



## COURT MARTIAL

**Citation:** *R v Sgt B.E.D. Parson*, 2004 CM 54

**Date:** 20040520

**Docket:** 200454

Standing Court Martial

720 Lawrence Avenue  
Kelowna, British Columbia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Sergeant B.E.D Parson, Accused**

**Before:** Lieutenant-Colonel M. Dutil, MJ

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Code*, information that could disclose the identity of the person described in this judgement as the complainant shall not be published in any document or broadcast or transmitted in any way.**

### **REASONS FOR FINDING**

(Orally)

[1] Sergeant Parson is charged with two offences. The first charge is laid under section 130 of the *National Defence Act* for the offence of sexual assault contrary to section 271 of the *Criminal Code*. The second charge is laid under section 129 of the *National Defence Act*, conduct to the prejudice to good order and discipline, in the form of harassment contrary to DAOD 5012-0, Harassment Prevention and Resolution, which is an order that applies to members of the Canadian Forces.

[2] The particulars of both charges allege that the offences took place on or about 1 December 2002, at or near the Brigadier Murphy Armoury, Vernon, British Columbia. Both offences were allegedly committed on the person of Private R.H., and I remind

everyone here, that there was an order on the publication ban about her identity at the beginning of these proceedings.

[3] So let me begin first with an explanation about the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with that principle fundamental to all criminal trials. These principles are well known to counsel, but other people in this courtroom may well be less familiar with them. It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with an offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt.

[4] An accused person doesn't have to prove anything. He doesn't have to prove that he's innocent. It's up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. 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 never shifts to the accused person. The 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. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice.

[5] In *R v Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed the model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court decisions 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 from the evidence or the lack of evidence. The fact that a person has been charged is no way indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are those that are on the charge sheet before a court.

[6] 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. Evidence may also include any things that were made exhibits before the court such as documents, photographs, maps or other items introduced by witnesses. Evidence could also consist in the testimony of expert witnesses. Finally, evidence may also consist of admissions of facts by either the prosecution or the defence and matters in which the court takes judicial notice.

[7] 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 testimony of a witness. For example, it may be useful for a judge sitting alone, or for a jury, to inquire and ask itself the following questions: Did the witness seem honest? Is there any reason why the witness would not be telling the truth? Did the witness have an interest in the outcome of the case or any reason to give evidence that is more favorable to one side than the other? 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. Was the witness in a position to make accurate and complete observations about the event? Did she or he have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine? Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which she or he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions? Did the witness seem to be reporting to the court what he or she saw or heard, or simply putting together an account based on information obtained from other sources rather than personal observation? Did the witness' testimony seem reasonable and consistent? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion? Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different or because he or she failed to mention something? Is there an explanation for it? Does the explanation make sense? What was the witness' manner when he or she testified?

[8] This factor must, however, be assessed carefully. As one can appreciate, looks can be deceiving. Giving evidence in a trial is not a common experience for many witnesses. People react and appear differently. Witnesses come from different backgrounds. They have different abilities, values, and life experiences. There are simply too many variables to make the matter in which a witness testifies the only or most important factor in the court's decision. This is one of the reasons why the witness' manner must be assessed in light of all the evidence. A court is not required to accept the testimony of any witness except to the extent it has impressed the court as credible. However, the court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[9] In *R v Starr*, [2000] 2 S.C.R. 144, and more specifically at paragraph 242, the Supreme Court of Canada 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 virtually impossible to prove anything to an absolute certainty, and 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 Sergeant Parson, beyond a reasonable doubt. To put it in perspective, if the

court is convinced that the accused is probably or likely guilty, then the accused shall be acquitted. How much or little of the evidence of the witnesses the court will believe or rely on does not depend on the number of witnesses who testify for one side or the other.

[10] As I said earlier, the proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation. As stated by both counsel, it is essential that the credibility and reliability of the witnesses be tested in light of all the evidence presented. In this case, the accused has chosen to testify. It is fair to say that his version of events contradicts, in some areas, the evidence heard from other witnesses, and that his version totally contradicts the evidence of the alleged victim, Private R.H., on the matter at issue; that is, with regard to a sexual assault and harassment that allegedly took place in a bed they both shared for an undetermined period of time during the night in question in the barracks.

[11] The evidence presented by the witnesses called by the prosecution also differs, or at least reveals significant discrepancies on material and relevant details, when examined in light of all the other evidence presented at trial. As the rule of reasonable doubt also applies to the issue of credibility, the court is not required to definitely decide on the credibility of a witness or a group of witnesses, nor does the court need to fully believe or disbelieve one witness or a group of witnesses.

[12] As stated by counsel, the approach on the assessment of credibility as it relates to the issue of reasonable doubt was suggested by Justice Cory, as he then was, in the decision *R v W.(D.)*, [1991] 1 S.C.R. 742 at page 758, and I quote:

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.

[13] Over the recent years, the Supreme Court and various appellate Courts, including the Court Martial Appeal Court in *Able Seaman Bernier v R*, neutral citation, 2003 CMAC 3, have expressed that the *W.(D.)* principle is not a magic incantation which trial judges must mouth to avoid appellate intervention, rather, *W.(D.)* describes how the assessment of credibility relates to the issue of reasonable doubt.

[14] What the judge must not do is simply choose between alternative versions, and, having done so, convict if the complainant's version is preferred. Rather, *W.(D.)* reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of the charge have been proved beyond a reasonable doubt. The ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue, at the end of the day,

in a criminal trial, is not credibility, but reasonable doubt. If the court has a reasonable doubt as to the guilt of Sergeant Parson arising from the credibility of the witnesses, then the court must find him not guilty.

[15] In a case such as this one where credibility is important and where the accused testified on his own behalf, the law requires the following:

One, if the court believes the testimony of Sergeant Parson that he did not commit the offence as charged, the court must find him not guilty;

Second, if the court does not believe the testimony of Sergeant Parson, if it leaves the court with a reasonable doubt about his guilt or about an essential element of an offence, the court must find him not guilty of that offence;

Third, if the court does not know whom to believe, it means the court has a reasonable doubt and the court must find Sergeant Parson not guilty; and

Fourth, even if the testimony of Sergeant Parson does not raise a reasonable doubt about his guilt or about an essential element of an offence, if, after considering all the evidence that the court does accept, the court is not satisfied beyond a reasonable doubt of his guilt, the court must acquit.

[16] Having instructed myself as to the onus and standard of proof, I will now examine the facts of this case as revealed by the evidence put before this court.

[17] The evidence before the court consists of the testimonies of Private R.H., the complainant in this case, that of Corporal Barber, that of Captain Stecyk, or at least the part of his testimony heard in a *voir dire* that was versed in the main trial, that of Sergeant Parson, the testimony of Mr. Mike Illingby, testimony of Corporal Neid, testimony of Warrant Officer (Retired) Carbonell, and the testimony of Constable White from the Royal Canadian Mounted Police, the RCMP.

[18] The evidence consists also of various exhibits filed before the court. Exhibit 3 is an admission made by Sergeant Parson, which has been reduced in writing and filed before the court, and it reads as follows:

"On 30 November and 1 December 2002 he was aware of the contents of Defence Administrative Order and Directive 5012-0, Harassment Prevention and Resolution.

On 30 April 2003 Sergeant Parson met with Master Corporal Diana Demeules and Corporal Steve Shea of the Canadian Forces National Investigation Service. During that meeting, he made a written statement and was interviewed by Master Corporal Demeules. The interview was videotaped by Corporal Shea. The written and verbal statements made by Sergeant Parson during this meeting were voluntary within the meaning of Military Rule of Evidence 42(1)(b).

Sergeant Parson waives any requirement for a *voir dire* to determine their admissibility."

[19] Exhibit 4 is an admission made by the prosecution, which has also been reduced in writing and filed before the court. It says:

"On or about 1 December '02, somewhere between the early morning hours of 0200, 0500 hours, Lieutenant Hisdal was awoken by someone turning on the lights in the RSM's room of Building A-10 in Vernon, BC, where he, Lieutenant Hisdal, had been sleeping."

[20] Exhibit 5 is the copy of a single paragraph letter dated December 6, 2002, signed by Sergeant Parson, or Sergeant B. Parson, addressed to Private R. H., which has been reduced in writing and filed before the court. It reads as follows:

"December 6, 2002, Private R. H., I'm writing this letter as a formal apology. The trust and confidence that you may have had for the rank of which I hold has been undermined and for that, I am remorseful. The events that occurred were misjudgements and I am regretful for their taking place. I am prepared to take the appropriate action to rectify the circumstances in which we currently find ourselves. Rest assured that you have no fear of reprisal or retaliation at any time as a result of this situation and I will always be fair and professional in any future contact with you. Please accept this as a formal apology. Sincerely, Sergeant B. Parson."

[21] In addition, this court taking judicial notice of those facts and matters under Military Rule of Evidence 15 completes the evidence; of course, that includes DAOD 5012-0 on harassment.

[22] Let us now turn to the facts. The facts leading to this case can be summarized along this way: On 30 November 2002 A Squadron of the British Columbia Dragoons was hosting its Christmas dinner party at the Brigadier Murphy Armoury located in Vernon, British Columbia. In addition to members of A Squadron, some members of B Squadron, located in Kelowna, and other guests, were invited. The dinner was referred as a "potluck," where various persons would bring a dish to the dinner. An informal gathering in the combined mess followed the dinner where people would socialize. The evidence also revealed that some attendees went to a bar in Vernon during the same evening, after the dinner, before some of them returned to the mess later that night.

[23] For the purpose of this trial, the court retains the following evidence heard or filed during the trial: Private R.H. is, at the time of the alleged offences, a member of [information that would identify the complainant]. She is a Reservist and currently works also at a [information that would identify the complainant]. On 30 November 2002 she is supposed to attend at the A Squadron Christmas dinner in Vernon because she is invited. Private R.H. has planned to attend the dinner with a good friend, Corporal Barber, who is a member of her squadron. Their plan includes sleeping over

in the barracks in Vernon, and for that purpose she brings some clothes in a bag as well as her army sleeping bag. She admitted that she had planned to drink that night and to return to Kelowna the next morning with Corporal Barber. Corporal Barber corroborates this. Earlier that day, she had spoken to Sergeant Parson on the phone who wanted her to inform Corporal Barber to wear a bow tie. Sergeant Parson is the PMC for the Christmas dinner that evening.

[24] Corporal Barber picks her up at her parents' residence in Kelowna between 1700 and 1800 hours. Corporal Barber is the driver. Once in Vernon, they go to the Armoury and leave the food they had brought for the pot luck. Shortly after, they go to the barracks, more specifically Building A-10, to secure a bunk for the night and leave their personal belongings. According to Corporal Barber, Private R.H. took the food to the Armoury and he drops their belongings in the barracks. He puts her bag or valise on one bed and he does the same for his belongings, but on the upper bed or upper bunk. He says the bunk was located on the right side at the far end of the first room. During the evening, Private R.H. is wearing a long dress or an evening gown, black in colour. She also wears black high-heeled shoes.

[25] Private R.H. and Corporal Barber attend the pre-dinner cocktail. Corporal Barber says that Private R.H. left the cocktail after one hour. He drinks a few beers at that time, but he did not see if Private R.H. had anything to drink during that period. She says that she drank a couple of beers then. Corporal Barber testified that he then attends the dinner at the Armoury's floor. He says that he sits with a person named MacNiven and some officers. He does not remember where Private R.H. is sitting at the dinner table or at the dinner.

[26] According to Private R.H., she sits with Corporal Barber. She notices that Sergeant Parson sits at the end of the opposite table because he gave a toast. Private R.H. testified that she drinks a few beers during the dinner, but that she was not drunk, only feeling good. The dinner lasts a few hours and she enjoys it, having a good time with friends that she has not met for months or even a year. Over the same period of time, Corporal Barber has several glasses of wine and port and he does not observe what Private R.H. had to drink. The dinner ends around 2200 hours. Corporal Barber pursues the evening in going back to the combined mess where he continues to drink beer and wine. He's feeling good. He sees Private R.H. drinking too and having a good time. According to Corporal Barber, she's bubbly and happy. She tries to convince him to go to a club or a bar downtown in Vernon with the rest of the troop, but he refuses as he does not have enough money. Corporal Barber testified that Private R.H. and others left for downtown approximately an hour, an hour and a half after the dinner.

[27] According to Private R.H., she stays in the mess a few hours after the dinner. She then leaves in a taxi to go to a club in Vernon. She testified that Corporal Barber leaves with her as well as Master Corporal Hicks and someone else. She's still wearing her dress. According to her version, ten to twenty persons from the Regiment are in the bar. She orders one drink, dances, and talks. She says that her drink did not taste right and that she had left it unattended. She adds that she stays in the bar for approximately

one hour until two skateboarders approach her and briefly talk to her, and the court will not get into the details of that discussion. She leaves the bar and goes back to the mess with Corporal Barber and she recalls freezing outside waiting for the cab. According to her, she blacks out and she does not remember anything until someone, the accused, Sergeant Parson, is pulling her on top of "him or them," as she used the term, in the barrack bunk.

[28] In direct examination, she stated that she was not drunk that evening. In cross-examination, she admits that she was drunk and she blacked out. She added that she experienced blacking out once before. Moreover, Private R.H. tells the court in cross-examination that she blacked out before but only if she drank more than 15 beers. She also says that she can drink a case of beer during one night. On her state of sobriety, she finally said, in relation to that evening, "I blacked out, I drank in excess."

[29] As indicated before, Corporal Barber stays in the mess during that evening. During that period, he observes Sergeant Parson drink beer, talking, and dancing. Mr. Mike Illingby, a friend of Sergeant Parson who attended the party as a guest invited by Sergeant Parson, testified before the court with regard to a series of events that took place in the mess after the dinner involving Sergeant Parson and Private R.H.

[30] As stated by Private R.H., she has no recollection of that period of time. Sergeant Parson testified as well with regard to these events. Sergeant Parson testified to these events in this way: After the meal they go back to the mess. At that time, he works the room in talking to guests and former members of the regiment. He sees Private R.H. and talks to her. He learns that she is the [information that would identify the complainant] and he learns about her involvement in the unit. As it is her first dinner with A Squadron, she tells him how happy she is. Sergeant Parson had spoken to her earlier that day to pass on information to Corporal Barber. At some point, where they are both at the bar, she leans forward and kisses him on the lips. According to Sergeant Parson, this kiss lasts three to four seconds. He describes that that shocks him for several reasons: it is unsolicited and unexpected, he is a Senior NCO, he has a girlfriend who was also present at that function, although she had left earlier to go home nearby. And according to Sergeant Parson, Mr. Illingby who was a few feet away; he sees that kiss—although Mr. Illingby described it as being a very brief, a peck that did not last three seconds—Mr. Illingby then intervenes between Parson and Private R.H. Sergeant Parson said that his friend then takes him away to talk about what had just happened and to clarify what is going on as Mr. Illingby knows that Sergeant Parson has a girlfriend.

[31] Sergeant Parson testifies that Mr. Illingby and himself talked about the situation which was not looking good. Mr. Illingby said that Sergeant Parson told him defensively, "she kissed me" or words that Mr. Illingby perceived to mean, "get off my back." Sergeant Parson then continues to talk to other guests and members including Corporal Barber, when he notices Private R.H. heading to the women's bathroom. Sergeant Parson said that he sees that as the opportunity to clear up the matter with Private R.H. and he goes in the same area and stands in the hallway for her to exit the



bathroom. When she exits, he asks her to talk and walking down the hallway with her, he guides and takes Private R.H. to a storage room for more privacy.

[32] Mr. Illingby says that it is Private R.H. who leads Sergeant Parson to the storage room and it is her that initiates a conversation with Sergeant Parson in the hallway. It is for that reason that Illingby reacts and decides to walk down the hallway and intervene. Once in that room, Sergeant Parson testified that he then starts a conversation concerning the kiss incident and how it does not look good and how wrong this is. Sergeant Parson hears a knock at the door and his friend Illingby tells them, "Hey, get out." According to Sergeant Parson, he tells his friend that he will leave when the conversation is over which Illingby replies, "This doesn't look good, get out." Sergeant Parson said that he realizes his friend is right and he gets out and has a discussion with his friend about that situation. Sergeant Parson does not see where Private R.H. goes after this. Mr. Illingby says on this that Sergeant Parson, rather, tells him, "We're just talking."

[33] Despite the fact that Sergeant Parson was the Christmas dinner PMC, he said at that time his level of sobriety was 7 out of 10; 10 being passing out. He referred to himself as still being able to walk straight, not having a slurred speech. As to Mr. Illingby, he said about his own sobriety, that he was sober as he drank one and a half glasses of wine at dinner and a glass of port, and that he drank Coke for the rest of the evening.

[34] Later, Corporal Barber sees Private R.H., who has returned from downtown. He notices that she's tired. He gives her wine. They both sit down and talk. According to Corporal Barber, she seems out of it. She wants to go to bed. He then takes her to Building A-10 where they had left their belongings. When they leave at around 0230 hours on 1 December, he notices that there is only a handful of persons left in the mess. Corporal Barber describes that Private R.H. is wobbly on her feet and that he has to take her by the arm for her not to fall.

[35] According to him, she gets in the sleeping bag, or crawled up in the sleeping bag, part-way, with her shoes on, and, that, in a bunk at the far end against the wall. Corporal Barber says that most of the empty bunks were top bunks and that there were eight to ten bunks in that room. At that time, she is still fully dressed, and Barber returns to the mess.

[36] Once back in the mess, he observes that Sergeant Parson is still there. Corporal Barber leaves the mess at approximately 0500 hours to go to Building A-10. As he enters the first room, he sees Sergeant Parson laid in the bunk where the sleeping bag was laid out. He notes that Sergeant Parson is on the bed's far side, his back against the wall. According to Corporal Barber, he sleeps in the bunk located across Private R.H.'s bunk in the bottom bunk. Corporal Barber undresses but ends up going outside to vomit as he felt ill. On his return, he said that he crawls back to his bed. Corporal Barber then hears footsteps, he thinks from high heeled shoes, and hears a door open. He figures

that it is Private R.H. who is going to the bathroom. Sometime after; that is, early in the morning, Private R.H. crawls in his bed, in his bed blanket, fully clothed.

[37] According to Corporal Barber, his next recollection is that he wakes up around ten o'clock in the morning and he goes to the bathroom. He says that when he wakes up, he is alone in his bed and there are several other persons still asleep in the room. According to him, both Private R.H. and Sergeant Parson are gone as well as their kit. He finds Private R.H. five minutes later as she is in the parking lot. According to Barber, they both go to the A&W restaurant at around 10:30. She then asked him if he saw her flirting with Sergeant Parson or if Parson had been sitting on her during the evening or night before. He tells her that the only thing he knows is that there were rumours. He finds that Private R.H. seems all right at this time and in good spirits. Once arrived in Kelowna, he drops Private R.H. to her parents' residence and Corporal Barber goes to see his friends.

[38] In cross-examination Corporal Barber said that when he sees Sergeant Parson in the bed, the sleeping bag was laying out flat and he could not say whether Private R.H. was there. He says that while in bed, Sergeant Parson was wearing his regimental dress uniform; that is, tunic on, buttoned up, pants on, and that Sergeant Parson was sleeping. Corporal Barber also added that Sergeant Parson asked him the next weekend, not to spread any rumours in the Regiment as to what happened or did not happen at the mess dinner.

[39] Now, going back to Private R.H.'s version of events. She blacks out as she entered the cab with Corporal Barber, according to her, who denies even being there, to go back to the mess. The next event that she remembers consists in someone pulling her over top of "him" or "them," as she used the expression or used the word, as she is in the bunk bed. She hears a door opening, like a door locking. She is confused and she doesn't know where she is. She sits up and looks at the person pulling her over top of "them"—and that's the word she used—that other person is Sergeant Parson and she says that he lies on his back. According to Private R.H., when she is fully aware of what is happening to her, she's right on top of Sergeant Parson. She doesn't know what happens. She's still wearing her dress but it felt amid hip, or it's up to mid-hip. She has no nylons or underwear, but still has her bra, and she doesn't know where they are. She says that the sleeping bag is pulled over then. She is shocked because, as she mentioned in court, she did not even talk to Sergeant Parson the previous evening, according to her.

[40] In her version, Sergeant Parson is awake, his eyes opened, and he is looking at her. He is wearing a shirt and his pants, and she sees his zipper undone and his penis hanging out. She does not remember doing anything consensually with Sergeant Parson in that bed. As she realizes what had happened, she feels sick. She then leaves the bed and crawls to her friend Barber's bunk, on the other side and tells him to move over. She said that Barber then puts his hand around her. At that time, she's nervous, scared, and still disoriented, but she feels safe with Barber. She says that she and Barber are later woken up by somebody as it did not look good to have male/female in the same

barracks, even more so, sharing the same bed, when courses are going on. She says that she then goes back in her bunk where she knows that Sergeant Parson has left. She adds that it is Corporal Barber who then wakes her up to get going as she was the only one left in the room. According to Barber, she was not there when he woke up. Private R.H. then finds that her underwear is scattered around the bed where she had been sleeping, her nylons and panties on the side of the bed. She said that she never sleeps without underwear and that she wears pyjamas. She said that, at that time, she felt sick and went to the bathroom. According to her, it was not because of overindulgence of alcohol, although, she said in cross-examination having told to the NIS investigators that when she felt sick at the time, she felt drunk, hung-over. She then throws her belongings in Corporal Barber's truck as she sees Sergeant Parson standing by with other persons by the truck. She does not remember when she leaves the Armoury. It is at that time, according to her version, that she asks Corporal Barber what happened or what did she do. Once back in Kelowna, Corporal Barber drops her at her parent's residence. She, then, feels ill, hurt, and upset for the remainder of the day.

[41] Sergeant Parson testified about the events. He, first, described what he was wearing during the Christmas dinner; that is, what he refers to as patrol blues. In short, this is a ceremonial dress; dark blue in colour which consists of a tunic with a fake mandarin collar and cuffs to give the impression that a person is wearing a white dress shirt underneath. The pants are regular mess dress pants with a wide yellow stripe on the side.

[42] Sergeant Parson testified that he wore Wellington boots on that occasion. He says that he was wearing a black t-shirt underneath. The court already highlighted the portions of Sergeant Parson's testimony with regard to the incident of the kiss and his presence in the storage room with Private R.H. in the early hours of 1 December 2002.

[43] So let me continue with the set of facts after Sergeant Parson left the mess. According to Sergeant Parson, he spends some more time in the mess and as he is tired, he decides to seek a place to sleep in the barracks at ground zero of Barrack A-10 and that despite the fact that his own girlfriend, with whom he lives, has already gone home a few minutes away from the barracks or the Armouries. Sergeant Parson goes outside and sees his friend Illingby in the parking lot. His sober friend offers him a ride home, but Sergeant Parson declines as he is not sure about the sobriety of his friend and considering the danger associated with that. Sergeant Parson knows that he is himself in no position to drive, however Sergeant Parson does not enquire about the state of his friend, who is also his guest, and let him leave.

[44] Sergeant Parson, who was drunk at the time, from his own admission, described in abundant details all the steps he took to find a place to sleep in Building A-10. He enters in room 1, where the alleged incidents took place. According to him, all bunks are empty. At the north end of the room, he sees a lower bunk on the left with a sleeping bag crumbled up on it. It is not Sergeant Parson's sleeping bag. Across that bed, there is another bed with a ranger blanket on it; this is not, also, his ranger blanket. He enters room 2 that is occupied by students on the QL2 course. He goes through that

room, up to the RSM room knowing that the RSM is not there as he saw the RSM leave with his wife earlier that evening. He opens the door, turns on the light and accidentally wakes up Lieutenant Hisdal. Sergeant Parson leaves the room. The prosecution at Exhibit 4 admits this. Sergeant Parson then proceeds to the washroom to urinate and washes his hands after. Once in room four, or ground zero, he sees that all bunks are taken. He sees the same in room 6, the officer quarters, so he then decides to go back to room 1, or he heads down to room 1. Once in the room, he then picks the bottom bunk on the right and throws a sleeping bag over top of it. This is not his sleeping bag. According to him, this happens between 0400 and 0600 hours in the morning.

[45] According to Sergeant Parson, he doesn't see anyone else in that room. Once in bed, he takes his glasses off and falls asleep. A movement suddenly awakens him on his right. He oversees blond hair over the sleeping bag. According to him, he thought that female was supposed to sleep in room 9. Once awakened, he's confused, and the person in the bed with him continues to move, he pretends he's asleep. He is shocked as the movement continues. Then, the person stands up and leaves to go to another bed across. According to Sergeant Parson, he does not touch that person nor does he say anything. After a few minutes, he decides to get up and leave which he does. He then sees that it is Private R.H. who is in the other bed across with another person.

[46] According to him, he first realized that there were allegations of sexual assault against him the next Thursday once the RSM told him he had to see the OC, Captain Stecyk, who gave a notice of intent to suspend him from military duty. According to Sergeant Parson, no details were provided to him and he thought this was all about the kiss.

[47] In summary, Sergeant Parson goes to Captain Stecyk's office at the regiment to sign a notice of intent to suspend him from duty. They are the only persons in that room. Captain Stecyk informs Sergeant Parson that there are allegations of sexual assault against him, although no specifics or details are discussed, nor that details of the allegation appear on the notice of intent to suspend Sergeant Parson from duty. He asks Sergeant Parson to read the document and to sign it. Sergeant Parson does not tell him anything at the time. Captain Stecyk then orders Sergeant Parson to travel to Kelowna on the following Saturday where he will be formally suspended from duty. During that meeting, Captain Stecyk notes that Sergeant Parson appears to be stressed and very nervous when Captain Stecyk observes his speech and his body language. According to Captain Stecyk, Sergeant Parson does not say very much but he felt that it was obvious Parson had problems. According to Captain Stecyk, his tone of voice was not aggressive during that meeting and they were the only two persons in the room.

[48] On the next day; that is, mid-afternoon of Friday, Sergeant Parson arrives unannounced at Captain Stecyk's place of business, allegedly to talk about what happened. In looking at Sergeant Parson, Captain Stecyk is concerned about his mental state and he wants to calm him down. Captain Stecyk notes that Sergeant Parson is very emotional, incoherent, and distraught. Captain Stecyk apparently does not order Sergeant Parson to do anything at that time, and they are the only persons in the store.

They are discussing at Captain Stecyk's desk in relation to avenues of counselling for Sergeant Parson and the name of the unit padre, Captain Greenhalgh, comes up as being one option as he is highly respected by the members of the unit. Sergeant Parson does not rule out that option. Captain Stecyk observes that Sergeant Parson appears to be very distraught, upset. Sergeant Parson let him know that he feels that he let the Canadian Forces, the unit, and the senior NCOs down.

[49] According to Sergeant Parson, he leaves that meeting very upset and he calls Private R.H. to get clarification and settle the matter. She is very upset. Sergeant Parson testified that he does not raise the issue of the kiss or the issue of the bed during that conversation, although he believes this whole thing is about the kiss, a kiss that was not solicited by him and for which he could not have avoided.

[50] On the following Saturday, the commanding officer suspends Sergeant Parson from duty and no details are provided. There again, according to Sergeant Parson, this could only be for the kiss. He then apologizes to Private R.H. because, in his version, he felt responsible for the situation he found himself in as a senior NCO.

[51] Private R.H. and Sergeant Parson later meet together with the padre in order to reconcile them and settle the matter. There again, Sergeant Parson testified that even then he still believes that this whole incident is because of the kiss in the mess. According to Sergeant Parson, he realizes four months after that this situation is not only about the kiss when he attends voluntarily at an interview with Corporal Demeules from the National Investigation Service in order to clear his name.

[52] Sergeant Parson explained why he was so emotional about the kiss incident. Amongst other factors, he insists that he was a sergeant and she was a private; and he had a girlfriend to whom he had to explain the kiss; to whom he had to explain the suspension from duty; to whom he had to explain the fact that he was under investigation for sexual assault; and to whom he had to explain the fact that a woman ended up in his bed in the barracks after the unit Christmas dinner party when he had decided not to go home that night after not having returned that particular evening with that girlfriend.

[53] Sergeant Parson's version to the effect that he learned that this situation had to do with more than just the kiss only four months later is contradicted by his friend, Illingby who told the court that he had spoken with Sergeant Parson one week after the Christmas party where Sergeant Parson told him that he was under investigation for sexual assault. Illingby recalls telling Parson that this could not be only for the kiss, that it had to be for something more than the kiss. According to Illingby, he got the impression from Sergeant Parson during that conversation that Sergeant Parson was being investigated for waking up in bed with Private R.H. when he had not gone to bed with her in the first place. Sergeant Parson denies this.

[54] Now, going back to Private R.H. She speaks of the incident to her parents, to Corporal Kostiuk, and to Corporal Neid the next day or so as to the events, as she said, were fresh in her mind.

[55] Corporal Neid corroborates that she met with Private R.H. accompanied by her friend, at Private R.H.'s request over the phone. During that telephone conversation, Corporal Neid found Private R.H. to be hysterical. She said that she found Private R.H. to be distraught and upset and she formed the belief that she had been raped although she did not provide details that helped her to form that belief.

[56] Corporal Neid testified that when she met Private R.H., she was told that Sergeant Parson was on top in that bed and that her panties were down to her ankles. Private R.H. then meets with Warrant Officer (Retired) Carbonell during the next Tuesday or Wednesday after the alleged incident. Private R.H. testified to the effect that she trusted Warrant Officer Carbonell. According to Private R.H.'s version, she did not provide Warrant Officer Carbonell with any details about the incident, but that Warrant Officer Carbonell took notes but was not sure what to do and that she would get back to her. Private R.H. added that Warrant Officer Carbonell did get back to her to tell her that the matter was so sensitive that it should be passed to the RCMP.

[57] Private R.H. said in cross-examination that she did not remember whether she told Warrant Officer Carbonell that the person was on top of her with his penis hanging out, but rather said that she told Warrant Officer Carbonell what she had told her friend Corporal Neid. Warrant Officer Carbonell stated in court that Private R.H. told her that when she woke up in bed someone was standing over top of her with his penis out.

[58] According to Private R.H., she speaks to a constable from the Royal Canadian Mounted Police a few weeks after the incident. In direct examination Private R.H. describes that during that conversation with the RCMP constable she did not want Sergeant Parson to be charged or kicked out of the Forces. She wanted the unit to handle it. She just wanted an apology.

[59] Constable White was called by the defence to testify concerning that conversation. She testified as to her experience of eight years with the RCMP as an investigator, including investigations of sexual assaults. She said that a conversation occurred on the phone on 19 December 2002; that it lasted about 45 minutes during which she did not take notes although she wrote an occurrence report of three quarters of a page later in the day. Constable White formed the opinion that nothing of a sexual nature happened between Private R.H. and a male person as Private R.H. did not want to say who that male person was, and that she formed that opinion in light of her conversation with Private R.H., and the fact that the latter did not wish to pursue the matter and seemed to be mature, well-spoken, and a reasonable person who had just told her that she was highly intoxicated that particular night. Constable White did not pursue the matter as she felt nothing had happened.

[60] The court gives little weight to that evidence. No notes were taken by the police officer. That officer did not even meet with Private R.H. as an experienced police officer should have done. Although she felt she could form her belief that nothing of a criminal nature happened, the court finds that she did not take the adequate measures to form that belief when she spoke to someone that did not really want to talk to her in the first place and that refused to provide her with information such as the identity of her assailant. In the circumstances, Constable White should have taken, at least, some measures to ascertain Private R.H. did not use the phone as a shield against her and not being forthright in her answers. She treated this file as routine and relied on her experience, and for those reasons, in light of that evidence and the context when it was obtained, it has very little weight.

[61] With regard to complaints, Private R.H. added in cross-examination that she finally made a complaint to the military police because she had not received what she wanted from Sergeant Parson. In cross-examination, she testified that she did not remember what she told Constable White, the RCMP officer, during that conversation although she recalled telling her that she and Sergeant Parson had no intercourse; of course, she did not name Sergeant Parson.

[62] At the end of that vigorous cross-examination during which counsel for the defence confronted her different versions or inconsistencies with regard to her discussions with the NIS, the RCMP, Corporal Neid, and Warrant Officer Carbonell, Private R.H. said the following, "I was drunk; I blacked out. I never blacked out like that before. I have no recollection. Somebody may have put something in my drink. I believe something else could have happened." She then added, "I didn't know what had happened before. I did not know what led up to it. I was embarrassed. You don't mess around with your sergeant."

[63] In December 2002 Sergeant Parson writes a letter of apology to Private R.H. This letter is marked as Exhibit 5.

[64] I will now turn to a consideration of the elements of the offence that the prosecution must prove beyond a reasonable doubt with regard to the first charge, sexual assault. Over the years the Supreme Court of Canada has provided trial judges with guidance in matters related to sexual assault. These cases are, *R v Chase*, [1987] 2 S.C.R. 293; *R v Ewanchuk*, [1999] 1 S.C.R. 330; and also *R v V.(K.B.)*, which is a judgement of the Ontario Court of Appeal reported (1992) 71 C.C.C. (3d) 65, that was affirmed by the Supreme Court of Canada at [1993] 2 S.C.R. 857.

[65] Sexual assault is an assault which is committed in circumstances of a sexual nature such that the sexual integrity of the victim is violated. The test to be applied in determining whether the conduct has the requisite sexual nature is an objective one. Whether viewed in the light of all the circumstances of sexual context of the assault is visible to a reasonable observer. The part of the body touched, the nature of the contact, the situation in which it occurred, the words and gestures accompanying the act and all other circumstances surrounding the conduct that may or may not be accompanied by

force, will be relevant. The intent or purpose of the person committing the act, to the extent that this may appear from the evidence may also be a factor in considering whether the conduct is sexual. Sexual assault does not require proof of sexuality or proof of sexual gratification which are merely factors. The *actus reus* of sexual assault is established by the proof of three elements: the touching, the sexual nature of the contact, and the absence of consent.

[66] The first two elements are objective; it is sufficient for the prosecution to prove that the accused's action were voluntary. The sexual nature of the assault is determined objectively. The prosecution need not prove that the accused had any *mens rea* with respect to the sexual nature of his behaviour. Therefore, the elements of this offence, as it relates to the first charge are: the identity of the accused, Sergeant Parson; the date and place; that is, on or about 1 December 2002 at or near the Brigadier Murphy Armoury of Vernon, British Columbia; that the accused committed an assault on the person of Private R.H. in applying force directly or indirectly; that the force in question was of a sexual nature; that Private R.H. did not consent and that Sergeant Parson knew that Private R.H. did not consent to the force that Sergeant Parson applied or that he was reckless. In other words, that Sergeant Parson was aware that there was a risk that Private R.H. was not consenting to the force that Sergeant Parson applied but went ahead anyway not caring whether Private R.H. consented or not; or that he was willfully blind; that is, Sergeant Parson knew, he should inquire whether Private R.H. consented to the force that Sergeant Parson applied but did not make the inquiry because he did not want to know the truth about it. He did not want to know the truth about Private R.H.'s consent. In other words, that Sergeant Parson deliberately failed to inquire about Private R.H.'s consent even though Sergeant Parson knew that there was reason to do so. So those are the elements of the offence.

[67] The second charge is laid under section 129 of the *National Defence Act* for a conduct to the prejudice of good order and discipline. It alleges harassment contrary to DAOD 5012-0. In that context the prosecution must prove beyond a reasonable doubt the following elements: the identity of the accused, Sergeant Parson; the date and place as alleged in the charge which are the same as the first charge; the next element is the impugned conduct; that is, harassing Private R.H.; the next element is the prejudice to good order and discipline resulting from the conduct. In this case, the particulars of the charge alleged the contravention of the DAOD 5012-0. Therefore, the prosecution must prove that the harassment falls within the meaning of that particular order before it can rely on the presumption set out in sub-section 129(2) of the *National Defence Act* which provides, in part, that a contravention of an order by any person is a conduct to the prejudice to good order and discipline. This element also requires the prosecution to establish beyond a reasonable doubt that the accused knew about the existence of that order, and that is admitted by the defence.

[68] As I said earlier, the prosecution must prove beyond a reasonable doubt all the essential elements of each offence. The accused does not have to prove anything. In this case, the accused denies that the events that form the base of both charges; that is, the touching of Private R.H. while they were both in a single bed after the Christmas



party in Room 1 of Building A-10 ever took place. It is for the prosecution to prove beyond a reasonable doubt that the events alleged, in fact, occurred and that Sergeant Parson was the person involved in that. It is not for Sergeant Parson to prove that these events never happened. If the court has a reasonable doubt whether the events alleged ever took place, the court must find Sergeant Parson not guilty.

[69] As I have already indicated, the court does not decide whether something happened simply by comparing one version of events with another and choosing one of them. The court has considered all the evidence to satisfy itself beyond a reasonable doubt that the events that form the basis of the charges, in fact, took place and it has done so in applying the principles set out by the Supreme Court of Canada in *R v W.(D.)*. The nature of the evidence in this case requires the court to make certain findings as to the credibility of various witnesses, and, as I said, this is not a matter where one can choose between the version of the accused or of other witnesses.

[70] The court finds no issue of credibility with the testimonies of Captain Stecyk, Mr. Mike Illingby, Corporal Neid, Constable White, and Warrant Officer (Retired) Carbonell. They all testified in an honest and straightforward manner. They had no interest in the outcome of this case and their testimony is fairly limited. However, their testimony assists the court in assessing the credibility and reliability of the testimonies of Private R.H. and that of Sergeant Parson.

[71] Concerning the testimony of Corporal Barber, the court finds that his testimony is generally credible, but the court has some concerns with its reliability when it refers to his recollection considering his own consumption of alcohol between 30 November and 1 December 2002 as revealed by his own evidence.

[72] First, dealing with Sergeant Parson, the court does not believe Sergeant Parson. He testified about his behaviour and his actions during the relevant period. Although he said he was drunk on a scale of 7 out of 10, he provided an enormous amount of details about the incident of the kiss, his encounter with Private R.H. in the storage room, and all the measures he took in his search for a place to sleep in Building A-10 until he was awakened by a person making movements in his bed later identified as Private R.H. He explained why he was so emotional about the incident of the kiss and how he only realized, four months after, that the investigation against him went beyond the unsolicited kiss from Private R.H. contrary to Mr. Illingby's version. The court finds that his testimony is filled with contradictions and inconsistencies when examined in light of all the evidence.

[73] He described himself as a proud senior NCO with an absolute sense of responsibilities. Despite the fact that he was PMC of the dinner, and his responsibilities as a senior NCO, in the presence of guests and very junior members from his unit, he got drunk. When he received a kiss from Private R.H., he did not react other than putting the blame on her once confronted by his friend Illingby. According to him, he took on himself to confront Private R.H. in the storage room, and the court retains the version of Mr. Illingby on that aspect. The court finds not credible his explanation to go

home after, or not to go home after as he was living close by, and why he refused a ride home offered by his sober friend Illingby as he was concerned for his own safety, but apparently not so concerned by his guest and friend's safety because he did not enquire with Mr. Illingby to determine his state of sobriety before he let him leave the Armoury. When he realizes someone is in bed with him, he pretends being asleep. As it comes out in his evidence, Sergeant Parson is a victim here. It is an unfortunate series of events that make him look bad. In the barrack room, he ends up in a room and in a bed that he knows or should know that is either occupied or reserved by someone else as there's something on that bed. He said that there was nobody in those beds. Corporal Barber offers a different recollection. His appropriation of that bed is not consistent with a person who takes responsibility and pride in his rank in relation to subordinates. Let us not forget that he lives nearby.

[74] His evidence defies logic and common sense on issues that may be against his personal interest, but he persists in trying to find an explanation or reason. His conduct after the incident is not consistent or credible with a person who received a kiss in public without provocation. His actions are consistent and logical with someone who knows that there is more. His great capacity to provide an enormous and extraordinary amount of details, anecdotes, and explanations for the events that occurred during the evening between 30 November and 1 December 2002 is inconsistent with the capacity of a person admittedly drunk. In other words, Sergeant Parson is not credible and the court does not believe him.

[75] Now, Private R.H. Private R.H. testified in an honest manner and she tried to be helpful as much as she could. The court found her to be a courageous witness who was very embarrassed to describe the events that she remembered with regard to the alleged incidents including her drinking habits. She described how drunk she was that night, to the point that she lost all recollection for the events from the time she returned from a club in Vernon until she woke up being pulled over-top of Sergeant Parson in a bunk bed located in Room 1 of A-10.

[76] The evidence of Corporal Barber indicates that her blackout was more severe, and the totality of the evidence indicates that her recollection of the events is deficient. For example, she believes that Corporal Barber accompanied her at the club in Vernon which he refutes. She does not remember the incident of the kiss as witnessed by Mr Illingby. It is also impossible to reconcile her version of events with regard to being pulled over-top of them, as she said, with no underwear, when you compare what she reported to Corporal Neid and Warrant Officer Carbonell shortly after the alleged incidents; that the man was on top of her, his penis out, and with her panties down to her ankles. As much as the court tries to reconcile her testimony, when looking at the evidence as a whole, her contradictions and inconsistencies are very significant.

[77] As I already indicated, the only issue as it relates to the first and second charge is whether the prosecution established beyond a reasonable doubt that the events took place.

[78] The court does not believe the accused, specifically with regard to his description of his role and responsibilities that particular evening, and his testimony does not leave the court with a reasonable doubt about the elements of sexual assault dealing with the application of force on Private R.H. and the sexual nature of that force as well as the lack of consent of Private R.H. It is also not a case where the court doesn't know whom to believe as the court does not believe the accused.

[79] The question that remains is the following: even if the testimony of Sergeant Parson does not raise a reasonable doubt about his guilt, is the court satisfied beyond a reasonable doubt of his guilt after considering all the evidence that the court does accept? The answer must be no. The evidence of Private R.H. is not sufficiently reliable to satisfy the burden of proof beyond a reasonable doubt. Taking out her contradictions and inconsistencies, after having reviewed them in light of all the evidence presented by the other witnesses that the court accepts, it remains insufficient to provide a solid evidentiary foundation that would establish not only the act, but also the sexual nature of the act and the lack of consent.

[80] The court can only speculate as to what exactly happened between those two drunk persons in the bed. For example, the prosecution asked the court to draw the inference that Private R.H.'s underwear could only have been removed by Sergeant Parson or that he participated in its removal. The court disagrees. The court can only infer that she was wearing her underwear when she crawled in bed for the first time assisted by Corporal Barber. What happened after to that underwear is open to speculation much wider than that proposed by the prosecution.

[81] The prosecution has also asked the court to retain the version of Private R.H. in that Sergeant Parson pulled her on top of him. That is also not proved beyond a reasonable doubt as Private R.H., herself, said the man was on top of her within days after the incident when she spoke to her friend and Warrant Officer Carbonell.

[82] As much as the court disbelieves the accused on critical issues, this disbelief does not operate and cannot operate in order to erase the major contradictions and inconsistencies of Private R.H.'s own testimony when assessed with all the other evidence, and increase or boost *de facto* the reliability of her own evidence. As I said earlier, the onus does not shift on the accused and the prosecution rests with that burden of proof. It is one of those cases where the court is left with a reasonable doubt based on the totality of the evidence.

[83] The court believes that Private R.H. was probably touched in some way by Sergeant Parson, whether he was awake or even asleep, but this is not enough. The court could only speculate as to what happened exactly, how it happened, and what led to it. The court is left with a reasonable doubt with regard to the act and the issue of consent. Therefore, the accused must be acquitted on the first charge.

[84] As to the second charge, the court is not satisfied beyond a reasonable doubt that Private R.H. was occupying the bunk bed when Sergeant Parson went to sleep in that

same bed or that he would have been conscious should Private R.H. have joined him in that bed as the case might have been.

[85] The court being left with a reasonable doubt with regard to the act and the issue of consent, the mere presence of those two persons in the same bed in absence of more convincing and reliable evidence to explain that fact, is not sufficient to amount to harassment in the circumstances.

[86] With regard to the kiss incident, the evidence is sufficiently convincing to conclude that this kiss was unsolicited by Sergeant Parson and that it was given by Private R.H., therefore the court must acquit Sergeant Parson on the second charge.

**FOR THESE REASONS, THE COURT:**

[87] **FINDS** Sergeant Parson not guilty of the first charge and not guilty of the second charge.

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