



COURT MARTIAL

Citation: *R v Déry*, 2013 CM 3024

Date: 20130920

Docket: 201307

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

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Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.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

(Orally)

[1] Private Déry is charged with a service offence punishable under section 130 of the *National Defence Act*, in that he, on or about 25 October 2011, at Canadian Forces Base Wainwright, Alberta, did sexually assault I.F., contrary to section 271 of the *Criminal Code*.

[2] The facts on which this charge is based relate to an incident that allegedly occurred the night of 24 to 25 October 2011 at Canadian Forces Base Wainwright, Alberta, during the exercise MAPLE RESOLVE. To be more specific, the alleged sexual assault occurred in the tent where the complainant was sleeping, after the celebrations

that the unit had to mark the end of the exercise. The issue to be determined in this decision is whether the prosecution has proved beyond a reasonable doubt that Private Déry committed the offence of which he stands accused.

[3] The evidence before this Court Martial essentially consists of the following:

- a) the testimonies heard before the Court, in order of appearance: Petty Officer Second Class Dumas, Corporal I.F., who is the complainant in this case, Corporal Forster, Corporal da Silva, Corporal Abdou and Master Corporal Frank;
- b) Exhibit 3, a DVD containing a copy of the interview of Private Déry by the Military Police on 27 October 2011;
- c) Exhibit 4, the legal rights form signed by Private Déry on 27 October 2011;
- d) Exhibit 5, a map showing the positions of tents, drawn by Private Déry during the interview with the Military Police on 27 October 2011;
- e) Exhibit 6, four photographs taken by Petty Officer Second Class Dumas, on 26 October 2011, of the area with the tents where the alleged incident took place;
- f) Exhibit 7, the complainant's drawing of a floor plan of the tent where the alleged incident took place; and
- g) the judicial notice taken by the Court of the facts and matters contained in Rule 15 of the *Military Rules of Evidence*.

[4] The facts in this case may be summarized as follows: exercise MAPLE RESOLVE took place from 11 September 2011 to the end of October 2011 on the training area at CFB Wainwright in Alberta. Taking part in the exercise were 2 Canadian Mechanized Brigade Group and 2 HQ and Sigs Squadron. The unit's camp was located on the training area in Wainwright and consisted of modular tents where the unit's members, divided into troops, slept. The exercise ended on 24 October. To mark the occasion, the unit held a small celebration that involved a "smoker", a kind of barbecue, for supper. The entire exercise was alcohol free, with no consumption of alcohol; members of the unit were not allowed to drink alcohol; but during the smoker, alcohol was distributed with supper, and alcohol was distributed or sold throughout the evening.

[5] Once supper was over, several members of the unit brought some alcohol back to the tents where they slept. Members of the unit of the complainant, I.F., brought alcohol back to their tent, and people played music on their cellular telephones or other devices hooked up to speakers and socialized there. I.F. joined the revellers a little later in the evening, in her tent. At that point, Private Déry, who was with B Troop, had already been in I.F.'s tent for some time, I.F.'s tent being the place for members of A Troop. I.F. was in A Troop but had known Private Déry for some time already. Private Déry allegedly followed I.F. whenever she left and returned to her tent, at least five times during the evening, and he allegedly made sexual advances to her, which she says she categorically refused each time. She allegedly brought this to the attention of Private Abdou, a member of her troop who was in the tent that evening. Around midnight, everyone went to bed, either on their own accord or after Corporal Foster from Troop B reminded members of his troop that many of them had been assigned to perform driver's duties early the next morning. When people were leaving the tent, Private Déry allegedly made one last advance towards I.F. while she was sitting on her cot. She once again turned him down. I.F. quickly fell asleep, owing to her fatigue and the alcohol she had consumed that evening.

[6] The modular tent where I.F. slept consisted of five modules attached together. The modular tent was rectangular in shape. The entrance was located on one of the rectangle's short sides, and the other short side was the back of the tent. From the tent entrance looking in, I.F.'s cot was located in the very back, on the right. The cot was against or very close to the back wall of the tent. The back wall of the tent consisted of two panels attached to the middle of the wall from top to bottom with wooden buttons inserted into small loops of cord. On the side, outside the wall, sandbags had been arranged to keep the wall in place. I.F. was woken up by a hand in her underwear, rubbing her clitoris. She then saw Private Déry's face, which was next to hers, about six inches away. Half of Private Déry's body had slipped in under the modular tent and over her cot, and he had his left hand in I.F.'s underwear. I.F. immediately froze and then pushed him off, telling him not to do that. She then went over to another empty cot near hers, taking her sleeping bag and cellular telephone with her. She then started crying and finally left the tent to find Corporal Foster.

[7] Text messages were allegedly exchanged between I.F. and Corporal Foster, between I.F. and Private Déry and between Private Déry and Corporal Foster. The lighting in the tent was good in the circumstances, since the inside of the tent was all white and one or two laptop computers were on at the time of the incident, apparently lighting up the entire tent. I.F. went to Corporal Foster's tent, and Corporal Foster was coming out as she was coming in. Corporal Foster intercepted Private Déry in the area where I.F.'s tent was located. There was an altercation between them, and Corporal Foster was thrown to the ground. Corporal Frank came out of his tent and intervened. He sent Private Déry back to his tent, and he discussed the situation with Corporal Foster.

[8] Master Corporal Frank went with Corporal Foster to I.F.'s tent. He observed the scene and tried to recreate what had happened. He noticed that it was possible to get in through the back wall of the tent and reach I.F.'s cot from that position. Private Déry later returned to I.F.'s tent, accompanied by his supervisor. He allegedly told Private Abou that this was bullshit and she was a slut. Private Déry was taken away by the Military Police for questioning.

[9] 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.

[10] 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 an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is 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 entire body of evidence relied on by the prosecution to establish guilt. The burden of proof rests with the prosecution throughout the trial and is never shifted 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 of the evidence.

[11] In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, Justice Iacobucci, writing for the majority, stated as follows:

. . . [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. . . .

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 persuaded that Private Déry is probably or likely guilty, then he must be acquitted, 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. 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 Private Déry that stems from the credibility of the witnesses, it must acquit him.

[12] 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*. 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.

[13] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, the Court will assess a witness's opportunity to observe, 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 the accused chooses to testify.

[14] 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. Consideration must be given to whether the witness was responsive to questions, straightforward in his or her answers, or evasive, hesitant or argumentative, and indeed whether his or her testimony is 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, deliberate falsehoods are an entirely different matter; they are always serious and 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, the Court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[15] Section 271 of the *Criminal Code* reads as follows:

271. 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

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

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* reads, in part, as follows:

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;

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

[18] 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.

[19] 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.

[20] 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.

[21] 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.

[22] In this case, 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. that Private Déry used force, directly or indirectly, against the complainant;
 - ii. that Private Déry's use of force against the complainant was intentional;
 - iii. that the complainant did not consent to the use of force;
 - iv. that Private Déry knew of, or was reckless of or wilfully blind to, a lack of consent on the part of the complainant; and
 - v. that Private Déry's contact with the complainant was of a sexual nature.

[23] In addition to having instructed myself as to the burden and standard of proof, I have also noted 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*.

[24] 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.

[25] It appears that in the circumstances, the Court should begin by assessing the credibility and reliability of the testimonies heard to determine the facts that should be considered in analyzing the essential elements of the offence. The prosecution submits that the evidence relies essentially on the testimony of the complainant, I.F. Her testimony was frank, direct, calm and polite. Clearly, this was an unpleasant experience for her, and she was a bit nervous and wanted to get it over with as quickly as possible. It is also clear that what happened was a noteworthy and highly unusual incident that was seared into her memory. She told the Court that because of how she reacted when she was assaulted, it was possible that she had failed to recall certain details. There was absolutely no doubt in her mind as to the identity of the person who assaulted her, namely, Private Déry. In general, the complainant gave clear answers to counsel's questions. When she was unsure whether she understood a question, she did not hesitate

to ask for clarifications. On the whole, her story was consistent and logical. Furthermore, the witnesses for the prosecution, and at least one witness for the defence, corroborated the main events related by the complainant.

[26] As counsel for the defence mentioned, Corporal Foster seemed to want to make the Court believe that he had reacted less emotionally than he seems to have done in reality, as described by Corporal Abdou and Master Corporal Frank. However, in the Court's view, this is not sufficient reason to find all his testimony not to be reliable and credible. Indeed, he gave clear and consistent testimony. His answers to questions were frank and direct. He clearly stated that on the night of the incident, he already regarded Private Déry with a degree of suspicion and that because of what little the complainant had related to him, after the incident, he was affected emotionally. However, the Court accepts two elements of this testimony that appear to be reliable and credible, that is, that Private Déry was, in the early morning hours, in the area around I.F.'s tent shortly after the alleged incident, and that it was possible to enter I.F.'s tent through the back wall and to reach her bed from that position.

[27] In the Court's view, Corporal da Silva and Corporal Abdou seem to be credible and reliable. They were both detached from the incident. The Court finds that they did not have any reason to favour the accused or the complainant. It is true that Corporal Abdou had to have his memory refreshed a few times, but he was able to recall, in a forthright and frank manner, certain things that he had said shortly after the incident. These two witnesses who were called to testify—Corporal da Silva, for the prosecution, and Corporal Abdou, for the defence—confirmed, in pretty much the same manner and in the same terms, that the complainant was whispering something like go back to bed, that they both thought that she was talking to them, that she got up and changed cots, that she cried and that she left the tent just as she had described in court. Regarding the fact that these two witnesses did not see the assailant, it appears that Corporal da Silva was sleeping and Corporal Abdou was concentrating on a film he was watching. Both had their attentions drawn to the incident at the same moment, that is, when they both thought that the complainant was talking to them. Interestingly enough, Corporal Abdou also admitted that when Private Déry was brought back to the tent after the incident, Private Déry referred to someone, and Corporal Abdou knew to whom he was referring, given what had happened that evening. Indeed, Corporal Abdou confirmed that the complainant had alerted him to Private Déry's actions towards her that evening, thereby confirming the complainant's story in this regard.

[28] Master Corporal Frank's testimony was interesting in a number of respects. First, it should be noted that he had formed his own opinion on the situation and that his testimony was influenced somewhat by this. However, even if that could give the Court the impression that he slightly favoured the accused, the Court does not think that this was truly the case. However, because he had conducted his own investigation, he had a highly personal opinion of the case. The Court nevertheless gathers from his testimony that Private Déry was in the area near I.F.'s tent shortly after the incident, and that it was

possible for him to slip in through the back wall of the tent and reach the complainant's cot.

[29] It is true that I.F.'s testimony may contain a few minor contradictions with what was said by the other witnesses, which is normal, given that all this happened nearly two years ago. However, the Court finds that when the evidence is considered as a whole, it becomes clear that the complainant's testimony, taken on its own or in relation to all the other testimonies, is reliable and credible.

[30] As regards identity, the Court finds that the complainant's testimony is sufficient and that it has established beyond a reasonable doubt that it was indeed Private Déry who committed the offence. What is more, it appears from the other testimonies that he was in the area of the complainant's tent shortly after the incident. As for the date and place of the incident, all the testimonies given before this Court have established beyond a reasonable doubt these essential elements of the offence.

[31] Regarding the fact that Private Déry used force, directly or indirectly, against the complainant; that the use of force against the complainant was intentional; that the complainant did not consent to Private Déry's use of force; that Private Déry knew of, or was reckless of or wilfully blind to, a lack of consent on the part of the complainant; and that Private Déry's contact with the complainant was of a sexual nature, the Court finds that the testimony of I.F. has proved beyond a reasonable doubt all these essential elements. She gave a credible and reliable description of how Private Déry behaved shortly before the incident and how he went about assaulting her.

[32] Considering all the evidence, the Court is satisfied that the prosecution has discharged its burden of proof by proving beyond a reasonable doubt that the accused did indeed sexually assault I.F.

FOR THESE REASONS, THE COURT

[33] **FINDS** Private Déry guilty on the first and only count on the charge sheet.

Counsel:

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