COURT MARTIAL

Citation: *R v LeBlanc,* 2012 CM 3005

Date: 20120421
Docket: 201215

Standing Court Martial

Canadian Forces Base Edmonton
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Ex-Corporal T. LeBlanc, Accused

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

Restriction on publication: By court order made under section 179 of the *NationalDefence Act* and section 486.4 of the *Criminal Code*, information that could disclosethe identity of the persons described in this judgement as the complainants shallnot be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

[1] Corporal LeBlanc is charged with one offence punishable under section 130 of the *National Defence Act* for a sexual offence on M.G. contrary to section 271 of the *Criminal Code*.

[2] The facts on which this count is based relate to events that took place on 15 April 2008, mainly at the building where both complainant's and accused's rooms were located at that time. More specifically, the alleged sexual assault would have occurred on that evening in the complainant's room.

[3] The trial's hearing took place from 16 to 19 April 2012. Five witnesses were heard during this trial, including the accused, which make it mainly as a matter of credibility to be assessed by the court in accordance with the principles set out by the Supreme Court of Canada in the decision of *R* v *W (D)*, [1991] 1 SCR 742.

[4] The evidence before this Court martial is composed essentially of the following facts:

a. The testimony heard; in the order of their appearance before the court, the testimony of M.G., the complainant in this case, Mrs Tambling, Corporal LeBlanc, the accused in this case, Corporal Sebo and Corporal Stuart;

b. Exhibit 3, an agreed statement of facts regarding events that occurred on 16 April 2008, which is the day after the alleged incident;

c. Exhibit 4, an overall second floor plan of a building on Canadian Forces Base Edmonton and an enlarged room plan of complainant's room. This document was entered in evidence by consent; and

d. The judicial notice taken by the court of the facts in issues under Rule 15 of the Military Rules of Evidence.

[5] Corporal LeBlanc does not dispute that he had sexual intercourse with M.G. on 15 April 2008 in her room on Canadian Forces Base Edmonton, province of Alberta. Essentially, according to his testimony and representations made by his defence counsel and the prosecutor, the only essential element that should be the subject of an analysis by this court is if the complainant consented to the force intentionally applied by the accused.

[6] From what the court has heard and saw during this trial, there is undisputed evidence that I propose to review first. It is clear that the complainant and the accused knew each other prior to the day the sexual intercourse occurred, because they've seen each other on various occasions in the building, identified by witnesses as the shacks, and they had a number of conversations.

[7] It is also not disputed that on 15 April 2008, the complainant, while coming back from work in the early afternoon, stopped by the room of Corporal LeBlanc for inviting him to accompany her while she drove to bring back pants to a friend and provide a ride to somebody else. The accused declined first the invitation and later accepted it. While stopping at the house of the person named Kent to who she gave a ride, it is also not contended for that the latter left both of them alone for unexplained reasons further to having put some kind of pornography movie, which both described as a very strange, unexpected and unusual situation. This set of circumstances led them to leave Kent's house and go pick up food on their way back to the shacks.

[8] There is no controversy about the fact that Corporal LeBlanc consumed beer on various occasions throughout the day of 15 April 2008, that he made several stops at the

complainant's room during the evening on that day, which for some of them two of the complainant's friends were there. It is also not disputed that the accused showed up at some point during the evening with a sore and bruised hand because he punched the wall following an argument he had over the phone with a girl from his hometown. While in presence of her two friends, she took care of his hand by putting ice on it. Her friends left her room some time after, but one of them checked if the complainant would be able to handle the situation, to which the latter responded positively. Sexual contact occurred between both the complainant and the accused, and once stopped, Corporal LeBlanc inquired at some point in time if the complainant was okay and that he left her room.

[9] Some time after that contact, because she was upset, the complainant contacted her friend who came over and, further to a request, threw out the complainant's clothing she wore during the sexual contact with the accused.

[10] On the morning of 16 April 2010, the complainant met a military police investigator, which led to the arrest of Corporal LeBlanc. In the afternoon, a nurse specializing in sexual assault cases performed a medical examination of the complainant. A service offence for sexual assault was laid and preferred against the accused. A General Court Martial convicted the accused in January 2010. The accused appealed the conviction. In October 2011, the Court Martial Appeal Court allowed the appeal and ordered a new trial.

[11] Before this court provides its legal analysis, it's 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 principle fundamental to all criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[12] 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 guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

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

[14] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or 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 jus-

tice. In *R v Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that 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 no way indicative of his or her guilt and I will add that the only charge that is faced by an accused person is the one that appear on the charge sheet before a court.

[15] 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.

[16] 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 an accused person, in this case, Corporal LeBlanc, 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.

[17] 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.

[18] 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.

[19] 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' opportunity to observe; a witness' reasons to remember, like, 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.

[20] 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' testimony consistent with itself and with the uncontradicted facts?

[21] 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 tint a witness' entire testimony.

[22] 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] As the rule of reasonable doubt applies to the issue of credibility, the court is required to definitely decide in this case first on the credibility of the accused, and to believe or disbelieve his evidence. It is true that this case raises some important credibility issues and it is one of those cases where the approach on the assessment of credibility and reliability expressed by the Supreme Court of Canada in *R v W (D)* must be applied, because the accused, Corporal LeBlanc, testified. As established in that decision at page 758, the test goes as follows:

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

[24] This test was enunciated mainly to avoid for the trier of facts to proceed by establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word by word as some sort of incantation (see *R* v *S (W D)*, [1994] 3 S.C.R. 521, at 533). The pitfall that this court must avoid is to be in a situation appearing or in reality as it chose between two versions in its analysis.

[25] Section 271 of the *Criminal Code* reads, in part, as follows:

> SEXUAL ASSAULT
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> 271. (1) every one who commits a sexual assault is guilty of

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

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

> Sexual assault is an assault, within any one of the definitions of that concept in s. 244(1) [now section 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.

[27] Paragraph 265(1) of the *Criminal Code* reads, in part, as follows:

> ASSAULT
>
> 265. (1) A person commits an assault when
>
> (*a*) without the consent of another person, he applies force intentionally to that other person, directly or indirectly.

[28] In *R v Ewanchuck*, [1999] 1 SCR 330, it was established that a conviction for sexual assault requires proof beyond a reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*.

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

[30] 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. It involves knowledge of what is going to happen and voluntary agreement to do it or let it be done.

[31] 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 is going to happen and a decision by her, without the influence of force, threats, fear, fraud or abuse of authority, to let it occur.

[32] 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 and it contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to a lack of consent on the part of the person touched.

[33] Then, the prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet. The prosecution also had to prove the following additional elements: the fact that Corporal LeBlanc used force directly or indirectly against the complainant; the fact that he used intentionally the force against the complainant; the fact that the complainant did not consent to the use of force; that Corporal LeBlanc knew, or was reckless of or wilfully blind to, a lack of consent on the part of the complainant; and the fact that the contacts made by him on the complainant were of a sexual nature.

[34] In addition to having instructed myself as to the onus and standard of proof, I have also instructed myself that there is no legal requirement for corroboration of the complainant's story. Finally, I have reminded myself that consent is entirely subjective and that it requires the "voluntary agreement of the complainant to engage in the sexual activity in question" pursuant to section 273.1 of the *Criminal Code*.

[35] Having instructed myself as to the presumption of innocence, the reasonable doubt, the onus and the required standard of proof, I will now turn to the questions in issue put before the court and address the legal principles.

[36] There is three main issues for the court to decide in this trial:

a. Whether or not the prosecution has proven beyond a reasonable doubt that the complainant did not consent to the force that Corporal LeBlanc intentionally applied;

b. Whether or not the prosecution has proven beyond a reasonable doubt that Corporal LeBlanc knew that the complainant did not consent to the force that he intentionally applied; and if the court concludes that the prosecution succeeded on those two essential elements, then;

c. Whether or not the accused could have an honest but mistaken belief that she had consented.

[37] Concerning the other essential elements of the offence, the accused conceded and admitted, through his own testimony and his defence counsel, that they were established by the prosecution beyond a reasonable doubt, which means that, in addition to the identity, date and place, he admitted touching occurred between him and the complainant, that this contact was of a sexual nature, and that he touched her intentionally.

[38] Now, the court is applying the test enunciated in the Supreme Court decision of *R v W (D)*, in order to determine if it can find any reason in the evidence considered as a whole to disbelieve the accused in his testimony, and more specifically on the issue of absence of consent by the complainant concerning the sexual contacts and on the question of knowledge by the accused of such absence of consent by the complainant.

[39] Corporal LeBlanc testified in a straightforward and relatively calm manner. His testimony was not necessarily consistent and on some issues he testified, it has raised some concerns that the court must address.

[40] Corporal LeBlanc told the court during his examination-in-chief that only after a period of seven days where he had met the complainant from 10 to 20 times for a period of 5 to 10 minutes each time, he had developed a friendly relationship with her. On cross-examination, he went further by characterizing it as a close relationship with her. However, when asked by the prosecutor, he couldn't identify any specific or special bond that would have helped the court to understand why he could have developed such close friendship on a so short period of time, such as the one he had with his roommate at that time, and still has. Reality is that he did not know much of her personal life, including about her sexual orientation. It looked like the accused wanted to make the sexual intercourse he had with the complainant appear as a normal step, considering the close friendship he claimed they had at that time. However, Corporal LeBlanc's testimony on their factual relationship did not fit with the qualification he gave to it.

[41] The accused told the court that the sexual orientation of the complainant was never discussed and that he had just an impression at the time, and still under this impression, that she was confused about her sexual orientation. By admitting his knowledge about the complainant's confusion, he confirmed to the court that he knew that she could have some reluctance to have sexual intercourse with a man. However, despite what he affirmed to be a close friendship with the complainant, his testimony revealed that he never did pay real attention to that factor. Then, it indicates to the court that in the context where he didn't find the complainant physically attractive, the accused had a very selfish perspective concerning his own sexual needs.

[42] Corporal LeBlanc testified on his consumption of alcohol on the day of the incident. He was transparent about the number of beers he bought and consumed on that day, which is 11 on a period of about 10 hours. However, his position was strikingly different between the beginning and the end of his testimony. While he affirmed during his examination-in-chief that he was sober, which means not affected by alcohol, during all the day long, he changed his position during his cross-examination, further to his admission that he was slightly impaired by his consumption of alcohol and that he might have been more uninhibited in the course of the evening. The court does think that he tried to minimize or downplay his level of intoxication the night of the incident, as it is for his ability to assess and making personal decisions.

[43] During the examination-in-chief, the accused told the court that he was not depressed but probably needed cheering up. However, on cross-examination, he told the court that he was bored, he was feeling down a little bit and that there was a lot of things going on, a lot of emotional turmoil caused by the recent loss of two friends, one in Afghanistan and another one who committed suicide on the base, and also because he was harassed by his girlfriend on the phone and this relationship ended on that day by the fact that they broke up.

[44] Finally, the accused's description of the sexual intercourse he had with the complainant, which he described as very consensual and pleasant, contrasts dramatically with the uncontradicted evidence concerning the reaction of the complainant after that event, her call for help to a friend, the disposal of her clothing she wore during the incident and the information received by the CFB Edmonton Military Police in the early morning hours of 16 April 2008 that she was sexually assaulted.

[45] Those issues lead the court to conclude that the testimony of Corporal LeBlanc changed on some key questions over time and it contained some important contradictions. Then, applying the test enunciated in the Supreme Court decision of *R v W (D)*, and having considered the evidence introduced before this court as a whole, it is the opinion of the court that the accused's evidence must be disbelieved about the consent of the complainant concerning the sexual contact and intercourse they had, and also concerning that he knew that she was not consenting.

[46] Now, the court is turning itself to the second step of the test enunciated in the Supreme Court decision of *R v W (D)*. Despite the court concluded that the testimony of Corporal LeBlanc must be disbelieved, what is the impact of it on the evidence considered as a whole.

[47] Parts of the testimony of the accused, even the court said that he must be disbelieved on some issues, bring some concerns about the complainant's testimony. While qualifying the accused as being an acquaintance, meaning by this that she did not know much about him, she invited him to spend some time, go with her in different places on the afternoon, she had no difficulty to entrust her bike to him with her keys to have it put in her locker, to give him some of her furniture and to stay with him in her room alone, late in the evening.

[48] The court understands clearly that the complainant is a very kind person who is ready to help people but her description of what she did with the accused on that day prior to the sexual contact they had, indicates to the court that her kindness was going beyond the desire of simply helping somebody that she didn't know well. What she described to the court is a situation where she was personally concerned about somebody she trusted as something as a friend at that time but that she does not want to hear about since the incident. The factual foundation she provided to the court does not fit well with her affirmation that the accused was simply some kind of acquaintance.

[49] In addition, it is important to mention that the complainant testified and it appears to the court that her recollection of the events was heavily influenced by the passage of time, as it was for all other witnesses in this trial, including the accused. She expressed the fact that going through this incident for a second time in court was traumatizing her again, especially in the context of her PTSD diagnosis in relation to that incident, and that she has no clear desire to remember.

[50] During her cross-examination, while evidence was put to her by the defence counsel in order to contradict or refresh her memory, she clearly stated many times that

she did not dispute the evidence she provided in the past but as it was for today, she could not simply recall some things for which questions were put to her. As a result, she could not simply remember.

[51] As an illustration, she had great difficulty to describe the set-up of her room, where was located her bed and what size it was. Also, she had some difficulty to remember if she had complete sexual intercourse with the accused and to what extent it occurred. While she couldn't remember when she saw him for the first time and couldn't tell for how long she knew him prior to event, the testimony of the accused demonstrated that they knew each other for about a month and that they haven't seen each other for more than a week at the time of the incident.

[52] As stated by both counsel, the complainant was a difficult witness, very emotional, some time incoherent, frustrated, argumentative, aggressive and with an affected memory. The inconsistencies in her testimony, combined with her incapacity to remember about some issues make her an unreliable witness.

[53] Concerning the three other witnesses, the court is ready to consider all of them credible and reliable. They testified in a clear and straightforward manner. It is clear that they had no interest in the outcome of the trial. They clearly told the court what they knew or not.

[54] After having considered the evidence as a whole, even if disbelieved, this court is left with a reasonable doubt by the testimony of Corporal LeBlanc on the issue of consent to the force intentionally applied by the accused on the complainant and on his knowledge that the complainant did not consent to the force that he intentionally applied for the incident before this court. His testimony brought the court to conclude that the complainant's evidence, being the cornerstone of the prosecution's case, is unreliable and left it with some doubts as to her credibility.

[55] Finally, I would add that notwithstanding not considering the accused testimony, the court would also have found that the prosecution had not proven beyond a reasonable doubt that the complainant did not consent to have sexual contact and intercourse with the accused. In itself, the testimony of the complainant is not deemed reliable by the court.

[56] Then, the court does not have to rule on the question of honest but mistaken belief. However, it is clear for the court that if it had accepted the complainant evidence, it would have been difficult to say for the accused that he had taken reasonable steps to ascertain that she was consenting.

[57] Consequently, having regard to the finding of the court concerning the essential elements of section 271 of the *Criminal Code*, especially the absence of consent from the complainant and the accused knowledge that the complainant did not consent to the force that he intentionally applied, and the application of those elements to the facts of this case, the court is not satisfied that the prosecution has discharged its burden of proof by

establishing beyond a reasonable doubt the fact that the accused did sexually assault or assault M.G..

FOR THESE REASONS, THE COURT:

FINDS Corporal LeBlanc not guilty of the first and only charge on the charge sheet.

Counsel:

Major D. Hodson and Major C.E. Thomas, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Captain M. Pecknold and Captain A-C. Samson, Directorate of Defence Counsel Services
Counsel for ex-Corporal T. LeBlanc