



COURT MARTIAL

Citation: *R v Morel*, 2014 CM 3011

Date: 20140530

Docket: 201389

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.E. Morel, Accused

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

OFFICIAL ENGLISH TRANSLATION

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Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Rendered orally)

[1] Sergeant Morel is charged under section 130 of the *National Defence Act* (hereafter the *NDA*), with having allegedly committed sexual assault on S.J.B. contrary to section 271 of the *Criminal Code*, and for two other offences of disgraceful conduct for sexual contact and certain statements he allegedly made contrary to section 93 of the *NDA*.

[2] The hearing took place over two days, on May 26 and 27, 2014, during which three witnesses were heard by the court: the complainant in this matter, Master Corporal

McCord and the accused, Sergeant Morel. In addition to the convening order and the charge sheet, a document was introduced by the prosecution with the consent of the accused, an excerpt from the *Concise Oxford Dictionary* regarding the definition of the word “*centrefold*”.

[3] The complainant and Master Corporal McCord testified in English without the assistance of an interpreter and with the explicit consent of the accused.

[4] As part of training for public affairs officers in the Canadian Forces that was taking place from April 30 to May 2, 2007 in a building located at 45 Sacré-Coeur Blvd. in Gatineau, Quebec, Sergeant Morel, an imagery technician, was given the task of acting as photographer and cameraman to simulate impromptu press conferences (“scrums”) and televised interviews to help evaluate the candidates in this course.

[5] According to the complainant, in April 2007, she had to do an interview that was to be evaluated. She was accompanied by an evaluator, a public affairs officer, Major Lee. S.J.B. went to the main lobby of the building where two imagery technicians were waiting for her. These two persons were acting as members of the media and one of them was to conduct an on-camera interview.

[6] The complainant conducted the preparatory interview by having a discussion with one of the persons present. The cameraman, Sergeant Morel, whom she had never met before, was placing a wireless microphone on her to pick up her voice for the interview. In fact, there was a microphone on the camera, but to better pick up the sound, a second microphone was installed on the interviewee that was connected by a wire to a transmitter (“body pack”).

[7] As Sergeant Morel was installing the microphone on her uniform, he allegedly stated softly, almost in a whisper, while touching her on the buttocks with his open hand and without her permission, that he wanted to make her a centrefold (“making me a centrefold”). She found this comment disgusting. From that moment, she no longer felt well, but she continued with the interview as planned in the scenario. She felt a brief contact from an open hand on one of her buttocks.

[8] This act caused her to feel repugnance and lack of respect. The other imagery technician present was Master Corporal McCord, a close friend of the complainant, whom she had known for approximately three years. He was taking photos and he was located at a distance that allowed him to hear Sergeant Morel’s statements, if he paid attention to what was happening, from a maximum of four metres away.

[9] No other statement of this nature was made or exchanged because the interview began. She received feedback from Major Lee immediately after regarding her performance during this interview. The same night, she spoke of the incident to her spouse and discussed it with Master Corporal McCord, who allegedly heard something.

[10] He described the incident to the court as a conversation between Sergeant Morel and the complainant that allegedly took place during the coffee break, following the complainant's performance, in the context of a simulated impromptu press conference ("scrum"). He allegedly saw the two individuals speaking and noticed that the complainant seemed agitated, in shock. Sergeant Morel approached the complainant. When he was around seven feet from them, he heard Sergeant Morel say to the complainant that she would make a good centrefold picture for a magazine. At no time did he see Sergeant Morel have physical contact with the complainant. The words used by Sergeant Morel shocked him. The incident apparently lasted three to five minutes.

[11] The complainant referred to the incident afterward, during her interview for her final report on her entire performance in the course. Not knowing whether such an incident was part of the scenario and considering that it was noted that her performance had decreased at some point during the course, she wanted to get to the bottom of this incident. She then found out that such a thing was not at all part of the interview scenario. She consulted the harassment counsellor and the commander was informed of the situation.

[12] She met with her commander and after discussing it, based on her understanding of things, this incident would be kept and dealt with at an informal level for several reasons: not to ruin the career of a member; not to affect her own career transition and the possibility of being transferred because of proceedings; taking an approach that would help the perpetrator realize that his conduct is totally inappropriate, because he may not know that it is. The commander, still according to the complainant's understanding, committed to taking the following actions: inform Sergeant Morel of his improper conduct and ensure that he is no longer used in such a role in training public affairs officers.

[13] She discussed the incident with Master Corporal McCord a few times in 2007-2008, but afterward she moved on.

[14] It was only in May 2012 that she again met Sergeant Morel in a professional meeting where she found herself alone with him to review certain documents. She returned home that night and realized that Sergeant Morel was the person who was directly involved in the incident of 2007, following certain statements that he made in a banal way that day and that triggered the complainant's memory. She confirmed with Master Corporal McCord the identity of Sergeant Morel as the one who had been involved in the incident of 2007 with her.

[15] Following this, she decided to write to her commander regarding the details of the incident that justified, in her opinion, removing her from the task she was working on as it was becoming inappropriate for her to continue working with Sergeant Morel.

[16] A military police investigation followed. Charges were laid against Sergeant Morel in June 2013 in this matter.

[17] Before applying the law to the facts of the case I believe it is important to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, which is an essential component of the presumption of innocence.

[18] Whether facing charges under the Code of Service Discipline before a military court or proceedings before a civilian criminal court involving criminal charges, an accused person is presumed to be innocent until the prosecution has proved his or her guilt beyond a reasonable doubt. This burden of proof rests with the prosecution throughout the trial. An accused person does not have to prove that he or she is innocent. The prosecution must prove each of the essential elements of a charge beyond a reasonable doubt. 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 can be based not only on the evidence, but also on a lack of evidence. Proof beyond a reasonable doubt does not apply to individual pieces of evidence or to separate parts of the evidence, it applies to the totality of the evidence relied on by the prosecution to establish guilt. The burden of proof rests with the prosecution throughout the trial and never shifts to the accused. A court must find the accused not guilty if it has a reasonable doubt as to his or her guilt after having assessed all the evidence.

[19] In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, Justice Iacobucci for the majority stated 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...

It is useful, however, to recall that it is virtually impossible to prove something with absolute certainty, and that the prosecution is not required to do so. That kind of standard of proof does not exist in law. In other words, if the Court is convinced that Sergeant Morel is probably or likely guilty, it must acquit him, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt. The standard of proof beyond a reasonable doubt also applies to questions of credibility and the Court need not make a definitive determination of the credibility of a witness or group of witnesses. In addition, the Court need not believe the entire testimony given by a person or group of persons. If the Court has a reasonable doubt regarding the guilt of Sergeant Morel that stems from the credibility of the witnesses, it must acquit him.

[20] 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 also 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*. 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.

[21] 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.

[22] 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 uncontested 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 it may well taint a 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.

[23] This is one of those cases where the approach to be followed in assessing the effect of the credibility and reliability of an accused's testimony in court in light of the notion of reasonable doubt was laid down by the Supreme Court of Canada in *R v W(D)*, [1991] 1 SCR 742. This decision must be applied because the accused, Sergeant Morel, testified.

[24] The pitfall that this court must avoid is to appear to be or to be in a situation where it chooses between two versions in its analysis, namely that submitted by the prosecution and that put forward by the accused, as the Supreme Court of Canada again recently recalled in *R v Vuradin*, 2013 SCC 38, at paragraph 21:

The paramount question in a criminal case is whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused: *W.(D.)*, at p. 758. The order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration. A verdict of guilt must not be based on a choice between the accused's evidence and the prosecution's evidence: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 6-8. However, trial judges are not required to explain in detail the process they followed to reach a verdict: see *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, at para. 29.

[25] Section 271 of the *Criminal Code* is thus written:

Everyone who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding 10 years...

- (b) an offence punishable on summary conviction and is liable to imprisonment for a term not exceeding 18 months...

[26] In *R v Chase*, [1987] 2 SCR 293, at page 302, Justice McIntyre provided a definition of sexual assault:

11. ... Sexual assault is an assault within any one of the definitions of that concept in s. 244(1) [now subsection 265(1)] of the *Criminal Code*, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated....

Subsection 265(1) of the *Criminal Code* states

A person commits an assault when

- a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

...

[27] In *R v Ewanchuk*, [1999] 1 SCR 330, it was established by the Supreme Court of Canada that for an accused to be convicted for sexual assault, two basic elements must be proven beyond reasonable doubt: that the accused committed the *actus reus* and that he had the necessary *mens rea*.

[28] The *actus reus* of assault is unwanted sexual touching and it is established by the proof of three elements: touching, the sexual nature of the contact, and the absence of consent.

[29] Consent involves the complainant's state of mind. Is it the voluntary agreement of the complainant that the accused do what he did in the way in which he did it and when he did it? In other words, did the complainant want the accused to do what he did? A voluntary agreement is one made by a person, who is free to agree or disagree, of his or her own free will.

[30] Just because the complainant did not resist or put up a fight does not mean that she consented to what the accused did. Consent requires knowledge on the complainant's part of what will happen and a decision by her, without the influence of force, threats, fear, fraud or abuse of authority, to let it occur.

[31] The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

[32] Here the prosecution had to prove the following essential elements beyond a reasonable doubt:

- (a) the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet;
- (b) The prosecution also had to prove the following additional elements:
 - i. the fact that Sergeant Morel used force directly or indirectly against the complainant;
 - ii. the fact that Sergeant Morel intentionally used force against the complainant;
 - iii. the fact that the complainant did not consent to the use of force;
 - iv. the fact that Sergeant Morel knew of, or was reckless of or wilfully blind to, a lack of consent on the part of the complainant; and
 - v. the fact that that the contacts made by Sergeant Morel on the complainant were of a sexual nature.

[33] Section 93 of the *National Defence Act* reads as follows:

Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

[34] With respect to this charge, the prosecution thus had to prove the following essential elements:

- (a) the identity of the accused and the date and place as alleged for each offence in the charge sheet;
- (b) that the accused's conduct was disgraceful.

[35] With respect to demonstrating that the accused's conduct was disgraceful, this means that the accused's behaviour was unacceptable, shocking, degrading or indecent, or that the accused behaved very badly.

[36] Generally, to objectively determine this essential element, the court usually used the standard of society's threshold of tolerance. In my view, this test has been subject to some criticism in criminal matters and should allow for a new way to address the issue.

[37] Indeed, in a case where the Supreme Court of Canada has had to discuss the concept of indecency in a criminal law context, it has established a different assessment based on the significant objectively ascertainable harm. It is the majority decision in *R v Labaye*, [2005] 3 SCR 728. At paragraph 62 of the decision, the court established, from a legal perspective, that two things must be proven beyond a reasonable doubt. 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:

- (a) confronting members of the public with conduct that significantly interferes with their autonomy and liberty;
- (b) predisposing others to anti-social behaviour; and
- (c) physically or psychologically harming persons involved in the conduct.

[38] Second, the harm or risk of harm is of a degree that is incompatible with the proper functioning of society. This two-part test must be applied objectively and on the basis of evidence.

[39] In my view, this test applies perfectly and must be applied in the context of the determination of the essential element relating to the disgraceful conduct.

[40] The Supreme Court reiterated the validity of this approach in *R v Katigbak*, 2011 SCC 48. At paragraph 66 of this decision, the court wrote:

A majority of the Court rejected the “moral views of the community” approach to “undue” and replaced it with a norm of significant objectively ascertainable harm in *R. v. Labaye*, 2005 SCC 80, [2005] 3 S.C.R. 728. McLachlin C.J. for the majority reasoned:

[O]ver time, courts increasingly came to recognize that morals and taste were subjective, arbitrary and unworkable in the criminal context, and that a diverse society could function only with a generous measure of tolerance for minority mores and practices. This led to a legal norm of objectively ascertainable harm instead of subjective disapproval. [Emphasis added; para. 14.]

In addition to the requirement of objectively ascertainable harm, the Court in *Labaye* held that the conduct of the accused must pose a “significant risk of harm” (para. 30) or create a level of harm that is “incompatible with the proper functioning of society” (para. 24).

[41] In my humble opinion, this approach must be fully applicable in the context of this offence, given that it is up to the court to make a very similar determination on this issue, at first glance, by reference to moral values.

[42] So, having instructed myself as to the presumption of innocence and the standard of proof beyond a reasonable doubt, I will now turn to the questions in issue.

[43] First, the court found that the prosecution has demonstrated beyond a reasonable doubt the essential elements relating to the date and place of each offence. Essentially, the testimony of Sergeant Morel, the complainant and Master Corporal McCord is consistent on this point and leaves no doubt that these offences were committed between April 30 and May 2, 2007, at 45 Sacré-Cœur Blvd. in Gatineau, Quebec, as alleged in the charge sheet.

[44] The evidence submitted by the accused and the prosecution rely essentially on testimonial evidence. Considering the time that has elapsed since the incident, i.e. seven years, it appears from this evidence that it presents a significant challenge for this court, more of reliability than credibility, as counsel for the defence so aptly noted.

[45] Sergeant Morel testified in a calm and direct manner. He answered the questions without problem, to the best that his memory could allow. He stated to the court that he was indeed there on the dates indicated in each charge, but that he has no memory of interacting in any way with the complainant. He states that it is very possible that he might have been in her presence and, if that was the case, he would never have conducted himself in the manner that is alleged against him before this court. Essentially, he categorically denies having sexually assaulted or demonstrated disgraceful conduct toward the complainant.

[46] How can the accused state, without batting an eye, that he has not committed the offences alleged if he has no memory of an encounter with the complainant and he admits that it is entirely possible that he had met her? The accused relies on his professionalism to state that he would never do such a thing but he did not submit to the court any example of such professionalism other than his own general and personal statement on this issue. In fact, he attempted to provide evidence of a good reputation without really providing tangible evidence of this.

[47] On the basis of this one statement, the court is not prepared to enter an acquittal on all charges. However, the court must point out that in the context of the prosecution's evidence, the accused's testimony, even if the court arrives at the conclusion that it does not believe him, raises sufficient reasonable doubt to enter an acquittal on all charges.

[48] Indeed, his testimony clearly reveals that the complainant had great difficulty in associating him with the incident of 2007, while she was in Sergeant Morel's presence in 2012. Sergeant Morel pointed out in his testimony that between October 2011 and May 2012, he worked in the same environment as the complainant and that he interacted directly with her in a program related to the promotion of the Canadian Forces mascot with the Canadian public. The complainant never referred to this period and she testified that in May 2012, an element of a conversation with the accused during her work triggered something in her memory that she had to confirm with one of her friends who was a witness of the incident of 2007, that Sergeant Morel was indeed the one who was involved in the incident of 2007 with her.

[49] The accused's testimony casts doubt on the complainant's ability to have an independent memory of the events and to be able to identify on her own Sergeant Morel, who appeared before this court as the person who purportedly committed the alleged offences.

[50] In addition, the complainant's testimony is also very problematic in terms of reliability, even if the court sees no problem with her credibility. Indeed, she clearly

stated to the court that after 2008, she had moved on from the incident in question and that she had not discussed it until the time that her memory indicated in 2012 that Sergeant Morel, with whom she was working at that time, was probably the same individual involved in the incident of 2007.

[51] As for the incident itself, she had an idea of the words said by Sergeant Morel and of the contact that had been made at the same time. However, she is unable to describe what uniform clothing she was wearing the day of the incident, how Sergeant Morel and Master Corporal McCord were dressed to perform their task and the exact manner in which the contact occurred. She was not able to provide a detailed description of the contact, such as with which hand Sergeant Morel allegedly touched her, whether he was on the left or right side, the exact side he used to place the microphone and in which pocket she put the transmitter.

[52] The other witness called by the prosecution, Master Corporal McCord, somewhat corroborated Sergeant Morel's statement that he allegedly did not touch the complainant. Indeed, Master Corporal McCord described the incident differently and only the statements of Sergeant Morel have some similarity with the complainant's testimony.

[53] Master Corporal McCord described the incident as having occurred during the coffee break after an impromptu press conference ("scrum") involving the complainant, which is totally different from the circumstances described by the complainant herself. He confirmed that the accused would never have touched the complainant. He also confirmed that she contacted him in 2012 to discuss the identity of Sergeant Morel.

[54] He also mentioned that the conversation between Sergeant Morel and the complainant lasted from three to five minutes. During this entire conversation, statements that were harassing or of a sexual nature were allegedly made by Sergeant Morel. However, Master Corporal McCord was able to report only one sentence in this entire conversation and during which it appeared that the complainant was agitated and in shock.

[55] This testimony also has the effect, in the same way as that of Sergeant Morel, of casting doubt on the reliability of the complainant's testimony.

[56] Finally, the complainant indicated that she had discussed the incident at the time with her superiors. However, the prosecution did not produce witnesses that could have provided details on the exact content of these conversations. However, since it was not contradicted, the court retains that the complainant raised this aspect of the facts in her testimony to illustrate her concern that the impact of such an incident could have had on the evaluation of her performance and the perception that her superiors had and not on the psychological effect that it could have had on her.

[57] In short, Sergeant Morel's testimony is sufficient to cast doubt on the essential element of identity, which concerns the three charges.

[58] With regard to the charge of sexual assault, the court is of the view that the prosecution has not discharged its burden of proof as to the existence of physical contact. Further, if physical contact had been proven beyond a reasonable doubt, the court would still have doubted that the alleged contact was intentional, considering the less than reliable testimony of the complainant.

[59] Regarding the contact between the complainant and the accused allegedly being of a sexual nature, the meaning to be given to the statements is somewhat uncertain, considering what was reported by the prosecution's witnesses and, in either case, the court is of the view that the prosecution did not prove that they were intended to violate the sexual integrity of the complainant or that they had the effect of degrading or diminishing the complainant for the sexual pleasure of the accused.

[60] As to the offence of disgraceful conduct, with respect to the essential element to the effect that the accused's conduct was disgraceful, the court must note a lack of evidence from the prosecution on the two parts retained by the court. First, it was not demonstrated beyond a reasonable doubt regarding the first part, that it causes harm or presents a significant risk of harm to a value reflected in and formally endorsed through the Constitution or similar fundamental laws and, second, that if such harm was proven, the harm or risk of harm is of a degree that is incompatible with the proper functioning of society.

[61] I would add that in the perspective where it is rather the approach relating to the moral values of society that the court should have adopted, it is interesting to note a total absence of proof by the prosecution on this aspect, which would not have left the court any choice but to conclude that there is reasonable doubt on this same aspect. Indeed, at the very least, the prosecution would have had to establish, in applying an objective standard, proof of moral values involved to allow the court to assess objectively the accused's conduct in the circumstances.

[62] In conclusion, the court is of the view that it is possible that the offences alleged against the accused were committed but that the prosecution did not discharge its burden of proving several of the essential elements of each offence, considering that the accused's testimony casts reasonable doubt as to the reliability of the complainant's testimony and that this testimony in itself, seems not to be very reliable to the court. The court wishes to point out that it does not affect the credibility of the complainant, since she testified directly and sincerely, as did Master Corporal McCord, in these proceedings.

FOR ALL THESE REASONS, THE COURT

[63] **FINDS** Sergeant Morel not guilty of the three charges appearing in the charge sheet.

Counsel:

Major A.-C. Samson, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major J.L.P.L. Boutin, Defence Counsel Services
Counsel for Sergeant Morel