Citation: *R. v. Corporal M.F. McCallum*, 2007 CM 4026

Docket: 200722

STANDING COURT MARTIAL
CANADA
ONTARIO
WOLSELEY BARRACKS

Date: 14 September 2007

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

HER MAJESTY THE QUEEN
v.
CORPORAL M.F. MCCALLUM
(Accused)

FINDING
(Rendered Orally)

INTRODUCTION

[1] The accused, B63 841 217 Corporal McCallum, 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*. The evidence before this court martial is composed essentially of the following: judicial notice, testimonies and one exhibit. Judicial notice was taken by the court of the facts and issues under Military Rule of Evidence 15. The testimonies heard in the order of their appearance before the court are those of Corporal S. and Corporal McCallum. The exhibit presented by defence counsel is a photograph of the sleeping area occupied by the accused and the complainant while they were in Meaford.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE

[2] The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

(a) the identity of the accused and the date and place as alleged in the charge sheet;

(b) that the accused applied force directly or indirectly to the complainant;

(c) that the accused intended to apply force to the complainant;

(d) that the complainant did not consent to the application of force by the accused;

(e) that the accused knew the complainant did not consent; and

(f) that the assault was of a sexual nature.

[3] Before this court provides it's 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 principles fundamental to all criminal trials. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[4] 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. 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.

[5] 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.

[6] A court must find a accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term, "beyond a reasonable doubt," has been used for a very long time. It is part of our history and traditions of justice.

[7] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles layed 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.

[8] In *R. v. Starr*, [2000] 2 S.C.R. 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.

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 Canadian law. The prosecution only has the burden of proving the guilt of an accused person, in this case Corporal McCallum, 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.

[9] 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.

[10] 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.

[11] 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. 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.

[12] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant, or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts?

[13] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. A series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the testimony of a witness. A deliberate falsehood is an entirely different matter. It is always serious, and it may well tint a witness's entire testimony.

[14] 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.

[15] 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 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.
>
> 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.

[16] Justice Sopinka, writing for the minority in the *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 the *R. v. W.(D.)* decision. He stated at paragraph 12 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.), supra*, where Cory J. Stated the following, at p. 757:
>
> > "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.

[17] The Supreme Court of Canada has also indicated in *R. v. Avetysan* (2000) 149 C.C.C. (3d) 77 that a judge giving a charge to a jury should not fall "into 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:

> 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 men could be acquitted even if their evidence was not believed but a doubt remained.

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

[18] Therefore, the case law surrounding the proper application of the test elaborated in *R. v. W.(D.)* clearly indicates that the evidence presented by the accused, which consists of his testimony, 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 court leaves the court with a reasonable doubt as to the guilt of the accused. Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court.

ANALYSIS

[19] The accused and the complainant provided this court with very different versions of the events that led to this charge. They were the only witnesses in this case. Corporal McCallum joined the Reserves in 2003 and generally described himself as a competent soldier; he would have been sent to a Primary Leadership Qualification course as a Private because, as he said, he had earned it. He stopped parading about two years ago because he "did not feel comfortable while these proceedings were going on". He did not elaborate as to why he felt uncomfortable and no questions were asked on this topic during his cross-examination.

[20] He described how Corporal S. became his fire team partner and the problems she was experiencing during the summer. He described how he would try to help her out during the course but that they did not get along. He described a few of the arguments and fights they had during the summer of 2005. He explained why he would have given her two massages and described these massages. Corporal McCallum

categorically denied touching Corporal S. other than the two massages where he touched her shoulders, back and lower back after she had asked him for a massage. Neither of these massages occurred on 16 August 2005.

[21] Corporal McCallum participated in the "frills" disease joke but states that he did not initiate this joke. He did find it funny when Corporal S. was furious after discovering she had been the subject of that joke. He testified that Corporal S. had problems with the physical portions of the courses. He knew Corporal S. had problems with her knees and he knew of her spider bites and of a yeast infection. Corporal McCallum would have had two interactions with Corporal S. after summer of 2005.

[22] Corporal S. testified that she found the summer courses of 2005, the BIQ and DP 2A, quite demanding physically and that she was not a good runner and was not as fit as she would have liked. She also stated that she had some difficulty with her weight. She stated that her relationship with Corporal McCallum was fine during working hours but that they had arguments during off hours. She felt he pushed her to achieve higher standards and to become a better soldier. She described the topics of conversations she had with Corporal McCallum during their free time.

[23] She testified that Corporal McCallum and Corporal S. gave each other massages during their free time. He would have given her four or five massages. The first massage that she deemed unacceptable occurred at the end of the BIQ or approximately at the end of July 2005. It would have occurred in the evening at approximately 2200 hours. She states that he would have asked her if she minded removing her shirt and she did remove her shirt. She covered her front with her shirt and described it as the same as wearing a bathing suit. He started massaging her back and moved his hands towards her breasts. She would have told him to stop. He did stop, massaged her back again and then went to his cot.

[24] She then testified that similar events occurred a few times after that first inappropriate massage. He would have tried to touch her breasts again and her buttocks. She would have told him to "piss off" or "fuck off" and to stop. He would have ceased trying to touch her breasts and buttocks and would have massaged her back for a while before going back to his cot. Corporal S. would have consented to the back massage but not to the touching of her breasts and of her buttocks.

[25] Corporal S. described the last incident as happening at the end of the course, two nights before the end of the course on either Thursday or Friday 18 August 2005. Corporal McCallum would have entered the tent and offered her a back massage or would have given her a back massage. She could not recall if anyone was present in the tent but she stated that people were going in and out of the tent constantly. She would have taken off her shirt and layed on her cot. He would have started giving her a back massage. He tried touching her breasts and her buttocks. She was uncomfortable, she sat up and told him to stop. He would have apologized. He would have undone his pants,

taken her hand and tried to force her to touch his penis. After resisting for a while, she would have touched his penis and said, "There, are you happy. Just leave me alone."

[26] She then described he would have massaged her "quads area". He massaged her leg, her "quads area", and her knee and tried to put his hand in her pants to get to her crotch area. The first time would have been between her pants and her underwear. She would have shoved him away and told him to leave her alone. He would have said it is just a massage and that it was not cheating. He would have put his hand down her pants and would have started "fingering her". She would have "frozen" for a few seconds and then threw his hand to the side as she told him to "fuck off". She would have used her right hand to take his hand away. He then left. She could not remember how long this event happened.

[27] Corporal S. was cross-examined extensively. She confirmed that she had only consented to getting a massage on her back and her knee area or quads area. She did not consent to being touched in her private areas, being her breasts, buttocks and crotch. She agreed that, although she was angry with Corporal McCallum because he had touched her breasts and her buttocks, she had consented to getting a massage in her "quads area" after she had turned over towards him.

[28] I will now apply the test found in the *R. v. W.(D.)*. The court finds reasons to doubt the testimony of Corporal McCallum. He is not considered a credible and reliable witness. Although his testimony was consistently presented in a clear, confident and straightforward manner during his examination-in-chief, he answered quite differently during his cross-examination. Although he was respectful to the Prosecutor, I found him to be quite guarded and defensive during his cross-examination. His answers were more of a tentative nature and his voice was not as clear. He looked at his defence counsel after practically every answer provided to the Prosecutor.

[29] Throughout his testimony, Corporal McCallum attempted to portray himself as a person beyond reproach. He presented himself as a good soldier who could pass difficult and physically demanding courses while helping his less competent fire team partner with whom he did not get along and who did not help him. His elusive answers to questions during his cross-examination pertaining to discussions of a sexual nature between men and women at Meaford are but one example of this effort to portray himself only in a positive light. Also, when he would have had an interaction with Corporal S. in September 2005, although she would have been friendly to him initially, he would have told her to go away because he had heard she was spreading false stories about him being a bad soldier. Although he admits using aggressive words, he could not remember exactly what he had told her. He could remember that she had called him a piece of shit when she replied to him. I also find this description of this incident as another example of his reluctance to admit anything that might reflect negatively on him.

[30] Corporal McCallum did state during his examination-in-chief that he had PT with Corporal S. and that on the few times she did participate in PT she always fell out of PT. Corporal McCallum then contradicted himself when he specified during his cross-examination that he was not present when she fell out at PT.

[31] He stated during his examination-in-chief that, although he was disappointed in losing his first fire team partner, he was indifferent to having Corporal S. as a fire team partner. Corporal McCallum readily admitted that he did not get along with Corporal S. and that he argued with her regularly and that he whole platoon probably knew this. He testified that his section commander would have told him to get along with her since Corporal McCallum had already passed his course. He was not impressed by Corporal S. because he thought she was a bad soldier. During his cross-examination, Corporal McCallum agreed that he had made fun of Corporal S. and had insulted her. He also testified that she could not take care of her gear or her space and that he had to help her for inspections although she did not help him. He also testified that he had no respect for Corporal S. and that he had made it perfectly clear to her that he did not like her. These negative impressions of her do not coincide with his stated feeling of indifference towards having her as a fire team partner.

[32] When told by a master corporal to make efforts to get along with her, he would have attempted to do so by giving her two back massages when she asked for them. She would have taken off her shirt and he would have massaged her shoulders, back and lower back. The first massage would have occurred during the BIQ course in July 2005. It was after lights out and the whole section would have been present in the tent during the first massage. He testified that she then asked him to go lower and he refused. She would have rolled over; at that point he asserts that he got uncomfortable and would have gone to his cot.

[33] Corporal McCallum would have given Corporal S. a second massage halfway to three quarters of the way in the DP 2A course. He would have done that because they had had a few fights and he was trying to improve their relationship. She would have asked for a massage and he accepted. She again would have taken off her shirt and he massaged her shoulders, her back and her lower back. She again would have rolled over on her back. She would have then suggested "something more sexually should happen" although Corporal McCallum could not remember the exact words she used. Corporal McCallum felt uncomfortable and he left the tent. They would have been alone in the tent at that time. He further testified that Corporal S. told him the next morning that "she had to go to the washroom to finish herself off afterwards because it had been so good".

[34] On these two occasions, Corporal McCallum would have ceased to give her a back massage and he would have left her cot area when she would have rolled over to face him. He explained why he felt uncomfortable at that time. He explained that he had been accused during the previous summer of fraternization. He also specified that the accusation had ultimately been proven unfounded. He explained that he did not want to

get into similar trouble during his course in 2005 by being found sitting on the bunk of a topless girl.

[35] Thus, Corporal McCallum was concerned of being accused of fraternisation and its possible consequence on him. Yet, in an effort to mend fences, he would have accepted twice to give a back massage to a topless female in his section tent late in the evening. He did not object to her decision to remove her shirt. He would have given her a second back massage while she was topless when he was alone with her in the tent even after the unwanted suggestions made to him during the first massage. Again, he would have been the victim of her unwanted advances or suggestions. He could remember the crude comment she made to him in next morning but he could not remember what she would have said when she made her sexual advance to him the previous evening. Given his stated concern about possible fraternisation accusations and their consequences, I find it difficult to believe his version of events for these two massages.

[36] Therefore, based on the contradictions in his testimony, his evasive and guarded replies and his demeanour during his cross-examination and the lack of air of reality in some of his answers and explanations, the court does not find Corporal McCallum's evidence credible as it relates to his description of the massages and his denial of these allegations.

[37] The court must now turn itself to the second step of the test elaborated in *R. v. W.(D.)*. Corporal McCallum has flatly denied all the allegations that form the basis of this charge of sexual assault. According to his testimony, neither of the two consensual massages he would have given to Corporal S. occurred on 16 August 2005. I have already decided that I do not believe his version of events. I must now ask myself if some of his evidence still leaves me with a reasonable doubt as to his guilt. For the same reasons I have provided previously, I am not left with a reasonable doubt by the evidence of Corporal McCallum.

[38] 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 Corporal McCallum?

[39] Corporal S. testified that she received numerous back massages from Corporal McCallum during the summer of 2005. During that same time period, they would have been arguing with each on a regular basis. Although the first massages would have been proper back massages, Corporal McCallum would have attempted to touch her breasts and would have progressed to trying to touch her buttocks. She described a continual progression towards more sexual massages. She would have clearly and emphatically told Corporal McCallum to stop; she would have used vulgar language to get her point across but he would still persist. She provided a sworn statement to the

Windsor Police in November 2005 in which she stated that she stopped asking for a massage after the first massage where Corporal McCallum would have touched her breasts because she felt uncomfortable. Yet, her evidence is that she accepted his offers of a massage throughout the summer and she would have removed her shirt even if he consistently tried to touch her in a way that she disliked and had clearly expressed this displeasure to him. Although she felt uncomfortable receiving massages from him, she kept accepting his offers because, as she puts it "she is a sucker for back massages." The court finds that this explanation lacks an air of reality.

[40] She testified she accepted his suggestion that she take off her shirt although she said she initially felt uncomfortable because she felt she was a bit overweight. She took off her shirt for each massage and covered her front. Although she has told Master Corporal Golding of the CFNIS during a videotaped interview on 8 December 2005 that she even felt uncomfortable taking off her shirt in front of her boyfriend, it would appear from her testimony that she voluntarily took off her shirt to expose her back to a man whom she hardly knew initially and who subsequently was consistently hostile towards her and was trying to fondle her against her wishes. Again, the court finds this evidence to be quite suspect.

[41] On 16 August 2005, Corporal McCallum would have either offered her a massage or would have started massaging her back. She took off her hoody. He massaged her back and he tried to touch her breasts and "the crack of her bum". She testified that she sat up on her cot because she was uncomfortable and angry and would have told him to stop. She was unclear in her testimony if she then put her shirt back on or held in front of her because she gave conflicting testimony on that topic during her examination-in-chief.

[42] Corporal S. would have consented to Corporal McCallum massaging her quads area because her knee was sore even after he had tried to fondle her breasts and touch her buttocks and after he would have tried to force her to touch his penis. Her explanation of this portion of this alleged assault is inconsistent. Although she stated that she was frozen or in shock after he had tried to force her to touch his penis, she subsequently testified that she had consented to him massaging her quads. This inconsistent evidence leaves the court somewhat perplexed as to her frame of mind at the time of these alleged events.

[43] Although her interviews with the Windsor Police and the CFNIS indicate that she would have been lying on her back when Corporal McCallum would have put his hand in her pants, Corporal S. testified that she was sitting up on her cot when this incident occurred. Her position vis-à-vis Corporal McCallum is not a minor inconsistency in the description of the alleged sexual assault.

[44] Her evidence as to whether it was dark or not in the tent at the time of the alleged assault is also inconsistent with her statement given to Master Corporal Golding in December 2005. She testified that, although she was unsure if the lights in the tent were

on or off, she was able to see in the tent but she had told Master Corporal Golding that "it was really dark in the tent". This inconsistent evidence on a key factor permitting her to closely observe the events as they unfold is not deemed a minor inconsistency.

[45] Corporal S. testified that she had given a sworn written statement to the Windsor Police in late November 2005 and that she had participated in a videotaped interview with Master Corporal Golding of the CFNIS on 8 December 2005. She testified that she has attempted to push away from her memory the events that she alleges occurred on 16 August 2005. She testified that she had begun to push those memories away when Lieutenant Rozic telephoned her while she was in Gagetown in May 2006 to ask her questions in the course of his summary investigation concerning these allegations. She testified that she did not remember the sequence of events on 16 August 2005. Although this desire to forget these events might explain the inconsistencies in her evidence, the court must assess the reliability of her evidence based on her testimony and her previous statements.

[46] In my task of assessing the credibility of the prosecution's evidence, I use as guidance the following passage from the 1994 Ontario Court of Appeal decision in *R. v. M.G.* 93 C.C.C. (3d) 347 at page 344:

> Probably the most valuable means of assessing the credibility of a crucial witness is to examine the consistency between what the witness said in the witness-box and what the witness has said on other occasions, whether on oath or not. Inconsistencies on minor matters or matters of detail are normal and are to be expected. They do not generally affect the credibility of the witness. This is particularly true in cases of young persons. But where the inconsistency involves a material matter about which an honest witness is unlikely to be mistaken, the inconsistency can demonstrate a carelessness with the truth. The trier of fact is then placed in the dilemma of trying to decide whether or not it can rely upon the testimony of a witness who has demonstrated carelessness with the truth.
>
> The effect of inconsistencies upon the credibility of a crucial witness was recently described by Rowles J.A. speaking for the British Columbia Court of Appeal in *R. v. B.(R.W.)* ...:
>
> > Where, as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.
> >
> > In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt

> about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which was the case here."

FINDING

Corporal McCallum, stand up.

[47] Corporal S. has provided this court with evidence that was contradicted by other portions of her testimony or that was contradicted by previous statements she had given to either the Windsor Police or to the CFNIS. Her evidence on matters that are at the heart of this charge was also at times unsure, inconsistent, ambiguous or lacked an air of reality. Therefore, I find that her evidence pertaining to the charge is not reliable and is not credible.

Consequently, I find that the prosecution had not proven this charge beyond a reasonable doubt.

Corporal McCallum, the court finds you not guilty of the charge of sexual assault.

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

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