



COURT MARTIAL

Citation: *R v Youden*, 2013 CM 4002

Date: 20130118

Docket: 201258

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer I.W. Youden, accused

Before: Lieutenant-Colonel J-G Perron, M.J.

RESTRICTION ON PUBLICATION

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Code*, information that could disclose the identity of the person described in this judgement as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

[1] The accused, Warrant Officer Youden, is charged with sexual assault and drunkenness. Before this court provides its analysis of the evidence and of the charges, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[2] It is fair to say that the presumption of innocence is most likely the most fundamental principle in our Canadian 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 the cases dealt with under Canadian criminal law, every person charged with an offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[3] 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.

[4] The court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and tradition of justice.

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

[6] In *R v Starr* [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court of Canada held that:

... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities ...

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

[7] 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.

[8] 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.

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

[10] 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 un-contradicted facts?

[11] 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.

[12] 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.

[13] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R v W.(D.)* [1991] 1 S.C.R. 742. This 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.

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

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

[14] Warrant Officer Youden did not testify. Therefore, the court only has to focus on the third step of the test in reaching its verdict. Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before this court.

[15] The evidence before this court martial is composed essentially of the following: judicial notice, the testimony of Major Jackson, Lieutenant K.A.M., Miss Snow, Major White, Mr Rhodenizer and Petty Officer 2nd Class Monette and exhibits. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. Three exhibits were produced by the prosecution and three by defence counsel.

[16] Every witness, except Mr Rhodenizer, was a member of 36 Service Battalion at the time of the alleged offences. They attended a formal dinner during the evening of 30 October 2010 at the Royal Artillery Park (RA Park) Officers' Mess to celebrate the retirement of three officers and two senior NCOs of that unit. RA Park is located in Halifax.

[17] Warrant Officer Youden was also a member of 36 Service Battalion and he attended the formal dinner. The evidence clearly proves beyond a reasonable doubt the date and place of both alleged offences.

[18] The dinner started at approximately 1900 hours and there was a 15 minute pause at approximately 2045 hours. The dinner ended at approximately 2345 hours and some participants departed while others went to the basement bar. The court will now examine each offence.

[19] The particulars of the first charge read as follows:

"In that he, on or about 30 October 2010, at or near Halifax, Nova Scotia, did commit a sexual assault upon Lieutenant K.A.M."

[20] The prosecutor alleges the sexual assault was committed when Warrant Officer Youden grabbed Lieutenant K.A.M.'s buttocks as they were going up the stairs when they were leaving the RA Park mess. The prosecution had to prove the following essential elements of this offence beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Warrant officer Youden applied force to Lieutenant K.A.M.;
- (c) that Warrant Officer Youden intentionally applied force;
- (d) that Lieutenant K.A.M. did not consent to the force that Warrant Officer Youden applied; and
- (e) that the force Warrant Officer Youden applied took place in the circumstances of a sexual nature.

[21] Is Warrant Officer Youden the offender? Warrant Officer Youden, Lieutenant K.A.M., Miss Snow, Second Lieutenant Watson, Captain White, Officer Cadet Domanski and Petty Officer 2nd Class Monette left the RA Park mess to go to the Palace, a bar approximately two blocks from the RA Park mess. Lieutenant K.A.M. testified that Miss Snow was the first person to go up the stairs. Second Lieutenant Watson would have told Lieutenant K.A.M. to go ahead and then she would have started to go up the stairs. She heard Warrant Officer Youden laughing. She felt a hand grab her buttocks, once firmly on the left side and less firmly on the right side, and then a hand swipe her buttocks. She heard a trip and then Warrant Officer Youden laughing. Upon reaching the top of the stairs she turned around and saw Warrant Officer Youden going up the stairs. He seemed relaxed and was laughing. He walked past her. She took Miss Snow aside in a cloakroom to tell her that Warrant Youden was an "octopus" and Miss Snow said, "yes." Lieutenant K.A.M. told Miss Snow they should stay together at the bar and Miss Snow agreed.

[22] Petty Officer 2nd Class Monette testified he was one of the last persons to go up the stairs. He described it as a gaggle going up the stairs. There were two people side by side going up the stairs ahead of him. Lieutenant K.A.M. testified the stairs are very narrow and that two people cannot easily walk up or down the stairs. She described them as a single file stairway. Mr Rhodenizer, the mess manager of RA Park, testified two people could easily go up the stairs and Exhibit 8 clearly demonstrates the stairs are much wider than a single file stairway.

[23] Lieutenant K.A.M. did not see who would have grabbed her buttocks. All she knows is that Second Lieutenant Watson told her to go up the stairs; she does not remember who was behind her. She heard Warrant Officer Youden laugh and she testified that Warrant Officer Youden was the first person going up the stairs when she turned to look down the stairs when she reached the top of the stairs.

[24] Miss Snow and Petty Officer 2nd Class Monette answered all questions in a straightforward manner and admitted their memory was affected by the passage of time. They could still remember numerous events and stated they could remember significant events that would have happened. Petty Officer 2nd Class Monette had not drunk any

alcohol during the meal and Miss Snow had a glass or two of wine at the meal. Neither was under the influence of alcohol at the time of these events. Miss Snow admitted that Warrant Officer Youden is not her favourite person in the world and Petty Officer 2nd Class Monette is a general acquaintance of Warrant Officer Youden. Miss Snow and Petty Officer 2nd Class Monette are considered credible and reliable witnesses.

[25] No witnesses testified he or she saw Warrant Officer Youden grab Lieutenant K.A.M.'s buttocks. This is a case where the prosecution is asking the court to conclude that Warrant Officer Youden is the person that grabbed Lieutenant K.A.M.'s buttocks based on Lieutenant K.A.M.'s statement that she heard him behind her and that he was the first person up the stairs when she turned around at the top of the stairs. Circumstantial evidence is evidence coming from the testimony of witnesses concerning a circumstance that relates to a fact in issue. From this circumstance, the court is asked to draw an inference proving the fact in issue.

[26] The law treats direct evidence and circumstantial evidence equally. Neither is necessarily better or worse than the other. In each case, the court must decide what conclusions it will reach based upon the evidence as a whole, both direct and circumstantial. To make its decision, the court must use common sense and experience.

[27] An inference is a deduction of fact that may logically and reasonably be drawn from another fact or group of facts established in the trial. It is a conclusion that may, not must, be drawn in the circumstances. It does not change the burden of proof or the standard of proof of any party to the proceedings.

[28] An inference is a much stronger kind of belief than conjecture or speculation. If there are no proven facts from which an inference can be logically drawn, it is impossible to draw an inference; one would be speculating or guessing—and that is not good enough. An accused must not be convicted on a guess, no matter how shrewd that guess may be.

[29] There is no evidence before this court that proves Warrant Officer Youden was directly behind Lieutenant K.A.M. when she was grabbed. Petty Officer 2nd Class Monette testified the group went up the stairs as a gaggle. Lieutenant K.A.M. heard a trip, heard Warrant Officer Youden laugh and then, a short time later, saw him coming up the stairs when she was at the top of the stairs. The court finds the prosecution has not presented evidence that can lead the court to logically infer that Warrant Officer Youden was the person who grabbed her buttocks. It could have been him, but the evidence does not support the conclusion that it was him. The court finds the prosecution has not proven beyond a reasonable doubt that Warrant Officer Youden is the offender.

[30] The particulars of the second charge read as follows:

"In that he, on or about 30 October 2010, at or near Halifax, Nova Scotia, was drunk."

[31] The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Warrant officer Youden was under the influence of alcohol or a drug;
- (c) through the effect of alcohol or of a drug, Warrant Officer Youden was unfit for duty, behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service; and
- (d) that Warrant Officer Youden intentionally consumed alcohol or a drug to the level of impairment.

[32] There is no doubt Warrant Officer Youden was present at the formal dinner at the RA Park mess on 30 October 2010 and that he drank alcohol that evening. The first question to be answered is whether he was under the influence of alcohol.

[33] Major Jackson was the president of the mess committee (PMC) and as such he was responsible for the mess dinner. He testified he thought Warrant Officer Youden was under the influence of alcohol because he was loud during the dinner, his face was red and his comments "were getting close to the edge." Major Jackson thought his comments were inappropriate because of the presence of civilians at the dinner. He felt his behaviour was not acceptable for a senior NCO. He spoke to Warrant Officer Youden during the break and Warrant Officer Youden was not as loud afterwards.

[34] Major Jackson could not remember exactly what Warrant Officer Youden said and he could not comment on whether he was articulating clearly since he could only hear the noise from Warrant Officer Youden's table. He could state that Warrant Officer Youden did not utter any sexual or racist comments. He thought that Warrant Officer Youden was trying to be the centre of attention but he did also state that is his normal behaviour. Warrant Officer Youden did not need any assistance to walk or stand and he did not spill anything. Major Jackson did agree with defence counsel that Warrant Officer Youden did have a red face during the trial and that it was very hot in the room during the dinner. Major Jackson is a credible witness.

[35] Lieutenant K.A.M. testified Warrant Youden became louder as the dinner went on. He would interrupt speakers. She stated Major White and Warrant Officer Youden were both loud; she could hear their voices over everyone else. Major Jackson would have told Major White, Captain Ball and Warrant Officer Youden to "shut the fuck up" loud enough that everyone could hear. Major Jackson testified he did not say that and Miss Snow, Major White and Petty Officer 2nd Class Monette testified they did not hear Major Jackson say that.

[36] Lieutenant K.A.M. testified Warrant Officer Youden continually encouraged her to drink during the whole dinner and even bought her a drink. She agreed that Major White and Captain Ball also encouraged her to drink. Lieutenant K.A.M. agreed that she does not agree with the military custom of drinking. After the dinner, while sitting in the basement bar, she felt Warrant Officer Youden was very intoxicated because he would speak clearly and then say something she could not understand and he would start laughing.

[37] Major White was sitting at the same table as Warrant Officer Youden during the dinner. He did not feel that Warrant Officer Youden's behaviour was worse than his or Captain Ball's behaviour. He did not think Warrant Officer Youden was drunk. He testified that Warrant Officer Youden's speech was fine and was as loud as he usually is. Warrant Officer Youden had no problems walking or standing. He did not observe Warrant Officer Youden do anything inappropriate. Major White answered in a straightforward manner. He admitted he had drunk six to eight drinks that evening. Although his testimony's reliability might be affected by the passage of time and the effect of the alcohol; he is deemed a credible witness.

[38] Petty Officer 2nd Class Monette was not sitting with Warrant Officer Youden during the dinner. He could hear Warrant Officer Youden having a good time and he could hear his laugh. He did not observe anything out of the ordinary in the basement after the dinner. He found that Warrant Officer Youden's speech was normal and that he could stand and walk normally. He testified Warrant Officer Youden normally has a loud voice, a distinctive laugh and is an extroverted person. He did not think Warrant Officer Youden was drunk.

[39] Miss Snow remembers an uneventful night. She stated she was not uncomfortable being near Warrant Officer Youden when they were sitting in the basement bar. She did not hear anything that she considered out of colour and she was not upset. Lieutenant K.A.M. testified that Warrant Officer Youden would have made three comments to her concerning his penis and that Miss Snow would have expressed shock at hearing these comments. Lieutenant K.A.M. also testified that she could observe Warrant Officer Youden talking to Miss Snow while they were in the basement bar and that Miss Snow had an uncomfortable look on her face and that she was shifting in her seat. Miss Snow testified she did not make an agreement to remain with someone because of Warrant Officer Youden's presence.

[40] Once outside, Warrant Officer Youden would have grabbed Lieutenant K.A.M. twice and tried to steer her away from the group. She would have broken free, she would have yelled to Second Lieutenant Watson to wait for her and she would have caught up to Second Lieutenant Watson and would have told him to stay between her and Warrant Officer Youden. She would have walked to the bar with Miss Snow and Second Lieutenant Watson. Petty Officer 2nd Class Monette testified he walked to the bar with Second Lieutenant Watson and Officer Cadet Domanski. He testified Lieutenant K.A.M. was walking with Miss Snow and Warrant Officer Youden. Major

White, Miss Snow and Petty Officer 2nd Class Monette never heard any shouts for help that evening.

[41] Lieutenant K.A.M.'s version of key events is quite different from Major Jackson, Miss Snow, Major White and Petty Officer 2nd Class Monette's versions of these same events. Lieutenant K.A.M. is not a credible witness. There are too many important discrepancies between her testimony and the testimony of prosecution and defence witnesses.

[42] Major Jackson did not like the comments coming from Warrant Officer Youden's table although he could not describe the exact nature of these comments. He felt the volume and the flow of comments was not respectful considering the nature of the formal retirement dinner. That is why he intervened. He spoke to Warrant Officer Youden at the break. While Warrant Officer Youden did not seem to agree or understand he did lower his volume.

[43] Warrant Officer Youden was loud during the dinner but it appears it is his normal behaviour. Was he louder than usual; possibly, but he did lower his tone once Major Jackson asked him to do so. His face was red, but having observed him during the trial and based on the testimony of the witnesses, it does not appear that this is a definite sign of impairment due to alcohol. There is no evidence before this court that his speech was slurred or that his comments were off colour or out of control.

[44] The Concise Oxford Dictionary defines influence as "the capacity to have an effect on the character or behaviour of someone or something, or the effect itself." The court finds the prosecution has not provided evidence that would prove beyond a reasonable doubt that Warrant Officer Youden was in fact under the influence of alcohol.

[45] Notwithstanding this conclusion; the court will now examine whether through the effect of alcohol, Warrant Officer Youden was unfit for duty, behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service. The prosecution alleges Warrant Officer Youden behaved in a disorderly manner or in a manner likely to bring discredit upon Her Majesty's service.

[46] The prosecutor argues the loud comments and his insistence that Lieutenant K.A.M. drink are examples of disorderly conduct. He also alleged that the tasking of Officer Cadet Domanski to get drinks was disorderly. Warrant Officer Youden grabbing Lieutenant K.A.M. is also a disorderly conduct. The prosecutor also argues his behaviour towards Lieutenant K.A.M. in the basement and his loud comments during the dinner would likely bring discredit upon Her Majesty's service as well as the fact that Lieutenant K.A.M. felt she needed to miss an exercise because Warrant Officer Youden would be present at that exercise.

[47] Warrant Officer Youden was loud but not offensive and he did lower the volume when asked by Major Jackson. Major White had also tasked Officer Cadet Domanski.

The court has stated it does not find Lieutenant K.A.M.'s evidence to be credible. The court finds the prosecution has not provided evidence that would prove beyond a reasonable doubt that Warrant Officer Youden behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

FOR THESE REASONS, THE COURT:

FINDS Warrant Officer Youden not guilty of charges one and two.

Counsel:

Major P. Rawal, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major S. Collins, Directorate of Defence Counsel Services
Counsel for Warrant Officer I.W. Youden