Citation: *R. v. Private D.A. Wilkins*, 2009 CM 3004

Docket: 200865

STANDING COURT MARTIAL
CANADA
MANITOBA
2ND BATTALION, PRINCESS PATRICIA'S CANADIAN LIGHT INFANTRY

Date: April 16, 2009

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
v.
PRIVATE D.A. WILKINS
(Accused)

FINDING
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] As appears from the charge sheet dated February 13, 2008, Private Wilkins has been charged with two offences punishable under section 130 of the *National Defence Act*: first, having been in the possession of child pornography contrary to paragraph 163.1(4)(*b*) of the *Criminal Code* and, second, having accessed child pornography contrary to subsection 163.1(4.1) of the *Criminal Code*.

[2] The substance of this case turns on events that occurred in summer 2007, more specifically, between early May and late July 2007, at the Canadian Forces Base Wainwright in Alberta. The hearing of this case was held at Canadian Forces Base Shilo in Manitoba because this is where Private Wilkins' parent unit is now based.

[3] The case was heard over two days, on April 7 and 8, 2009.

EVIDENCE

[4] The evidence adduced by counsel for the prosecution at this trial by Standing Court Martial is as follows:

a. Testimony heard from the following individuals, in order of appearance: ex-Private Kolyn; Sergeant Laliberté, an investigator with the Canadian Forces National Investigation Service (CFNIS) who was in charge of the investigation that led to the charges before this court; Private Dany Wilkins, the accused in this case; and Master Corporal Wilkins;

b. Exhibit 3, namely a video recording on DVD of the interview of Private Wilkins carried out by CFNIS investigator Sergeant Laliberté, dated August 21, 2007;

c. Exhibit 4, namely an audio recording on CD of the interview of Private Wilkins carried out by CFNIS investigator Sergeant Laliberté, dated August 21, 2007;

d. Exhibit 5, namely four pages of a print-out of the images of the LimeWire 5 search engine appearing on the computer;

e. The judicial notice taken by the court of the facts and questions contained in Rule 15 of the *Military Rules of Evidence*.

FACTS

[5] Private Wilkins, the accused in this case, arrived at Canadian Forces Base Wainwright on May 4, 2007. He came there to take a military training course. In May 2007, he bought a computer. He brought his personal computer to the privates' and corporals' mess from May to July 2007. There, he could connect to the Internet and drink at the same time.

[6] He essentially used his computer to transfer and store videos and photographs of his fiancee and himself and other such souvenirs taken using a digital camera and also to listen to and download music videos.

[7] He clearly admitted that, during that same period, he was a consumer of adult pornography, particularly when it involved celebrities, and that he played online poker.

[8] In order to download music and adult pornography videos, Private Wilkins used a search engine called LimeWire. In fact, that is the only way he knew at the time, because it was the way his two older brothers had shown him to find and download any files and videos that he wanted from the Internet.

[9] After selecting the desired file type on LimeWire, be it a video, audio, picture, document or program file, one merely had to enter one or more key words in the area provided for that purpose to ask the search engine to search for files of the requested type and the text of which included these words. Then a list of files would appear in a window, and users simply had to select the files they wanted and transfer them to a selection window reserved for the files they wished to download. Once the file was moved to the download window, all the files in that window could be downloaded to a user's computers.

[10] Private Wilkins downloaded an enormous number of pornographic videos, that is, from his keyword search results, he selected certain videos on the basis of their titles, moved them to the download selection window and then downloaded all of the selected videos. It has been established that he could only see the contents of these videos once he had downloaded them to his computer.

[11] During the downloading of these videos, Private Wilkins drank at the mess and played online poker, as the downloading took some time. Once the videos had been downloaded, he could watch them elsewhere than at the mess, any time he wanted to, most often in his quarters. On a number of occasions at the time he watched these videos in the company of Private Kolyn, who is now a civilian and who was voluntarily and honourably released about 18 months ago.

[12] It was while watching an adult video pornography video in the company of Private Kolyn that Private Wilkins showed Private Kolyn, still on his computer, a pornographic bestiality video and, lastly, a child pornography video.

[13] The child pornography video began with a scene in a hotel room where a man was watching a girl between the ages of seven and nine—she could have been no more than twelve, dressed in a skirt and a camisole and dancing on a bed. In the next scene of the same video, the same girl was lying on the bed completely naked, hog-tied with handcuffs and rope, performing oral sex on the man who had been in the room in the previous scene. It was clear that she was not very tall and that her body was not as physically mature as that of a woman. She had no signs of body hair. According to Private Kolyn's description of this video to the court, it did not seem as if the girl was having one of the best experiences of her life, but she was not physically constrained in any way.

[14] Private Kolyn said that he had been surprised and, moreover, sexually turned off when he had watched the last video. He stated that he had watched the video because he wanted to make sure that what he was seeing was real. He told the court that Private Wilkins had not seemed surprised or shocked, that it was possible that he, too, was watching the video in question for the first time and that the video had appeared on the computer by mistake or that it came from an unknown source. He never discussed the video with Private Wilkins. However, he did mention it to another soldier, and some time later, a Military Police investigator came to question him about the matter.

[15] It was on the basis of the information gathered, inter alia, from Private Kolyn that the CFNIS investigator, Sergeant Laliberté, arrested and formally interrogated Private Wilkins on August 21, 2007, at Canadian Forces Base Wainwright. The police officer suspected Private Wilkins of having accessed and possessing child pornography.

[16] In his statement to the police officer, the free and voluntary nature of which the accused expressly renounced during a *voir dire* before the Court, the accused stated as follows:

a. He had seen on his computer the child pornography video of a young girl dressed in a skirt and dancing on a bed, who was later completely naked, hog-tied and performing oral sex on a man who was in the hotel room. A certain number of guys had seen the video in question, and he had downloaded it because this group of guys had told him to do so. More particularly, two of his military colleagues had given him the name of the clip to download and had recommended that he do so. He knew that these two members downloaded child pornography because they had already shown him. He deleted this video from his computer, as it was not his style at all;

b. He had downloaded 10 to 15 child pornography videos, which he had opened, watched and then deleted because they were not what he was looking for. He downloads a large number of pornographic videos at random, preferring those with celebrities. Sometimes, even if the pornography involves only adults, the title states [TRANSLATION] “age 7”;

c. In his opinion, there might be a single video on his computer with a 15-second scene in which one can see a man’s hand wandering or playing around on the torso of a 14- or 15-year old girl lying on a bed. This video bothers him because he knows that it is illegal, particularly in the military because of military regulations;

d. Out of curiosity, he kept three videos which he had watched once or twice on his computer because the girls seemed older to him. The first involves a blond, very beautiful girl, whose pubic area can be seen, lying in a bed and who is doing what her brother is telling her to do. She is with a 24- or 25-year-old adult. The second video, entitled *Dads doing it with their daughters*, involves two 13- or 14-year-old girls who are doing it (implying that they are probably engaged in a sexual act) and a 30- to 40-year old man. The third involves two girls between the ages of 14 and 16 masturbating a man's penis. The man cannot be seen in the video.

e. He categorically denied having shown anyone the videos he described as featuring individuals under the age of 18;

f. He likes young women in pornographic fils to be around 17 or 18 years' old;

g. He used LimeWire to download at the privates' and corporals' mess;

h. The last time he downloaded something to his computer was a month and a half ago.

[17] As a result, charges were laid against Private Wilkins.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGES

[18] First, with regard to the first charge subsection 163.1(4) of the *Criminal Code* reads as follows:

> Every person who possesses any child pornography is guilty of
>
> (*a*) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days; or
>
> (*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

[19] The prosecution must prove beyond a reasonable doubt the following essential elements of this charge. It must establish Private Wilkins's identity and the date and place of the offence as alleged in the first count appearing on the charge sheet. It also has to prove beyond a reasonable doubt the following additional elements:

a. The existence of a photographic, film, video or other visual representation constituting child pornography. To that effect, subsection 163.1(1) of the *Criminal Code* defines "child pornography" as follows:

> . . .
>
> (*a*) a photographic, film, video or other visual representation, whether or not it was made by electronic or mechanical means:
>
> (I) that shows a person who is or is depicted as being under the age of eighteen years and is engaged in or is depicted as engaged in explicit sexual activity, or
>
> (ii) the dominant characteristic of which is the depiction, for a sexual purpose, of a sexual organ or the anal region of a person under the age of eighteen years;

It should be noted that the Supreme Court of Canada explained in *R. v. Sharpe*, [2001] 1 S.C.R. 45 , at paragraph 43, that in applying the first paragraph of this definition, "[t]he test must be objective, based on the depiction rather than what was in the mind of the author or possessor. The question is this: would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity?"

b. That Private Wilkins was in possession of a photographic, film, video or other visual representation constituting child pornography. The decision of the Court of Appeal of Ontario in *R. v. Chalk*, 2007 ONCA 815, in particular paragraphs 17 to 25, is very helpful on the issue of possession in such a context. The decision draws a very clear distinction between wholly innocent possession and possession that attracts criminal liability in the context of child pornography. The decision relies first and foremost on the definition of possession found at subsection 4(3) of the *Criminal Code* and which refers to the concepts of knowledge and control. Specifically, if an accused knows that the item in question contains child pornography, whether or not he or she has seen it, it is what the accused decides to do with the item that is used to establish control, a concept that is essential in defining possession.

[20] Concerning the second charge, subsection 163.1(4.1) of the *Criminal Code* stipulates as follows:

> Every person who accesses any child pornography is guilty of

> (*a*) an indictable offence and liable to imprisonment for a term not exceeding five years and to a minimum punishment of imprisonment for a term of forty-five days; or
>
> (*b*) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months and to a minimum punishment of imprisonment for a term of fourteen days.

[21] In addition to proving beyond a reasonable doubt Private Wilkins' identity and the date and place of the offence as alleged in the second count appearing on the charge sheet, the prosecution must prove

a. The existence of a photographic, film, video or other visual representation constituting child pornography. In that regard, the previous comments made about this essential element of the charge concerning possession of child pornography also apply to this offence;

b. The fact that Private Wilkins had access to a photographic, film, video or other visual representation constituting child pornography; and that

c. Private Wilkins' specific intent to access a photographic, film, video or other visual representation constituting child pornography. In that respect, subsection 163.1(4.2) of the *Criminal Code* clarifies as follows:

> For the purposes of subsection (4.1), a person accesses child pornography who knowingly causes child pornography to be viewed by, or transmitted to, himself or herself. [Emphasis added]

[22] Before this Court provides its legal analysis, 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, of course, are well known to counsel, other people in this courtroom may well be less familiar with them.

[23] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his 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.

[24] 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.

[25] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of subsequent Supreme Court and appellate courts decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[26] 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.

[27] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Private Wilkins, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[28] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did. It could be documents, photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice under the *Military Rules of Evidence*.

[29] 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.

[30] 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, such as whether the events were noteworthy, unusual or striking, or relatively unimportant and, therefore, understandably more difficult to recollect. Does a witness have any interest in the outcome of the trial, that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[31] 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?

[32] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well taint a witness's entire testimony.

[33] 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.

[34] As the rule of reasonable doubt applies to the issue of credibility, the court must first decide on the credibility of the accused, that is, whether or not it believes the evidence submitted to the court by the accused, including the accused's own testimony. This is one of those cases where the approach to the assessment of credibility expressed by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, must be applied strictly because the accused, Private Wilkins, 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.

[35] This test was established mainly to prevent the judge of the facts proceeding by choosing the evidence he or she believes, either that submitted by the accused or that submitted by the prosecution. However, it is also clear that the Supreme Court has reiterated several times that this formula does not have to be recited word for word as some magic incantation (see *R. v. S. (W.D.)*, [1994] 3 S.C.R. 521 , at page 533).

[36] As emphasized by Justice Abella, writing for the majority in *R. v. C.L.Y.*, 2008 SCC 2, at paragraph 10, I confirm that I am aware of the test in *W. (D.)*, above, and the decision rendered in 2008 by the Supreme Court of Canada in *C.L.Y.* and *R. v. J.H.S.*, 2008 SCC 30 concerning the application of this test in assessing credibility. The trap that this court must avoid is to appear to be or to be in a situation where it chooses between two versions in its analysis, namely that submitted by the prosecution and that put forward by the accused.

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

ISSUES

[38] In testifying before this court, Private Wilkins made a case for the defence that raises certain fundamental questions about the essential elements of both charges.

[39] With regard to the first count, the accused submits that he never possessed the child pornography video beginning with a scene in a hotel room where a man was watching a girl between the ages of seven and nine, or at least under the age of twelve, dressed in a skirt and a camisole, dancing on a bed, as he never intended to obtain that video given the nature of what it depicted, given that he did not like that sort of thing at all.

[40] With regard to the second count, the accused submits that he never had the specific intent to access child pornography as he never voluntarily downloaded child pornography videos and that the videos he admits to having kept on his computer for some time were obtained by accident and did not depict child pornography.

ANALYSIS

[41] Before analysing the evidence submitted by Private Wilkins in his defence, including his testimony, and, in particular, before determining whether it raises reasonable doubt as to the evidence submitted by the prosecution on some of the essential elements of each of the charges, the court must first rule on the reliability and credibility of the prosecution’s witnesses. In fact, the evidence of the accused, and

particularly his testimony, can only be assessed in light of the prosecution's evidence, which it considers reliable and credible.

[42] In that sense, the testimony of the Military Police investigator, Sergeant Laliberté seemed reliable and credible to me. In fact, he simply provided evidence on the context of Private Wilkins' statement on August 21, 2007, and the general background to his investigation.

[43] Ex-Private Kolyn also testified for the prosecution. His testimony was consistent and forthright. He had a clear recollection of watching the video of a young girl dressed in a skirt and dancing on a bed in a hotel in front of a man. He provided a detailed and fairly specific description, as it was clear that the event had stood out for him because of the unusual nature of the video. He simply described what he knew of the events, and it was clear that he was not biassed in any way. He left the Canadian Forces 18 months ago and has had no particular contact with anyone, including the accused who was a friend at the time of the incidents. Ex-Private Kolyn's testimony is reliable and credible.

[44] Now, how about the evidence submitted by Private Wilkins? To begin with, let me state right away that the testimony of Master Corporal Wilkins, the accused's brother, appears to be reliable and credible. The essence of his testimony pertained to the use of the search engine LimeWire. His live online demonstration was clear and consistent, as was his testimony. The court noted his constant concern for presenting the facts to the court in a professional, impartial manner. Testifying after the accused, he confirmed one of the statements made by the accused, namely that the content of a file obtained using LimeWire does not always match what is indicated in its title.

[45] Private Wilkins, the accused in this case, testified in a forthright and generally consistent manner. The elements of his testimony that required a more detailed or additional explanation than what he told the police appeared to the court as being reliable and credible because of the consistency of what he said. However, the court does not believe some elements of his testimony that directly contradict what he told the police or which are an attempt to explain the broader context of his statement.

[46] In fact, with regard to the context of his statement to the police, the court does not believe Private Wilkins' explanation on this specific subject in his testimony. The accused explained to the court that it should not give much weight to the incriminating elements of his statement to the police for three reasons: first, because he had not cared about anything, that is, he was not considering the consequences of his statement when he made it; second, he had no computer knowledge; and lastly, because of his emotional state and the language of the interview with the police officer, English, he was unable to easily and correctly answer the questions he was asked.

[47] The review of the statement made by the accused clearly shows that he was entirely aware of the consequences of his statement. In fact, his long moments of silence where he seemed to be thinking about what he should or should not say, his clearly voiced fear of being released from the Canadian Forces and of losing his job and his fear, as expressed to the police officer, of going to prison for a long time reveal the attitude of someone who is highly concerned about the consequences of his actions. During his interview with the investigator, he clearly expressed the fact that in the military, the rules are strict and that he knew them well.

[48] For someone who knows nothing about computers, it seems that Private Wilkins knew full well how to operate a computer to watch videos, access and play certain online games and download personal photos. The court understands that he is not an experienced computer specialist and that he is not able to explain the entire workings of a computer. However, between telling the court that he knew absolutely nothing about computers, to the point of pretending that he could not even operate a computer, and explaining to a Military Police investigator and the court that he was able to download and watch several videos on his personal computer there is a sufficient gap to allow the court not to believe the accused on this matter.

[49] Lastly, as to the language used during the interview with the Military Police investigator, the court cannot believe Private Wilkins' explanations in his testimony. It appears that Private Wilkins first spoke in French with the CFNIS investigator while he was being transported from the place of his arrest to the offices of the Military Police. During his interview with the Military Police investigator, he never asked for the interview to be conducted in French, knowing full well that the investigator was able to speak French. In addition, about 15 minutes in to the interview, while the investigator was telling him that he could consult an attorney and trying to get an answer from him in that regard and although the conversation had been in English since the start, Private Wilkins unceremoniously told the investigator in French, [TRANSLATION] "I don't know what the hell is going on in my head". From that time on, for four minutes, the conversation was entirely in French. The investigator even took pains to explain the meaning of "renonciation" (French for waiver) to Private Wilkins. At the end of the four minutes, following a long silence on the part of Private Wilkins, the investigator asked him in French, [TRANSLATION] "Show me that you understand, Dany". In response, Private Wilkins answered in English "I understand, Sir". From that point on, the conversation was entirely in English. This is a clear example that the accused was able to use the language of his choice to express himself during the interview with the investigator and that he chose to speak in English of his own will. If he had wanted to use the other official language, he was able to do so at any time, as the excerpt to which I referred to before illustrates.

[50] The court will now assess the reliability and credibility of the testimony of Private Wilkins as part of the analysis of the essential elements of the charges.

[51] With regard to the first charge, Private Wilkins' testimony establishes and confirms the evidence submitted by the prosecution, including Private Wilkins' statement to the investigator, with regard to certain essential elements. In fact, the identity, the date and place of the offence of possession of child pornography have been established to the court's satisfaction, beyond a reasonable doubt. Moreover, to the same effect, the fact that the video that is the subject of the first charge, namely the video of the young girl dressed in a skirt and dancing on a bed in a hotel in front of a man, is a video representation constituting child pornography within the meaning of the *Criminal Code* has also been established beyond a reasonable doubt.

[52] Therefore, there remains for determination whether Private Wilkins' testimony, if it is believed, raises reasonable doubt as to the essential element of possession. As stated previously, possession attracting criminal liability entails the concepts of knowledge and control. First, with regard to knowledge, it appears that Private Wilkins told the court that he downloaded the video in question inadvertently, by accident, that is, unintentionally, and that he did not have actual knowledge of it until he opened it. He admits having downloaded and watched the video in question.

[53] To some extent, his testimony in court corroborates what he told the investigator and what was stated by Ex-Private Kolyn, namely, that he was aware of the content of the video on his computer.

[54] On the issue of control, I find Private Wilkins' testimony credible and reliable, namely that he deleted the video in question almost immediately. In fact, after having watched it, the accused persistently stated, both before the court and in his statement to the police officer, that he deleted the video because it was not at all what he was looking for. The prosecution has submitted no evidence to the contrary.

[55] In his statement to the police officer, Private Wilkins explained in a fairly detailed manner that two soldiers known for having an interest in child pornography told him to download the video. However, in that statement, Private Wilkins did not clarify whether or not he knew the content of the video in advance. He explained that it was not the type of thing he was interested in.

[56] During his testimony before the court, Private Wilkins explained that what he had really wanted to tell the police officer was that he had been advised to delete the video if he downloaded it to his computer. He said that it was not the type of video he was interested in and stated that he had not known that he had downloaded it to his computer. Moreover, ex-Private Kolyn clearly implied that it was possible that this had been the first time that Private Wilkins had seen the video on his computer and that he had downloaded it inadvertently.

[57] In this regard, the court accepts the following from the testimony of the accused as being reliable and credible: when he downloaded the video, he did not know that he was downloading specifically that video. The evidence submitted by the prosecution on this subject does not contradict this version supplied by the accused in his testimony to the court. In his statement to the investigator, it was never clear from what he said that he had deliberately downloaded this specific video. His words to the police officer suggest that he was told to do so. However, did he specifically download this particular video, or did he download in bulk, that is, did he download a set of videos and then recognize the title of the video in question? How did he proceed? To which Web site did he go, and what was the exact title of the video in question? The evidence is silent in that respect.

[58] Clearly, the court cannot find credible the accused's testimony that he had been advised to delete the video if he downloaded it inadvertently. This is a major contradiction, as was pointed out by counsel for the prosecution, which cannot hold water in the context of what the accused said in his statement to the investigator. In that regard, the accused seemed to have wanted to change substantially what he said to the police officer in his statement, without any other plausible, consistent explanation. However, this fact alone does not make Private Wilkins' testimony unreliable and implausible.

[59] Consequently, as the accused's testimony, which the court considers to be, as a whole, reliable and credible, raises reasonable doubt as to an essential element of the charge, the court finds that the prosecution did not discharge its burden of proof which was to prove beyond a reasonable doubt that Private Wilkins was in possession of the video of a young girl dressed in a skirt and dancing on a bed in a hotel in front of a man and which constituted child pornography.

[60] In passing, the court would like to point out that there is no evidence that the video was saved on Private Wilkins' personal computer. As the evidence revealed, the accused downloaded a video, which is defined in the *Canadian Oxford Dictionary* as "copy[ing] or transfer[ring] (software or data) from one storage device or computer to another", while saving means "stor[ing] (data) on a hard drive, disk, tape, etc." in the same dictionary.

[61] With regard to the second charge, namely having accessed child pornography, the court must determine whether Private Wilkins' testimony, if it is believed, raises reasonable doubt as to two essential elements of this offence: first, the required specific intent and second, the fact that the videos constituted child pornography.

[62] As for the first charge, Private Wilkins' testimony establishes and confirms the evidence submitted by the prosecution, including Private Wilkins' statement to the investigator, with regard to certain essential elements. In fact, here, too, the court finds

that the identity, the date and place of the offence of having accessed child pornography have been established to the court's satisfaction, beyond a reasonable doubt. As to the essential element of specific intent, the court believes Private Wilkins when he stated that he was not wilfully looking for child pornography. He candidly admitted that he liked adult pornography, that is, pornography involving individuals aged 18 or above, but that he had no interest in child pornography. This testimony is consistent with what he told the CFNIS investigator in his 2007 statement. The court believes that Private Wilkins inadvertently watched the pornography which he described as child pornography because of the apparent age of the individuals involved in four different videos. It is entirely plausible that the titles of these files appearing to be the result of his searches were so misleading that he thought that they were pornography involving only adults before watching them.

[63] On the fact that the four videos he identified in his statement to the investigator and of which he confirmed the existence in his testimony before the court constitute child pornography, the court finds that the combination of the accused's testimony with the evidence submitted by the prosecution raises reasonable doubt.

[64] This is one of those rare cases where the prosecution has submitted no images in support of the charge. In order to answer the following question, namely would a reasonable observer perceive the person in the representation as being under 18 and engaged in explicit sexual activity, the least that is required is a description of the images or videos. Yet it appears that to answer this objective test, no videos were submitted by the prosecution and the prosecution's evidence relies entirely on the description provided by the accused. In addition, it appears that in both his testimony and his statement, the accused gave a very brief description of the persons and activities he saw.

[65] In the first video which relates to a 15-second scene in which one can see a man's hand wandering or playing around on the torso of a 14- or 15-year old girl lying on a bed, there is no other element that can lead the court to objectively conclude that, first, the girl was under the age of 18 and, second, the man was engaged in an explicit sexual activity. No one has said whether the girl was lying on her back or her stomach, and no one has described the environment in which these people were. The Military Police investigator referred to this video during the interview, specifying that the man was stroking the girl's chest, but Private Wilkins has neither denied nor confirmed the police officer's description.

[66] The video of a blond, very beautiful girl, whose pubic area can be seen and who is in a bed and doing what her brother is telling her to do was not described in any more detail. This makes it very difficult for the court, which must objectively decide whether this video is child pornography. The same applies to the video entitled *Dads doing it with their daughters,* involving two 13- or 14-year old girls who are doing it (implying

that they are probably engaged in a sexual act) and a 30- to 40-year old man. The evidence contains no other description of this video. Lastly, the last video involving two girls between the ages of 14 and 16 masturbating a man's penis has the merit, at least, of having a description of the nature of the sexual activity. However, there is no detailed physical description that allows the court to objectively conclude beyond a reasonable doubt that it involves two girls who are under the age of 18.

[67] Moreover, in both his testimony and his statement to the investigator, Private Wilkins indicated what he thought was the approximate age of the girls involved in the videos, and he himself mentioned that he kept the videos because he believed the girls to be older, meaning that there was no risk in keeping them on his computer as the girls seemed to be of legal age, that is, they were at least 18 years' old. However, he did not provide any specific details that led him to provide the approximate ages, namely the very specific context of these videos or the physical features of the girls. In the absence of such details, it is difficult for the court to objectively conclude anything concerning the fact that these videos constituted child pornography.

[68] For the same reason, it would be difficult for the court to conclude, in a special finding, that Private Wilkins was in possession of child pornography on the basis of these videos.

[69] Consequently, as the accused's testimony, which the court finds reliable and credible, on the whole, raises reasonable doubt as to an essential element of the charge, and that the same testimony combined with the evidence submitted by the prosecution raises reasonable doubt as to another essential element of the same charge, the court finds that the prosecution has not discharged its burden of proof, which was to prove beyond a reasonable doubt that Private Wilkins had accessed child pornography.

DECISION

[70] Private Wilkins, considering the finding of this court on both charges against you, the court pronounces you not guilty on the first and second charge.

[71] The proceedings in the matter of the Standing Court Martial of Private Wilkins are now concluded.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

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