Citation: *R. v. Ex-PO1 McDougall,* 2009 CM 4018

Docket: 200921

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE TRENTON

Date: 27 October 2009

PRESIDING: LIEUTENANT-COLONEL J-G. PERRON, M.J.

HER MAJESTY THE QUEEN
v.
EX-PETTY OFFICER 1st CLASS R.J. MCDOUGALL
(Accused)

Warning

By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

FINDING
(Rendered Orally)

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[1] The accused, ex-Petty Officer 1st Class McDougall, is charged under section 130 of the *National Defence Act* of having committed a sexual assault contrary to section 271 of the *Criminal Code of Canada*. Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code of Canada*, an order directing that any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way was made at the commencement of these proceedings.

[2] The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt every element of the alleged offence. The prosecution argues that

ex-PO1 McDougall had sexual intercourse with the complainant without her consent. The accused asserts that he and the complainant did engage in sexual intercourse but that she was a willing participant.

[3] Before this court provides its analysis of the evidence and of the charge, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined which is a principle that is fundamental to all criminal trials. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[4] It is fair to say that the presumption of innocence is most likely the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as the cases dealt with under the Canadian criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[5] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[6] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a long time. It is part of our history and traditions of justice.

[7] In *R. v. Lifchus,* [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles layed out in *Lifchus* have been applied in a number of Supreme Court and appellate court subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice, it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

[8] In *R. v. Starr*, [2000] 2 S.C.R. 144, the Supreme Court held that:

> ... an effective way to define [a] reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of providing the guilt of an accused person, in this case ex-PO1 McDougall, beyond a reasonable doubt. To put it in perspective, if the court is convinced, or would have been convinced, that the accused is probably or likely guilty, then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[9] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did. It could be documents, photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

[10] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[11] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. 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, 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? Does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[12] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanor of the witness while testifying is a factor which can be used in assessing credibility; that is, was a witness responsive to questions, straightforward in his or her answers, or evasive, hesitant, or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts?

[13] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well taint a witnesses's entire

testimony.

[14] The court is not required to accept the testimony of any witness, except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason rather to disbelieve it.

[15] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R. v. W. (D.)*, [1991] 1 S.C.R. 742. As established in that decision, the test goes as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in [a] reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

In *R. v. J.H.S.*, 2008 SCC 30 at paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R. v. H. (C.W.)* (1991), 68 C.C.C.(3d) 146 British Columbia Court of Appeal, where Wood J.A. suggested the additional instruction:

> I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[16] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court.

[17] The evidence before this court martial is composed essentially of the following: judicial notice, testimonies and exhibits. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. The testimonies heard in the order of their appearance before the court are those of J.H., I.M., the complainant, and ex-PO1 McDougall.

[18] Two exhibits were entered by the prosecution on consent and three exhibits were entered by defence counsel on consent. The two exhibits entered by the prosecution were agreed statements of facts.

[19] The particulars of the charge read as follows:

> "In that he, on or about 19 November 2006, at or near Grotto Bay Beach Resort, Bayley's Bay, Bermuda, did commit a sexual assault on Captain ..."

I will not state the name, although, it has already been stated in court when the charge was read.

The prosecution had to prove the following essential elements of this offence beyond a reasonable doubt:

a. the identity of the accused as the offender and the date and place as alleged in the charge sheet;

b. that the accused applied force to the complainant;

c. that the accused intentionally applied force;

d. that the complainant did not consent to the force that the accused applied; and

e. that the force the accused applied took place in the circumstances of a sexual nature.

[20] Ex-PO1 McDougall does not dispute that he had sexual intercourse with the complainant on or about 19 November 2006 at or near Grotto Bay Beach Resort, Bayley's Bay, Bermuda. He has testified to that effect. The only essential element of this offence that is contested is the issue of consent. See paragraph 10 of Exhibit 3, Agreed Statement of Facts.

[21] Firstly, I will briefly review the evidence that is not disputed in this trial. The complainant, the witnesses and the accused were all members of the same course during the period of October to December 2006. The course consisted of nine candidates and morale and group cohesion were excellent. They had to fly to Bermuda on a C-130 Hercules as part of that course. They had to stay in Bermuda longer than initially planned because a pilot became sick. The complainant and the accused each occupied a room at the resort. These two rooms had adjoining doors. They arrived in Bermuda during the early evening of 17 November 2006. After having checked into their rooms, they each had supper at different locations, but met after supper and the complainant brought the accused to see some caves on the grounds of the resort. They then returned to their rooms where they had a conversation through the opened adjoining doors.

[22] The accused would have entered the room of the complainant after she had told him that she could not hear him well and that he could come in if he wanted. He would have first sat on the side of her bed and then would have leaned against the headboard of her bed. He then took off his clothes except for his boxer shorts and he lay under the blankets with the complainant. He was spooning her, that is to say he was lying behind

her and they were both lying on their left side. They spoke for a short time and fell asleep. They did not engage in any sexual activity.

[23] The next morning, they were informed after breakfast that a pilot was sick and they had to stay in Bermuda for two more days. A few members of the course rented scooters during the afternoon. The complainant and the accused were part of that group. They consumed only one beer during the day because they were driving scooters. The group met at a restaurant near the resort at 1900 hours to celebrate the birthday of one of the candidates. Alcohol was consumed by all in varying degrees.

[24] The group left the restaurant to return to the resort at approximately 2100 hours. They went to their rooms to change into their bathing suits and then went to swim at the beach, the hotel pool, and the hot tub. J.H. and a few other members of the group left the group to go to sleep at approximately 2230 hours. The complainant and the accused and three other candidates stayed at the bar at the resort and continued drinking.

[25] Sometime later, the complainant left the group by jumping over a railing and disappeared in the darkness. After a certain amount of time, I.M. and the accused went looking for the complainant. They found the complainant in the water in the bay. The accused left I.M. with the complainant and went back to the bar.

[26] I.M. brought the complainant to his room. He could not bring her to her room because the complainant had left her key with the accused since she did not have any pockets in her bathing suit. I.M. then went to the bar to get the key from the accused. He met the accused and they brought the complainant to her room. He left the complainant in her room with the accused.

[27] The next day, on 19 November 2006, the complainant participated in the group outing, but she was very reserved and did not speak with anyone. She maintained that demeanor until her return to Canada. A few days after her return to Canada, J.H. asked her if anything had happened in Bermuda and the complainant told J.H. that she had been raped by the accused. After a few discussions with J.H., the complainant agreed to go to a nearby civilian hospital to be examined for possible sexually transmitted diseases and to verify if she was pregnant. She had to inform her chain of command of the fact that she was taking antibiotics and this meeting with her immediate supervisor subsequently led to an interview with an investigator of the Canadian Forces National Investigation Service.

[28] A charge of sexual assault was laid and then preferred and a Standing Court Marital was held in late 2007. The accused was convicted and sentenced to imprisonment for one year. The accused appealed the verdict. In 2009, the Court Martial Appeal Court set aside the verdict and ordered a new trial.

[29] Consent for the purposes of sections 271, 272 and 273 of the *Criminal Code of Canada* is defined at paragraph 1 of section 273.1 of the *Criminal Code of Canada* as:

> ... the voluntary agreement of the complainant to engage in the sexual activity in question.

Paragraph 2 of that section stipulates that:

> No consent is obtained, for the purposes of sections 271, 272 and 273, where
>
> (*a*) the agreement is expressed by the words or conduct of a person other than the complainant;
>
> (*b*) the complainant is incapable of consenting to the activity;
>
> (*c*) the accused induces the complainant to engage in the activity by abusing a position of trust, power or authority;
>
> (*d*) the complainant expresses, by words or conduct, a lack of agreement to engage in the activity; or
>
> (*e*) the complainant, having consented to engage in sexual activity, expresses, by words or conduct, a lack of agreement to continue to engage in the activity.

[30] The main issues in this trial are whether the prosecution has proven beyond a reasonable doubt that the complainant was incapable of consenting to the sexual activity. See sub-paragraph 273.1(2)(*b*). And that the accused could not have an honest but mistaken belief that the complainant had consented.

[31] The prosecution asserts that the evidence clearly indicates that when she was in her room the complainant was unconscious and did not have the capacity to consent to the sexual activity with the accused. The accused states that his evidence demonstrates that the complainant was sober enough and conscious enough to initiate the sexual relations with the accused and that she was a willing participant throughout the sexual intercourse. He also states that the prosecution must prove beyond a reasonable doubt that the complainant was too intoxicated to consent.

[32] A trial such as this one turns on the assessment of the credibility of the witnesses. An assessment of credibility involves the evaluation of the honesty of a witness but also the reliability of the evidence of that witness. Credibility is a function of the veracity of the witness and reliability pertains to the accuracy of the evidence. The assessment of credibility may not be a purely intellectual exercise. Numerous factors are involved. Some factors may defy verbalization. See *R. v. R.E.M.*, 2008 SCC 51 at paragraph 49. A trial judge may assess evidence: "... through the lens of common sense and everyday experience, in the same manner as juries are instructed to do by trial judge." See *R. v. H.C.*, 2009 ONCA 56 at paragraph 64

I will now examine the evidence of the accused and of the prosecution as it relates to the sexual activity of the night of 18 to 19 November 2006.

[33] The accused testified that, once I.M. had left the complainant's room, the complainant was awake and laying on the bed. She would have told him she was cold. He went to the other bed to get another blanket. While his back was turned to the complainant, she would have taken off her wet swimsuit and then had gotten under the blankets. He said that he did not see her while she was doing this. He tucked the blanket around her but she was still cold. He would have then taken off his T-shirt and his Hawaiian bathing suit but would have kept his boxer shorts and would have lain behind the complainant under the blankets to warm her with the heat of his body. She would have started to rub her buttocks against his groin. He would have moved away from her and she would have rubbed herself against him again. He would have asked her, "if that is what she wanted" and she would have replied "yeah." He described how they had sex and he stated that he did not recall a lot of words but that she was moaning and she was responding to his touching. She would have asked him where he was going when he wanted to perform oral sex on her and she would have pulled him up to her. He described making eye contact with her. Once sexual intercourse was completed, she would have smiled at him, her eyes were open but no words were exchanged.

[34] The accused admitted that he was attracted to the complainant because she was attractive, witty and smart. He also seemed to enjoy flirting with her during the course. He cuddled with her in her bed the first night they were in Bermuda and, although he stated during his examination-in-chief that he did not remember who had initiated the cuddling, he agreed during cross-examination that he had suggested it. He agreed with her that she had nice breasts.

[35] The accused initially testified that he was present when I.M. made the decision to bring the complainant to her room, but he could not explain why I.M. had made that decision other than to say that it might be because the complainant was wet or that it was getting late. He disagreed with the prosecutor when she asserted that he was not there at the time I.M. made that decision. He also indicated that he forgot to tell I.M. that he had the key to the complainant's room; yet later in the cross-examination, the accused clearly stated that he wasn't present when the decision was made to bring her to her room. This is a glaring inconsistency in his testimony since at issue during that portion of the evidence is whether the complainant was in a state to rejoin her comrades or whether she was intoxicated to the point where she had to be brought back to her room. The accused testified that she was not drunk or exhibiting signs of impairment when I.M. and he found the complainant in the water. He felt that she could either join them at the bar or go to her room; the choice was hers.

[36] He also stated during his cross-examination the complainant had no problem walking from the beach to her room. How can he say that since he was not present

when I.M. brought the complainant to his room and since he also testified that he was walking ahead of I.M. and the complainant when they took her from I.M's room to her room? He testified that he did not see I.M. act as a walking crutch because he was walking ahead of them.

[37] The accused testified that the complainant was sleeping in I.M.'s bed and that the air conditioner was probably on. He did not describe the complainant as being cold, but once she was in her room she was cold because of the air conditioning system. His solution to this problem is to put another blanket on her and then get into bed with her to share his body heat. He did not think of stopping the air conditioning unit or of less intimate means to help get her warm. It would also appear that his present testimony is somewhat different from his testimony during the first trial. In the first trial, it would appear that he would have taken off all his clothes when he got into bed that night whereas, in the present trial, he states that he did not remove his boxer shorts when he got into bed with the complainant.

[38] The accused has consistently tried to describe the complainant as a person who was not intoxicated to the point of being incapable of consenting to sexual intercourse. His contradiction as to whether he was present when I.M. decided to take her to her room is not a trifling matter in this case. First, he said he was present and forgot to mention she could not get into her room because she did not have her key and she was supposed to enter through his room. Later, he asserts he was not there when that decision was made. This important inconsistency causes the court to question his credibility.

[39] The complainant was asleep in I.M.'s room and the accused agreed with him that this was not an acceptable situation to have a married woman sleep in the room of a married man, yet he had slept with her the night before. Once she was in her room, when she would have told him she was cold, he concluded that the best way to help her was to take off his clothes and to get into bed with her to share his body heat. He offered to join her in bed to warm her up. He did not think of turning off the air conditioning unit. The accused never testified that the complainant's health was in danger at that point. In this trial, he testified that he had not removed his boxer shorts whereas he would have indicated that he had taken all of his clothes off in the first trial.

[40] The accused had no reasons to think that he had to lie in bed with the complainant as a first aid measure. He did not testify that she was in any danger. He could have turned off the air conditioning unit. His story is very suspect. His actions represent the actions of a man who wants to get into bed with an attractive woman for other reasons than first aid measures. This portion of the accused's testimony is not credible. The court concludes that he wanted to lay in bed with the complainant in the hope that she would have sex with him. His description of his reaction to her advances are not those of a man who needs much prompting to engage in sexual intercourse.

[41] Having said that, it does not mean that the accused committed sexual assault because he wanted to have sex with the complainant and that he had sex with her. The accused described the sexual intercourse. He stated that the complainant had agreed to have sex with him by saying "yeah" and by participating in the sexual activity. He testified that he did not recall a lot of words. He was asked leading questions by his counsel as to whether the complainant's eyes were open and whether she was aware of what was happening to which he replied in the affirmative.

[42] The court does not believe the accused's version of events leading to sexual intercourse with the complainant. He consistently attempts to minimize the level of intoxication of the complainant and wishes to distance himself from the decision to bring her to her room from the beach, yet he contradicts himself on this very important event. He only wants to paint a picture that has him as a victim of circumstances.

[43] Although the court does not necessarily believe the accused had planned to sleep with the complainant that night, the court believes the accused saw an opportunity to have sexual intercourse with the complainant when she was intoxicated.

[44] The court does note, "... that [a] lack of credibility on the part of the accused does not equate to proof of his ... guilt beyond a reasonable doubt." See *R. v. J.H.S.*, [2008] 2 S.C.R. 152 at paragraph 13. The court must now ask itself if the evidence of the accused creates a reasonable doubt in the mind of the court. To answer this question, the court must direct its mind to, "... whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt." See *R. v. Dinardo* 2008, SCC 24 at paragraph 23. I will now examine the rest of the evidence.

[45] The complainant testified. The complainant is not deemed a reliable witness. Her recollection of these events is heavily influenced by the passage of time, her level of intoxication, and her desire not to remember these events. She has also testified that she has recurring nightmares about these events. She has been on sick leave and under the care of a medical team since the first trial for complex PTSD and a major depressive disorder linked to the events of November 2006. Although she admitted that she has difficulty with her memory because of the PTSD, she testified that those problems only existed in relation to more recent memory.

[46] The complainant was argumentative during most of her cross-examination and attempted to evade answering certain questions. There are a fair number of inconsistences in her testimony that are not insignificant. While she expressed no doubts as to how she had run to go vomit in the beach during her examination-in-chief, she stated that she could not remember running to the beach during her cross-examination.

[47] She could remember some of her conversation with I.M. when he found her at the beach. She could remember him helping her up the steep stairs and that they appeared steeper than earlier during the day. He had to help her because she was stumbling. She only remembers being in her room although she was originally brought to I.M.'s room.

[48] She remembers being cold when she got to her room because she was still in her wet bathing suit. She provided a relatively detailed description of where she thought I.M. and the accused were standing in her room. She went under the blankets while still wearing her wet bathing suit. She remembers the accused "giving her shit," for swimming by herself in the bay and she replied, "Stop shitting on me," or words to that effect. She would have then turned onto her left side and closed her eyes and would have lost consciousness. Her back would have been towards the accused. The lights were still on in her room. She does not remember I.M. leaving the room.

[49] She then described how she awoke to find the accused on her having sexual intercourse with her. She froze and does not remember saying anything to him because she was in disbelief. She stated that her awareness of this sexual activity was not long and that she does not remember him leaving the room. She testified that she did not want to have sex with him.

[50] During her cross-examination, she testified that she remembered being cold and wet in the bed and that she probably took off her bathing suit. She then said, "When he came in, I did not have it on," to which defence counsel said, "You mean when you woke up," and she replied in the affirmative. Although there seems to be some confusion as to when she would have removed her bathing suit, she believes that she took it off. This demonstrates a certain level of consciousness and of motor skills. This portion of her testimony is similar to that of the accused.

[51] During her cross-examination, she testified that she did not know if she was awake until the end of sexual intercourse. Later, when informed that the accused would state that she had rubbed herself against him and that she had initiated sexual contact with him, she indicated that she did not recall such events. Defence counsel quoted part of her testimony in the first trial where she answered that it was unlikely but possible she had given consent. There was some discussion about certain events she could not remember such as walking when supported by I.M. and thus she could also have forgotten that she had consented to having sexual intercourse with the accused. She replied that she, "could not believe there were any reasons I would consent to that."

[52] She alleges the accused grabbed her breast the morning of 18 November. This allegation was first made during the first trial and she had never told anyone of this before informing the prosecutor the day before the first trial although she had two opportunities to tell the CFNIS investigator, but did not.

[53] She also testified that she had bruises on the inside of her thighs as a result of the sexual assault. She testified that she still had visible bruises when she was examined by the doctor at the Belleville General Hospital. When asked by the prosecutor if she had shown them to the doctor, the complainant replied he wanted to take photographs and she refused because it was her body and she did not want to have pictures taken of her body. During her cross-examination, she stated that she did not remember pointing out her bruises to the doctor, but that she would have told medical personnel at the hospital of her bruises. Exhibit 4, the supplementary agreed statement of facts, indicates that Lieutenant (N) De La Roche, a Reserve Force medical officer, was the doctor who examined the complainant at the Belleville General Hospital Emergency Department. He did not document any injuries as being present during his examination of the complainant. It is not his practice to take photographs. The complainant would have told J.H. and the CFNIS investigator about the bruises, but did not show them to J.H. or to the CFNIS investigator.

[54] Her credibility is brought into question because of her evidence concerning the bruises and her allegation the accused grabbed her breast. Her explanations are not very convincing and her evidence concerning the reporting of her bruises to the doctor is inconsistent and is contradicted by the evidence found at Exhibit 4. The court is thus left with a doubt as to whether she is trying to embellish the allegation of sexual assault.

[55] The complainant's testimony surrounding the snuggling and sleeping with the accused during the previous night also casts a shadow on her credibility. The complainant testified that she often snuggles with men she considers friends. It did not bother her that the accused asked her if she wanted him to snuggle and sleep with her the first night in Bermuda. It would appear that such snuggling episodes are acceptable if no one knows about them. That is what she told the accused and she explained it as a joke. She has not told her husband or anyone else about sleeping with the accused on 17 November and she became quite argumentative when she was cross-examined on that point. She did not tell her husband because, as she said, "it would not do her any good."

[56] The fact that she snuggled with the accused the night before does not logically lead one to believe that she would want to have sexual intercourse with the accused the next night. But her argumentative approach to this line of questioning and the testy exchange she had with defence counsel on the topic of being truthful with her husband and her statements as to the "different levels of true" also cause the court to question her credibility.

[57] I.M. testified that the complainant climbed over a three foot railing to get to the beach. I.M. testified that the complainant needed help to get to her room because she had problems walking; she was stumbling. He did not testify that she could not walk. He testified that she had vomited when he was with her in the bay. He brought her to

his room because she told him she did not have her key because she did not have any pockets and that she had made an arrangement with the accused. He left the complainant in his room and went back to the bar to finish his drinks.

[58] I.M. indicated that he was intoxicated that evening and that his memory is affected by the passage of time. He also agreed that his memory was better during the first trial. He testified that the complainant should have received some medical care because of her level of intoxication. During his cross-examination, he agreed that he never testified to that effect during the first trial and that he only thought of the medical care a few days before this trial.

[59] I.M. is not considered a credible and reliable witness. It is clear from his testimony that his recollection of events is influenced by his level of intoxication and by the passage of time. He considers himself a friend of the complainant. J.H. described him as a good friend of the complainant. His credibility is also suspect because he attempts to exaggerate the level of intoxication of the complainant by describing the medical care he would have given her, although he admitted he had only thought of that a few days before this trial.

[60] The court takes from that witness that the complainant was intoxicated but was able to jump a three foot railing, respond to his suggestion, was able to walk, although with some support, and was able to tell him who had the key to her room and why that person had her key. He decided to take her to his room, but it would appear that he did not consider her to be in a state that required him to stay with her since he decided to go back to the bar to finish his drinks.

[61] J.H. is a very good friend of the complainant. She is deemed a credible and reliable witness. She testified in a straightforward manner throughout her testimony. She left the group to go to bed at approximately 2230 hours on 18 November. She described the complainant as happy, walking straight, not falling over intoxicated, and being able to converse with her without any problems. She testified that no one was dangerously drunk when she left the group.

[62] The testimonies of the complainant, of I.M., and of J.H. do not tell the court what quantity of alcohol was consumed by the complainant. The complainant testified that she was highly intoxicated by the end of the evening of 18 November. She did not specify how much she drank. She only states that her glass was always full when she was at the main bar and that she might have drunk some beer. She remembers spending a lot of money, but did not indicate the amount. She thought she had given her money to I.M., but she was not a hundred per cent certain.

[63] The court has found the complainant's evidence to be unreliable and the court is also left with some doubts as to the credibility of the complainant. In light of the

previous observations concerning the testimony of the complainant, of I.M., and of J.H., the court finds that the evidence of the accused, considered in the context of the evidence as a whole, raises a reasonable doubt whether the complainant was incapable of giving her consent to having sexual intercourse with the accused. Having come to that conclusion, I will also state that, based on the evidence accepted by the court, the prosecution has not proven beyond a reasonable doubt that the complainant was intoxicated to the point of being incapable of giving her consent to having sexual intercourse with the accused.

[64] Also, based on the evidence accepted by the court, the court finds that the evidence of the accused, again considered in the context of the evidence as a whole, raises a reasonable doubt as to whether the complainant did not consent to having sexual intercourse with the accused. The court would also have found that the prosecution had not proven beyond a reasonable doubt that the complainant did not consent to having sexual intercourse with the accused.

[65] Notwithstanding that, having come to these conclusions, the court does not have to rule on the question of honest but mistaken belief that the complainant consented to having sexual intercourse, the court will address that question. An honest belief need not be reasonable, but an accused must have taken reasonable steps to ascertain that the complainant was consenting. See s. 273.2 of the *Criminal Code of Canada* and *R. v. Brooks*, [1999] C.M.A.J. No. 8. The complainant was unsure whether she was awake until the end of the sexual intercourse and she could not recall if she had rubbed herself against the accused and had initiated sexual contact with him. She did not categorically deny any of this. It is possible she reacted in the manner described by the accused.

[66] The court has already determined that the evidence has not proven that the complainant was intoxicated to the point of being incapable of giving her consent. The reliability and the credibility of the complainant have already been assessed by the court. Consequently, the evidence of the accused, considered in the context of the evidence as a whole, does lead the court to believe the accused could also have had an honest but mistaken belief the complainant was consenting to sexual intercourse.

[67] Ex-Petty Officer 1st Class McDougall, the court finds you not guilty of the charge of sexual assault.

LIEUTENANT-COLONEL J-G. PERRON, M.J.

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