

Date: 20020211

Docket: CMAC-450

Neutral citation: 2002 CMAC 2

**CORAM: DesROCHES J.A.
SEXTON J.A.
GOODWIN J.A.**

BETWEEN:

ABLE SEAMAN ANDRE LAWRENCE RENARD

Appellant,

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario on Monday, February 11, 2002

JUDGMENT delivered from the Bench at Ottawa, Ontario on Monday February 11, 2002

REASONS FOR JUDGMENT BY:

DesROCHES J.A.

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REASONS FOR JUDGMENT

(Delivered from the Bench at Ottawa, Ontario
on Monday, February 11, 2002)

DesROCHES J.A.

[1] Despite the thorough arguments by Major Gibson on behalf of the appellant both in his Memorandum of Fact and Law and orally before us this morning, we are not persuaded on the facts of this case as found by the Military Judge that he made any error that would warrant our intervention.

[2] With respect to the appellant's first ground of appeal, that the finding of guilty on the first charge was unreasonable, we are convinced a properly instructed jury acting judicially, could

reasonably have come to the same result. The Military Judge accepted the evidence of the complainant which was sufficient to establish the charge. It has been said many times, for example by Madame Justice McLachlin as she then was in *R. v. W. (R.)* (1992), 74 C.C.C.(3d) 134 (S.C.C.)) that in applying the test of reasonableness a court of appeal should show great deference to findings of credibility made at trial. A verdict based on credibility should only be overturned where, after considering all the evidence and having due regard to the advantages afforded to the trial judge, the Court of Appeal concludes the verdict is unreasonable. We do not reach such a conclusion in this case.

[3] Ground two relates to whether the Military Judge erred in failing to properly apply the second prong of the test for deciding cases in which credibility is the central issue. It is common ground the Military Judge correctly articulated the tripartite test in such cases set out by Justice Cory in *R. v. W. (D.)* (1991), 63 C.C.C.(3d) 397 (S.C.C.)). We are of the opinion the Military Judge committed no error in applying that test. He quite correctly analysed the appellant's testimony and concluded he did not believe that testimony. He specifically stated in his finding at page 274 at line 40

With respect to charge number one, I do not believe the accused
nor am I left in a reasonable doubt as a result of his testimony.
(A.B. II)

Furthermore, having analysed all the evidence he accepted the Military Judge concluded:

Lastly, I do not have a reasonable doubt on the basis of the whole
of the evidence I have accepted.

[4] Counsel for the appellant has very ably argued that the Military Judge made fundamental errors in his assessment of the appellant's testimony, that he conflated the issues of the worthiness of the appellant's general conduct with that of his truthfulness or credibility. We find, on the contrary, however, the Military Judge addressed in his finding the improbabilities in the appellant's testimony. We find no error in how he applied the test for credibility.

[5] The third ground of appeal relates to the manner in which the Military Judge dealt with certain post-offence conduct of the appellant, including certain statements reported by the complainant to have been made by the appellant very shortly after the sexual assault occurred.

[6] While Mr. Justice Major in *R. v. White* (1998), 125 C.C.C. (3d) 385 at 398(S.C.C.) does warn that such conduct must be treated with caution, he also points out that evidence of post-offence conduct is not fundamentally different from other kinds of circumstantial evidence.

[7] The Military Judge accepted the testimony of the complainant concerning the words spoken by the appellant. Having done so he was entitled to conclude that given the context in which those words were spoken, they were relevant and probative, and they supported the conclusion that the appellant had touched or manipulated the complainant's penis in a sexual context.

[8] The fourth ground of appeal relates to the second charge, drunkenness. It is argued that the evidence of Leading Seaman Finn should have raised at least a reasonable doubt as to the appellant's guilt on this charge.

[9] While Finn had a very brief encounter with the appellant sometime shortly after 04:30 hours and testified he had not detected any evidence of drunkenness, there remained, in our view, more than sufficient evidence to support the finding that the appellant was drunk on or about 13 July 2000 on board HMCS St-John's in the Gulf of Main even before he met Leading Seaman Finn. His own testimony detailed the large quantity of alcoholic beverages he had consumed during the hours immediately before he was to begin duty at 03:30 hours on that date. We are not persuaded the evidence of Leading Seaman Finn, standing alone, was sufficient to raise a reasonable doubt as to the appellant's guilt on this charge.

[10] For all of the above reasons the appeal of the legality of the findings of guilt on both charges is dismissed. The appellant has abandoned his appeal as to the legality and severity of the sentence imposed. Accordingly the sentence remains.

(s) "J"A" DesRoches"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: CMAC-450

STYLE OF CAUSE: Able Seaman Andre Lawrence
Renard v. Her Majesty the Queen

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: February 11, 2002

REASONS FOR JUDGMENT OF THE COURT BY: (DesRoches, Sexton, Goodwin JJ.A.)

DELIVERED FROM THE BENCH BY: DesRoches, J.A.

APPEARANCES:

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| Major M. Gibson | FOR THE APPELLANT/ APPLICANT |
| Major K. Lindstein | FOR THE RESPONDENT |

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