

Citation: *R. v. Private S.C. Cross*, 2009 CM 3016

Docket: 200902

**STANDING COURT MARTIAL
CANADA
MANITOBA
CFB WINNIPEG**

Date: 22 September 2009

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

HER MAJESTY THE QUEEN

v.

**PRIVATE S.C. CROSS
(Accused)**

Warning

This decision was formatted to comply with an Order issued by the Standing Court Martial, directing that any information that could identify the complainant shall not be published in any document or broadcast or transmitted in any way.

**FINDING
(Rendered Orally)**

Introduction

[1] Private Cross is charged with one offence punishable under section 130 of the *National Defence Act* for sexual assault contrary to section 271 of the *Criminal Code*. The complainant in the case brought before this court is C.S. I will refer to the initials only.

[2] The facts on which this court is based relate to events that occurred over the night of 6 to 7 June 2008, in the city of Winnipeg, and at Private Cross's room on the Canadian Forces Base (CFB) Winnipeg, province of Manitoba. At the time of the

alleged incident, the accused was working at CFB Winnipeg, while C.S. was on job training (OJT) for trade qualification purposes on the same military base.

The Evidence

[3] The evidence before this court martial is composed essentially of the following facts:

a. The testimony heard, in the order of their appearance, before the court: the testimony of C.S., the complainant in this case; Commissionaire Visca; and Private Cross, the accused in this case. Also, the testimony of Corporal Concha, provided during the *voir dire*, held for the determination on admissibility of evidence under section 276 of the *Criminal Code*, was rolled into the main trial with the agreement of both counsel.

b. The evidence of the complainant's sexual activity I declared admissible further to an application made by the accused pursuant to section 276 of the *Criminal Code*, which is the following one:

i. That on 16 May 2008, while at the Palomino nightclub in Winnipeg, the applicant and the complainant engaged in a sexual activity, to wit, during the last half hour or so they spent at that location, while they were dancing on the dance floor, they kissed each other on the lips and on the neck, and started to make out meaning that they rubbed their respective bodies;

ii. That on 6 June 2008, while at the Coyotes nightclub in Winnipeg, the applicant and the complainant engaged in a sexual activity near the end of the time they spent at that location, to wit, while they were dancing on the dance floor, they kissed each other on the lips for about 15 minutes.

c. Exhibit 3, the pictures of Private Cross's cellphone taken on 24 June 2008. This document was entered in evidence by consent;

d. Exhibit 4, two pages of the 17 Wing Taxi Control Check Sheet for 6 and 7 June 2008;

e. Exhibit 5, a DVD on which can be found the videotaped interview of Private Cross by the investigator of the National Investigation Services (NIS) made on 24 June 2008. This document was also entered in evidence by consent; and

f. The judicial notice taken by the court of the facts in issue under Rule 15 of the Military Rules of Evidence.

[4] At this stage, it would be appropriate for the court to provide the testimonial evidence presented by both parties in this case.

The testimony of C.S.

[5] According to C.S., the complainant in this case, the facts leading to the commission of the alleged offence by the accused started a couple of weeks before, when both the accused and the complainant accidentally met each other on an early Friday evening at the CFB Winnipeg Junior Ranks' Mess.

[6] She said that they saw each other at the mess, but it took some time for them to recognize each other. In fact, they have not seen each other for years and they did not know that they have both joined the Forces. The complainant was Private Cross's sister's friend and was used to going to their parents house when they were living in the same town.

[7] C.S. recognized Private Cross at the mess and approached him. They cut out with what transpired in their life and decided to go out to the Palomino nightclub with some other CF members. She said that her mother drove her there with the accused and a couple of other CF members. The complainant testified that she spent most of her night with Private Cross, drank and danced with him. At the closing of the bar, she was hungry and they both looked together for a place to eat. They walked for a while, but did not find any restaurant open. They took a cab together that drove the complainant first, to her house, and then, the accused to his room on the base.

[8] During the two previous weeks before the incident, C.S. testified that she was on sick leave because of her illness. She had a sore throat, she had a serious cough and she took some medication for that. She was isolated in some ways in her parents' basement house in order to avoid making others sick. She was not eating much and she, essentially, drank liquid during that time. When she started to feel better, which is about two days before the incident, she wanted to go out with familiar faces, and she then sent an invitation to do so on the Friday by text message to two persons; one named Matt and the other being Private Cross. Matt declined the invitation and C.S. stated that she was without any news from Private Cross. She explained that the accused probably never got her invitation for technology reasons, and then she renewed it the same way. That time, the accused received it and accepted.

[9] According to the complainant, she had ceased medication and started to eat normally, however she was having only small portions, two days prior to the incident.

She had lost between five and ten pounds during those two weeks of illness.

[10] She testified that on the early Friday evening in question, a text message exchange occurred between her and Private Cross in order to determine at what place they would go out that night. It ended that they stopped their choice on the Coyotes nightclub, but before going there, considering that the accused had the intent to drink alcohol, it was decided that he would leave his car at the complainant's parents' house, and that they would have some pre-drinking before going to the nightclub.

[11] The complainant said that the accused arrived at her house at about 8 p.m. They hung out and chatted about a variety of things. She showed him pictures of her boyfriend and other friends, they listened to music and watched videos. She talked to him about the fact that she had a long distance relationship. Private Cross shared his experiences with her on these issues. While at the house, she said that she consumed three coolers, and that the accused came to her house with a bottle of spirits and some juice. According to her, he left one inch to one inch and a half of alcohol in the bottle when they left the house. She mentioned that prior to heading to the nightclub, Private Cross was talking to a friend on the phone. She called a cab and they left the house around 10:30 p.m.

[12] C.S. confirmed that they got to the Coyotes nightclub just before 11 p.m. She socialized, smoked, drank and danced, being most of the time with Private Cross. She had three to four rum and Cokes. According to her, nothing significant happened during that night at nightclub.

[13] At the closing of the bar, when the lights went on and the music stopped, they left the place. She was walking by herself. She took a taxi with Private Cross. She entered into the taxi on her own and sat behind the driver. She mentioned that she was able to provide her home address to the cab driver, but she did not. She testified that when she left the bar, she felt exhausted and drowsy. She laid down in the cab. She recalled her falling asleep or passing out in the taxi very quickly after she entered, which is about within a minute or two. As she was doing that, she remembered hearing the word "base." She affirmed that they never discussed the fact that they were going back to the base. She does not remember who provided directions to the cab driver, but it was not her. She said that she recalled Private Cross sat beside her and her head was close to Private Cross's lap, but she does not remember touching it. However, she conceded, during her cross-examination, that it could have happened.

[14] C.S. stated that she does not remember the cab ride to the base and passing the gate. She does not recall either speaking to the commissionaire at the gate, but mentioned that it could have happened. She testified that she was awoken by the cab driver who was yelling at them. She sat and realized that she was at the shacks on the base.

[15] According to the complainant, Private Cross wanted to pay the ride, but he had not enough money. She then gave her last twenty-dollar bill to him in order to help him to pay the fare. Once paid, the accused told her to get out of the cab, to which she replied negatively because she wanted to go back to her parents' house where she lived at the time. He pointed out to her the fact that she had not enough money to pay the ride, and he offered her to come to his room where she could have a glass of water and where he could call her another cab. She acknowledged the fact that by giving her last \$20, she knew at the same time that she had not enough money to pay the taxi ride to her parents' house. She also confirmed during her cross-examination that she knew, at that time, that she had her debit card with her.

[16] What was said by Private Cross made sense to her and she voluntarily, on her own, made the decision to step out of the cab and sat on the curb. She clearly and emotionally highlighted the fact, in her testimony before the court, that it is a decision that she deeply regrets today. At that point, she described herself as being very drowsy, dizzy and exhausted. She testified that she was assisted by Private Cross in order to walk, go up the three flight of stairs for getting to his room. She indicated that the accused had to slip his arm under her armpit for supporting her with his shoulder. He leaned her against the wall in the hallway in order to unlock his door.

[17] C.S. testified that Private Cross had to help her to enter. As they were going into the room, she noticed that one of her earrings fell down. She bent down on her own, without help, and picked up her silver earring that she was wearing and removed the remaining one, she put both earrings in her pocket. Then, Private Cross helped her to enter the room and placed her at the edge of the bed in a sitting position, facing what she thought to be the bathroom. She described that she saw him turning his back, heading to the bathroom for, what she assumed, getting her a glass of water. She told the court that she fell back on the bed with her knees down dangling over the side of the bed, and she passed out.

[18] Some time later, the complainant testified that she was woken up by the feeling of being penetrated inside of her. When she opened her eyes, it looked like Private Cross was completely naked, on the top of her, and felt he was penetrating her with his penis in her vagina. She pushed him back with her hands, and told him to stop, and that she had to go. He got up immediately. She described that at the moment she felt that Private Cross was shocked. She said that her reaction snapped him out. He gave her back her clothes. She realized that she was wearing only her underwear. She testified that Private Cross never resisted or insisted. He offered to call her a cab. She got her dress, took things that had fallen out of her pants pockets on the floor, and basically, ran out the door.

[19] According to C.S., when she fell asleep, she completely blacked out, and she did not remember anything for the next little bit. She said that she was coming in and out,

felt that things were happening, but it was like she was not awake. She felt like coming in and out of unconsciousness. She testified that she had never experienced anything like this before. She said that she does not remember opening her eyes or seeing anything during that period of time. She was able to visualize and to picture in her head what was going on based on her feelings. She felt like she was outside her body, looking in or down, something like an out of body experience.

[20] The complainant testified that it was more a matter of feeling things. She felt being kissed, and also a tugging on her shirt where she had a string in the middle, tied into a bow for decorative purposes. She felt the lips of somebody else on her lips. She could feel what was going on, but she could not do anything. She felt paralyzed. She could not move or react to what was going on. She did not remember anything else, like her clothes being taken off, until she woke up. However, she firmly stated to the court that despite the fact that she has no recollection of having her clothes taken off, she never provided help to take her clothes off, and that her doing such thing, never happened. She explained by saying that for her if a person is in a state of unconsciousness, as she was, this person cannot help, voluntarily, in any way to take off his or her clothes.

[21] When she woke up, she said that she then realized that she was at the same place and position she was in when she passed out, and that her shirt, her pants, and her shoes have been removed. Her clothes were not damaged, but the bow on her shirt was untied.

[22] As soon as C.S. went out of the room, she testified that she exited the building, and once outside, she walked to the main gate. On her way, she called her boyfriend who was in Ontario, but was directed to his voicemail, and left a message to let him know what had just happened. She told the court that she called him because she was in love with him and he was the first person she thought, at the moment, that could be the most supportive in order to help her to go through what was going on, which turned out to be different than she expected. She felt embarrassed by what occurred in Private Cross's room. She asked the commissionaire at the gate to call a taxi and waited inside the booth. She took the cab and while in there she sent a text message to Private Cross to find out why he did such a thing to her, and to tell him what she thought of him. She said that he replied by text message that it is because he drank too much. She stopped at a bank machine in order to get money for the cab fare, and it drove her home.

[23] The complainant testified that she talked to her boyfriend who was not very supportive. He pointed fingers at her and she felt blamed and embarrassed. On the Monday, she talked to a co-worker about what happened, and about a week after, she decided to report the incident to the military police. Before reporting the incident to the MPs, she sent an email, through her Facebook profile, to Private Cross asking what she would tell to her boyfriend. The relationship with her boyfriend came to an end some

time before she filed her complaint to the military police.

The testimony of Commissionaire Visca

[24] Commissionaire Visca was brought by the prosecution. He said that he was a member of the Canadian Corps Commissionaires for about two years. On the night of 6 to 7 June 2008, he was on duty alone at the booth of 17 Wing, the main gate on CFB Winnipeg. He testified that he was performing gate checks, identification control and log-in taxi information.

[25] According to him, he logged in the 17 Wing Taxi Control Check Sheet (Exhibit 4) a taxi passenger he identified as a male military member named Cross. He said that he seemed to be fine. He stated that there was also a female passenger at the back of the cab. He said that the taxi was bringing the passengers to building 64. He stated that he talked to the female passenger and asked for ID, but she did not have any. Then, he said that Cross mentioned that the female passenger was his guest.

[26] He described the female passenger as not being all there, like out of it, and in a daze. She was a little bit slow in her response and her words were a bit slurred. The taxi proceeded to building 64.

[27] He said that about 30 to 40 minutes later, the female passenger, he earlier identified as being with Cross in the taxi, came to his booth and asked him to call a cab. He found the situation odd considering that it never happened before that somebody asked him to call a cab so early in the morning. He described her as appearing different than the first time he saw her. He said that she seemed upset, but quiet while waiting for the taxi. He mentioned to the court that the cab arrived 10 to 15 minutes later and that she got in and left.

The testimony of Corporal Concha

[28] Corporal Concha was called as a witness by the defence counsel during the hearing on the admissibility of evidence pursuant to section 276 of the *Criminal Code*. His testimony was rolled into the main trial on consent of both parties.

[29] He testified that he has known Private Cross since his trade course at CFB Borden. He said that at the time of the incident, they were work acquaintances because both were working at 435 Squadron, and they were both working, actually, in the same crew. He considers him as a friend.

[30] The night a group went to the Palomino nightclub in May 2008, he was sitting beside Private Cross at the Junior Ranks' Mess. He saw a young lady that he has never seen before approach the accused. He saw them discuss, and after she left, he learned

from Private Cross that she was a friend from his hometown. They made plans to go the Palomino nightclub and he went home to change. He went to the Palomino nightclub and met up with a group of people there. He stated that he saw, at the bar, Private Cross with the same young lady he saw earlier pouring a drink, and he noticed that he had his arm around her waist. Later in the night, he said that he saw both of them dancing with each other closely. At the end of the night, he said that he passed by the dance floor and noticed Private Cross and the same young lady dancing together and kissing each other, mouth to mouth. Then, he said he went home. He mentioned that each time he saw them, he was not very far from them. In addition, he mentioned that he had a clear view when he saw them, and that it was very easy to notice the presence of Private Cross in the nightclub because he is very tall.

[31] He stated that some time later, he learned from Private Cross that the latter was charged for sexual assault. He asked if it was related to the young lady he saw with him that very same night. When Private Cross confirmed that it was the case, he told him that he saw them together at the Palomino, and that if he needed his help, he was ready to testify about what he saw that night at the Palomino nightclub.

[32] Private Cross and him never discussed the details of the charge. They have not talked or discussed about the case since then.

The testimony of Private Cross

[33] Private Cross, the accused in the trial, testified on his own behalf. He told the court that he is 23 years old and that he is from Middleton, Nova Scotia, near Greenwood. He knows C.S. as his sister's friend from the time they were at the elementary school. He said that he joined the CF in January 2005, and that he was posted to CFB Winnipeg at the end of April 2007. He's worked there since.

[34] According to Private Cross, it was on Friday, 16 May 2008, that he saw the complainant at the Junior Ranks' Mess. At the time, they had not seen each other for a long time, and when he saw her, her face was familiar to him, but it took some time to recognize her. He stated that she came to him and identified herself. They had a general chat on various topics.

[35] Private Cross testified that at some point in the night, a few people at the mess decided to go to the Palomino nightclub. C.S. and him joined. He said that the complainant's mother gave them a ride from the mess to go there.

[36] The accused said that once at the Palomino nightclub, he had a couple of drinks. He danced with the complainant. He said that he knew some of the people from the mess that went there, but he was able to remember only the name of one of them that was there that night, which was Concha. He mentioned that later in the night, he danced

closer with the complainant, their bodies touching each other, while songs were playing, including slows. At some point, they began to kiss each other on the lips and on the neck, according to him, it lasted a little while. Then, at the closing of the club, they left the bar and walked for finding a place to eat, considering that C.S. was hungry. However, everything was closed that night. After about walking one kilometre, they decided to continue in order to find a cab. He said that they found one after a little while at a hotel on Portage Avenue. They went together in the cab, which drove, first, the complainant at her house, and then, the accused at the base.

[37] According to the accused, further to that, C.S. and him had many conversations through text messages and emails on MSN and on Facebook for the following three weeks. He said that further to a specific invitation he had from the complainant to go out on Friday, 6 June 2008, he sent her a text message to see if she was still interested to do so. He suggested to go to the TGIF at the Junior Ranks' Mess. However, he found out that there was no food and not many people at that place that night, and informed her that it was not a very good idea. He told the court that through a series of text messages, it was finally decided that he would go first to her house where he would leave his car, as she offered him to do, considering that he would drink that night, and then to the Coyotes nightclub.

[38] Private Cross told the court that he bought a 26-ounce bottle of rum with a bottle of juice before getting to her house. He arrived at complainant's parents' house at about 8 p.m. They went downstairs and he started to drink. He said that they talked about her boyfriend, basic training, and they watched pictures and videos of friends while listening to music. He drank most of the bottle, leaving about an inch in it when they left for Coyotes. He mentioned that he called a friend to find out if he could come with them to the Coyotes nightclub, but that friend could not make it. He stated that it is C.S. who called the cab and they left the house some time later that night for the nightclub.

[39] The accused testified that they arrived at the nightclub at a decent time because they did not have to make the lineup to enter. He had a couple of drinks at that place and bought a round of shooters at some point during the night. He said that he danced and went a couple of times outside with C.S. who was smoking. Towards the end of the night, they began kissing a little bit. Lights came on and they left the nightclub.

[40] He said that once they were outside, they found, right away, a cab. He went to the driver's side and told the driver that he was going on the 17 Wing Base on Whyte Road. He slurred a little bit his words and he had to repeat himself. He described the complainant as walking and getting in the cab behind the driver's seat by herself. He entered in the cab on the back seat on the passenger side. He leaned back his head, C.S. put her head on his lap, and he went to sleep for the length of the cab ride.

[41] Private Cross testified that he was woken up by the cab driver just before

arriving at the gate of the base. The driver stopped at the gate and identified himself to the commissionaire. Then, the accused provided his military ID to the commissionaire. Meanwhile, the complainant was looking in her purse to find her own ID, but she did not have it. Private Cross mentioned to the commissionaire that she was with him. He said that the cab proceeded to building 64 on the base.

[42] The accused mentioned that once at the building, he had not enough money to pay the fare. Then, the complainant gave her last twenty-dollar bill in order to help. Once he paid the driver, he realized that C.S. would not have enough money to pay the ride to her place and he offered her to come to his room, have a glass of water and figure out what they will do. They got out of the cab and sat down on the curb for a moment. He offered her to come upstairs. C.S. got up, he put his arm around her shoulder and they walked to his room. He said that she was able to walk by herself without any problems.

[43] He said that when they arrived at his room, he unlocked the door and they got inside. He offered her to sit on the bed, which she did, and went to pour her a glass of water in his washroom. He sat beside her, passed her the glass of water and she took a couple of sips. He said that she was in a sitting position at that time.

[44] According to Private Cross, the complainant gave him back the glass and he put it on the table beside his bed. He described that there was some sort of short pause, they turned their heads towards each other and started to kiss for a quick moment. He stood up and took his jeans off. He sat down, she had her hand down his boxers, and she grabbed his penis. They laid back on the bed and he unbuttoned and unzipped her jeans. He reached down her jeans, over top of her underwear, and put his hand down her pants. He then began to remove her shirt, which happened to get bunched up around her armpits, and she took over and removed, by herself, the shirt. He removed her pants, but they got stuck at her knees. Without sitting upright, she assisted him to remove them. He stood up to finish removing her jeans. He removed his shirt and boxers.

[45] The accused indicated that C.S. was down to her underwear. He then put himself on the top of her, using his hands and knees to keep himself above her without putting any weight on her, moving his legs inside hers. He moved her underwear on the side and he started to insert his penis in her vagina. Before getting all the way in, she told him to stop and to get off. He testified that he was shocked a lot because up to that point everything seemed normal. He jumped back immediately. He went for his clothes, and she went for hers. Before he got his clothes on, she was already gone to the door.

[46] He said that he went out of the building to look for her. He yelled out at her, without being able to see her, and said that he could call her a cab. He went to go see if the bank machine at the Junior Ranks' Mess was available, knowing that she had no

money to pay a cab, and found out that it was closed. He had a look at the main gate and he could not see her. He started to walk around in order to find her, but he was unsuccessful. Then, he went back to his room. Some time later, he received a text message to which he replied.

The Applicable Law and the Essential Elements of the Charge

Essential elements of the offence

[47] Section 271 of the *Criminal Code* reads, in part, as follows:

Sexual assault

271.(1) Every one who commits a sexual assault is guilty of

(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or

(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

[48] In *R. v. Chase*, [1987] 2 S.C.R. 293, at page 302, Judge McIntyre provided the definition of a sexual assault:

Sexual assault is an assault, within any one of the definitions of that concept in s. 244(1) [now section 265(1)] of the *Criminal Code*, which is committed in circumstances of a sexual nature, such that the sexual integrity of the victim is violated.

[49] Paragraph 265(1) of the *Criminal Code* reads, in part, as follows:

Assault

265. (1) A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly

[50] In *R. v. Ewanchuck*, [1999] 1 S.C.R. 330, it was established that:

A conviction for sexual assault requires proof beyond reasonable doubt of two basic elements, that the accused committed the *actus reus* and that he had the necessary *mens rea*. The *actus reus* of 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.

The *actus reus* of sexual assault is established by the proof of three elements:

(i) touching, (ii) the sexual nature of the contact, and (iii) the absence of consent.

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] Then, the prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet. The prosecution also had to prove the following additional elements: the fact that Private Cross used force directly or indirectly against the complainant; the fact that Private Cross used intentionally the force against the complainant; the fact that the complainant did not consent to the use of force; that Private Cross knew or was reckless of or wilfully blind to a lack of consent on the part of the complainant; and the fact that the contacts made by Private Cross on the complainant were of a sexual nature.

Presumption of Innocence and Reasonable Doubt

[52] Before this court provides its legal analysis, it's 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 principle fundamental to all criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[53] 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 guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[54] 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.

[55] 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 Supreme Court 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 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 a court.

[56] 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.

[57] 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 Cross, 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.

[58] 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.

[59] 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.

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

[61] 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?

[62] 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 tint a witness's entire testimony.

[63] 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.

[64] As the rule of reasonable doubt applies to the issue of credibility, the court is required to definitely decide in this case, first, on the credibility of the accused and to believe or disbelieve him. It is true that this case raises some important credibility issues and it is one of those cases where the approach on the assessment of credibility expressed by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 must be applied because the accused, Private Cross, 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.

[65] This test was enunciated mainly to avoid for the trier of facts to proceed by establishing which evidence it believes; the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word by word as some sort of incantation (see *R. v. S. (W. D.)*, [1994] 3 S.C.R. 521, at page 533).

[66] As underlined by Judge Abella, writing for the majority in *R. v. C.L.Y.*, 2008 SCC 2, at paragraph 10, I want to confirm that I am aware of the test in *W. (D.)*, as quoted above, and of the decisions of the Supreme Court of Canada delivered in *C.L.Y.* quoted just above and *R. v. J.H.S.*, 2008 SCC 30 on the application of that test while assessing credibility. The pitfall that this court must avoid is to be in a situation appearing or in reality as it chose between two versions in its analysis.

[67] In addition to having instructed myself as to the onus and standard of proof, I

have also instructed myself that the law relating to recent complaints has been abrogated in Canada, although failure to complain may be a factor to consider by the trier of fact. I have also instructed myself that there is no legal requirement for corroboration of the complainant's story. Finally, I have reminded myself that consent is entirely subjective and that it requires the "voluntary agreement of the complainant to engage in the sexual activity in question" pursuant to section 273.1 of the *Criminal Code*.

[68] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court and address the legal principles.

Position of the Parties

[69] At this stage, it would be appropriate to summarize the position of the parties.

Position of the prosecution

[70] The prosecution submits to the court that considering the admissions made by the accused in his testimony, the main and sole issue for the court to resolve in this case relates to the matter of consent from the complainant in relation to the *actus reus* and the *mens rea* of the offence of sexual assault.

[71] On the issue on consent concerning the *actus reus*, the prosecution's theory on the absence of consent is twofold: first, that the complainant was incapable of consenting to the sexual activity considering that she was passed out or asleep; and second, that at least she expresses, by her conduct, a lack of agreement to engage in the activity.

[72] The prosecution submits that the version of the events put by the complainant is credible and reliable because of her manner to deliver it before the court and because it is supported by other evidence adduced by the prosecution, such as the independent testimony of Commissionaire Visca.

[73] The prosecution suggested that complainant's incapacity to consent was the result of the combined effect of the alcohol, her state of illness and exhaustion. The prosecution also submitted to the court that if the absence of consent did not result from such incapacity, her testimony at least disclosed her total lack of agreement to participate in any sort of sexual activity with the accused. The prosecution invited the court to consider all the evidence surrounding the incident in order to make inferences that support such conclusion.

[74] On the issue of the *mens rea*, which is that Private Cross knew that C.S. did not consent to the force he applied, the prosecution submits that the evidence it adduced supports, beyond a reasonable doubt, this essential element of the offence, and that the defense of honest but mistaken belief raised by the accused in his testimony cannot

stand.

[75] The prosecution suggests to the court that Private Cross's testimony must be disbelieved, despite the fact that he corroborated most of the complainant's evidence for the following reasons:

- a. The accused appeared to have been coached in his testimony;
- b. The accused had a strong tendency to downplay, throughout his testimony, his level of intoxication for the day of the incident;
- c. The accused's explanations about giving the cab driver the base's address rather than providing the complainant's address on the night of the incident are problematic;
- d. The accused did not remove the complainant's underwear and bra before sexual intercourse with her;
- e. The accused did not use a condom and that no discussion occurred on this issue between him and the complainant;
- f. The accused's position he described having on the bed while having sexual intercourse with the complainant is impossible;
- g. The accused's explanations for taking the blame as an easier thing to do after the text message exchanges that occurred following the incident with the complainant are strange;
- h. The accused's inability to answer difficult questions during his testimony; and
- i. The accused's affirmation that the differences between his version and the complainant's one are minor.

[76] Then, the prosecution concludes that following the court's analysis pursuant to *R. v. W.(D.)*, quoted above, it would conclude that the prosecution had discharged its burden of proof in this matter beyond a reasonable doubt and that it has to find the accused guilty.

Position of the accused

[77] Counsel for the accused agrees that the sole issue in this case relates to consent, and he submits that the testimony of the complainant supports the theory that she

consented to the sexual intercourse that occurred with Private Cross.

[78] Counsel for the accused relies on some evidence that the prosecution adduced during the trial to support his theory that the conduct of the complainant disclosed her capacity to consent and to fully engage in sexual activity with the accused:

- a. The complainant never mentioned to her boyfriend, at the time of the incident, the friendly relationship she was developing with the accused despite the fact that she affirmed that she was truthful and transparent with her boyfriend;
- b. The complainant told the court that she was able to provide her home address to the cab driver when the accused and her left the Coyotes nightclub for the base;
- c. The complainant testified that she was not awake when she passed the gate at CFB Winnipeg contrary to the evidence adduced by the prosecution through Commissionaire Visca's testimony;
- d. The complainant accepted knowingly, and on her own will without being forced, to get out of the cab in order to go to the accused's room;
- e. The difficulty to reconcile her affirmation that she did not remember anything about removing her shirt and pants in the accused's room, with her firm denial that she never assisted the accused to do such thing.
- f. The complainant's ability to react quickly, mentally and physically after she told the accused that she had to go, in opposition to her state of unconsciousness she described having just some moments before;
- g. The complainant's ability to bend without help when she picked up her earring that fell in the accused's room.

[79] Counsel for the accused submits to the court that the blackout experienced by the complainant is not sufficient to prove the incapacity to consent of C.S., and that additional evidence, such as the testimony of an expert, may have helped the court to make such conclusion.

[80] In addition, counsel for the accused submits that the testimony of Private Cross, supported in part by the one provided by Corporal Concha, is sufficient to support the

defense of honest but mistaken belief on consent advanced by the accused, and accordingly, the latter must be found not guilty of the charge.

Analysis

[81] The court agrees with counsel that the issue to be resolved here is about consent. Considering the testimony of Private Cross who admitted that sexual intercourse took place as described in the particulars of the charge, but for consent. The court considers that other essential elements of the charge are proven beyond a reasonable doubt, then the court is left with making a finding on the following two remaining essential elements of the offence, which are:

- a. That C.S. did not consent to the force applied by Private Cross;
- b. That Private Cross knew that C.S. did not consent to the force he applied.

[82] The court has to determine first if the evidence provided by the accused must be believed or not. The nature of the evidence in this case requires this court to make certain findings as to the credibility of witnesses in order to assess properly the credibility and reliability of the accused's testimony in light of all the evidence presented by the prosecution in support of those two essential elements of the offence.

[83] The cornerstone of the prosecution's case in this matter is the testimony of the complainant, C.S. Then, it is the intention of this court, considering that the prosecution's case relies essentially on her testimony, to make first a finding about the credibility and reliability of her testimony in relation with the incident. It will allow then the court, as the trial judge did, and as approved by the majority in the Supreme Court decision of *C.L.Y.*, quoted above, to proceed with the test, as defined in *W. (D.)*, in the context of the evidence it accepted.

The acceptable evidence

The complainant's testimony

[84] C.S., the complainant in this case, testified in a clear, honest and straightforward manner. She was responsive to questions. She reacted with emotions on some specific subjects, but it appears normal to the court to have such behavior in this kind of matter. She clearly testified from her own memory and to the best of her recollection of the events. It appears to the court that because of the combined effect of the alcohol she had that night, her state of illness, which made her not eating much for some time, and the exhaustion caused by the fact it was late, she fell in a state of unconsciousness that impacted on her ability to remember everything from the time she left the Coyotes

nightclub to the time she woke up while having sexual intercourse with the accused.

[85] As an example, she was unable to recall that she passed the gate at the base while independent evidence adduced by the prosecution established that she was awake when the cab passed that gate.

[86] The complainant testified that she was blacked out just after she entered the accused's room up to the time she woke up in the same room wearing only her underwear and having the accused on top of her. She expressed the fact that she felt things, that she went through something that appeared to her as an out of body experience and that she visualized and pictured things in her head based on feelings she had. She felt paralyzed and unable to move or do things. She has not seen anything or anybody. It is clear for the court that the combined effects of alcohol, few food, and exhaustion had a significant effect with regards to the assessment of the trustworthiness of her testimony on the issue of consent.

[87] More problematic to the court is her statement concerning the fact that she did not remember anything about removing her clothes, but that she firmly affirmed that she did not help the accused to do so. She explained to the court that she came to that conclusion because it would be logical to infer that if she was unable to move as she remembered, it would have been impossible for her to move in order to help the accused to remove her clothes.

[88] It is clear for the court that she was able to remember bits and pieces of what occurred, such as the earring she picked up in the accused's room, but she was unable to remember everything.

[89] Interestingly enough, without being determinative on the issue of her credibility and reliability, the complainant never directly and expressly denied that she consented to sexual activity in the accused's room.

[90] I am really convinced that the complainant never tried to lie or make appear her recollection of the events better than it was, but the reliability of her version of the events surrounding the commission of the alleged offence is problematic in different ways on the issue of consent.

The testimony of Commissionaire Visca

[91] Commissionaire Visca testified in a calm and straightforward manner. It appears to the court that he has no specific interest in the outcome of this trial. His testimony was coherent, respectful, and he had a good recollection of the events he witnessed. He clearly explained why having a woman coming to his booth early in the morning was a notorious event for him. He did not overstate any event and limited

himself to what he saw and what he heard. Minor discrepancies, such as the bicycle in the trunk of the taxi do not impact on the reliability of his testimony. The court concludes that his testimony is credible and reliable.

The *W. (D.)* analysis

[92] Having now made a finding on the acceptable evidence put forward by the prosecution in order to support the charge, I am turning now to the test enunciated by the Supreme Court in *W. (D.)*. I will first proceed with the analysis of the evidence introduced by the accused. It requires a finding on the reliability and credibility of the accused's testimony and also on the witnesses presented to the court, which is here, Corporal Concha.

The testimony of Private Cross

[93] Private Cross, the accused in this case, testified in a straightforward manner. He appears to the court that he was a bit nervous at the beginning of his testimony, but his answers were clear. He clearly explained how the relationship developed between him and the complainant. He saw this relationship as something more than platonic, but far from being something steady, and that was confirmed by one witness he brought before this court. The court does not think that he tried to minimize or downplay his level of intoxication the night of the incident. Without being prompted, he indicated to the court that at some point during the night he slurred, for a moment, his words. He also told the court that alcohol had some uninhibited effects on him, such as making him more inclined to dance. However, he was clear that he knew and was fully aware of what he was doing that night with the complainant despite all the alcohol he had.

[94] As described by the prosecution, Private Cross corroborated most of the complainant's evidence up to the time they went in his room. Private Cross described the complainant's awareness as sufficient enough to know what she was doing. The independent witness brought by prosecution confirmed that she was awake as indicated by the accused during his testimony when they were at the gate.

[95] Private Cross was confronted on some issues with the statement he provided to the NIS investigator. His answers and explanations were clear and logical. As he stated before the court, it was true that the accused spent most of the interview acknowledging what was said by the investigator without admitting anything.

[96] Concerning the explanation he provided in court and his hesitation on the issue of the address he provided to the cab driver, the court considers that, in itself, it does not mean anything. In fact, prosecution's evidence supports that he could have some concerns about the ability for the complainant to provide her address, but also that she was able to do it if it would have been required. This issue, viewed with the evidence as

a whole, could not support also the conclusion that the testimony of the accused is not credible and reliable.

[97] Concerning the fact that the complainant's underwear were not removed by Private Cross during the sexual intercourse and that the accused did not use a condom, those facts are of no significance because the court has no point of reference in the evidence to assess the impact of such thing on the accused's testimony. What would have been normal in the circumstances or at least for the complainant on these issues? The court still does not know.

[98] Finally, the position of Private Cross on the bed during the sexual intercourse, as he described, does stand the road. Taken as a whole, the evidence adduced by the prosecution and accepted by this court fully supports the explanations provided on this topic by the accused. Considering that the knees of the complainant were at the edge of the bed, and not her buttocks, it was possible for the accused to place his knees on the bed as he told the court. Then, I conclude that the testimony of Private Cross is credible and reliable.

The testimony of Corporal Concha

[99] Corporal Concha testified in a very calm and straightforward manner. He explained his relationship with the accused and what he saw the night of 16 May 2008. It appears to the court that he has no specific interest in the outcome of this trial. His answers were coherent and logical. He limited himself to what he saw and what he heard. It is clear that events of that day were notorious to him because he clearly noticed the unusual presence of the complainant who was an unknown person to him at the Junior Ranks' Mess, and that he saw her some time later at the nightclub with the accused having more than a platonic relationship. His testimony is credible and reliable.

Conclusion

[100] In applying the test enunciated in the Supreme Court decision of *R. v. W.(D.)*, quoted above, the court did not find any reason in the evidence, considered as a whole, to disbelieve the accused in his testimony, and more specifically on the issue of absence or lack of consent by the complainant concerning the sexual contacts. Consequently, the court believes the evidence provided by the accused.

[101] On the essential element of knowledge by the accused of the absence of complainant's consent when he applied force, the court reaches the exact same conclusion. Consequently, the court believes the evidence provided by the accused on this issue.

[102] Would the court have not reach such conclusion, the court is of the opinion further to have considered the evidence as a whole, that it could have be left with a

reasonable doubt on these two specific issues by the testimony of the accused, despite the fact that it would have disbelieved it.

[103] Finally, if the court would have reached the third step of the *W.(D.)* analysis, it would have concluded, as expressed by Judge Bennett in the Court Martial Appeal Court decision in *R. v. Brooks*, [1999] C.M.A.J. No. 8, at paragraph 50, and by the Chief Military Judge in *R. v. Weir*, 2009 CM 1008, at paragraph 55, that the inability for the complainant to recall things, further to the consumption of alcohol combined or not with other factors, would have resulted in a finding that this evidence was unreliable.

[104] Also, I would have concluded to the necessity of some expert evidence for the exact same reasons expressed by the Chief Military Judge in *Weir*, where he said at paragraph 55:

The court disagrees with the prosecution that the high level of intoxication and loss of memory that came as a result of the excessive consumption of alcohol by B.V. is proof of lack of consent. Absent expert evidence, it is my view that a loss of memory or a blackout attributable to excessive consumption of alcohol, is direct evidence of nothing, except the fact that the witness cannot testify as to what happened during a particular period. Without more, it means only that the complainant cannot give direct evidence as to whether or not she consented to the sexual contact or whether or not she had the capacity to do so. This does not mean that evidence of memory loss or a blackout has no probative value. It may permit inferences to be drawn about whether or not a complainant did or did not consent, or whether she was or was not capable of consenting at the relevant time. But some expert evidence will be required. Although expert evidence cannot be admitted to bolster the credibility of a complainant, it may well assist the trier of fact in order to explain the effect of severe intoxication and human behaviour. In *R. v. Marquard*, McLachlin J., as she then was, stated:

... [T]here is a growing consensus that while expert evidence on the ultimate credibility of a witness is not admissible, expert evidence on human conduct and the psychological and physical factors which may lead to certain behaviour relevant to credibility, is admissible, provided the testimony goes beyond the ordinary experience of the trier of fact.

[105] The absence of such evidence, combined with the conclusion of this court on the reliability of the evidence adduced by the prosecution on the issue of consent, would have led the court to conclude to the existence of a reasonable doubt concerning the essential element of absence of consent.

[106] Finally, the prosecution invited the court to refer to indirect evidence in relation to the sexual intercourse that occurred in the room, to conclude beyond a reasonable doubt to the absence of consent by the complainant. The analysis of the evidence has not provided the court any indication of the existence of such evidence.

[107] Based on the conclusion of this court about the credibility and reliability of the accused's testimony, I conclude that the prosecution has not established beyond a

reasonable doubt that the complainant did not consent to sexual activity with Private Cross. This conclusion is sufficient to determine this case. However, the court would also have been left with a reasonable doubt that Private Cross knew that the complainant did not consent to the force he applied.

[108] Additionally, having regard to the finding of the court concerning the essential elements of section 271 of the *Criminal Code*, and the application of those elements to the facts of this case, the court is not satisfied that the prosecution has discharged its burden of proof by establishing beyond a reasonable doubt the fact that the accused did sexually assault or assault C.S.

Disposition

[109] Private Cross, please stand up. Private Cross, this court finds you not guilty of the first and only charge on the charge sheet.

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

COUNSEL

Lieutenant-Commander S.C. Leonard, Canadian Military Prosecution Service
Co-counsel for Her Majesty the Queen
Captain S.L. Collins, Directorate of Law/Administrative Law
Co-counsel for Her Majesty the Queen

Lieutenant(N) M.P. Létourneau, Directorate of Defence Counsel Services
Co-counsel for Private S.C. Cross
Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
Co-counsel for Private S.C. Cross