Date: 20050530

Docket: CMAC-479

Citation: 2005 CMAC 4

CORAM: **McFADYEN, J.A.**
VEIT, J.A.
O'REILLY, J.A.

BETWEEN:

CPL M.A. ROSE

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

HEARD at Edmonton, Alberta on April 8th, 2005

JUDGMENT delivered at Ottawa, Ontario on May 30th, 2005

REASONS FOR JUDGMENT BY: **McFADYEN, J.A.**

CONCURRED IN BY: **VEIT, J.A.**
O'REILLY, J.A.

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REASONS FOR JUDGMENT

McFADYEN J.A.

[1] The appellant appeals his conviction on two offences punishable under s. 134 of the ***National Defence Act***: (1) common assault and (2) break, enter and commit common assault. The appellant also appeals his sentence of 14 days' detention.

FACTS

[2] The facts can be briefly stated. The appellant and complainant, both members of the Canadian Armed Forces stationed in Edmonton, Alberta, played in a hockey tournament at the base in Shilo, Manitoba. The participants in the tournament stayed in the same barracks. Following the game, members of the teams went out to dinner and eventually gathered in the hallway of the first floor of the barracks which had been converted to a meeting area. This area was adjacent to the rooms occupied by the women players.

[3] The appellant and complainant met in this area. At the appellant's request, the complainant sat on the appellant's left knee while another female member, Loraine Vaillancourt, sat on his right knee. The appellant and the complainant had some discussions about work and about three way sex. The conversation continued for ten to fifteen minutes. The appellant said that the complainant was rubbing his neck and back during this time. The complainant denied that she rubbed his neck or back and said that she was very still as she sat on his knee. Sgt. Perrault, who was seated beside them, testified that the complainant was rubbing the appellant's neck and back. This activity continued for some time. Because Perrault found the complainant's conduct embarrassing, she told the complainant to stop what she was doing a number of times. Perrault finally told the complainant to go to bed, because Perrault was concerned that the complainant would get herself into trouble. The complainant denied having these conversations with Perrault. The only portions of her conversation with Perrault that the complainant recalled were her warning Perrault not to associate with Vaillancourt, and her asking Perrault not to go to bed before she did, because the complainant was concerned about rumours regarding her conduct. Shortly after that, the complainant went to the room

she shared with two other women, who were both in their beds when she entered the room. She closed but did not lock the door.

[4] The complainant testified that she fell asleep. Her next recollection is that she was feeling warm and nice, and that someone was in bed with her and was touching her. She responded, as she believed the person to be Dupuis, with whom she had a romantic encounter earlier in the evening. She said that she opened her eyes while kissing the person and recognized that the person was the appellant. She says that she said, “no, not here”, got up and left the bedroom. However, she cannot say whether anything happened after she said “no, not here”. The complainant did not recall the sequence of events. She says that she heard the door to the bedroom opening and got up to go to the washroom, but that she did not fully awaken until she was in the hallway or the washroom. Her evidence as to events in the bedroom was vague and contradictory. She stated that she was in a dreamlike state and acknowledged that she did not clearly remember what happened until she had time to think about it. At trial, she admitted that she still could not remember some events while other events still remained vague to her.

[5] The appellant testified that he remained in the meeting area after the complainant went to bed. He says that about 15-20 minutes later, the complainant crossed the hallway and went into the washroom. When she left the washroom, she smiled at him. He interpreted this to be an invitation, went to her room, opened the door and asked whether he could come in. The complainant invited him in and he got into bed with her. They were kissing and touching each other in a sexual manner when someone opened the door and looked in. At that point the complainant got up and went to the washroom. She did not return. The appellant waited for approximately five minutes, then left the room.

[6] The complainant testified that she went to the lounge at the end of the hallway after she left the washroom. Vaillancourt joined her there after a few minutes and the complainant told Vaillancourt that the appellant had entered her bedroom and gotten into bed with her without her permission.

TRIAL DECISION

[7] The military judge found the appellant not guilty of the offence of sexual assault, as he was not satisfied beyond a reasonable doubt that the touching was sexual in nature. He found the appellant guilty of common assault and break, enter and commit common assault.

[8] The military judge found that the evidence of the complainant was credible and reliable on the important issues. He attached no significance to prior inconsistent statements the complainant made to colleagues minimizing or denying the events she later testified to, as he accepted the complainant's explanation that she did not want others in the close knit military community to think less of her and therefore did not disclose the details of what had happened. The military judge also found the complainant's statements to the military police investigators were inconsistent with her testimony at trial, as the complainant initially failed to identify the person who had entered her room, did not disclose some essential facts and, in fact, misled the investigators by some of her assertions. While the military judge concluded that these inconsistencies were more serious, he did not discuss whether this factor had any effect on his view of the credibility of the complainant. The military judge accepted the evidence of Perrault as to the incident on the couch and the fact that the complainant had massaged the appellant's back, and rejected the evidence of the complainant on this

point. However, in his assessment of the complainant's credibility or reliability, he did not direct his mind to the effect of this finding, although arguably the finding implied that the complainant had given false or misleading testimony at trial.

[9] Regarding what occurred in the bedroom, the military judge found that the evidence of the complainant was not sufficiently precise to convince him beyond a reasonable doubt that the assault was sexual. However, he rejected the evidence of the appellant as to what had occurred in the bedroom, except where that evidence was confirmed by the evidence of the complainant. He was not satisfied that the appellant obtained the complainant's consent before entering the room and getting into bed with her. He found that the complainant was sleeping and therefore had not invited the appellant into the room, rejecting the evidence of the appellant that she had invited him in. He found that the appellant touched the complainant while she was sleeping, and therefore without her consent, but was not satisfied of the sexual nature of the touching. In making these findings, the military judge stated:

> Except where the evidence of the accused is confirmed by the evidence of the complainant, I reject the version of events given by the accused as to what occurred after the complainant retired to her room. I simply do not believe him. There is no evidence that independently confirms any of the aspects of the version of the accused that differ from that of the complainant. The story he relates does not flow reasonably or sensibly from the events that immediately precede it. There was no behavior by either of the parties prior to the accused entering the complainant's bedroom that might be considered to be a prelude to sexual intimacies. In particular, I do not consider the rubbing of the accused's back by the complainant, and perhaps

> another female Private, to be of a sexual nature. The only discussion of sexual activity took place on the couch and concerned the possibility of sexual activity among three people. The topic was raised by the accused, and the complainant said no to this possibility on two occasions during this short discussion. Even the accused testified that he would only engage in sexual activity with the complainant if it were also to involve another female. The evidence of the accused that the complainant then lowered her voice and said something which indicated to the accused that she might be interested in sexual activity later, or another time, I find to be not credible, and simply the product of the imagination of the accused.

[10] The military judge found that the complainant's failure to return to the bedroom after her visit to the washroom was also inconsistent with the appellant's evidence of consensual sexual activity. The defence had suggested that the complainant had not returned to the room because others were still in the hallway area and she was concerned about her fiancé. The military judge found there was simply no evidence to support this theory.

APPELLANT'S POSITION

[11] On appeal, the appellant argues, *inter alia*, that the military judge improperly subjected the evidence of the appellant to a higher standard of scrutiny than he applied to the evidence of the complainant, although the complainant's evidence called for special scrutiny on several grounds. The appellant sets out the following concerns about the evidence of the complainant:

(1) the complainant's evidence at trial was contradictory in several respects;

(2) regarding the events which occurred in the bedroom, the complainant's evidence was vague and the complainant admitted that she reconstructed some of that evidence after thinking about it for months;

(3) the complainant's evidence was inconsistent with statements which she had previously made both to colleagues and to the military investigators; and

(4) the complainant's evidence was clearly inconsistent with the evidence of other witnesses at trial, especially as it related to the activities of the complainant just prior to retiring.

[12] The military judge found no reason to give special scrutiny to the complainant's evidence, even though these factors may have indicated some need for confirmation, but he was not prepared to accept the evidence of the appellant unless it was confirmed by the complainant's evidence. The military judge did not explain what effect, if any, his findings that the complainant had misled the investigators and his preference of the evidence of Perrault and over that of the complainant respecting the back massages had on his assessment of the complainant's credibility. The appellant submits that the military judge erred in law in subjecting the evidence of the appellant to a higher standard of scrutiny and in requiring confirmation before accepting what the appellant said.

[13] In addition, the appellant submits that the military judge misconstrued evidence which supported the defence theory. We will deal with the specific instances of the alleged misapprehension of evidence in the analysis which follows.

ANALYSIS

[14] It is well established that appellate courts may not interfere with the findings of fact made and the factual inferences drawn by the trial judge, unless they are clearly wrong, unsupported by the evidence or otherwise unreasonable: ***R. v. Clark***, 2005 SCC 2 at para. 9; ***Housen v. Nikolaisen***, [2002] 2 S.C.R. 235, 2002 SCC 33. Findings based on the credibility of witnesses may only be reversed on appeal if it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts: ***Geffen v. Goodman Estate***, [1991] 2 S.C.R. 353 at 388. Appellate intervention may be justified, for example, where a trial judge has based his assessment of credibility on an apparent misapprehension of the evidence: see ***R. v. L. (R.G.)*** (2004), 185 C.C.C. (3d) 55 (aff'd 2005 SCC 18).

[15] We have concluded that the military judge misapprehended the evidence in the following respects.

[16] The military judge rejected the evidence of the appellant that, while the complainant was sitting on his knee, the complainant told him that she might be interested in sexual activity later or at another time. In rejecting this evidence, the military judge stated:

> The evidence of the accused that the complainant then lowered her voice and said something which indicated to the accused that she might be interested in sexual activity later or another time, I find to be not credible, and simply the product of the imagination of the accused.

[17] The military judge did not consider the complainant's own evidence in this respect. In fact, in her evidence the complainant never denied that she made such a statement. In direct examination the complainant said that she said "no" to the appellant's suggestions of a threesome but later, while responding to another question, she stated: "I did remember as well, back tracking, that I did tell him that I wasn't interested and, maybe another time." The complainant says that she intended that statement to be a brush-off. However, she acknowledged making the statement and the words were not a figment of the appellant's imagination. The appellant testified that he took this conversation to indicate that the complainant might be willing to have sex with him later, or another time.

[18] It may be helpful to set out some of the evidence of the complainant on this point. In direct examination, after indicating that she and the appellant discussed work issues, the complainant continued: (p.23)

A. ... The conversation switched to a threesome.

Q. When you talk about a threesome, what are you referring to?

A. He wanted to engage in sexual activity with me and Private Vaillancourt at the beginning.

Q. ...but tell us more what you told him.

A. I said, no.

Q. What else did you talk about?

A. Then he also asked if–he would want to have a threesome with his wife and myself. And I later talked—I asked him how he felt about his wife...

Q. And?

A. I also said, no.

The complainant stated that the conversation continued for about 10 minutes.

Q. What was Private Vaillancourt....what was she doing during that time? Where was she?

A. I think she was more now on the arm. I can't remember exactly where she was but she was very very close to him.

Questions turned to whether there was any discussion between the complainant and Vaillancourt.

Q. ... Was she part of the discussion you were having with [the appellant]?

A. She wasn't a part of it.

Q. She was not?

A. I don't think. She was there, close, but I don't think she overheard.

[19] The prosecutor then asked the complainant to discuss what happened after she got off the appellant's knee.

A. ... I did remember as well, back tracking, that I did tell him that I wasn't interested and, maybe another time. It's usually a way I say to people that, forget about it.

Q. Sorry?

A. I said to him: maybe another time.

Q. You mentioned that to him at that time?

A. Yes.

Q. When you were talking about what, at which point in the discussion you mentioned? Sorry, I just wanted to situate that. When were you talking about, which subject, about the threesome?

A. Right.

Q. With who?

A. I don't remember who.

Q. But it was with regard to the threesome?

A. I believe so. My intent wasn't to any... I just wanted him to forget about that sort of issue.

Q. So you tell him that at some point that maybe you will?

A. I didn't say, maybe.

Q. So what did you say, sorry.

A. I said—I can't remember.

Q. Sorry, I don't want to –because you report. Sorry, I'm a bit ...So what do you report?

A. It's very vague, a few things. But I might have said to him with regards "maybe" I can't remember exactly at what time I did say that.

Q. But is it when you were sitting on his knee?

A. Yes, because the only conversation I had with him is when I was on his knee.

Q. So you might have said something to the effect of what—Sorry ?

A. ....

Q. You don't remember?

A. I don't remember.

[20] While testifying as to the conversation regarding three way sex, the complainant agreed that she had used the words, maybe another time, maybe later. They were not the product of the appellant's imagination. The complainant testified that Vaillancourt, who was sitting on the appellant's other knee or on the arm of the sofa close to him, would not have been able to hear this conversation, arguably giving some credence to the appellant's statement that the conversation was a quiet, private one. Did the conversation refer only to three way sex? That is not clear from the complainant's evidence.

[21] The military judge also discounted the theory put forward on behalf of the appellant that the complainant failed to return to the bedroom because someone had opened the door and she discovered that others were milling about in the hallway when she left the room. The defence asked the military judge to infer that she did not return to the room because she was concerned that her fiancé might learn of her activities. The military judge indicated that there was no evidence to support this theory. In fact, he found that her failure to return to the bedroom supported the complainant's evidence. However, the complainant, as well as one of the other women who shared the room, testified that the door to the bedroom opened at least once, if not more than once, while the complainant was still in the room. The complainant testified that several guys were seated in the hallway just outside her room when she went to the washroom. The complainant acknowledged that she was concerned that no suggestion be made that she had any sexual encounters with other men, as her fiancé had been concerned about her participation in the hockey tournament and she had reassured him that the men would be housed in separate barracks. This was the reason given by the complainant for asking Perrault not to go to bed before she did. While it was open to the military judge to reject the defence theory, he erred in suggesting that there was no evidence to support it.

[22] Generally, when giving evidence about what happened in the bedroom, the complainant describes a dreamlike state. She says that she did not immediately remember what had occurred, and it was only after she thought about the events over a prolonged period of time that she concluded that certain things had happened. She readily acknowledged that other things which she did not remember could have occurred. The military judge recognized that the complainant had difficulty remembering exactly what happened after she went to her bedroom and fell asleep. He was not

satisfied that the complainant's evidence was sufficiently reliable to support a conviction for sexual assault. However, he accepted the complainant's assertion that she was asleep when the appellant entered the bedroom and that she did not invite him in. While the complainant specifically denied that she invited the appellant into the room, the military judge did not consider whether this could have occurred but that the complainant simply did not recall it. He did not direct his mind to whether the evidence could raise a reasonable doubt as to whether the appellant entered the complainant's room without her permission.

[23] The military judge did not suggest that any independent confirmation of the complainant's evidence was necessary and, in law, it may not have been. However, in giving reasons why he did not believe the evidence of the appellant where it conflicted with the evidence of the complainant, he stated that there was no evidence to independently confirm that of the appellant. The military judge did not consider whether the complainant's prior inconsistent statements to the military police and his rejection of her evidence relating to the back rub events were to be given any weight in determining the credibility and reliability of the complainant. In addition, the military judge's erroneous statements that there was no evidence to support (i) the defence theory that the complainant may not have returned to her room because of the presence of others outside the room, and (ii) the appellant's evidence that the complainant said "maybe later or maybe another time" while discussing the possibility of having sex, lead us to conclude that the military judge misapprehended key evidence which he should have considered in determining whether the defence had raised a reasonable doubt.

[24] The factual errors and the error of approach referred to above related to the critical issues of the appellant's credibility and reasonable doubt. We are not persuaded that the verdict would have been the same had the errors not been made. We allow the appeal and direct a new trial.

"Elizabeth McFadyen"
McFADYEN J.A.

I agree: " Joanne B. Veit"
VEIT J.A.

I agree: "James W. O'Reilly"
O'REILLY J.A.

COURT MARTIAL APPEAL COURT OF CANADA

Names of Counsel and Solicitors of Record

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CONCURRED IN BY: VEIT J.A.
O'REILLY J.A.

DATED: MAY 30TH, 2005

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