COURT MARTIAL

Citation: *R v Yurczyszyn*, 2014 CM 2004

Date: 20140410
Docket: 201364

Standing Court Martial

Canadian Forces Base Wainwright
Wainwright, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Major D. Yurczyszyn, Accused

Before: Colonel M.R. Gibson, M.J.

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Code*, information that could disclose the identity of the person described in the judgement as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

[1] Major Yurczyszyn is charged with an offence punishable under section 130 of the *National Defence Act*; that is to say, sexual assault contrary to section 271 of the *Criminal Code*.

[2] In explaining the court's decision, I shall first review the facts of the case as they have emerged in the evidence heard by the court, then instruct myself as to the applicable law, indicate the findings that I have made with regard to the credibility of certain witnesses, then apply the law to the facts in explaining the analysis that I have made, before indicating the court's determination as to finding on this charge.

The Facts

[3] The allegation of sexual assault before the court arises from an incident that occurred at a party held at the house of W.D. a Canadian Forces (profession), in Wainwright, Alberta, on the evening of Remembrance Day, 11 November 2012. Major Yurczyszyn, who was at that time the Base Commander of Canadian Forces Base Wainwright, attended the party. While gathered in the kitchen of the house with a number of other people, it is alleged that Major Yurczyszyn touched the left breast of Y.J., a civilian guest at the party who was at that time the girlfriend of the party's host, W.D. An account of this incident was provided by three prosecution witnesses.

[4] The first of these, Y.J., a civilian woman currently 32 years old, stated in her evidence that during a conversation in the kitchen, Major Yurczyszyn asked her if she was wearing a padded bra, then touched the side of her left breast with his right hand and said, "it's a padded bra." She said that she had not wanted Major Yurczyszyn to touch her breast, and that this action made her feel uncomfortable and embarrassed. She indicated that his actions had made her feel uncomfortable as a woman, as there was no need for him to invade her personal space and touch her body. She had not invited him to do so. She had been wearing a long-sleeve white dress, which did not show cleavage. She indicated that Major Yurczyszyn appeared to be intoxicated at the time. She indicated that he was wearing a red uniform. On cross-examination, Y.J. also indicated that during the incident, Major Yurczyszyn had used the word "boob". In a quick motion with his hand, he felt her breast, long enough for him to remark that she was wearing a padded bra. She did not sustain any physical injuries from the touch, and did not report the incident that evening. She said that it did feel like it was a violation of her body, or of her "bubble." She described his actions as "pretty intentional." She did not pursue a formal complaint at that time because she was concerned at the potential consequences for her boyfriend W.D.

[5] The second prosecution witness was K.H. She was at that time the commanding officer of the Health Services Detachment at Wainwright. She was also standing in the kitchen at the time that the touching incident occurred. K.H. testified that on the evening in question Major Yurczyszyn appeared to be intoxicated, and that upon his arrival at the party at W.D.'s house she had helped him adjust his uniform as he appeared to be dishevelled. She indicated that he was wearing the green Army DEU with medals that he had worn to the Remembrance Day parade that morning. Major Yurczyszyn was the only person at the party in uniform. She tried to get him to go home to change, but he declined. He was unsteady on his feet, and came into the kitchen and leaned on a counter. He asked for a drink. She was standing next to Major Yurczyszyn. W.D. introduced Y.J. to Major Yurczyszyn. He leaned over and began to remove some stray hairs from her clothing, saying "you've got some hair on your shirt," then reached around after two to three seconds and cupped her left breast with his right hand. Major Yurczyszyn was smiling. Y.J. and W.D. appeared shocked. W.D. brought his hand down to remove Major Yurczyszyn's hand. After about five seconds, Major Yurczyszyn reached over to K.H.'s left breast, as if he were going to do the same to her. She

brought her hand up to prevent him, and said "get the fuck off," as she did not want him to do the same to her. K.H. was shocked, as this was not conduct that she would have expected from a senior officer in the Canadian Forces, especially one in his position. W.D. then took Y.J. away. K.H. left the party an hour later with Major Yurczyszyn, as she said that he was "making an ass of himself" in front of junior officers and civilians from the base. K.H. acknowledged on cross-examination that she did not make a formal report of the incident for several months after the incident, in March 2013.

[6] An email from Major Yurczyszyn to K.H. was introduced into evidence as Exhibit 3. The text of this email read:

> "Hey K.H. Jamie just told me you guys had talked and I wanted to apologize for my actions and comments the other night. I have huge memory gaps of the night and obviously said and did inappropriate things. Please accept my sincerest apologies. I am on the road right now or I would have came over in person. Sorry if this may have tarnished our friendship as I wouldn't want that but fully accept I was in the wrong my bad completely."

[7] The third prosecution witness was W.D., the (profession) at whose house the party on 11 November was held. He was at that time the boyfriend of Y.J. He was standing next to Major Yurczyszyn and observed him to touch Y.J.'s left breast with his right hand. He indicated that he heard Major Yurczyszyn say "nice boobies." He was shocked. Y.J. backed up. She looked shocked. K.H. said it was time to go home, and led Major Yurczyszyn away.

[8] The accused Major Yurczyszyn also gave evidence. He confirmed that on 11 November 2012 he was the Base Commander of Canadian Forces Base Wainwright, and that he attended the party at W.D.'s residence. He stated that he had previously consumed alcohol prior to arriving at the party, both at the Legion in Wainwright and a local drinking establishment called the Dog N' Suds, and that he was still wearing the green DEU uniform with medals that he had worn at the Remembrance Day ceremony earlier in the day. He indicated that he was conversing with K.H. in the kitchen of W.D.'s house, when Y.J. approached. He noticed that she had a loose hair on the left side of her dress, and reached out to pull it off. He said that, due to intoxication or some other reason, he stumbled and brushed her left side with his hand. He said that it was a "split-second" gesture, and that there was "no intent or motive". He said that his intent was just to remove the hair, similar to how people remove cat hair. The hair was halfway on her shirt, and he attempted to grab the part that was loose. He made contact with the left side of her dress. He stumbled when he pulled it off. He reiterated that it was a "split-second touch." He denied making any gesture towards K.H. He left 40 minutes to 1 hour later. He indicated that he did not recall mentioning what type of bra Y.J. was wearing, or saying "nice boobies". He denied cupping Y.J.'s breast. He indicated that he was intoxicated ("under the influence"), but still able to converse. His explanation about the apology in the email at Exhibit 3 was that it was a general apology spurred by his wife's remonstrations about having talked with K.H., who was her super-

visor at the base medical clinic. He indicated in summary that he had made "a bad call" regarding being drunk, but denied that he had any sexual intent in touching Y.J. He denied making a comment about "nice boobies" or "padded bras", or of deliberately feeling her breast.

[9] The defence also called four other witnesses, V.L., D.L., G.C. and L.K., who did not witness the touching incident in the kitchen. The defence represented that their evidence was relevant to the credibility of the three prosecution witnesses.

The Law

[10] In order to arrive at a proper finding in this case, the court must instruct itself as to the applicable law. The first issue deals with the offence of sexual assault.

[11] The Supreme Court of Canada has elaborated the proper analysis of this offence in the case of *R v* Ewanchuk, [1999] 1 SCR 330. Justice Major, writing for the majority of the court, provided the following guidance at paragraphs 25-66 of the judgment, which I paraphrase for succinctness. A conviction for sexual assault requires proof beyond a reasonable doubt of two basic elements, that the accused committed the *actus reus* (or guilty act) and that he had the necessary *mens rea* (or culpable intent). The *actus reus* of sexual assault is unwanted sexual touching. The *mens rea* is the intention to touch, knowing of, or being reckless of or wilfully blind to, a lack of consent, either by words or actions, from the person being touched.

[12] The actus reus of sexual assault is established by proof of three elements: (i) touching (ii) the sexual nature of the contact, and (iii) the absence of consent. The first two of these elements are objective. It is sufficient for the prosecution to prove that the accused's actions were voluntary. The Crown need not prove that the accused had any *mens rea* with respect to the sexual nature of the behaviour. The absence of consent, however, is purely subjective and is determined by reference to the complainant's subjective internal state of mind towards the touching, at the time that it occurred. While the complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trier of fact in light of all the evidence. It is open to the accused to claim that the complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, she did not want the sexual touching to take place. If, however, the trial judge believes the complainant that she did not consent, the Crown has discharged its obligation to prove the absence of consent. The accused's perception of the complainant's state of mind is not relevant and only becomes so when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.

[13] The trier of fact may only come to one of two conclusions: the complainant either consented, or she did not. There is no third option. If the trier of fact accepts the complainant's testimony that she did not consent, no matter how strongly her conduct may contradict that claim, the absence of consent is established and the third component of *actus reus* of sexual assault is proven.

[14] The mens rea of sexual assault contains two elements: intention to touch, and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched. Consent is an integral part of the *mens rea*, but considered at this stage of the inquiry from the perspective of the accused. In order to cloak the accused's actions in moral innocence, the evidence must show that he believed that the complainant communicated consent to engage in the sexual activity in question. A belief by the accused that the complainant, in her own mind, wanted him to touch her but did not express that desire, is not a defence. The accused's speculation as to what was going on in the complainant's mind provides no defence.

[15] There is a difference in the concept of consent as it relates to the state of mind of the complainant vis-à-vis the *actus reus* of the offence, and the state of mind of the accused in respect of the *mens rea*. For the purposes of the *actus reus* consent means that the complainant in her mind wanted the sexual touching to take place. In the context of the *mens rea* specifically for the purpose of the honest but mistaken belief in consent- consent means that the complainant had affirmatively communicated by words or conduct her agreement to engage in the sexual activity with the accused. The two parts of the analysis must be kept separate.

[16] In the case of *R v Chase* [1987] 2 SCR 293, at paragraphs 11-12 of the judgment Justice McIntyre for the court provided guidance in determining the sexual nature of the body part being touched:

> ...The test to be applied in determining whether the impugned conduct has the requisite sexual nature is an objective one: "Viewed in the light of all of the circumstances, is the sexual or carnal context of the assault 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, including threats which 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. If the motive of the accused is sexual gratification, to the extent that this may appear from the evidence, it may be a factor in determining whether the conduct is sexual. It must be emphasized however, that the existence of such a motive is simply one of the many factors to be considered, the importance of which will vary depending upon the circumstances.
>
> Implicit in this view of sexual assault is the notion that the offence is one requiring a general intent only.

[17] In *R v S.(P.L.)* [1991] 1 SCR 909, Justice Sopinka writing for the majority of the Supreme Court said at paragraph 33 of the judgment:

> By concluding that sexual assault was not established because there was insufficient proof of sexual motivation, the majority in effect converted the offence of sexual assault to one of specific intent. This would, of course, be contrary to *Chase* which held that the offence is one of general intent and established that the intent of the person committing the act is only one of the factors to be considered in determining whether the overall conduct had a sexual context. The appropriate question which had to be consid-

> ered in this case was whether, notwithstanding the absence of a proven sexual intent, the touching was committed in circumstances of a sexual nature.

[18] The second legal issue upon which I must instruct myself relates to the presumption of innocence and the standard of proof beyond a reasonable doubt.

[19] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in Canadian criminal law, and the standard of proof beyond a reasonable doubt in order to displace the presumption of innocence is an essential part of the law that governs criminal trials in this country. In matters dealt with under the Code of Service Discipline, as with cases dealt with under Canadian civilian 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. 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 essential element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[20] 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. In order to secure a conviction, it is incumbent on the prosecution to prove each essential element of the offence charged to the standard of proof beyond a reasonable doubt. 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.

[21] The court must find an accused person not guilty if it has a reasonable doubt about his or her guilt on all the essential elements of the offence after having considered all of the evidence.

[22] The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and tradition of justice.

[23] In *R v Lifchus* [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model jury charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice; rather, it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that the person has been charged is no way indicative of his or her guilt.

[24] *In R v Starr* [2000] 2 S.C.R. 144, 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....

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

[26] The third legal issue is the assessment of the testimony of witnesses. 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, videos, 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.

[27] 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 and reliable.

[28] Credibility is not synonymous with telling the truth, and the 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 events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where the accused chooses to testify.

[29] 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? However, demeanour must be assessed with caution, and should be assessed in conjunction with an assessment of whether the witness's testimony was internally consistent, that is, consistent with itself, and consistent and with the other uncontradicted or accepted facts in the evidence. The Court of Appeal for Ontario, and the Court Martial Appeal Court, have cautioned against over-reliance on demeanour as a factor in assessing the credibility of witnesses and the reliability of their evidence.

[30] 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.

[31] The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. The court may accept the evidence of a particular witness in total, in part, or not at all. In *Captain Clark v. The Queen*, 2012CMAC 3, the Court Martial Appeal Court has given very clear guidance as to the assessment of credibility of witnesses. Justice Watt for the court elaborated the governing principles:

> First, witnesses are not "presumed to tell the truth." A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced at the proceedings, unaided by any presumption, except the presumption of innocence [of the accused person.]
>
> Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense, and rationality to reject uncontradicated evidence. [A trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.]

[32] Credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable. A finding that a witness is credible does not require a trier of fact to accept the witness' testimony without qualification. Credibility is not co-extensive with proof.

[33] As Justice Watt indicated at para 48 of *Clark*:

> Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as a witness believes it to be. In a word, credibilty. Accuracy concerns have to do with the actual accuracy of the witness' account. This is reliability. The testimony of a credible, in other words an honest witness, may nonetheless be unreliable.

[34] The accused, Major Yurczyszyn, gave evidence in his trial and his evidence was essentially a denial of several essential elements of this offence. Given this, the court must focus its attention on the test provided in the reasons for decision of Justice Cory in the Supreme Court of Canada case of *R v W.(D.)* [1991] 1 S.C.R. 742, for cases such as this where the accused has testified and his evidence essentially constitutes a denial of one of the essential elements of the charge. This guidance provides as follows:

a. first, if I believe the evidence of the accused, then I must acquit;

b. second, if I do not believe the testimony of the accused but am left in reasonable doubt by it, I must acquit; and

c. third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence that I do accept, I am

> convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[35] In *R v J.H.S.* 2008 SCC 30 at paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R v H.(C.W.)* (1991) 68 C.C.C. (3d) 146 (BCAA) where Wood J.A. suggested the additional instruction:

> I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[36] I will now turn to an assessment of the evidence in this case, and whether the prosecution has met its burden of proving the guilt of the accused on each essential element of the offence, to the standard of proof beyond a reasonable doubt.

[37] Applying the *W(D.)* analytical framework, I start with the evidence of the accused Major Yurczyszyn. Concerning his testimony regarding the central issue of his touching of Y.J.'s breast, and his intent in doing so, I find his evidence on this issue inherently improbable, unpersuasive and too convenient. Aware of the necessity for caution regarding the use of demeanour expressed above, I do note as one factor in the credibility assessment that his demeanour while giving his evidence was unpersuasive. More importantly, his evidence is not externally consistent on crucial points with the evidence of the three other witnesses who gave evidence on this point. Each of them indicate that he said something that would suggest a sexual intent to the touching. In particular, I note the absence of any indication in his account of any apology to Y.J. for what he says was an accidental touching of her breast, which one would expect following an accidental touching of a sensitive area of another person's body. I note as well as the absence of any indication in the evidence of the other three witnesses that he offered any apology. I also note the indication by Major Yurczyszyn in the email entered as Exhibit 3 in evidence that he has "huge memory gaps of the night" adversely effects the assessment of both the credibility and reliability of his evidence of the events. I do not believe his evidence regarding how the touching of Y.J.'s breast occurred, nor of his intent in doing so, and I am not left with a reasonable doubt by it.

[38] I must then turn to assessing whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[39] I will start by an assessment of the credibility and reliability of the evidence of the three witnesses called by the prosecution, mindful of the guidance of the Court Martial Appeal Court described earlier.

[40] I found Y.J. to be a credible witness. She gave her evidence in a forthright manner, and did not exaggerate. Indeed, she was at pains to indicate that she had not considered the incident especially serious at the time, and did not make an independent complaint regarding the touching incident. She did not seek to minimize or avoid the

embarrassing aspects of her intoxication or nudity later on in the evening of the incident. I accept her evidence that at the time of the touching incident she was not intoxicated, and was able to clearly perceive what transpired.

[41] There was one aspect of her evidence that was inconsistent with the evidence of the other witnesses. This concerns the uniform that Major Yurczyszyn was wearing on 11 November. She indicated that it was a red uniform with a vest (consistent with an Army Mess kit), rather than the Green DEU that all of the other witnesses, including Major Yurczyszyn, indicated that he was wearing at the party on 11 November. The evidence was to the effect that Y.J. had earlier attended another social function at the base in September or October 2012 (the firefighters ball) at which mess kits were worn, and at which she had met Major Yurczyszyn. It appears probable to the court that in her memory she has conflated the uniform that Major Yurczyszyn was wearing between the two occasions. This particular lapse of memory on a minor detail by a civilian witness 17 months after the event does not seem to me to substantially affect the credibility or reliability of her evidence concerning the touching incident which is the subject of the charges, and upon which her attention would naturally be focused.

[42] I found K.H. to be a generally credible and reliable witness. Her demeanour while giving evidence was at times somewhat sullen, and she demonstrated an evident animus towards Major Yurczyszyn at times, perhaps relating to other events during that evening which are the subject of the section 97 charge, but I find her account of the touching incident in particular to be both credible and reliable. She was proximate to the event, and had a clear view of what transpired. I gave no weight whatsoever to the remarks made by the defence witnesses D.L. or G.C. to the effect that K.H. was a "bitch," or that "one had to watch one's back with K.H.". The issue of whether G.C. was present at this particular party which was raised by the defence, or whether she was conflating it with another party, strikes me as collateral to the central issue of the touching incident, and does not detract from my assessment of the credibility and reliability of her evidence on that point.

[43] I also found the third prosecution witness W.D. to be credible. Some minor confusion in his evidence likely arose from the fact that, as he indicated, English is his second language, and he does not yet have a perfect command of it. I accepted his evidence that at the time of the incident he was not intoxicated, and that he was able to perceive and recount the incident clearly. I do not accept the evidence of D.L. or Major Yurczyszyn to the effect that W.D. later made comments casting doubt on his account of what happened in the kitchen of his house on 11 November 2012. I specifically do not find D.L. to be a credible witness in this regard.

[44] I should say that I agree with the defence that there is a potential ambiguity with regard to the apology offered by Major Yurczyszyn to K.H. in the email entered as Exhibit 3 in evidence, concerning what exactly it relates to regarding the events of that evening, and I thus have given it no weight as a purported admission of guilt in making my determination on the issue of the sexual assault charge. I do however find that the admission that Major Yurczyszyn had "huge memory gaps of the night" relevant to the

assessment of the credibility and reliability of his evidence regarding the events of the night in question.

[45] There are seven essential elements of the offence before the court. Identity and date, time and place are not in issue. The remaining five elements relate to the *actus reus* and *mens rea* requirements stipulated in *Ewanchuk*, to which I referred earlier. There is ample evidence from Y.J., K.H. and W.D. that I do accept that Major Yurczyszyn intentionally touched Y.J.'s body.

[46] The sexual nature of the contact, as indicated in *Chase*, is to be determined on an objective basis. The part of the body touched (Y.J.'s breast) and the comments reported by the observers "wearing a padded bra" or "nice boobies" are clear evidence of a sexual intent to the touching.

[47] The third element of the actus reus, the lack of consent of the complainant Y.J., is to be determined by her subjective belief. Her evidence was very clear that she did not want Major Yurczyszyn to touch her breast, and that she felt that it was a violation of her body or her "bubble."

[48] I thus find that the requisite elements of the *actus reus* of sexual assault have been made out to the standard of proof beyond a reasonable doubt.

[49] Turning to the *mens rea* analysis, sexual assault is a crime of general intent. The apparent intoxication of Major Yurczyszyn during this incident thus does not negative this element. There is no evidence before the court to indicate that Major Yurczyszyn's level of intoxication on the evening in question was so extreme as to deprive him of the ability to form an intent, and self-induced intoxication is not a defence to a charge of sexual assault in reference to the consent element of *mens rea*. In any event, honest but mistaken belief in consent was not advanced as a defence in this case. The defence submission on this point was rather that Major Yurczyszyn's level of intoxication may have caused him to stumble. The defence advanced in relation to the influence of intoxication in the present case is thus one of accident rather than consent. As I have indicated, the court does not accept Major Yurczyszyn's assertion that he touched Y.J.'s breast because he stumbled due to the influence of alcohol.

[50] As indicated in *Ewanchuk*, the *mens rea* of sexual assault contains two elements: intention to touch, and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched.

[51] On the evidence in this case, the intention to touch is demonstrated by the remarks about "padded bras" and "nice boobies" made by Major Yurczyszyn reported by the witnesses. Regarding the second element of recklessness or wilful blindness, there is absolutely no evidence that anything in Y.J.'s comments or actions in the kitchen at the time of the incident could have led Major Yurczyszyn to reasonably believe that she wanted or consented to him touching her, and to touch the breasts of a woman that one

knows only slightly in such a social situation can only be regarded as reckless or wilfully blind to the issue of her consent.

[52] I find that on the evening of 11 November 2012, Major Yurczyszyn did intentionally touch the left breast of Y.J. for a sexual purpose, either reckless or wilfully blind as to her consent to be touched, and that therefore the *mens rea* component of the offence is made out to the standard of proof beyond a reasonable doubt.

[53] The defence has pointed out that the evidence of the three prosecution witnesses about the touching incident is not perfectly consistent, particularly with regard to the words spoken by Major Yurczyszyn. Minor inconsistencies in the evidence of eyewitnesses are to be expected. The central elements of the touching, and words spoken by Major Yurczyszyn indicating a sexual purpose, are clear on the evidence. I do not find that any of the inconsistencies are so significant as to give rise to a reasonable doubt about the central aspects of their evidence.

[54] Major Yurczyszyn has not advanced a defence of honest but mistaken belief in consent, but rather one of accident. I find that there is no air of reality to that defence in the circumstances of this case.

[55] Finally, the defence has invited me to find that even if touching occurred, that it was so trivial or minor that the legal maxim of *de minimis non curat lex* should be applied, and presented me with a number of trial level cases in which the judges applied such a defence. So far as I am aware, there is no binding appellate authority to the effect that the *de minimis* defence pertains in Canadian criminal law, and I was not provided with any judgments of either a court martial or the Court Martial Appeal Court to that effect. In any event, even if such a defence is indeed available in Canadian law, I would not apply it on the facts of this case as the court has found them to be. For a Canadian Forces senior officer who was a Base Commander, in uniform, to intentionally touch the breast of a civilian person for a sexual purpose, while making sexual comments, is clearly beyond the *de minimis* range.

FOR THESE REASONS:

[56] **FINDS** that the prosecution has met its burden of proving all of the essential elements of the offence to the standard of proof beyond a reasonable doubt. Major Yurczyszyn, the court finds you guilty of the first charge on the charge sheet

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Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major S. Collins, Directorate of Defence Counsel Services

Counsel for Major D.W. Yurczyszyn