

**Citation:** *R. v. Acting Sub-Lieutenant P. Pelletier*, 2009 CM 4017

**Docket:** 200872

**STANDING COURT MARTIAL  
CANADIAN FORCES BASE HALIFAX  
HALIFAX, NOVA SCOTIA**

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**Date:** 9 October 2009

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

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**HER MAJESTY THE QUEEN  
v.  
ACTING SUB-LIEUTENANT P. PELLETIER  
(Accused)**

**Warning**

**Restriction on publication:** 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Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

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**FINDING  
(Rendered orally)**

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**OFFICIAL ENGLISH TRANSLATION**

[1] Acting Sub-Lieutenant Pelletier is charged under sections 130, 97 and 129 of the *National Defence Act*. More specifically, he is accused of sexual assault, drunkenness and harassment. The particulars of these charges are as follows:

[TRANSLATION]

FIRST CHARGE.

OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, NAMELY, SEXUAL ASSAULT CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*

In that, on or about April 27, 2007, at the Royal Military College, Kingston, Ontario, he committed a sexual assault against Officer Cadet D.M.

**SECOND CHARGE.**

Section 97 of the *National Defence Act*.

**DRUNKENNESS**

In that, on or about April 27, 2007, at the Royal Military College, Kingston, Ontario, he was drunk.

**THIRD CHARGE**

Section 129 of the *National Defence Act*

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

In that, between September 2006 and April 27, 2007, at the Royal Military College, Kingston, Ontario, he harassed Officer Cadet D.M.

[2] The evidence before this Court consists of the judicial notice taken by the Court of the facts and issues under Rule 15 of the Military Rules of Evidence and the testimonies of the complainant, Petty Officer First Class Bagnell, Second Lieutenant Béland and Acting Sub-Lieutenant Pelletier and exhibits filed by the prosecution and the defence.

[3] Before this Court provides its legal analysis 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 with principles fundamental to all criminal trials. Although these principles, of course, are well known to counsel, other people in this courtroom may well be less familiar with them.

[4] It is fair to say that the presumption of innocence is 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 in cases dealt with under 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 beyond a reasonable doubt rests upon the prosecution, and it never shifts to the accused person. 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 very long time. It is part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model charge to provide the necessary instructions as to reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court 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 arises at the end of the case based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is in no way indicative of his or her guilt.

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

... an effective way to define the 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 ...

[7] However, 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 proving the guilt of an accused person beyond a reasonable doubt. To put it in perspective, if the Court is satisfied or would have been satisfied that the accused is probably or likely guilty, then the accused would have to be acquitted, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[8] What is evidence? Evidence may include testimony under oath or a 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. 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. 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, the Court will assess a witness’s opportunity to observe or a witness’s reasons to remember. The Court will consider, for instance, whether there was something specific that helped the witness remember the details or 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 any 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.

[9] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor that can be used in assessing credibility, that is, was the 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? 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 may well taint the witness's entire testimony. 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. The full test articulated by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, may be applied, given that the accused, Acting Sub-Lieutenant Pelletier, has testified. In that case, the Supreme Court sets out the procedure to be followed by the Court.

First, if the Court believes the evidence of the accused, it must acquit.

Second, if the Court does not believe the testimony of the accused but is left in reasonable doubt by it, it must acquit.

Third, even if the Court is not left in doubt by the evidence of the accused, it must ask itself whether, on the basis of the evidence which it does accept, it is convinced beyond a reasonable doubt of the guilt of the accused.

This process does not mean that the Court must decide which version of the facts is true or whether it believes the complainant or the accused. The question is always whether the prosecution has proven the offences beyond a reasonable doubt.

### **The evidence**

[10] The complainant, D.M., described the events of April 26 and 27, 2007, as well as the conduct of Acting Sub-Lieutenant Pelletier in September-October 2006 and February 2007.

[11] The complainant was the sole occupant of Room 4049 in Fort Sauvé at the Royal Military College in April 2007. The complainant testified that Acting Sub-Lieutenant Pelletier had entered her room at about 3:00 am on April 27, 2007, while she slept. She did not remember whether Acting Sub-Lieutenant Pelletier knocked before entering. She was sleeping in the upper bunk of a bunk bed and her work desk was under her bed. She had met Acting Sub-Lieutenant Pelletier in the smoking area behind Fort Sauvé at about 11:00 p.m., while each was smoking a cigarette. She had told him about some problems she was having. He told her that he was getting ready to go out drinking in Kingston with some of his friends. He left, telling her that he would see her later, and she told him that she was going to bed.

[12] The complainant testified that she had been awakened by Acting Sub-Lieutenant Pelletier at about 3:00 am. He was in her bedroom. She had great difficulty understanding what Acting Sub-Lieutenant Pelletier was saying to her because he was mumbling. He climbed up into the bed and lay down behind her. She testified that she woke up when he lay down next to her. She was lying curled up on her right side, keeping her arms and legs in close to avoid being touched. He touched her left arm, her side, her breasts and between her legs with his left hand. She had not consented to this and she tried to push him away, telling him to get out of her bed. She did not cry out and could not explain why she did not. He climbed down out of the bed, muttering as he walked around her room. He said he felt badly about having hit on her and then he left the room. She stayed in her room for about two minutes, went to the bathroom, and then returned to her room and locked the door from the inside, turning the bolt before going back to bed. She testified that he had been in her room for about five minutes and in her bed for two or three minutes.

[13] The complainant's left leg was injured, which was preventing her from sleeping. She had obtained some prescribed medication to help her sleep, which she took about half an hour before going to bed. This helped her sleep deeply. The morning of April 27, she reported the incident to Petty Officer First Class Bagnell, as she had decided to report everything. He asked her to prepare a written statement and informed the squadron commander, Captain Audet. Petty Officer First Class Bagnell described his meeting with the complainant. He also described her condition. Her eyes were red as though she had been crying and she seemed upset.

[14] The complainant also testified that she believed Acting Sub-Lieutenant Pelletier was inebriated, as she could not understand everything he said; he was speaking as though he were drunk; he had trouble standing and he was not walking straight. She did not remember whether she could smell alcohol on his breath when he was lying next to her.

[15] The complainant also described two other incidents. The first took place in September or October 2006 in the RMC officer cadets' mess. She ran into Acting Sub-Lieutenant Pelletier while approaching the bar to order a drink. He asked her if she wanted to have sex with him. She answered no and returned to her friends without reaching the bar.

[16] The second incident with Acting Sub-Lieutenant Pelletier occurred in the Fort Sauvé smoking area at about midnight on a weekend in February 2007. Each was smoking a cigarette. Acting Sub-Lieutenant Pelletier appeared intoxicated. He made a pass at her and told her he thought she was pretty. He approached her and attempted to kiss her on the lips. She turned her head and pushed him away with her hand. Then she left the smoking area. She felt uncomfortable. She let the incident go, assuming that it had been provoked by the alcohol.

[17] Acting Sub-Lieutenant Pelletier denied the events of September-October 2006 and February 2007. He confirmed that he was familiar with the Canadian Forces and

RMC harassment policy. He testified that he normally went out to “My Bar” on Thursday nights with his friends Demers-Martel<sup>1</sup> and Béland to play pool and drink a few beers. He explained that he went out on Thursdays, reserving his weekends for study, as he received his assignments on Fridays. He explained that following his meeting with his squadron commander on April 30 and his interview with Sergeant Turcotte in June 2007, he decided to keep in mind the facts related to the incident that took place on April 27, 2007.

[18] He said he had met the complainant in the smoking area at around 7:30 or 8:00 p.m. on April 26, before meeting his friends. He spoke to her for about five minutes. Then he went to meet his friends, and they set out for “My Bar” on foot. He arrived at “My Bar” at about 8:30 or 9:00 p.m. He explained that each of them normally bought a round, so he probably drank two or three beers. He played pool, best two out of three, as usual. He left “My Bar” at about 11:00 or 11:15 p.m. to go eat a pita and then returned to the RMC on foot. He arrived at the College at around midnight. It was an ordinary night. He testified that people stayed up late at the College and that he often visited people or received guests at around midnight.

[19] After returning to his room and removing his coat, he went to the complainant’s room, since he had said he would go see her when he got back. He knocked on the door and she told him to come in. He entered and the door closed by itself. The complainant asked him to lie down beside her and pulled him toward her. He refused, and as she did not seem to appreciate his refusal and was becoming more insistent, he left to return to his room. His bedroom door was locked and his roommate opened it from the inside. Second Lieutenant Béland testified for the defence. He admitted that he did not remember in detail the events of April 26, 2007. He testified that he met Officer Cadets Demers-Martel and Pelletier in the Fort Sauvé smoking area before going to “My Bar” before nightfall. He testified that they normally went on foot, and sometimes by taxi. “My Bar” is about a 15- or 20-minute walk from the RMC. They normally went there on Thursday nights to play pool, particularly Cadets Demers-Martel and Pelletier, and have two or three drinks. They walked back to the RMC around midnight or 12:30 am. He said there was a parade at 7:00 am every Friday. After the parade, he had a mathematics course with Cadet Officers Demers-Martel and Pelletier. He did not believe that Acting Sub-Lieutenant Pelletier was drunk when he returned from “My Bar”.

[20] I will now apply the test stated in *R. v. W.(D.)*, quoted above. The Court must first review the testimony of the accused. Like for any other witness, the Court may believe or accept the testimony of the accused in whole, in part, or not at all.

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<sup>1</sup>Officer Cadets D.M. and Demers-Martel are not the same individual.

**First charge: sexual assault**

[21] The evidence clearly demonstrates that Acting Sub-Lieutenant Pelletier was in the complainant's bedroom at the RMC in Kingston on April 27, 2007. This element of the offence is not in dispute.

[22] On cross-examination, the accused described the complainant as an acquaintance rather than as a friend. He said that he was not attracted to her and that she was an officer cadet like the others. He testified that she did not fit in very well with the squadron, that she had medical and academic problems and that her morale was low in April 2007. He also said that he had a girlfriend in April 2007 and that he did not want to get emotionally involved with other Canadian Forces members, given the difficulties inherent in such relationships.

[23] During their brief meeting in the smoking area, which lasted about five minutes, she told him about some problems she was having with the College authorities and about an incident with another person. However, Acting Sub-Lieutenant Pelletier was unable to provide more detail about this incident during his cross-examination despite the fact that he had been aware of the complainant's allegations since April 30 and admitted to having made an effort to keep notes about the incident ever since.

[24] He also testified that he thought she had asked him before to come to her room to help her understand her mathematics problems, but he had refused because his life was already pretty full. He described the workload of engineering students and the importance he attached to his studies. As late April was the end of term, he explained that class attendance was very important because the professors were reviewing the material and giving the students tips on how to prepare for their exams. He testified that he returned to the RMC at about midnight on April 26-27 to get a good night's sleep and be alert in his engineering class. However, instead of going straight to bed, he decided to go to the complainant's room so that she could talk to him about her personal problems.

[25] The Court does not believe Acting Sub-Lieutenant Pelletier's testimony painting himself as a good Samaritan. His descriptions of the complainant, the importance he placed on his academic results and his earlier refusal to help her do not support this testimony. Therefore, the Court does not believe that he went to her room with the intention of helping her.

[26] Acting Sub-Lieutenant Pelletier denied the complainant's version of the facts, alleging that it was she who made the advances. He mentioned subtle verbal and non-verbal cues. He was unable to elaborate on how these advances were made, whether in words or through gestures. This scenario must be considered important in the life of an officer cadet, especially when he learns three days later that a complaint has been made with respect to the events in question and he is advised to keep notes. Despite this, his memories of her advances are vague.

[27] In light of all of the evidence, the Court is of the view that Acting Sub-Lieutenant Pelletier is not a credible witness with regard to the events of April 27, 2007, and the Court does not believe his version of the events. Moreover, his version does not leave the Court with a reasonable doubt. However, the Court does believe the evidence of the defence with respect to the events of April 26, 2007.

[28] It is clear that the complainant's memory of the events of April 26, 2007, has weakened over time. It is also clear that the medication she was taking made her sleepy, which affected her perception of the events.

[29] Her testimony contains significant details that she did not include in her interview with Sergeant Turcotte. She explained that her reticence was due to her embarrassment about mentioning certain details, such as the fact that he had touched her breasts, and she had not thought it necessary to provide such details in her written statement of April 27. She confirmed that it was possible that she had not mentioned it in her interview with Sergeant Turcotte, but that she thought she had mentioned those details in her conversations with the military police, Sergeant Turcotte, Petty Officer First Class Bagnell or Captain Audet. Although she had indicated in her written statement of April 27 that he had used both hands to touch her, she testified that he had used his left hand because he was lying on his side right next to her; therefore, she explained, the logical conclusion was that he had used his left hand.

[30] Her testimony also includes several contradictions and uncertainties. She described how he climbed the ladder to her bed, only to say later that she did not remember his climbing into her bed because she woke up when he lay down beside her. During her cross-examination, she was neither able to confirm nor deny whether she had been at the mess that evening and consumed two or three beers. She also expressed doubts in her testimony about whether Acting Sub-Lieutenant Pelletier had taken a taxi into Kingston the evening of April 26. Neither was she sure whether she had left her room after Acting Sub-Lieutenant Pelletier had left. She attributed these uncertainties to her state of shock after the event.

[31] She confirmed that he said he would see her later and that she told him she would be asleep by the time he returned from his evening out with his friends. She was positive that the events took place at about 3:00 am, more specifically at 3:07 or 3:08 am, as she checked the clock upon awakening as she always does. She was positive that she had locked the door to her room after Acting Sub-Lieutenant Pelletier's departure by turning the bolt inside her room. According to Exhibit 5, an excerpt of a report on the electronic lock on the complainant's bedroom door, and Exhibit 7, a letter analyzing the report in Exhibit 5, the complainant's bedroom door was not locked during the period from April 9, 2007, to April 28, 2007.

[32] The uncertainties in the complainant's testimony, which were surely caused by the passage of time, as well as the effects of the medication she had taken before going to bed, combined with her comments about logical deductions, make her relatively unreliable as a witness. This taints her credibility significantly. This testimony, the



prosecution's only evidence of the nature of the sexual assault, leaves the Court in reasonable doubt.

**Second charge: drunkenness**

[33] As for the first charge, the evidence clearly shows that Acting Sub-Lieutenant Pelletier was in the complainant's bedroom at the RMC in Kingston on April 27, 2007. Again, these elements of the offence are not in dispute.

[34] Acting Sub-Lieutenant Pelletier testified that he normally had two or three beers when he went out to "My Bar" on Thursday nights. Second Lieutenant Béland testified that they had consumed three or four drinks at "My Bar" and that they had consumed them over the course of approximately two hours, between 9:00 and 11:00 p.m. They returned to the RMC at around midnight. This evidence is not contradicted by the prosecution's evidence, except for the plaintiff's testimony to the effect that she met Acting Sub-Lieutenant Pelletier in the smoking area at about 11:00 p.m. on April 26, 2007. Acting Sub-Lieutenant Pelletier and Second Lieutenant Béland testified that Acting Sub-Lieutenant Pelletier was not drunk when he returned to the RMC. The Court does not consider this evidence of the accused to be particularly reliable or credible.

[35] The complainant said that she had trouble understanding what he was saying because he was mumbling and talking like he was drunk, that he was walking like he was drunk and that he had difficulty standing, and yet she said that he climbed down the ladder calmly and did not remember whether he had any difficulty getting down the ladder. She could not say whether he smelled as though he had been drinking alcohol, even though his face had been very close to hers when he was in her bed. The prosecution's evidence does not establish beyond a reasonable doubt that Acting Sub-Lieutenant Pelletier's gestures and speech indicated that he was under the influence of alcohol, even though he admitted to drinking alcohol over the course of the three previous hours. He had told the complainant that he would see her when he got back, and she told him that she would be in bed, without adding that she did not wish to be disturbed. The Court concludes that the evidence of the prosecution does not establish beyond a reasonable doubt that Acting Sub-Lieutenant Pelletier was under the influence or effect of alcohol when he was in the complainant's bedroom.

**Third charge: harassment**

[36] The prosecution submits that three events constitute the harassment: the invitation to have sex in September or October 2006, the attempt to kiss the complainant on the lips in February 2007, and the sexual harassment or at least the fact of entering her bedroom without her permission at about midnight on April 27, 2007.

[37] Acting Sub-Lieutenant Pelletier denied the allegations of September-October 2006 and February 2007. He has no memory of any such encounters with the

complainant. In light of all the evidence, the Court does not believe Acting Sub-Lieutenant Pelletier, and his evidence does not leave the Court in reasonable doubt.

[38] The complainant did not remember the details of these allegations. She did not remember the exact month of the first allegation. Apparently it occurred in the officer cadets' mess some time in the evening after supper. She did not remember the words used by Acting Sub-Lieutenant Pelletier, except that she heard the word "sex". She said that there was music playing at the time. She did not remember what had happened during the day. She had consumed two or three, perhaps four, alcoholic beverages but said that she was not intoxicated.

[39] As for the second allegation, of February 2007, the complainant does not remember the details, except that she was smoking a cigarette and that Acting Sub-Lieutenant Pelletier tried to kiss her on the lips and failed. She said that he appeared drunk, but she did not explain why she thought so.

[40] Finally, with respect to the third allegation, the sexual assault, or at least the fact of entering her bedroom without permission at around midnight on April 27, 2007, Acting Sub-Lieutenant Pelletier testified that he had knocked at the complainant's door and that she had answered. The complainant had only vague memories of that evening and her testimony was confused. Furthermore, when she left the smoking area, Acting Sub-Lieutenant Pelletier told the complainant that he would see her later, and she said that she would certainly be in bed. She did not tell him not to come to her room. Acting Sub-Lieutenant Pelletier came to her room like he said he would.

[41] In light of all the evidence filed by the prosecution, the Court has a reasonable doubt as to whether the events occurred as alleged by the prosecution. Acting Sub-Lieutenant Pelletier, please stand up.

[42] Acting Sub-Lieutenant Pelletier, for the reasons stated by the Court, the Court finds you not guilty of the three charges. You may now be seated.

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

Counsel:

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