



COURT MARTIAL

Citation: *R v Thibeault*, 2012 CM 1014

Date: 20121019

Docket: 201250

Standing Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Captain J.R.N.J. Thibeault, Accused

Before: Colonel M. Dutil, C.M.J.

[OFFICIAL ENGLISH TRANSLATION]

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Captain Thibeault is charged with committing sexual assault, an offence punishable under section 130 of the *National Defence Act*, contrary to section 271 of the *Criminal Code*. The particulars of the charge allege that on or about 4 February 2012, in Room A249 of Building P-198 on Canadian Forces Base Borden, Ontario, he sexually assaulted G.R.

EVIDENCE

[2] The evidence before the Court Martial essentially consists of the following:

- (a) the testimony of the complainant, Second Lieutenant G.R., and the testimonies of Corporal Burton, Major Greening and Captain Cyr;
- (b) Exhibit 3, which is a series of six photographs depicting the complainant's room at the time of the incident; and
- (c) finally, the facts and matters of which the Court took judicial notice under section 15 of the *Military Rules of Evidence*.

FACTS

[3] The facts alleged against the accused took place in the evening of Saturday, 4 February 2012, when Captain Thibeault joined G.R. in her room, Room A249 in Building P-198 on Canadian Forces Base Borden, in Ontario, under the pretext of watching a film on DVD with her on her television set. The two individuals knew each other, as they were both students taking the second part of aeronautical engineering course AOBC 1201 at the time.

[4] The complainant testified that she had met Captain Thibeault during the first part of their course, which ran from June 2011 until fall of that same year. During the first part of the course, her relationship with the accused was nothing out of the ordinary. According to her version of the facts, their relationship progressed beyond good comradeship over the second part of the course, which had begun in January 2012. During her testimony, she never hid the fact that her young career was rife with incidents that had serious consequences, for example, her dismissal from course AOBC 1201 and an occupational transfer. G.R. testified to the effect that during the first part of course AOBC 1201, she had received a few negative reports for arriving late for morning classes without a valid excuse. Similar incidents apparently occurred near the beginning of the second part of the course. Her academic misconduct continued until near the end of March 2012, when she was dismissed from the course for plagiarism, for having copied answers to an assignment from a student network computer because she had not had the time to provide her own answers. She has since been transferred to Kingston, where she is continuing to work towards an occupational transfer to the Logistics group.

[5] Although she did not mention it in her examination in chief and had no memory of it, the complainant confirmed that she had sent text messages to the accused at around three o'clock in the morning on 4 February 2012. She invited Captain Thibeault to watch a film with her. What is more, she wrote to him, [TRANSLATION] "My bed is more comfortable, and I'm woozy after too much cider". She added, "You should come up here". She stated that this invitation meant watching a film together in her room, on her bed. She did not see anything sexual in the invitation, but she suspected that

something could happen because of their past relationship. According to her testimony, they had had a recent conversation in which she had told him she was uncomfortable with continuing to have intimate conversations with him because they both had other people in their lives. Her testimony as a whole clearly shows that she had feelings for Captain Thibeault and that she felt more than just affection for him, even though she said that she wanted them to be just friends. It appears from her testimony that she was torn between her feelings for him and her feelings for someone else. On the one hand, she did not want any more encounters with Captain Thibeault; on the other, she sought out his company, going so far as to invite him to watch a film in her bed. She also stated that Captain Thibeault was one of her few friends during the course.

[6] After sleeping in on 4 February 2012, G.R. had lunch. She then returned to her room for a nap. Later in the day, she went to the officers' mess for supper around 1700 and sat with her colleagues as usual. She went back to her room. According to the complainant, she fell asleep shortly after supper and woke up around 2000 or 2100, when Captain Thibeault came knocking at her door, DVD in hand, to ask her if she wanted to watch a film with him. She was wearing jogging pants and a T-shirt, while Captain Thibeault was wearing a jacket, a sweater, a T-shirt and pants. She invited him into her room, and after putting the DVD on, they settled onto the bed in a semi-seated position, about one foot apart. About 30 minutes after the film had started, Captain Thibeault got closer to her and started caressing the complainant's vaginal area, but overtop of her pants. She found it pleasurable, and it excited her sexually. After a few minutes, the complainant asked Captain Thibeault to stop it because the situation was making her uncomfortable and they were not supposed to be doing this. She said, "It is not a good idea, we should not do this, it is not right." When she said these words, she moved away from him by rolling over on her stomach from left to right, with her face towards the headboard and her feet pointing towards the television set. Captain Thibeault then moved on top of her, putting his knees on either side of her torso, and he started kissing her on the neck and face. She felt pressure on her back, and he allegedly put his hand behind the nape of her neck while applying some pressure. The complainant again told him that they should not be doing this, but Captain Thibeault continued trying to kiss her. She turned her face away. According to G.R., she continued telling him, "We should not do this; I can't do this". Captain Thibeault did not react, and he continued. He then put one of his hands on the lower part of her neck and pinned her down (in her words, "He pinned my head down"). So, he forced her head into the pillow and pulled down her pants and panties to mid-thigh, below her buttocks. She added that she was having her period at the time and was wearing a tampon but did not know if Captain Thibeault noticed this. According to her version of the facts, G.R. felt that she was slow to react and did not realize what was happening until Captain Thibeault put a finger in her anus. G.R. told him no, repeatedly—first quietly, two or three times, but loud enough for him to hear despite the background noise in the room. He continued, and G.R. submitted that Captain Thibeault applied pressure to the nape of her neck and that her mouth was in contact with the pillow. She stated that she continued to tell him no, but louder, between seven and ten times, according to the complainant. She was crying. According to G.R., anyone in the room would have heard her saying no to Captain Thibeault, asking him to stop. This

went on for about a minute. The complainant testified that her body did not really react until the captain pulled out his finger, inserted his penis and sodomized her. This is when she tried to twist out of this position, as she said, "I squirmed out". He continued, and she was still trying to get free, continuing to say no. She thinks that Captain Thibeault sodomized her for a few minutes, even though she continued to tell him no. On cross-examination, the complainant stated that she was in pain at the time, as Captain Thibeault's penis penetrated deeper and deeper into her anus. According to her, it was hard to estimate how many times Captain Thibeault pushed or thrust his penis in and out of her, but she estimated that he did it more than five times. Suddenly, she screamed, "Get off of me", still squirming to get away from him. The complainant felt the pressure go away, and she slipped out of the bed, towards the left, still on her stomach, until her knees hit the floor. They said nothing to each other. The complainant stated that she was angry. When she picked herself up off the floor, to the left of her bed, near the sofa, she pulled up her panties and jogging pants and went to the bathroom located to the right of her bed. She did not look at Captain Thibeault. She closed the bathroom door behind her, enraged, frustrated and in tears. According to her version of the facts, the complainant splashed water on her face and tried to calm herself down. She remained in the bathroom for a few minutes, not knowing what to do. She was in shock and confused. G.R. came back out of the bathroom and saw Captain Thibeault sitting at the foot of her bed, looking sad. G.R. grabbed his sweater and threw it in his face, along with the DVD case, ordering him to leave her room. According to her, he seemed to want to apologize to her and discuss what had just happened, but she heard nothing. She was distraught. G.R. went back in the bathroom, leaving the door open this time. She came back out a few moments later. She wanted to smoke a cigarette. The complainant described how she grabbed her coat and opened the room's door to go outside. She said that Captain Thibeault, standing next to her, put his hand on the door to close it. On cross-examination, she described this precise moment as being particularly surprising (she used the word "awkward"). The complainant reports that the accused then told her that he did not want her to feel held back or that he wanted to keep her in her room, but that he wanted to talk about what had just happened. She was still angry and in shock. On cross-examination, she stated that she was not afraid of the accused at that moment and did not feel that her safety was in danger. She repeated that she was distraught at the time. According to her version of the facts, the complainant then told Captain Thibeault to talk, but he did not say much to her. She decided to leave the room to go for a smoke outside. He followed her, and in the following moments, they went down the stairs and exited the building. It was around 2130. Once they were in the designated smoking area, they both smoked cigarettes. The complainant submitted that she remembers that Captain Thibeault then apologized but added that he had stopped when he heard her say no. She allegedly replied, "It's not cool no matter what. Like you should have made sure it was okay beforehand. Like it was obvious I wasn't comfortable in that situation, I didn't want to do it". The complainant submitted that he offered her another cigarette, which she took, but she took only one puff before throwing it away and leaving, not without grumbling that she could not believe what she had just heard from Captain Thibeault. She stated that she was stressed out, frustrated and still in shock and that she could no longer see things clearly (the complainant used the words "my mind was racing"). She wanted to hit him, to push

him. G.R. therefore returned to her room alone. On her way up the stairs, she sent a text message to her friend, Corporal Burton, whom she has known for many years and who lives in family housing on the base in Borden, but she does not remember the content of this message. The complainant went into her room and started crying on her bed. A little later, she called her friend Burton on the telephone between 2200 and 2230 and asked to see him. He told her that he would be there in a few minutes. Corporal Burton corroborated her testimony, adding that they know each other very well and that they normally communicate by text message. He added that he knew something was not right when she called him because this was the first time she had done so. When Corporal Burton arrived on the scene, the complainant was waiting for him outside Building P-198. She was wearing a sweater. The complainant confirmed that she drank at least one alcoholic beverage while she was waiting for him. Corporal Burton saw at that moment that she had a bag containing a bottle of alcohol in her hand. According to him, G.R. had been drinking, but she had also been crying. When he was sitting in his truck, he could see that her eyes were red, and when she said "Hi" to him, her voice was trembling. He asked her what was the matter, but the complainant did not answer. Corporal Burton therefore went back home. The trip lasted about 90 seconds. When they arrived at the parking lot, he noticed that G.R. was crying. Corporal Burton told her that he did not know what to say to her or to do, and the complainant told him what had just happened to her, according to her version of the facts. They got out of the vehicle 10 minutes later and smoked a cigarette before going inside the house. The complainant stated that she had one alcoholic beverage at Corporal Burton's, while he said that he offered to make her a drink but she refused. According to him, he made some tea. They watched a film together, and he drove her back home around midnight or half past midnight, after she declined his offer of a room for the night, preferring to return to her quarters. He also acknowledged having told the police that she was under the influence of alcohol, using the words "she was drunk". However, he qualified his words, specifying that he himself had not been drinking and that even though he had smelled alcohol on her breath, she was having no difficulty moving around. According to him, she had been drinking. On cross-examination, he reported his understanding of what the complainant had told him while they were both in his car. According to Corporal Burton, G.R. had told him at that time that someone in her group had come to watch a film in her room and that during the film this person had tried to kiss her, which she tried to stop him from doing. He testified that he thought that she had told him that this individual had pushed her onto the bed, gotten on top of her and pulled down her pants before turning her over, realizing that she was having her period.

[7] Except for her friend Burton, the complainant did not tell any other individual or authority about the incident for several weeks. During that period, by her own admission, she had mixed feelings about Captain Thibeault. She did not go out of her way to try to avoid him because, according to her, she did not want to have to explain why she was avoiding him. She even sat across from him in the cafeteria when the other members of the group were there. The complainant explained her behaviour by saying, "I tried to act normal, I tried to forget about it, I tried to push it out of my mind". There can be no doubt that she was suffering because of all this. G.R.'s explanations on cross-examination clearly illustrate her state of mind:

“I really didn’t know how to react and I guess I didn’t react the way you would have, sir, with these questions, but it was like I wanted to act as if it was OK. But then, some times, it would really affect me like it was honestly it was really overwhelming. Some days, I would want to talk to him, so that people would think that nothing had happened; that we would-that I would look normal. Other days, I did not want to see him like it was really, yeah, it was fluctuating emotions.”

[8] On cross-examination, counsel for the defence noted the complainant’s behaviour towards the accused on various occasions, in particular at a mandatory social activity in the officers’ mess at Borden on 16 February 2012, and during a meet-and-greet for students on 21 February 2012 in Ottawa, which led to a subsequent incident later that evening in which the complainant, accompanied by two other persons from her group, became involved in a bar fight. The third event relates to a text message she allegedly sent to Captain Thibeault regarding a sports day at a ski resort, less than a week after the alleged incident. Finally, he noted a text message from 8 February 2012, four days after the alleged incident, in which the complainant asked the accused to give her a key to get into the classroom because she absolutely had to have her computer.

[9] Although she had no specific memory of the social activity on 16 February 2012, she acknowledged that she attended it. When it was put to her on cross-examination, she also acknowledged having cheered on Captain Thibeault, as well as other people from the group, during a game of crud. Furthermore, Major Greening testified that she saw G.R. cheering on the accused two or three times, calling him by his nickname, Jazz, although she added that the complainant cheered on the others just as much and in the same manner as for Captain Thibeault. Major Greening said, “She was not cheering him any louder than anyone else”. That evening, the complainant accompanied Captain Thibeault outside to smoke a cigarette, but she did not remember whether she had asked him. Captain Cyr corroborated this meeting. He explained that he saw them go outside and joined them there a few seconds later, along with two other course instructors. They stayed outside for a few minutes and then went back inside. According to Captain Cyr, both the complainant and the accused seemed relaxed.

[10] On 21 February 2012, the complainant, Captain Thibeault and the other members of their class went to Ottawa for a visit to National Defence Headquarters. Here again, the complainant was proactive regarding the accused. She acknowledged having been at a pub-style restaurant in the Byward Market for a meet-and-greet attended by the accused and other people, including the accused’s girlfriend, who according to the complainant was unaware of what Captain Thibeault had allegedly done to her, namely, that he had sexually assaulted her. It was between 1600 and 1630. G.R. found the situation difficult and still felt emotionally vulnerable. Despite everything, the complainant spoke to the accused to congratulate him on his new posting to Ottawa. When questioned twice on this on cross-examination, she denied having congratulated Captain Thibeault on his new posting and having added a comment to the effect that she was happy for him because he could now be reunited

with his girlfriend. The complainant added that she went outside the pub with the accused to smoke a cigarette together during this activity, shortly thereafter. The complainant added that they were not alone and that another person was with them, Captain Bisson.

[11] That evening of 21 February 2012 proved to be a trigger for the emotions experienced by G.R. up to then and, according to the complainant, was the reason she became involved in a fight later that evening in an Ottawa bar. When cross-examined about the events of 21 February 2012 and the meet-and-greet later in the evening, she tried to explain her state of mind since the incident that had allegedly taken place on 4 February in room. Counsel for the defence then asked her to clarify what she meant when she talked about her fluctuating emotions. The complainant expressed herself as follows:

“That’s kind of the point where I realized that I was not handling it properly. I was trying to internalize it all, forget it all, and that’s when all the emotions came out at the bar, like it, I just, that’s when I realized that I had to do something, I was not dealing with it in a healthy way”.

[12] Later in the evening of 21 February 2012, G.R. and two of her colleagues went to a bar in Ottawa. The complainant described how, when she and her friends were going down the stairs to leave the bar, she saw someone she did not know take her cigarette pack out of her handbag. According to the complainant, she confronted this person, and the situation quickly deteriorated until one of her friends was injured in the ensuing altercation after the complainant, under the influence of alcohol, physically attacked the individual in question and the female friends of that individual retaliated against her. Once back at the hotel, she was shaken, and she apologized to her friends for having dragged them into this situation. According to her testimony, she explained to them that she had felt threatened by the individual and that she would not let another man take advantage of her. This was the first time, since she had confided in her friend Burton on 4 February 2012, that she had told anyone in her circle of acquaintances about the 4 February 2012 incident in her room involving Captain Thibeault. According to her, her friends suggested reporting him to her chain of command. G.R. called her sister, who is also an officer in the Canadian Forces, from her hotel room to talk to her about the altercation in the bar, and her sister gave her the same advice. The complainant therefore went to the hotel room of Captain Fischer, one of the instructors responsible for her group, at around two o’clock in the morning on 22 February 2012 and not only told him about the altercation in which she had been involved a few hours ago, before someone else did, but at the same time also told him about what Captain Thibeault had allegedly done to her a few weeks before that. On cross-examination, counsel for the defence put it to her that she had taken advantage of her discussion with Captain Fischer to reveal the allegations of sexual assault against Captain Thibeault to divert attention from her own problems relating to the altercation that had happened a few hours earlier. The complainant denied that she had done so, stating that she had always accepted full responsibility for the events surrounding said altercation.

[13] On cross-examination, she acknowledged having run into the accused a few times by accident, in the weeks following the incident, after midnight, outside Building P-198, and that they had smoked cigarettes in each other's presence, including the time they saw a field mouse. She added that they started making jokes. The complainant equally acknowledged that she had sent a text message with a smiley to Captain Thibeault during a sports day on 8 February 2012 at a ski resort, less than a week after the alleged incident. It was after this sports day that she sent a text message to the accused, asking him to give her a key to get into the classroom because she absolutely needed her computer. She explained that all course seniors, Captain Thibeault being one at that time, had a key, but she knew him and knew where he lived and what his telephone number was. The complainant testified that when she sent this text message, she was in her room and did not have a list of telephone numbers for the other course seniors. The complainant confirmed that she went to the accused's room to give him the keys back when she was done with them and that she left them on Captain Thibeault's fridge, located inside his room near the door, after he told her to come in. The complainant reiterated that she was not afraid of him. When counsel for the defence questioned her about how unlikely it was that she would be so proactive in her dealings with Captain Thibeault in the days following her alleged assault, particularly by sending text messages, the complainant explained herself once again, saying, "When you're trying to convince yourself that everything is okay, you kind of have to be proactive". The complainant added that she did not know what to do. She thought at that time that acting normally with him, including by sending him text messages, as before, would erase the incident from her memory. In response to the following question from counsel for the defence, putting it to her that she was not trying to erase everything from her memory, but that nothing had actually happened, she answered without hesitation:

"No sir, because I sent him another text actually, I don't know, if you, have a copy of that one, right after the incident, the next Monday, we've had an harassment brief, and I had sent him an angry text."

[14] On cross-examination G.R. flat out acknowledged that during her course at Borden, she was taking antidepressants and that she sometimes drank alcohol at the same time, even though she knew it was counter-indicated. She denied having a drinking problem but did not try to play down said drinking. The complainant stated that during the period when the incident allegedly occurred, neither she nor Captain Thibeault were under the influence of alcohol.

ANALYSIS AND DECISION

The presumption of innocence and the standard of proof beyond a reasonable doubt

[15] Before applying the law to the facts of the case, it is useful to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, which is an essential component of the presumption of innocence. Two rules flow from the

presumption of innocence. One is that the prosecution bears the burden of proving guilt. The other is that guilt must be proven beyond a reasonable doubt. These rules are linked with the presumption of innocence and ensure that no innocent person is convicted. The burden of proof rests with the prosecution and never shifts. Captain Thibeault does not have to prove that he is innocent. He does not have to prove anything.

[16] A reasonable doubt is not a far-fetched or frivolous doubt. It is not based on sympathy or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from a lack of evidence. It is virtually impossible to prove anything with absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. In other words, if the Court is convinced that Captain Thibeault is probably or likely guilty, it must acquit him, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[17] Reasonable doubt also applies to the issue of credibility. Regarding any issue, the Court may believe a witness, not believe that witness or be unable to decide. The Court does not have to fully believe or not believe a witness or group of witnesses. If it has a reasonable doubt as to the guilt of Captain Thibeault because of the credibility of witnesses, the Court must find him not guilty.

Credibility and reliability of testimonies

[18] The evidence before this Court is such that the Court must rule on the credibility and reliability of the witnesses in light of all of the evidence. First of all, the Court accepts the testimonies of Corporal Burton, Major Greening and Captain Cyr without reservations. These witnesses gave very brief testimonies that were limited in scope. They testified in a succinct and precise manner. Their testimonies were consistent, and each of them honestly tried to tell the truth without being reticent, evasive or argumentative. Even though Corporal Burton is a self-described friend of the complainant, which she confirmed, his testimony was neutral and impartial.

[19] The credibility and reliability of the complainant's testimony are, however, the cornerstone of the defence's position in this case. According to counsel for the defence, her testimony was not credible and should be disregarded. Counsel also submitted that the Court should find that her testimony throughout the trial was sufficiently undermined to raise a reasonable doubt as to the facts alleged against the accused in this case. Counsel submitted that G.R.'s testimony is implausible and inconsistent and that, short of a complete rejection of the complainant's version, the inconsistencies and the illogical explanations she gave for her actions or omissions, or for those she attributed to Captain Thibeault, before during and after the alleged events are such that the Court should find reasonable doubt. The defence submitted that the complainant constantly wanted to explain herself because she had misspoken beforehand. The defence submitted that her version, where she went outside to smoke a cigarette with the accused just minutes after the assault, is implausible, when she had just, as she said,

thrown things at him and was allegedly beside herself with rage. The defence submitted that G.R.'s testimony to the effect that she returned by herself, contrary to what she allegedly told her friend Burton, is a significant contradiction that undermines the credibility and reliability of her testimony. The defence submitted, in veiled terms, that her story did not hold water and that she only disclosed it to Captain Fischer the night of 22 February 2012, in Ottawa, to get herself out of the mess she was in because of her altercation in a bar. Finally, the defence found it impossible to believe that the complainant continued, repeatedly, to return to her assailant in the days and weeks following the alleged assault, when she should have stayed away from him. According to counsel for the defence, the evidence shows that the complainant is capable of dishonesty and deception. Finally, the defence attacked the reliability of the complainant's testimony because she acknowledged having mixed alcohol and medication during her course in Borden.

[20] In the Court's view, G.R.'s testimony was calm, nuanced, respectful and polite, if occasionally emotional, particularly when she was cross-examined on the details surrounding the accused's alleged actions. She never shied away from the questions, and her explanations were in no way aimed at avoiding the questions of counsel for either side or avoiding the subjects that had been dealt with at length during her long examination in chief and cross-examination. Her testimony seems sincere and is completely consistent in her description of the facts surrounding what happened in her room and at all other times. Furthermore, nothing in all the evidence undermines the internal or external consistency of her version of the facts. The defence criticized her behaviour towards Captain Thibeault immediately after what happened in her room and during the many occasions that she allegedly brought about to contact or be in the presence of the accused after the incident.

[21] Several months after the incident, and coming from a reasonable, sensible person viewing the situation from the outside, such a vision is understandable when such a person finds that the complainant acted illogically and irrationally in the circumstances. This approach disregards the dynamics and emotional relationship that existed between the complainant and Captain Thibeault. Human behaviour cannot be assessed in the abstract in a purely rational manner. These two young adults knew each other and had a relationship that went beyond mere camaraderie or friendship. The complainant was perhaps naïve in thinking that they could remain just friends, or perhaps she was sending out mixed signals to this effect. This is immaterial. G.R. explained countless times the emotional turmoil or conflict she experienced regarding her relationship with Captain Thibeault after the incident. Her testimony as a whole clearly shows that she would consider him to be much more than just a friend. Hence, her behaviour towards the accused until she finally realized that she could not continue trying to convince herself through her actions and thinking that none of that had ever happened. This emotional context emerges clearly from her testimony and fully explains why she acted towards the accused as she described at such length and so often throughout all of her testimony. The fact that she may have been dismissed from a course for having cheated on an assignment does not in any way undermine the credibility of her testimony in light of her testimony as a whole. The complainant never

shied away from answering and did not try to make herself look good. It is totally understandable that she blames herself in part today for what allegedly happened, acknowledging, first, that she thought that something could happen with the accused when she invited him to her room with such a leading message and, second, that she found it sexually pleasurable when she allowed him to caress her vaginal area when she had invited the accused to lie down stretched out, semi-seated or otherwise on her own bed. However, this just goes to show the ambivalence of her feelings towards the accused in February 2012 which set the stage for the events which ended in an altercation in an Ottawa bar on 21 February 2012.

[22] G.R. was not at all afraid of Captain Thibeault and had no reason to believe that she could be in danger in his presence. The complainant's testimony supports this. In her eyes, what happened was a one-time occurrence in a specific context, and she saw no risk that it would reoccur. It had not only profoundly shaken and enraged her but also saddened her. Two contradictions emerged from her testimony. The first concerns her consumption of alcohol at her friend Burton's home after he brought her there. Whether she could accurately remember whether she had an alcoholic beverage or tea is not enough to undermine her credibility or the reliability of her testimony regarding the act of sodomy to which she was allegedly subjected. Her testimony and that of her friend Burton clearly show that she was in a highly disturbed emotional state when they were together at Corporal Burton's house. As regards the part of her testimony in which she said that she turned over on her back in the seconds preceding Captain Thibeault's acts with one of his fingers and the subsequent insertion of his penis into the complainant's anus, when Corporal Burton himself testified to the effect that she had told him, when they were in his truck, that it was Captain Thibeault himself who had turned her over, noticing that she was having her period, this difference is in my view a minor one in a context in which the alleged sexual assault by the accused essentially concerns acts of sodomy after Captain Thibeault had pulled her pants and panties partway down. On the one hand, it is difficult to know exactly what she may have said to her friend Burton when she was in a state of distress. On the other, it is possible that her memory of the sexual acts that occurred before he pulled down her pants and inserted a finger in her anus stood out much less in her mind. The Court finds that the entire testimony of the complainant G.R. is reliable and that her credibility, in spite of a rigorous and effective cross-examination, was not shaken. To the contrary, her cross-examination shows just how solid, nuanced, and lacking in vindictiveness, awkward justifications or evasive tactics it was.

Offence of sexual assault, contrary to section 271 of the Criminal Code

[23] In order to obtain the accused's conviction for the offence of sexual assault contrary to section 271 of the *Criminal Code*, the prosecution had to prove beyond a reasonable doubt each of the following essential elements, including that Captain Thibeault is the person who committed the offence on the date and at the place indicated in the charge sheet:

- (a) Captain Thibeault used force against G.R.;

- (b) Captain Thibeault's use of force was intentional;
- (c) G.R. did not consent to Captain Thibeault's use of force;
- (d) Captain Thibeault knew that G.R. did not consent to his use of force; and
- (e) Captain Thibeault used force in circumstances of a sexual nature.

[24] The Court accepts G.R.'s testimony regarding the events that occurred in her room, Room A249 in Building P-198, CFB Borden, Ontario. The unlawful use of force by Captain Thibeault when they were together on the complainant's bed essentially concerns the acts he committed against G.R. when he pulled down her pants and panties just below her buttocks, and the subsequent acts described by the complainant, until she slipped out of her bed from left to right, her knees hitting the floor. Whether she turned herself over or the accused did it, when he was caressing her genital area immediately before and the complainant told him that this made her uncomfortable, even if she was sexually stimulated at that moment, this changes nothing. Up to then, it was all consensual. The alleged wrongful acts of the accused began, in this Court's view, when Captain Thibeault straddled the complainant across her torso and started kissing her neck and face. She felt pressure on her back, and he put one of his hands behind the nape of her neck, applying some pressure. The complainant again told him that they should not be doing this, but Captain Thibeault continued trying to kiss her as she turned her face away. The complainant continued telling him that they should not be doing this and that she could not do this. Captain Thibeault did not react, and he continued. He then placed one of his hands on the lower part of her neck and forced her head into the pillow. At the same time, he lowered her pants and panties to mid-thigh, below her buttocks. There was little or no reaction on her part when Captain Thibeault inserted a finger in her anus. G.R. told him no repeatedly—first quietly, two or three times, but loud enough for him to hear despite the background noise in the room. He continued. Captain Thibeault applied pressure to the nape of her neck, and her mouth was in contact with the pillow. She continued to say no to him, but louder, between seven and ten times. She was crying. According to G.R., anyone in the room would have heard her when she said no. This went on for about a minute. The complainant's body did not really react until Captain Thibeault pulled out his finger, inserted his penis and sodomized her. This was when she squirmed to get out of this position. He continued, even though she was trying to get away. She continued to say no. According to the complainant, she thought that Captain Thibeault sodomized her for a few minutes, despite the fact that she continued to say no to him. She was in pain at the time, as Captain Thibeault's penis penetrated deeper and deeper into her anus and he pushed in and out of her more than five times. Suddenly, she screamed at him, "Get off of me", still squirming to get away from him. The complainant felt the pressure subside, and she slipped out of the bed, towards the left, still on her stomach, until her knees hit the floor.

[25] Inserting a finger or penis into the anus of another person without the consent of that person clearly constitutes intentional use of force against him or her. In the circumstances of this case, the use of force was sexual in nature. There can be no doubt that the complainant expressed her refusal when Captain Thibeault put his finger in her anus. Even if the accused had been unable to hear this initial refusal for whatever reason, including because of noise or the accused's state of mind at the time, she continued to refuse verbally, telling him no several times while she moved around to try to make him stop and cried for some time. He continued. It was not until she screamed, "Get off me" that Captain Thibeault stopped applying pressure on her and she was able to get away. Neither the complainant's movements nor her repeated refusals while she was in Captain Thibeault's clutches could reasonably be interpreted by him as valid consent on the part of G.R. in the circumstances. The complainant's expressed choice had been clear and unequivocal for some time. She did not want to. Unfortunately, the fact that the accused persisted in his actions shows that he chose to ignore the choice that the complainant had clearly expressed to him a few minutes before, that is, when he inserted his finger in her anus. Does a refusal to submit to sexual practices have to be shouted out loud to require an assailant to respect the other person's choice? Here again, a simple "no" suffices to answer this question. Beyond the law, respect and listening to one another also have to be considered in the circumstances. The accused chose to ignore the complainant's clear and unequivocal words when she told him no and kept on telling him repeatedly that she did not want to be sodomized. The Court is satisfied that the prosecution has proved all of the essential elements of the offence beyond a reasonable doubt.

FOR THESE REASONS, THE COURT:

[26] **FINDS** Captain J.R.N.J. Thibeault guilty on the first count, namely, sexual assault, contrary to section 271 of the *Criminal Code*, an offence punishable under section 130 of the *National Defence Act*.

Counsel:

Major E. Carrier, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander P.D. Desbiens, Defence Counsel Services
Counsel for Captain J.R.N.J. Thibeault