4022, at paragraph 50.

Evidence

[58] The relevant evidence in support of this charge was first presented by S2 Parsons who testified of an incident he witnessed in the cafeteria while the ship was alongside. Crew members were seated further apart than usual during mealtime to comply with physical distancing during the imposition of measures to prevent the spread of COVID-19. S2 Parsons testified that he went to the cafeteria to have his lunch and sat down. From his position, he could clearly see that some crew members were in line by the tray rails waiting to be served. At this time, he observed S2 Brady arrive in the cafeteria to get his lunch. It was late, therefore there were not that many people present. S2 Parsons testified that he saw the accused enter and move behind S2 Brady inches away from his face. PO 1 Martin then kneed S2 Brady multiple times on the side of his thigh area. S2 Brady gave the accused a look. The accused then banged on S2 Brady's tray. S2 Parsons was about ten feet away from the incident. He could not hear what was said. He explained that the degree of force used was such that it caught his attention. He felt that the accused was just picking on S2 Brady. S2 Parsons told S2 Brady when he sat with him afterwards that he should report the incident to the coxswain. In cross-examination, S2 Parsons told the Court that he did not like his prior use of the word "attack" to describe the incident, that the word "provocation" was better suited. He also believed he put "banged" the tray in his prior statement.

[59] S2 Brady also testified about this incident that would have occurred in late March 2021, just before he was taken off the ship. The ship was alongside. He was in the lunch line, waiting to be served, with the accused behind him at a time where the cafeteria was almost a "full house". Both the accused and S2 Brady had their respective trays on the tray rails. He testified that the accused pushed his tray on his, moving it around. S2 Brady then put his hand on his tray to hold it down, then looked back at the

accused. The accused got closer to S2 Brady, his face about eight inches from S2 Brady's head and rammed his knee at least three times into to his right hamstring, giving him a "charley horse". This lasted twenty to thirty seconds. Nothing was said. Once he received his food, S2 Brady sat with S2 Parsons who had witnessed the incident and told him he should do something about that. S2 Brady testified that he perceived PO 1 Martin's overall conduct with him as continuous harassment.

[60] In cross-examination, S2 Brady told us that the accused was involved in taking disciplinary measures against him that resulted in convictions at summary trial in January 2020 for two infractions of absence without leave that occurred in November and December 2019, and for an infraction of lying to a superior.

[61] The accused testified that he remembers having interactions with S2 Brady on several occasions in the cafeteria and conversing with him in the line-up. Once or twice, the accused bumped his tray with S2 Brady's, as he did with other members. PO 1 Martin described in detail one of those occasions. He explained the position of his body toward S2 Brady who was in front of him in the line-up, facing the other direction. He testified that when he walked in, he tried to get S2 Brady's attention, but the latter did not respond, probably because they were all wearing masks, so he tapped on S2 Brady's tray and whispered in his ear. S2 Brady then turned to the accused, almost face to face. The accused then asked him about his day. Nothing else happened.

Analysis

[62] I do not believe the accused when he denied hitting S2 Brady because his evidence on the third charge is not credible. Indeed, the accused was able to describe with precision the tray bumping incident prior to the impugned conduct, generally corroborating the circumstances provided by both S2 Brady and S2 Parsons. However, interestingly, although he could remember the details of the tray bumping incident, including his position in relation to S2 Brady when he bumped his tray, the accused could not explain why he felt it was so important at this moment to get S2 Brady's attention, to the point of invading his subordinate's personal space to whisper in his ear despite the requirement for social distancing. The accused could also not remember what he would have whispered in S2 Brady's ear. It is difficult to believe that he could remember details of an event that he referred to as insignificant or casual. It is also difficult to believe that the accused would persist in getting the attention of his subordinate just to casually ask about his day. If speaking to S2 Brady during a lunch break was so important, tapping on his shoulder to get his attention would be an appropriate, respectful, and logical gesture. Instead, the accused told us he entered S2 Brady's space and whispered in his ear. His general denial of the conduct forming the basis of the charge is simply not credible and does not leave me with a reasonable doubt.

[63] Having rejected his denial as it pertained to hitting his subordinate with his knee, the rest of PO 1 Martin's testimony leaves me with no reasonable doubt. Turning to the rest of the evidence, I find that the testimony of S2 Brady and S2 Parsons credible. They

did not try to exaggerate or embellish their account of the incident. They indeed said so when they could not remember a detail. S2 Parsons corroborated S2 Brady's testimony on key aspects. He could see the incident unfold from where he was seated. He saw the accused hitting S2 Brady with his knee with a degree of force that particularly caught his attention.

[64] Although there was a mention by S2 Brady that the cafeteria was "full house" while S2 Parsons testified that there was not that many people, the evidence shows that the seating area had been organized to accommodate social distancing. Thus, the evidence was consistent with personnel being spread out in the cafeteria. I therefore take no issue with this possible discrepancy between the two testimonies on this aspect, particularly because it pertained to the witnesses' perception of the number of people in the cafeteria, which is, in any event, a collateral fact.

Conclusion

[65] Consequently, considering the whole of the evidence accepted in Court, I am convinced beyond a reasonable doubt that the accused intentionally struck with his knee a person he knew was his subordinate, as particularized in the third charge.

V. Conclusion

[66] Considering the evidence adduced in Court, I find that the prosecution has proven beyond a reasonable doubt that the accused did harass S2 Brady based on race. In addition to the accused's testimony largely corroborating the evidence of the prosecution, the justifications he provided for his impugned conduct are neither credible nor a valid defence. However, the prosecution failed to prove that the conduct of the accused as particularized in the second charge meets all the elements of harassment. The impugned conduct did not consist of a series of incidents, or one severe incident with a lasting impact on the complainant. Finally, having found the evidence of the accused not credible, I find that the prosecution has proven beyond a reasonable doubt that the accused ill-treated a person who by reason of rank was subordinate to him, contrary to section 95 of the *NDA*, as particularized in the third charge.

FOR THESE REASONS, THE COURT:

[67] **FINDS** PO 1 Martin guilty of charges one and three.

[68] **FINDS** PO 1 Martin not guilty of charge two.

Counsel:

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

Major É. Carrier, Defence Counsel Services, Counsel for Petty Officer, 1st Class J.T. Martin