Citation: *R. v. Corporal B.J. Davidson*, 2007 CM 4016

Docket: 200718

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE BORDEN

Date: 2 June 2007

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

HER MAJESTY THE QUEEN
v.
CORPORAL B.J. DAVIDSON
(Accused)

FINDING
(Rendered Orally)

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[1] The accused, C13 310 877 Corporal Davidson, was charged with having committed two offences. The court having found that a no *prima facie* case had been made out in respect of charge No. 2, Corporal Davidson was found not guilty of that charge of drunkenness. Corporal Davidson now stands accused of one charge under section 130 of the *National Defence Act* of having committed a sexual assault contrary to section 271 of the *Criminal Code of Canada*.

[2] The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt every element of this alleged offence. The prosecution argues that Corporal Davidson committed the alleged sexual assault by grabbing the complainant on two occasions by the waist and by rubbing his pelvic area on her buttocks area, or in other words by grind dancing with her. He would have done this on two occasions for a few seconds and without the consent of the complainant. Finally, the accused would have grabbed the complainant's buttocks with his hands without the complainant's consent. The accused asserts that this alleged offence did not occur because there was never any physical contact between the accused and the complainant.

[3] The evidence before this court martial is composed essentially of the following: Judicial notice, testimonies, and exhibits. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. The

testimonies heard in order of their appearance before the court are those of Ms Betty Newman, Corporal Davidson, Corporal Hopkins, Corporal Squire, and Corporal Leduc. Two exhibits were entered by the prosecution by consent. Exhibit 3 is a photograph of the dance area of the Huron Club and Exhibit 4 is a floor plan of the Huron Club.

[4] The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt: The identity of the accused and the date and place as alleged in the charge sheet; that the accused applied force directly or indirectly to the complainant; that the accused intended to apply force to the complainant; that the complainant did not consent to the application of force by the accused; that the accused knew the complainant did not consent; and that the assault was of a sexual nature.

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

[6] It is fair to say that the presumption of innocence is most likely the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence.

[7] In matters dealt with under the Code of Service Discipline, as with cases dealt with under Canadian criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[8] 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. A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence.

[9] The term "beyond a reasonable doubt" has been used for a very long time, it is part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or

frivolous doubt. It is not a doubt based on sympathy or prejudice; it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

[10] In *R. v. Starr,* [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court of Canada, held that, and I quote:

> ... [A]n 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....

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 Davidson, beyond a reasonable doubt. To put it in perspective, if the court is convinced, or would have been convinced, that the accused is probably or likely guilty then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[11] 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.

[12] It is not unusual that some evidence presented before the court may be contradictory, often witnesses may have different recollections of events. The court has to determine what evidence it finds credible. Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimonies of witnesses. For example, a court will assess a witness' opportunity to observe, a witness' reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and therefore understandably more difficult to recollect? Does a witness have 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.

[13] 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? 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. The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. A court will accept evidence as trustworthy unless there is a reason rather to disbelieve it. A court may accept all, part, or none of the evidence presented by a witness.

[14] 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 him. 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 expressed by the Supreme Court of Canada in *R. v. W.(D.),* [1991] 1 S.C.R. 742, can be applied because the accused, Corporal Davidson, testified. As established in that decision, at page 758, the test to be followed is as such:

> First, if you believe the evidence of the accused, obviously you must acquit.
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> 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, if 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.

[15] Justice Sopinka, writing for the minority—correction, for the dissidents, in *R. v. Haroun*, a 1997 Supreme Court of Canada decision which can be found at 115 C.C.C. (3d) 261, offered further guidance on how finders of fact must use the test enunciated in *R. v. W.(D.)*. He stated at paragraphs 12 to 15 of the *Haroun* decision that:

> Even if a judge or jury does not believe the accused's testimony, that testimony may, when considered in the context of the evidence as a whole, raise a reasonable doubt in the judge's or jury's mind. This fundamental principle is set out in *W.(D.)* ... where Cory J. stated the following ...
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>> Specifically, the trial judge is required to instruct the jury that they must acquit the accused in two situations. First, if they believe the accused. Second, if they do not believe the accused's evidence but still have a reasonable doubt as to his guilt after considering the accused's evidence in the context

> of the evidence as a whole. See *R. v. Challice* (1979), 45 C.C.C. (2d) 546....
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> In *R. v. Challice* ... Morden J.A. explained ... that this principle applies to all the defence evidence:
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> > Understandably, a jury have to give careful consideration to issues of credibility when deliberating upon their verdict, and with respect to various pieces of evidence they may have differing views: total acceptance, total rejection, or something in between. An *effective and desirable way of recognizing this necessary part of the process, and putting it to the jury in a way that accurately comports with their duty respecting the burden and standard of proof, is to instruct the jury that it is not necessary for them to believe the defence evidence on a vital issue—but that it is sufficient if it, viewed in the context of all the evidence*, leaves them in a state of reasonable doubt as to the accused's guilt ...

Justice Sopinka continues at paragraph 14:

> [14] In *W.(D.)*, the accused testified that the incidents described by the complainant had never occurred. There was a simple contest of credibility between the accused and the complainant. No one else testified for either the Crown or the defence. It is therefore not surprising that Cory J. mentioned only the accused in his suggested charge ... However, it is clear from *Challice* and *Morin* that the principle stated by Cory J. also applies to other defence witnesses. Whether the testimony is that of the accused or another defence witness, it is always possible that it will raise a reasonable doubt in the mind of the jury even if the jury does not necessarily believe it. This principle is based on the Crown's duty to prove that the accused is guilty beyond a reasonable doubt. The accused has nothing to prove either by him- or herself or through the defence witnesses.
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> [15] Cory J.'s comments in *W.(D.)* thus apply not only to the testimony of the accused, but to the defence evidence as a whole. Accordingly, the trial judge must instruct the jury, first, that if they believe the testimony of the accused or the defence witnesses, they must acquit. Second, even if they do not believe the testimony of the accused *or the defence witnesses*, if they have a reasonable doubt after considering the evidence as a whole, including the testimony of the accused and the defence witnesses, they must also acquit.

[16] The Supreme Court of Canada has also indicated in R. v. Avetysan, I'll spell, A-v-e-t-y-s-a-n, (2000) 149 C.C.C. (3d) 77, that a judge giving a charge to a jury should not fall:

> ... [I]nto the trap of suggesting that the jury had to resolve the factual question of what happened....

The court further stated at paragraph 21 of that decision, and I quote:

> ... The jury was faced with two irreconcilable versions of events. It may have seemed to the jury that it bore the responsibility for figuring out "which version" to believe. It may logically have seemed an "either/or" proposition. It was important that the trial judge focus the jury's attention on the third alternative given in *W.(D.)*—that the accused could be acquitted even if their evidence was not believed but a doubt remained. The jury may have been left with the impression that it had to choose which competing version of events it would accept. The jurors should have had the third option ... left to them.

It is clear from this passage that a finder of fact is not expected to chose a version of events over another, but to determine if the evidence he or she accepts raises a reasonable doubt as to the guilt of the accused.

[17] A Nova Scotia Court of Appeal provides further guidance in *R. v. Lake*, (2005) 203 C.C.C. (3d) 316. It warns of the dangers of comparing the credibility of Crown witnesses against the credibility of the accused in paragraphs 19 to 22. And I quote:

> [19] At this point it is important to recall the essential principles which underlie the *W.(D.)* instruction. A trial judge is, of course, fully entitled to believe the Crown witness and disbelieve the accused. But she must respect the burden of proof. When the trial pits the credibility of the Crown witnesses against the credibility of the accused, the burden of proof is at risk in two ways.
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> [20] First, a verdict based on a choice of whom to believe may ignore the concept of reasonable doubt ...
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> [21] Second is the concern which arises here. The trial judge may discount the accused's testimony just because she has believed the Crown witnesses. The defence is neutered in the starting gate regardless of how the accused presents or testifies. The accused has not really been disbelieved. He has been marginalized. So it is impermissible to reject the accused's testimony solely as a consequence of believing the Crown witnesses. The trier of fact should address both whether the Crown witnesses are believed and whether the accused is disbelieved. This is the rationale for *W.(D.)*'s first question.
>
> [22] The analysis of both the accused's testimony and the Crown's evidence is done with full knowledge of all the evidence that has been adduced at the trial. The first *W.(D.)* question does not vacuum seal the accused's testimony for analysis. In *W.(D.)* ... Justice Cory cited *R. v. Morin*, [1988] 2 S.C.R. 345 ... which, at pp. 354 -55, 357-58, rejected the piecemeal analysis of individual segments of evidence for reasonable doubt. The point of *W.(D.)*'s first question is not to isolate the accused's testimony for assessment, but to ensure

> that the trier of fact actually assesses the accused's credibility, instead of marginalizing it as a lockstep effect of believing Crown witnesses.

[18] Therefore, the case law surrounding the proper application of the test elaborated in *R. v. W.(D.)* clearly indicates that evidence presented by the accused, which consists of his testimony and other evidence presented by the accused, must be evaluated in light of the evidence as a whole. This test does not lead to a choice between the evidence presented by the Crown and the evidence of the accused, but simply to the question of whether the evidence accepted by the finder of fact leaves the finder of fact with a reasonable doubt as to the guilt of the accused. Or in other words, the onus is on the prosecution to prove the offence beyond a reasonable doubt and not on the accused to prove that he or she did not commit the offence.

[19] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before this court. There is no disagreement between the prosecution and the defence on the issues of time and place of this alleged offence or on the identity of the alleged offender. I find that the date, location, and identity of the accused have been proven beyond a reasonable doubt. The critical questions in issue, based on the evidence put before the court, is whether Corporal Davidson touched the complainant as alleged by the prosecution and whether this physical contact constituted a sexual assault.

[20] In her closing address the prosecutor said the evidence seemed to indicate three or four versions of the events. The prosecutor did mention that Ms Newman's evidence is uncorroborated and that all the other witnesses were dancing on a somewhat crowded dance floor and that they were all drinking except Corporal Leduc. The prosecution mentioned that the witnesses had discussed the situation that evening and on the next day. The prosecution asserts that the complainant is a credible witness who answered in a straightforward and honest manner and that certain discrepancies were caused by the passage of time. Prosecution also asserts that the complainant's defensive approach during her cross-examination was due to the fact that she felt her testimony was not believed and that this demeanour is not indicative of untruthfulness.

[21] The defence argues this evidence provides this court with a reasonable doubt as to this alleged contact between the accused and the complainant. The court must decide if, based on the evidence accepted by the court, the prosecution has proven beyond a reasonable doubt that Corporal Davidson did commit a sexual assault on the complainant by pressing his pelvic area on her buttocks on two occasions and by grabbing her buttocks with his hands.

[22] I will now apply the test found in *R. v. W.(D.)*. Concerning the first question; the court finds reasons to doubt the testimony of Corporal Davidson. He is not considered a credible and reliable witness since he was under the influence of alcohol at the time of the alleged offence. He had consumed approximately four to five

beers by the time the alleged offence occurred and Corporal Leduc did indicate in her statement to the military police that he was really drunk that night.

[23] Corporal Davidson's testimony concerning the way he was escorted off the dance floor is ambiguous. Although he testified during his examination-in-chief that Ms Newman basically escorted me off the dance floor towards the coatroom, towards the entrance, he stated during his cross-examination that he was not escorted by anyone to the coatroom but walked there by himself. Corporal Leduc testified that Ms Newman had gotten a coworker to escort Corporal Davidson off the dance floor. This ambiguity is consistent with Corporal Davidson's approach of denying any possible wrongdoing on his part. Although Corporal Davidson states that he never said anything to Ms Newman, Corporal Leduc testified that Corporal Davidson would have answered Ms Newman before putting his beer down. Corporal Hopkins and Corporal Squire could not say if Corporal Davidson had said anything to Ms Newman.

[24] Further, during cross-examination, although he had initially agreed that he was mocking the complainant by dancing behind her, he reversed his stance on that issue by stating that he was just joking around and became argumentative with counsel. Also during his cross-examination he did not admit initially that he had told his course-mates that he believed he had heard someone at the Huron Club say that he had touched Ms Newman's breast when he was initially asked what he had told them upon his return to quarters, he only stated that he had told them he thought the problem was the fact that he had not given his military ID to the club staff. In cross-examination, when prompted further, he admitted telling his course-mates about the allegation of touching her. Therefore, the court does not believe his testimony.

[25] Now, the court is turning itself to the second step of the test elaborated in *R. v. W.(D.)*. Corporal Hopkins is not deemed a credible and reliable witness. He admitted that he had consumed approximately five or six gin and tonic in a matter of approximately three hours. During his cross-examination, when asked where Corporal Davidson would have put his beer, he admitted that he would do his best to recollect, but that event had taken place over a year ago. Considering the amount of alcohol he had ingested and his statement concerning the passage of time the court finds it difficult to believe that his description of his continual observation of Corporal Davidson can be found to be reliable. Also, Corporal Squire and Corporal Leduc both testified that Corporal Hopkins was on the dance floor for a short period of time. Corporal Leduc even stating that Corporal Hopkins was on the dance floor for only a couple of songs. Corporal Hopkins seemed to favour Davidson in his testimony. His immediate response that he "did not see a couple grinding" if that—correction, "if that is what you asked me" when asked by the prosecutor if he had seen anyone touching on the dance floor seemed to indicate he wanted to get a specific message across although this term had not been used in either the examination-in-chief or the cross-examination.

[26] Corporal Squire is deemed a credible witness, but not a reliable witness. She too was under the influence of alcohol at the time of the alleged offence. She had drunk approximately five beers between 1830 hours and 2300 hours. She admitted that she stopped watching Corporal Davidson at the time of the second incident. It does not appear from her testimony that she was paying particular attention to Corporal Davidson during the evening.

[27] I find that Corporal Leduc is a credible and reliable witness for the most part although her evidence is influenced by her perception of the complainant and by her reticence to provide certain information that might reflect negatively on the accused. She did not consume alcoholic beverages on the evening of 16 March. Although, she did answer most questions in a straightforward manner, she was reticent to admit that Corporal Davidson was drunk that night although she had stated it in her statement to the military police. She also did not seem to appreciate Ms Newman's attitude towards Corporal Davidson and she did not agree with this attitude. She testified that she was not always looking at Corporal Davidson during the evening.

[28] Although every witness for the accused indicted that they did not see any contact between Corporal Davidson and the complainant this in itself does not categorically mean that no contact occurred, it means that they did not see any contact. Corporal Leduc and Corporal Squire did not look at Corporal Davidson continually during the time period in question. The court does not believe that Corporal Hopkins can definitely say that he continually observed Corporal Davidson without any interference from other dancers on the dance floor or that he never diverted his attention from Corporal Davidson during the complete time period of the first two incidents.

[29] After having considered this evidence, this court is still not left with a reasonable doubt by the evidence presented by the defence.

[30] Finally, I will now apply the last step of the test. More specifically, I must ask myself the following question. On the basis of the evidence which I do accept am I convinced beyond a reasonable doubt by that evidence of the guilt of the accused?

[31] The evidence indicates that Corporal Davidson was under the influence of alcohol and was acting in a silly or "dorky" manner. He was approached on two occasions by Ms Newman because he had a beer in his hand when he was dancing. On both occasions she told him to put his beer down. On both occasions Corporal Davidson put his beer on the pillar in the corner of the dance floor and then proceeded to dance behind Ms Newman. At this point the evidence presented by the prosecution and by the defence is at opposite ends of the spectrum.

[32] Ms Newman was the only witness for the prosecution. She had been employed by the Huron Club for the previous six months, where she had initially been

employed as a bar labourer and then in security. She had received some training in the field of security in the early 1990's at Richard's Security in New Brunswick and had received some training at the Huron Club although the court was not provided with any description of either training. This was her first job in a bar. It would thus appear that she was relatively inexperienced in the field of security.

[33] There were a total of six persons employed in security at the Huron Club that evening. Her spouse was working as a bar labourer that evening. She described two incidents where the accused would have grabbed her by the waist and would have pressed his pelvic area to her buttocks. The first incident would have lasted about five seconds and the second incident would have occurred approximately 15 minutes after the first incident and would have lasted approximately 14 seconds. The grip on her hips and the grinding motion were stronger in the second incident than it was in the first incident. She also testified that she could feel a semi-erection or semi-hard-on when the accused was grinding his pelvic area on her buttocks during the second incident. She testified that she warned the accused after each incident to stop. She stated that although it was an unacceptable, she let the first incident "slide" because she knew the accused was on a course and at the club to party. She would have warned him again more forcefully after the second incident. She testified that she felt safer leaning against the railing surrounding the dance floor and that she was looking to see where the accused was. She did not see him and felt safe leaning against the railing to supervise the dance floor.

[34] One might ask oneself why she did not take any action at that time other than giving him a second warning and telling him he would be ejected if he did it again. Although she was not asked that exact question by either counsel, she did testify that she wanted to please the patrons and give them a chance to enjoy the evening.

[35] Corporal Davidson would have cupped her buttocks with both hands for a second when she was leaning on the railing. She would have turned around and started cursing and swearing at him; as she testified, "she lost it."

[36] During the cross-examination of Corporal Leduc, the prosecutor stated that Ms Newman had said "I want him out of here, he violated me." Corporal Leduc agreed she heard these words when Ms Newman was near the coatroom. Ms Newman stated that she was agitated and shouting at this point in the evening. Ms Newman testified that she was too embarrassed to write in her custodian report log about the semi-erection because she did not want her coworkers to know; she then testified that she did not want to complete that report because she was too upset.

[37] It was clear that Ms Newman was upset that night, the question is why. She did say out loud in a crowded club that she had been violated. She did not report the semi-erection to the military police corporal who responded to the call that night, but

she did mention it to Master Corporal Chase of the CFNIS the next morning. She explained, that although she still felt embarrassed about it, she felt more comfortable describing the incident and including the mention of the semi-erection to Master Corporal Chase because of the way he spoke to her; he made her more comfortable. She spoke to Master Corporal Chase after she had been up all night. She was asked to provide a written statement approximately one month after the alleged incident. The court was not informed why it took so long for the CFNIS investigator to request such an important statement. Although her description of the time frame for these alleged incidents seemed incorrect both her testimony and in her oral statement to Master Corporal Chase, she is not the only witness that is relatively imprecise in this area since the witnesses for the defence also described quite different time periods for the alleged events.

[38] Ms Newman was inconsistent when cross-examined on the exact words, "don't touch me or stop touching me," spoken by the accused and about his exact location on or off the dance floor when he would have cupped her buttocks. She became quite defensive and reversed her initial answer to these questions. Emotions and time can have an impact on a person's capacity to accurately remember events. Ms Newman did testify that she saw Corporal Davidson's friends "laughing and egging him on." This seemed to anger her. The court is puzzled that although she appears to show much embarrassment when describing how she felt a semi-erection against her buttocks she did not seem embarrassed to say in a loud voice in public that she had been violated.

[39] Although Ms Newman categorically states that Corporal Davidson was off the dance floor when he was escorted by security after the third alleged incident, Corporal Leduc testified during her cross-examination that he was on the dance floor with her when he was escorted by security. This evidence was not challenged by the prosecutor. The court is also puzzled that no other witness would have seen any of these three alleged incidents, especially the second incident that would have lasted approximately 14 seconds. Ms Newman now remembers words spoken by the accused that she did not mention in her interview with Master Corporal Chase on March 17, 2006, or included in her written statement on 18 April 2006.

[40] Corporal Davidson, please stand up. The court must make its decision by deciding if the prosecution has presented it with evidence that satisfies every element of the offence beyond a reasonable doubt. I have come to the conclusion that the inconsistencies in Ms Newman's evidence, the unchallenged contradictory evidence provided by Corporal Leduc, and Mrs Newman's emotional reactions that evening and during her testimony cause me to doubt the reliability of parts of her testimony that describe the alleged incidents that would prove that a sexual assault was committed as alleged.

[41] Although I believe the truth lies between the version the defence has offered the court and the version presented by the prosecution, this belief means that the prosecution has not proven to me beyond a reasonable doubt the acts that constitute this alleged offence. Corporal Davidson, the court finds you not guilty of charge No. 1. The proceedings of this court martial in respect of Corporal Davidson are now terminated.

Lieutenant-Colonel J-G. Perron, M.J.

Counsel:

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