COURT MARTIAL

Citation: *R v. Larouche*, 2012 CM 3009

Date: 20120831
Docket: 201164

Standing Court Martial

St-Jean Garrison
Saint-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private R. Larouche, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

OFFICIAL ENGLISH TRANSLATION

RESTRICTION ON PUBLICATION

By order of this Court under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could identify the persons described in this judgment as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

[1] Private Larouche is charged with a variety of service offences which allegedly occurred in 2007, 2009 and 2010 in Saint-Jean-sur-Richelieu, Quebec, and Kingston, Ontario, including two counts of voyeurism, contrary to subsection 165(2) of the *Criminal Code*; one of conduct to the prejudice of good order and discipline, resulting from harassment, contrary to section 129 of the *National Defence Act*; another for disgraceful conduct, for having produced nude visual recordings of a person, contrary to

section 93 of the *National Defence Act*; and, finally, one last count of possession of child pornography, contrary to subsection 163.1(4) of the *Criminal Code*.

[2] The purpose of this decision is therefore to determine whether the prosecution has proved beyond a reasonable doubt that Private Larouche committed each of the offences of which he is accused. The accused decided not to present a defence, which means that the Court must make this determination solely on the basis of the evidence presented by the prosecution.

[3] This Court Martial was initially convened for 12 March 2012, but further to a motion filed by the prosecution just before the accused's trial was to begin, the Court ordered that it be postponed to 22 May 2012. It was therefore on this date that the Court convened the hearing, at the beginning of which the prosecution withdrew the first three counts appearing on the charge sheet, requested and obtained from the Court an order amending the fourth and fifth counts to correct a defect in form and, finally, asked for and obtained an order of the Court, which is still in force, banning the publication, broadcast or transmission of any information that could identify the three complainants or the two witnesses.

[4] Next, from 22 to 25 May and on 14 and 15 August, I heard the preliminary motion filed by the accused to obtain from the Court Martial an order under subsection 24(2) of the *Canadian Charter of Rights and Freedoms* to exclude certain items of evidence because of an infringement of his right to be secure against unreasonable search or seizure under section 8 of the Charter. On 17 August 2012, I denied the motion. The trial hearing began the same day and ended on 18 August 2012 with the respective oral arguments of each party's counsel.

[5] The evidence consists of the following:

(a) The testimonies, in order of appearance before the Court, of Corporal Plourde, V.C. and H.M.;

(b) Exhibit 3, a copy of Chapter 5012-0 of the *Defence Administrative Orders and Directives* (DAODs), entitled "Harassment Prevention and Resolution";

(c) Exhibit 4, a video clip concerning V.C., on DVD;

(d) Exhibit 5, 14 photographs of H.M., on DVD;

(e) Exhibit 6, 14 printed photographs of H.M.;

(f) Exhibit 7, two statistical tables concerning child pornography file seized at Private Larouche's home;

(g) Exhibit 8, written confessions made by Private Larouche;

(h) A verbal confession made by Private Larouche through his counsel, as follows: The 1,054 files to which Private Larouche refers in his confession in Exhibit 8 are those whose distribution was established in the table at the bottom of Exhibit 7, except for those identified in the category [TRANSLATION] “Other”; and

(i) The judicial notice taken by the Court of the facts and matters contained in Rule 15 of the *Military Rules of Evidence*.

[6] The facts concerning this case unfolded during two distinct periods. For ease of understanding, I will therefore proceed chronologically.

[7] H.M. first met Private Larouche in August 2006. She was signing her attestation, as was Private Larouche’s daughter. She met him again during her recruit training in January 2007, when he was there for his daughter, who was in the same platoon as her.

[8] She was then sent to Kingston in March 2007 for her trade course. She had some difficulties with her course and was transferred to an identical course with another group at the end of June 2007. Private Larouche was a candidate in this course.

[9] She became friends with Private Larouche. She says that she helped him a lot in certain courses that required greater knowledge of mathematics, as he was not very strong in that area. They had in common that they both came from the Saguenay region.

[10] They spent a lot of time together, studying or having meals together, going on weekend trips to places such as Toronto or Ottawa, or travelling home, since they came from the same region.

[11] He lent her money on at least two occasions. One time, it was to help her pay a high telephone bill. Another time, it was simply so she could have a better holiday season.

[12] She described him as someone who offered her support and listened to her, which is what she needed at that time in her life. She stated that they were just friends and that she trusted him.

[13] In August 2007, she went to the Keg restaurant in Kingston with Private Larouche. Just before that, she had had a glass of wine with some of the candidates in her course. When she arrived at the restaurant, she ordered lobster, and he ordered a bottle of wine. She remembers having one or two glasses of wine and has no recollection of anything that happened after that, except for a few brief flashes of moments she was able to piece back together in her head after that night.

[14] She says that she did not see the bottom of the first bottle of wine and does not remember finishing her lobster. However, she thinks she remembers that they ordered another bottle of wine but does not remember drinking any of it.

[15] The flashes from that evening that she related to the Court are as follows:

(a) doing push-ups;

(b) smoking cigarettes outside;

(c) being caught by someone when she fell down without trying to protect herself;

(d) arguing with the woman from the room next to her, twice, when she was in her room, probably because she was talking loudly, and teasing her by making noise as if she were having sex;

(e) getting into her car through the roof; and

(f) talking with a woman at the restaurant bar, in English, a language she does not speak, while drinking a martini.

[16] She described herself as being in an altered state that was not due to her having consumed alcohol, as she states that she did not have enough to drink, as she recalls, to be like that; it was rather because of something of unknown origin that she had not willingly taken. In fact, she concludes that she was drugged because, in her opinion, she could not have done such things unless her judgment had been heavily impaired by the effects of some substance or other.

[17] She stated that she could not remember on her own what had happened and that the memory of certain aspects of that evening were triggered only by what Private Larouche told her the next day during a discussion they had. She could remember on her own doing certain things but could not necessarily place them in the context of the evening or give many details. What she was sure of, however, was that she had slept with a man other than Private Larouche, as that man was in her bed the next morning, when she woke up.

[18] Private Larouche confided in her, during this conversation that took place after the evening, that he had taken a photo of her while she was doing push-ups almost totally nude. He allegedly admitted to her that he had [TRANSLATION] “played” with her after, meaning that he had allegedly caressed her genitals.

[19] She says that she did not want to know any more and asked him to erase [TRANSLATION] “that thing”, meaning the photo. She stated that she did not feel that she was in danger and did not want to make a big deal of it. In her opinion, she could not do anything about it because she could not remember much. She therefore stated that this

was why she had not notified anyone in authority, be it her chain of command or the police.

[20] She said in court that in October 2007, she had become interested in a young man in her course and had confided this to Private Larouche. She learned from the young man in question that Private Larouche had allegedly approached him and told him untrue things about her. She interpreted this incident as an attempt by Private Larouche to keep this young man away from her so that the special relationship she had with Private Larouche would not be affected. She was very angry with what Private Larouche said and did. She went to meet with him and told him what she thought. She stopped seeing him. She says that after that, since she had been working very hard with him to help him with his math and was no longer helping him, he failed his tests and had to withdraw from the course.

[21] She says that the following summer, she was called in by the Military Police and for the first time saw the 14 photos of her nude in various poses. She says that she felt upset, disappointed and disrespected when she saw these photos.

[22] She stated that she seemed to be trying to deliberately hide her face in the photographs. She said that maybe she liked making these photos, maybe not, and that maybe she was subconsciously blocking out the fact that they had been taken. She recalled that it might not have been Private Larouche who took these photos.

[23] This ends the summary of the facts concerning the sixth and seventh counts.

[24] V.C. is a medical technician who met Private Larouche at her workplace at St-Jean Garrison in September 2009 when Private Larouche came to work there.

[25] At the time of their meeting, she was living in what she called a difficult situation because of workplace harassment by a colleague and because she did not know what would happen when her spouse at the time returned from a mission to Afghanistan, as he had been violent towards her before he left for this mission.

[26] She told the Court that in their conversations, Private Larouche had mentioned that he was a member of the NSA and that, in reality, he was a lieutenant-colonel, as his card and photo proved. He allegedly told her not to reveal his true identity to anyone or she would be court-martialled. She told the Court that he made her feel safe and comforted through the advice he gave regarding her problems in her personal life.

[27] She stated that around mid-October 2009, her friendship with Private Larouche turned into a romantic relationship. He reassured her, telling her that he had contacts and ways to keep her ex-spouse from hurting or harassing her. He told her that he could take care of the situation with her ex-spouse, if necessary. She was under the impression that he had a lot of power and money. He was not shy about telling her that everything has a price.

[28] She described how on one occasion, when they went to see Private Larouche's family in Québec, he took nude photos of her while she was taking her shower, which she agreed to, on condition that the photos be erased later. She said that back at her place, he had already shown her several photos of naked women on computer that were stored on a USB key and who were, so he said, former girlfriends. Another day, at work, he alleged showed her a nude photo of a co-worker.

[29] She admitted that she told Private Larouche a number of secrets concerning her personal and sexual life, particularly with regard to her preferences. She also stated that she was prepared to perform certain acts in certain places to please her spouse.

[30] However, as time passed, she began having doubts about what Private Larouche claimed to be, because of the answers he gave her, the large sums of money he seemed to have and his personal behaviour in certain situations.

[31] She confronted him, telling him that she did not believe him anymore, and Private Larouche replied that he suffered from schizophrenia. She learned that he was not receiving any treatment or taking any medication to control it. She demanded that he seek professional help within 24 hours, or she would leave him.

[32] He did not do so, and she ended their relationship in early December 2009. On 18 December 2009, she filed a complaint with the Military Police, fearing that the nude photos of her might be circulating around her workplace, as had been the case with her co-worker.

[33] Last year, for the first time, during a meeting with Military Police investigators, she viewed a video of her, taken in Private Larouche's apartment, in which she could be seen asleep on her left side, in Private Larouche's bedroom, wearing nothing but a pair of jeans, with course notes near her, the top half of her body completely naked.

[34] As for Corporal Plourde, he testified before the Court that in September 2009, he was a clerk at the St-Jean Garrison and that it was around this time that Private Larouche started working there. He thus became a co-worker. He also worked with V.C.

[35] He described how his relationship with Private Larouche changed, as he occasionally ate with him, and he was invited over to his home a few times. He stated that Private Larouche and V.C. were going out together and that he had already had dinner with them. He said that Private Larouche confided in him that he had to protect V.C. from her ex-spouse and that an officer had assigned him this responsibility.

[36] Indeed, he described Private Larouche as someone who seemed to know everything.

[37] He told about how one time, when he was in a vehicle with Private Larouche and V.C., he witnessed a conversation with sexual overtones between these two

individuals concerning couple swapping. He called this conversation bizarre and found it disturbing.

[38] He stated that Private Larouche told him that V.C. had gone with him to a strip club and that, out of jealousy, she joined the dancers on stage. He said that these statements seemed degrading to V.C., in his view, and that it changed his perception of her. He was not sure who or what to believe. It was not until after Private Larouche left his workplace, much later, that he tried to confirm with V.C. the basis of the story and learned that it was not true.

[39] This concludes the summary of the facts regarding the fourth and fifth counts.

[40] Regarding the eighth count, the accused made the following admissions:

(a) The identity of the accused, the place and the date in respect of the eighth count are admitted;

(b) Private Larouche had in his possession 1,004 electronic files containing child pornography within the meaning of subsection 163.1(1) of the *Criminal Code*;

(c) The defence acknowledges and admits that the samples presented to the Court by Corporal Gauvin are a fair representation of the 1,054 electronic files as a whole, depicting child pornography; and

(d) The 1,054 files to which Private Larouche refers in his confessions in Exhibit 8 are those whose distribution was established in the table at the bottom of Exhibit 7, except for those identified in the section [TRANSLATION] “Other”.

[41] With regard to the eighth count, subsections 163.1(1) and (4) of the *Criminal Code* read as follows:

> (1) In this section, “child pornography” means
>
> (*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means,
>
> (i) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;
>
> (*b*) any written material, visual representation or audio recording that advocates or counsels sexual activity with a person under the age of eighteen years that would be an offence under this Act;

(*c*) any written material whose dominant characteristic is the description, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act; or

(*d*) any audio recording that has as its dominant characteristic the description, presentation or representation, for a sexual purpose, of sexual activity with a person under the age of eighteen years that would be an offence under this Act.

. . .

(4) Every person who possesses any child pornography is guilty of

(*a*) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of six months; or

(*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of ninety days.

[42] The prosecution therefore had to prove, beyond a reasonable doubt, the identity of the offender, the date and the place as alleged in the particulars of the eighth count. It also had to prove the following additional elements beyond a reasonable doubt:

(a) the existence of a photographic, film, video or other visual representation constituting child pornography; and

(b) that the accused was in possession of a photographic, film, video or other visual representation constituting child pornography.

[43] With regard to the fourth and six counts, subsections 162(1) and (5) of the *Criminal Code* read as follows:

162. (1) Every one commits an offence who, surreptitiously, observes—including by mechanical or electronic means—or makes a visual recording of a person who is in circumstances that give rise to a reasonable expectation of privacy, if

(*a*) the person is in a place in which a person can reasonably be expected to be nude, to expose his or her genital organs or anal region or her breasts, or to be engaged in explicit sexual activity;

(*b*) the person is nude, is exposing his or her genital organs or anal region or her breasts, or is engaged in explicit sexual activity, and the observation or recording is done for the purpose of observing or recording a person in such a state or engaged in such an activity; or

(*c*) the observation or recording is done for a sexual purpose.

. . .

(5) Every one who commits an offence under subsection (1) or (4)

> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

[44] In addition to establishing beyond a reasonable doubt the identity of Private Larouche as the offender and the date and place of the offence as alleged in the fourth sixth counts on the charge sheet, the prosecution had to prove

(a) that the accused surreptitiously observed a person or made a visual recording of a person;

(b) that the person was in circumstances that gave rise to a reasonable expectation of privacy where

i. the person was nude in a place in which a person can reasonably be expected to be nude or to be engaged in explicit sexual activity;

ii. the person was nude in a place in which a person can reasonably be expected to be nude or to be engaged in explicit sexual activity, and the observation or recording was done for such a purpose; and

iii. the observation or recording is done for a sexual purpose.

[45] Now then, with regard to the fifth count, subsections 129(1) and (2) of the *National Defence Act* read as follows:

> (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.
>
> (2) An act or omission constituting an offence under section 72 or a contravention by any person of:
>
> (*a*) any of the provisions of this Act,
>
> (*b*) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
>
> (*c*) any general, garrison, unit, station, standing, local or other orders, is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[46] In addition to identity and the date and place of the offence, the prosecution had to prove the following essential elements:

(a) the conduct alleged in the charge;

(b) prejudice to good order and discipline, which includes

i. the standard of conduct (the nature and existence of the order, regulation or instruction);

ii. the fact that the accused was or should have been aware of the required standard of conduct (i.e., the order was issued, published and notified, in accordance with article 1.21 or 1.22 of the QR&Os); and

iii. the fact that the conduct constitutes a violation of the required standard of conduct (i.e., the conduct amounts to a violation of the order, regulation or instruction).

[47] Finally, regarding the seventh count, in addition to identity and the date and place of the offence, the prosecution had to prove beyond a reasonable doubt that the accused's conduct was disgraceful.

[48] Simply put, this means that the accused's behaviour was unacceptable, shocking, degrading or indecent, or that the accused behaved very badly. However, from a legal standpoint, two things must be proved beyond a reasonable doubt:

(a) First, by its nature, the conduct at issue causes harm or presents a significant risk of harm to individuals or society in a way that undermines or threatens to undermine a value reflected in and thus formally endorsed through the Constitution or similar fundamental laws by, for example:

i. confronting members of the public with conduct that significantly interferes with their autonomy and liberty;

ii. predisposing others to anti-social behaviour; or

iii. physically or psychologically harming persons involved in the conduct.

(b) Second, the harm or risk of harm is of a degree that is incompatible with the proper functioning of society.

[49] On this point, I adopt the test established by the majority of the Supreme Court in *R* v *Labaye*, 2005 SCC 80, for proving indecent criminal conduct. In my opinion, this test is fully applicable in the context of the offence at issue here because the purpose of the test is to determine the extent to which the disgraceful conduct in question constitutes a service offence. The test is based on the harm component, which entails that the risk of harm is easier to prove than the military social standard. Here, the idea is therefore to protect military order against the different types of harm that could

negatively affect the maintenance of discipline and thereby threaten the morale and cohesion of the Canadian Forces.

[50] Before this Court provides its legal analysis, 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 the 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.

[51] It is fair to say that the presumption of innocence is perhaps 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 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.

[52] 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 never shifts to the accused.

[53] A court must find an accused person not guilty if it has a reasonable doubt about his of 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 SCR 320, the Supreme Court of Canada proposed a model charge to juries on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of subsequent Supreme Court and appellate court decisions.

[54] 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, and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[55] In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, 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.

[56] 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 proving the guilt of the accused—in this case, Private Larouche—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 have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[57] 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 under the *Military Rules of Evidence*.

[58] 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.

[59] 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, such as whether the events were noteworthy, unusual or 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.

[60] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which 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?

[61] 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 witness's entire testimony.

[62] A 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 to disbelieve it.

[63] Having given this overview of the essential elements of each of the counts, the presumption of innocence and the standard of proof beyond a reasonable doubt, I will now turn to the questions at issue in the present case and address the legal principles.

[64] Regarding the eighth count, considering the admissions made by Private Larouche to relieve the prosecution of having to prove a fact that it had the burden of proving, the Court finds that all of the essential elements of this offence have been proved beyond a reasonable doubt. Accordingly, the Court is satisfied, having regard to all of the evidence, that the prosecution has proved beyond a reasonable doubt all of the essential elements of the offence of possession of child pornography.

[65] Regarding the other counts, the Court will analyze them by considering the alleged incidents involving Private Larouche in chronological order.

[66] First, the Court will analyze the six and seventh counts, which are related to H.M.'s testimony, and then turn to the fourth and fifth counts, which are related to the testimonies of V.C. Corporal Plourde.

[67] For the sixth and seventh counts, the Court must first decide how credible and reliable H.M.'s testimony is.

[68] H.M.'s testimony was frank and direct. However, she appeared rather agitated throughout it. Clearly, because of the passage of time, about five years, her ability to recall the events underlying the charges against Private Larouche has faded.

[69] She clearly stated that she had no precise memory of what happened during the evening and night that led to the charges. She told the Court that many of the flashes of memory she had were based on what was later reported to her by Private Larouche. She therefore explained to the Court that what she remembers today is perhaps based on what other people told her and not on her own ability to recall the events herself. She stated that she was in an altered state that could not have been due to alcohol and that she could not say what had had such an effect on her, except that she suspected having been drugged.

[70] Her sincerity, demonstrated by her thinking out loud and her spontaneity in readily considering other possibilities in her answers make her a credible witness but unreliable on many aspects of her testimony because of the passage of time and her difficulty in remembering all of the events.

[71] The fact that she does not seem have been really outraged, shocked or bothered by the fact that Private Larouche took advantage of her unconsciousness to take a nude photo of her and caress her genitals and breasts, and not seem to make much of it, whereas she stated that she was so totally offended and angry that Private Larouche had allegedly said untrue things about her to someone else that she decided not to have

anything to do with him anymore, leaves the Court somewhat confused as to what she seems to want to remember and what she seems to actually know.

[72] Regarding the count of voyeurism, the Court is of the opinion that the prosecution has established the date and place of the offence beyond a reasonable doubt.

[73] With regard to identity, the Court finds H.M.'s testimony on this question to be vague. On direct examination, she referred at least twice to the fact that it was possible that the photos had been taken by either the young man from her course or by Private Larouche. Once, she said that Private Larouche had taken a photo of her in push-up position, according to what he had told her. However, all of her testimony on this question suggests that she is not really sure what happened or who did it. She seemed rather reluctant to say certain things, and she was not convinced that Private Larouche should be blamed for what happened. Indeed, she also stated that he may not have been the person who had taken the photos.

[74] It is true that the files and the telephone, whose owner remains unknown, were seized at Private Larouche's home. However, this is not enough to prove beyond a reasonable doubt that it was Private Larouche who took the photos, or at least the photo of H.M. in a push-up position. H.M. reported that she encountered a number of people that evening, namely, the young men from her course, her next-door neighbour, Private Larouche and another young man, who was in her bed when she woke up the next morning. So nothing in the evidence shows beyond a reasonable doubt that it was Private Larouche who took the photo or photos. The Court does not deny that it may possibly have been him, but it cannot go any further than that on the basis of the evidence that was presented to it.

[75] As for the fact that everything happened surreptitiously, it is very possible that what happened, happened without her personal knowledge. It is also possible that she decided not to remember that part of the evening. It is surprising that she remembers what happened with her next-door neighbour, providing details about her behaviour without her memory being triggered by what someone reported to her or by the questions put to her in court, whereas she apparently cannot on her own remember the taking of the pictures or who took them. She even raised the fact that she may have consented to having the photos taken, but she is now unable to say whether or not she agreed to this.

[76] The Court therefore finds that the prosecution has not proved these two elements of the offence beyond a reasonable doubt. The Court therefore concludes, having regard to all of the evidence, that there is a reasonable doubt as to the fact that Private Larouche committed the offence of voyeurism in respect of H.M.

[77] Regarding the disgraceful conduct, the Court comes to the same conclusion concerning the identity element.

[78] As for the conduct itself, clearly, the act of taking nude photos of a person in her room may constitute a violation of human dignity, which is a value clearly stated in the *Canadian Charter of Rights and Freedoms*, an integral part of our constitution. Still, such conduct had to be engaged in without the consent of the person photographed, as alleged in the particulars of the charge. Such conduct could in fact be a violation of human dignity, but the context in which all this occurred is vague and uncertain, like H.M.'s testimony.

[79] Thus, the Court therefore has reasonable doubt regarding this essential element and finds, having regard to all the evidence, that the prosecution has not proved beyond a reasonable doubt that Private Larouche engaged in disgraceful conduct.

[80] Now, concerning the fourth and fifth counts, the Court must first assess the credibility and reliability of the testimonies of V.C. and Corporal Plourde.

[81] V.C.'s testimony was clear and direct. She had an excellent recollection of the events, particularly those which struck her as notorious. She did not hesitate to ask counsel to repeat a question if she did not understand it. The answers she gave to the various questions were consistent, and many of the questions were of a personal nature. Although she was a bit anxious and nervous, which can be expected in the circumstances, she never hesitated in answering the questions put to her. The Court finds her testimony to be credible and reliable.

[82] As for Corporal Plourde, his testimony was clear and consistent. It seems clear that he had no particular interest in this case. His memory was excellent, particularly regarding the events that he characterized as being notorious. The Court finds that his testimony, too, is credible and reliable.

[83] Regarding the fourth and fifth counts, namely, voyeurism, the first essential element that the prosecution had to prove is the identity of the accused as the perpetrator of the offence. The evidence on which the Court may rely to decide this issue are entirely circumstantial. The Court makes the following findings of fact:

(a) The video was filmed in Private Larouche's apartment, more specifically, in his bedroom;

(b) Private Larouche lived alone in his apartment and invited V.C. to sleep over there from time to time during their romantic relationship;

(c) Private Larouche had already taken nude pictures of V.C. in the shower, with her consent, on another occasion, while she was in a private residence;

(d) Private Larouche showed nude pictures of other women and stated that he had nude videos of women, including women with whom had previously been in romantic relationships; and

(e) The file containing the video giving rise to this charge was seized at Private Larouche's residence.

[84] In the absence of direct evidence that Private Larouche is the person who committed the offence of voyeurism, the Court finds that the circumstantial evidence set out above is sufficient for the Court to infer from the combined effect of all of the evidence that the prosecution has proved this essential element beyond a reasonable doubt.

[85] Regarding the date, V.C. clearly described the period during which the video was allegedly taken, that is, during their romantic relationship, which lasted from mid-October to early December 2009, and this date matches the one appearing in the particulars of the offence.

[86] Regarding the place, the Court is satisfied that this element, too, has been proved beyond a reasonable doubt through V.C.'s testimony. She described how they invited each other over to their respective homes when they were both working at the St-Jean Garrison. It is easy to infer from this and from V.C.'s testimony as a whole that Private Larouche was living in the area surrounding the town, if not in the town of Saint-Jean-sur-Richelieu proper.

[87] Regarding the fact that the accused acted surreptitiously, this is clear from the video in which V.C. appears sleeping, and from V.C.'s testimony, which confirms that she was not aware that she was being filmed and that she saw the video for the first time after the police had seized it, that is, in 2011. It is obvious to this Court that this video was made without her knowledge or consent.

[88] Finally, it is clear that at the time she was filmed, there was a reasonable expectation of privacy. She was in a bedroom, in bed, half naked, wearing nothing but a pair of jeans, with her breasts exposed, and had fallen asleep, most likely while she was studying. This was a place where one expects a high degree of intimacy and which should be accessible only to those persons who have been granted permission by the person who lives there. It is a place where one may be nude because one dresses, undresses and sleeps there in various states of dress, up to sleeping there half naked or totally nude.

[89] Counsel for Private Larouche argued that the fact that his client allegedly filmed his lover at the time without her knowledge, while she was sleeping half naked in her bedroom, does not fall within the intended scope of section 162 of the *Criminal Code* and that, for this reason, the Court could not find the accused guilty of this offence.

[90] The idea of section 162 of the *Criminal Code* is to protect privacy in this high-tech age in which we live. Indeed, whereas it is now possible to take instant photos with a variety of personal devices and disseminate them, Parliament intended to ensure that

the private lives of individuals in our society do not become public domain when someone deliberately and secretly captures images of us in our most private moments.

[91] In the debates of the House of Commons on 10 February 2005, regarding the reinstatement of certain government bills, including one to enact section 162 of the *Criminal Code*, Liberal member of Parliament Paul Harold Macklin said the following:

> There are other areas, too, where in fact we talk about voyeurism. I think most of us are aware that with electronic advances today, voyeurism is becoming more and more of a problem. The latest evolution seems to be in the cellphone camera. It seems to be the latest intervention that is causing additional concern about voyeurism. I see that now notices are actually being posted at various establishments like the YMCA, for example, to the effect that one no longer can take a cellphone into a dressing room because of that particular characteristic of these more modern phones.
>
> So it is something that is extremely important, this concept of voyeurism and making it an offence, and we have to deal with it. Bill C-20 is a bill that attempts to do this, and I believe it would do so in an appropriate manner. The rapid technological changes and developments of these years of course have brought many benefits to our society, but they raise all sorts of implications for such basic matters as our privacy. Web cameras, for example, which can transmit live images over the Internet, have raised concerns about their potential abuse, notably, of course, the secret viewing or recording of people for sexual purposes or where the viewing of a recording involves a serious breach of privacy.

[92] Every person has the right to dignity and to the physical and psychological security of the person, as provided in the Constitution and the Canadian Forces Code of Ethics. Accordingly, this section of the *Criminal Code* is in keeping with this fundamental value, and I do not see how this would be a problem, as counsel for the defence suggests it is. If the scope of this section seems overly broad or vague to him, this issue should have been raised in a preliminary motion challenging the constitutionality of this section, not in the course of determining the guilt of his client.

[93] Consequently, the Court finds, having regard to all of the evidence, that the prosecution has proved beyond a reasonable doubt that Private Larouche committed the offence of voyeurism in respect of V.C.

[94] Finally, regarding the fifth count, the Court finds that all of the essential elements of this charge have been proved beyond a reasonable doubt, except for harm, because of the fact that the conduct does not constitute a violation of the required standard of conduct.

[95] Chapter 5012-0 of the *Defence Administrative Orders and Directives* defines harassment as follows:

> Harassment is defined as any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles or causes personal humiliation or embarrassment, and any act of intimidation or threat. It includes harassment within the meaning of the *Canadian Human Rights Act*.

[96] It appears to the Court that what Private Larouche said when speaking with Corporal Plourde was confidential. Indeed, it was more of a confession designed to demonstrate a more intimate facet of the relationship between Private Larouche and V.C. than a statement intended to cause offence or harm. In the end, what he said drove a wedge somewhat between Corporal Plourde and V.C. It is true that this changed Corporal Plourde's perception of his co-worker for a time, but he never seemed to think that the purpose of these statements was to disparage, demean, humiliate or embarrass V.C. With the exception of this evidence, it appears that the statements that were made by Private Larouche in V.C.'s presence and reported to the Court were never made in the workplace and did not constitute harassment. The bizarre conversation between Private Larouche and V.C. in the car, in Corporal Plourde's presence, is not harassment either. It seemed to be designed to impress, more than anything else.

[97] In fact, V.C. never regarded Private Larouche's conduct as something that could cause offence. She found him reassuring, sometimes odd to the point where she wondered whether what he said was true or not. She worried that he was using photos of her at work. However, it was not something that was ever brought up or that Private Larouche ever insinuated at any time. When he showed the photo of a co-worker to V.C., it seems that he was trying to show her other aspects of his private life and that he never said or did anything to lead her to believe that he could do the same thing to her, that is, circulate photos of her.

[98] Accordingly, the alleged act does not constitute harm because it does not constitute harassment within the meaning of the directive.

[99] The Court therefore concludes, having regard to all the evidence, that there is a reasonable doubt that Private Larouche engaged in harassment contrary to a directive of the Canadian Forces.

FOR ALL THESE REASONS, THE COURT

[100] **FINDS** Private Larouche guilty on the fourth and eighth counts; and

[101] **FINDS** Private Larouche not guilty on the fifth, sixth and seventh counts.

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