Date: 20051220

Docket: CMAC-483

Citation: 2005 CMAC 7

CORAM: **BLANCHARD C.J.**
LÉTOURNEAU J.A.
HANSEN J.A.

BETWEEN:

LIEUTENANT NYSTROM

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on November 10, 2005.

Judgment delivered at Ottawa, Ontario, on December 20, 2005.

REASONS FOR JUDGMENT LÉTOURNEAU J.A.

CONCURRING: BLANCHARD C.J.
HANSEN J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] The appellant was summoned to appear before a Standing Court Martial on a charge of sexual assault causing bodily harm. At the conclusion of the trial, he was convicted of the lesser and included offence of sexual assault. The Chief Military Judge (Chief Judge) presided at the trial. She accepted the joint submissions of the parties as to sentence and imposed a sentence of 45 days imprisonment. The appellant was released pending this appeal.

[2] The appeal involves two matters: the legality of the guilty verdict and the legality of the Chief Judge's decision to reject a preliminary objection by the appellant based on section 186 of the *National Defence Act*, R.S.C. 1985, c. N-5 (Act) and paragraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces*.

[3] There were two components to the appellant's preliminary objection at trial, as I understand it. First, the appellant objected to the holding of a trial by a Standing Court Martial, chosen by the Director of Military Prosecutions, on the ground that section 165.14 of the Act is unconstitutional. This section gives the Director of Military Prosecutions, and not the accused, the choice of mode of trial, i.e. the choice of tribunal before which the trial will be held. It is said to be unconstitutional for three reasons: it is contrary to the principles of fundamental justice guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* (Charter), it is inconsistent with the right to a fair trial under paragraph 11(*d*) of the Charter and it breaches the equality right conferred by section 15 of the Charter.

[4] Second, the appellant submitted to the Chief Judge, and this is the second component of his objection, that the fact that she was the one who would be adjudicating on the constitutionality of section 165.14 of the Act created a reasonable apprehension of bias. This apprehension of bias originated in the fact that the Chief Judge, before she became a judge, occupied the position of Director of Military Prosecutions for a period of about three years. In this capacity, she was responsible for the application of section 165.14 and exercised the powers under it: see Appeal Book, Vol. I, at pages 54-55.

[5] At this point, it suffices to say that in substance the appellant argued that an informed person, viewing the matter realistically and practically — and having thought the matter through — would conclude that it is more likely than not that the Chief Judge, whether consciously or unconsciously, would not decide fairly: see *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259, at page 289.

[6] As to the legality of the guilty verdict, the appellant contends that the finding of guilt is unreasonable because the Chief Judge misapprehended the evidence and failed to take into account relevant evidence.

[7] I will address first the question of the legality of the verdict, since my determination is such that I do not have to rule on the constitutional questions that are raised: see *Skoke Graham v. The Queen*, [1985] 1 S.C.R. 106, at page 121; *C.P. Air v. British Columbia*, [1989] 1 S.C.R. 1134, at page 1154; *The Queen (Man.) v. Air Canada*, [1980] 2 S.C.R. 303, at page 320; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at page 71; *Allard Contractors v. Coquitlam*, [1993] 4 S.C.R. 371, at page 413; and *Ordon v. Grail Estate*, [1998] 3 S.C.R. 437, at pages 495 and 496. The Court should generally avoid making any unnecessary constitutional pronouncement: *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, at page 571; see also *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at page 51.

[8] In my humble opinion, the guilty verdict handed down in this case is unreasonable for several reasons which I will explain after a brief statement of the facts and circumstances that gave rise to the prosecution.

FACTS AND CIRCUMSTANCES SURROUNDING THE ALLEGED ACT

[9] The accused and the complainant, both took a course in logistics at the military base in Borden, Ontario in the summer of 2003.

[10] On August 1, the appellant, the complainant and Lieutenants Gill and Brooks, who were all good friends taking the same course and who engaged in social activities together, went to Barrie. In a bar there, they drank a fair quantity of alcoholic beverages — some, including the accused, more than others. The accused and the complainant danced together. A more intimate relationship had developed between them. They were more than friends and were going out together: see Appeal Book, Vol. III, at page 478.

[11] Around 1:00 a.m., Lieutenant Gill left the bar alone and returned on foot to his quarters which he shared with the accused. The complainant lived in a building adjacent to the accused's. Lieutenant Brooks lived in the same building as the complainant: *ibid*.

[12] The accused, the complainant and Lieutenant Brooks left the bar in a taxi. They arrived at their residences around 2:30 a.m. The accused was somewhat inebriated. Lieutenant Brooks immediately went to his room. The accused and the complainant went to the accused's room.

[13] Once in his room, the accused and the complainant engaged in sexual relations. The sexual encounter went on for two and a half hours: *id*., at page 490. It consisted of a session of reciprocal oral sex, repeated vaginal sexual intercourse and anal intercourse. According to the accused, there was an initial unsuccessful attempt at anal penetration, followed by a penetration

that lasted from two to three minutes: *id*., at page 489. According to the complainant, there were several anal and vaginal penetrations: *id*., at page 494.

[14] There is no dispute that the complainant was a consenting and active participant in the sexual activities, including the failed attempt at anal penetration. However, the complainant says that this attempt proved painful and that she withdrew her consent to the other anal penetrations that were subsequently imposed on her by the accused. According to her testimony, the accused became aggressive after this refusal.

[15] The accused maintains that the complainant was at all times consenting to all the sexual activities that took place. The complainant asked the accused several times to be more gentle with her, which, he says, he was. She also complained, he says, that during the vaginal sexual relations, his weight on her caused her some pain in her breasts and biceps. In fact, the complainant suffered bruising in those places. As we will see later, the extent of the injuries suffered by the complainant is in issue.

[16] The complainant left the accused's room around 5:30 a.m. and returned to her quarters. It was the morning of August 2, 2003. Later in the morning, she met Lieutenant Williams, who was part of the same group of friends, and told her that the accused was a little rough with her during the night. She showed her some marks she had above and around her breasts: *id*., at page 485. She then went to see Lieutenant Brooks and apologized for making him wait for the departure by taxi from Barrie. She repeated to him what she had told Lieutenant Williams about the accused and showed him a small bruise on her biceps: *ibid*.

[17] On that same morning, the accused met Lieutenant Gill in the common bathroom they shared. He told him what had happened between him and the complainant during the night. He also saw the complainant. She showed him her bruises and informed him that things got a little rough. Later in the day, the complainant, the accused and Lieutenant Gill went together to the beach.

[18] On August 3, 2003, the complainant told Lieutenant Gill that things had been a little rough the night before. She showed him two bruises on her chest.

[19] In the days that followed, from August 4 to 10, the complainant and the accused continued to be part of the same group of friends. They were together in the same place on several occasions. Also during this period, she told Lieutenant Brooks and Lieutenant Williams, on different occasions, that the incident with the accused had caused her to lose blood and that she had to go to the medical clinic to get a stitch. She also complained of abdominal pains: *id.*, at page 486.

[20] On August 16, 2003, 14 days after the sexual encounter, the complainant discussed this issue with Lieutenant Gill. She told him that she had not consented to what had happened and that she had tried to resist the accused. According to Lieutenant Gill, she told him that she had not said "no" or "stop" to the accused. She added that this was why she had not complained to the police, for fear she would not be believed. She confessed, however, that she had lied about receiving medical care when such was not the case. At Lieutenant Gill's suggestion, she went to

a sexual assault centre to get some medical attention. The following day, she filed a complaint with the military police.

[21] I have limited my summary of the facts to major facts which permit a clearer understanding of the events leading to the complaint filed against the accused. I will return to some of these general facts when I discuss the conclusions of the Chief Judge and the unreasonableness of the verdict. At that point, I will also refer to other, more specific facts that are relevant and that the Chief Judge misapprehended, failed to consider, or ignored because she thought they were of no importance.

DECISION OF THE CHIEF MILITARY JUDGE

[22] The evidence as to whether the accused's conduct was culpable was essentially the contradictory versions of the facts as laid out by the complainant and the accused. The accused advanced the defence of consent and, alternatively, the defence of an honest but mistaken belief in the existence of consent. The Chief Judge rightly found that the facts surrounding the sexual activities engaged the latter defence. She rejected the contrary submissions by the prosecution.

[23] The Chief Judge acquitted the accused of sexual assault causing bodily harm for two reasons: because there was some doubt in terms of causality, more precisely as to the sexual activity that was the cause of the bleeding, and because the *mens rea* of the accused had not been proved beyond a reasonable doubt: *id.*, at page 500.

[24] However, as stated previously, she convicted the accused of sexual assault on the strength of the following findings.

[25] First, she assigned more credibility to the complainant's version than to the accused's.

[26] Second, she said that in her opinion the complainant, after feeling some pain during the attempt at anal penetration, had clearly indicated that she refused to consent to this activity. The prosecution, she said, had proved beyond a reasonable doubt the elements of the offence and the *mens rea* that must accompany it.

ANALYSIS OF THE CHIEF JUDGE'S DECISION

[27] I will begin with the second determination by the Chief Judge concerning the expressed refusal of consent.

Withdrawal of complainant's consent

[28] The Chief Judge's conclusion on the withdrawal of consent is found at page 501 of the Appeal Book, Vol. III, in these terms:

> In this case, the complainant had voluntarily participated in a series of sexual acts with Lieutenant Nystrom. The Court accepts that Lieutenant Nystrom took reasonable steps at all times to ascertain her consent to vaginal intercourse. The Court finds that he did not seek specific consent to digital penetration, but that in the context of the activities, it was reasonable for him to believe he had consent.
>
> The Court finds, however, his failure to stop when there was a clear indication of pain verbally provided to him means that the prosecution has established beyond a reasonable doubt the *mens rea* and *actus reus* for this action.
>
> In addition, given the expressed verbal and subsequent non-physical consent of the complainant to anal penetration, the burden on Lieutenant Nystrom was to

> obtain clear consent to any subsequent anal penetration which he did not do, and the Court in that regard finds that these actions constituted sexual assault.
>
> (Emphasis added)

[29] The last paragraph of the quoted extract, as formulated, imposes on the accused, who had the explicit verbal consent of the complainant to anal intercourse, the burden of obtaining clear consent from her for each of the anal penetrations subsequent to the first.

[30] The respondent's counsel acknowledged that, as formulated, this paragraph taken in isolation is legally wrong as to the burden it imposes on the accused. I would add that it remains so even on a generous and liberal reading together with the paragraph that precedes it.

[31] Indeed, a reading of these two paragraphs together reveals that there was a burden on the accused, who was having consensual anal sexual intercourse with the complainant, to obtain from her a clear consent to pursue each of the penetrations after she said she felt pain during the first unsuccessful attempt at penetration. With respect, I do not think that, in the context of intense sexual activities that lasted two and a half hours, the expression of moans of pain entails or necessarily implies a withdrawal of consent to sexual activity. It should be borne in mind that the anal penetration episode was followed by vaginal intercourse to which the complainant was also consenting: see the testimony of the complainant on cross-examination, in the Appeal Book, Vol. II, at page 309.

[32] Furthermore, the Chief Judge accepted the complainant's testimony that she had categorically objected verbally to anal intercourse after experiencing some pain: see the

complainant's testimony in the Appeal Book, Vol. II, at pages 241-243. But Lieutenant Gill, who, I note, was a friend of the complainant, stated in his testimony that the complainant told him unequivocally that she had never asked the accused to stop and that she had never expressed her refusal: see his testimony in Vol. II of the Appeal Book, at page 226. The complainant also explained to Lieutenant Gill that this is why she had not filed a complaint earlier with the police, because she feared she would not be credible: *ibid*.

[33] The complainant, moreover, admitted on cross-examination that she had consented to a second attempt at anal penetration and that in her statement to the military police, in reply to the question whether she had said "no" or "stop", she replied that she did not think she had said that: Appeal Book, Vol. III, at pages 301 to 304. The Chief Judge does not address these contradictions in the complainant's testimony in relation to her prior statements and her testimony on examination-in-chief.

[34] That the Chief Judge ignored or trivialized the impact of Lieutenant Gill's testimony in this regard is surprising. It is even more surprising because she says of this witness and of Lieutenants Williams and Brooks that they were disinterested, credible and reliable witnesses. She even added that where there was obvious contradiction between their testimony and that of the complainant or the accused, she preferred to adopt their testimony. I reproduce the relevant passages, which are at page 484 of Vol. III of the Appeal Book:

> The court will begin by assessing the testimony of Lieutenant Gill, Lieutenant Williams, and Lieutenant Brooks and the reliability of their testimony. Neither the prosecution nor the defence suggested they were anything other than credible and reliable. The court found them all to be straightforward, direct, candid, concise, willing to say when they did not know something, and not willing to succumb to suggestion. None had any real reason to favour either the complainant or the accused and all seemed to be in a general sense friends of both.

> Their testimony was largely uncontradicted, and when there was a clear contradiction between their testimony and that of the complainant or accused, the court generally preferred the testimony of these witnesses.
>
> (Emphasis added)

[35] The Chief Judge avoided the difficulty by finding that there was no direct contradiction between the testimony of the two, but instead a dissonance that was not significant. At page 496 of Vol. III of the Appeal Book, she writes:

> The court finds that there is no direct contradiction between the two witnesses. This is more a situation of I said/you heard dissonance which is explained by the respective knowledge and understanding of the parties and which is not significant.

[36] With respect, I think there is an obvious contradiction between the testimony of the complainant and the testimony of Lieutenant Gill. Moreover, this contradiction is significant since it is unequivocal and bears on an essential element of the offence, the absence of consent. This so-called dissonance must also be analysed and considered in light of the evidence as a whole and the testimony of the complainant, which, as we will see later, was not always truthful.

[37] To conclude on the issue of the withdrawal of the complainant's consent, I find the Chief Judge erred in law when she imposed on the accused the obligation to ensure that he had the complainant's consent to the sexual activities subsequent to the initial unsuccessful attempt at anal penetration, when the evidence was contradictory and uncertain at best as to whether the complainant, as paragraph 273.1(2)(*e*) of the *Criminal Code* states, had expressed, by her words or conduct, a lack of agreement to continue to engage in the activities.

Credibility and reliability of the complainant's testimony

[38] As previously mentioned, the victim's testimony about the verbal expression of her withdrawal of consent was contradicted by Lieutenant Gill's testimony.

[39] Furthermore, the victim deliberately misled her friends about the extent of her injuries and the medical treatment she received. In the week of August 4 to 10, 2003, she confided to Lieutenants Brooks and Williams that she had to get stitches in her vagina as a result of the sexual relations with the accused, which was not true: see the testimony of Lieutenant Gill in Vol. II of the Appeal Book, at page 224. She also complained of abdominal pains: see the Appeal Book, Vol. III, at page 486. Yet, on Saturday, August 9, she ran ten (10) kilometres with Lieutenant Williams that she denied doing or did not remember, then went to the beach with the accused, Lieutenant Gill and another person: *ibid*, at pages 486 and 487. She stated in her examination that she was unable to run because of the pain from her injuries: Appeal Book, Vol. II, at page 251. But this did not prevent her from playing beach volleyball on the Sunday, Monday and Wednesday following the Saturday assault and going to the beach on the following Thursday, Friday and Saturday with the accused and Lieutenant Gill: *id*., at page 300.

[40] The Chief Judge said she was satisfied that the complainant had lied to her friends and exaggerated the seriousness of her injuries. At pages 496 and 497 of Vol. III of the Appeal Book, she writes in her reasons:

> In regard to the issue of medical treatment, it is clear that the complainant misled a number of her friends about what she had done and what had been done to her. This issue is much more significant for the court.
>
> After a careful review of the testimony here, the court is satisfied that the complainant did not tell the truth to her friends and that this is reflective of a consistent exaggeration of the impact of her physical ailments, which also can

> be seen in her recollection of her physical activity in the 2 to 16 August 2003 time frame, which, in her testimony, did not include a 10-kilometre run. It also includes her interpretation and account of what Ms Pleadwell had observed during her examination of her.
>
> The court has considered very carefully whether these discrepancies are of a degree and nature that it shouldn't raise a reasonable doubt about the complainant's other testimony, and the court has assessed they are not. It is clear that she mentally had a view of and a concern about her physical injuries, which were not reflective of an air of reality, but the court is satisfied that this is limited to that area of her testimony.
>
> (Emphasis added)

[41] In fact, while recognizing the significance of the complainant's lie and that a deliberate lie is a serious matter that can taint the entirety of her testimony (*id.*, at page 472), the Chief Judge chose to limit its negative impact to the sole question of the seriousness of the injuries.

[42] With respect, this lie was highly significant since the exaggerated gravity of the injuries helped to make the lack of consent alleged by the complainant more plausible as well as making the defence of an honest but mistaken belief in the existence of consent less plausible. Added to this lie is her statement, clearly contradicted by her own prior statements to Lieutenant Gill, that she had asked the accused to stop.

[43] The complainant also testified that during the first conversation with Lieutenant Williams when she told her about the incident, Lieutenant Williams was very shocked and disgusted to hear what had happened and became very emotional: Appeal Book, Vol. II, at page 245. She added that Lieutenant Williams recommended that she have some photographs taken of the bruises.

[44] But Lieutenant Williams, whose credibility and reliability, I recall, was acknowledged by the Chief Judge, contradicted this testimony of the complainant. First she stated that she had not noted anything in the complainant's conduct that had upset the complainant: *id*., at pages 356 and 357. She then stated that the idea of having photographs taken had not even crossed her mind and that consequently she had not made any such suggestion to that effect to the complainant: *id*., at page 365.

[45] The Chief Judge determined that this was a minor discrepancy that was not significant and consequently gave it no weight. In the circumstances, I cannot accept this finding. Had this discrepancy been the only contradiction with a credible witness, then its significance could perhaps be put into perspective and its impact could take on less importance although I am far from convinced that it can be done. The fact is that, in addition to this discrepancy, we have the complainant's evidence concerning the verbal withdrawal of consent contradicted by the testimony of Lieutenant Gill and the complainant's lie about the seriousness of her injuries. In my view, this lie is significant because the complainant testified that the injuries she sustained were sufficiently significant to evoke repulsion and disgust in her friend and be immortalized on film.

[46] The Chief Judge also rejected as minor and of no importance the contradiction between the complainant's testimony and that of Lieutenant Gill in relation to the fact that he, the complainant and the accused had gone to the beach together on Saturday afternoon, August 2, 2003, the very day of the sexual assault. She found it was an oversight on the part of the complainant.

[47] With respect, it seems to me that a complainant who claims to have been the victim of a cruel and brutal sexual assault (see the testimony of the complainant, Appeal Book, Vol. II, at pages 250, 264, 266, 267 and 272) marked, as she claims, by five non-consensual anal penetrations in addition to the two to which she had consented to (*id*., at page 312), should be able to recall whether on the very afternoon of the day of the assault, she drove to the beach with her attacker and Lieutenant Gill. Given her testimony that she fears her attacker, seeks to avoid him and wants to distance herself from him, she should have little difficulty remembering the circumstances surrounding her trip to the beach on that fateful day. (See her testimony at pages 251, 259-261 and 267.) Further, it is difficult to explain or reconcile the complainant's story with the following facts. How can one explain that, on the Saturday following the assault, the complainant returned to the beach with the accused and Lieutenant Gill and spent part of the afternoon stretched out on the same blanket with the accused (see the cross-examination at page 261). What is one to make of the fact that the complainant helped the accused and Lieutenant Gill prepare for an examination that they were to take on Monday following the assault (see the reasons of the Chief Judge, Appeal Book, Vol. III, at page 497). What to make of the corroborating testimony of Lieutenants Gill and Brooks wherein it is stated that the complainant, on several occasions, inquired as to whether the accused was still interested in her, what he was thinking and saying about her and in respect to the current state of their relationship? (See the testimony of Lieutenants Gill and Brooks, Appeal Book, Vol. II, at pages 213 and 378.)

[48] At page 498 of her reasons, Vol. III of the Appeal Book, the Chief Judge answered these questions in these words:

> It is stereotypical and not required that a person subjected to sexual assault must always and immediately resist, scream, run away, immediately report the incident, and stay away from the perpetrator. It depends on the nature of the assault, the relationship between the parties, and their intentions.
>
> In this case, the complainant's actions were consistent with someone, who, while not consenting to certain things done to her, was prepared to overlook them if they were not really evidence of deliberate abuse; that is, they were inadvertent or isolated and occurred in the context of an overall more comprehensive and supportive relationship.

[49] I agree with the Chief Judge that care must be taken not to apply stereotypes in addressing these questions. However, I agree with counsel for the defence that the complainant's conduct after the assault is hard to reconcile, if at all possible, with the degree of brutality she claims to have suffered and her statements to the effect that she had absolutely no interest in maintaining a relationship with the accused.

[50] With respect, I think that the Chief Judge drew an erroneous and unreasonable inference from this relationship — a remarkable one in the circumstances — that the complainant maintained with the accused after the sexual activities of August 2, 2003, which the complainant characterizes as brutal sexual assault. Furthermore, the Chief Judge appears to have assigned little if any weight to the fact that the complaint of sexual assault was filed only after the complainant was informed that the accused was also seeing other women, was not interested in a stable relationship with her, and was saying rather unflattering things about her: see her testimony at Vol. II of the Appeal Book, at pages 267-68 and 275-78. The complainant said it was just a coincidence that the two events occurred during the same time period: *id*., at page 299.

[51] It is always a sensitive matter for an appeal court to intervene on questions of credibility and assessment of the evidence. However, when an accused alleges that the conviction imposed

on him is unreasonable, the Court of Appeal must examine the evidence, not in order to substitute its own assessment, but in order to determine whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have returned: see Cournoyer and Ouimet, *Code criminel annoté 2003* (Cowansville: Éditions Yvon Blais), page 1066, citing *R. v. François*, [1994] 2 S.C.R. 827; *R. v. Molodowic*, [2000] 1 S.C.R. 420.

[52] The Court of Appeal retains the power to set aside an unreasonable verdict even when it rests on a question of credibility: *R. v. Burke*, [1996] 1 S.C.R. 474. In reviewing the evidence, it must satisfy itself that the verdict can be supported by it.

[53] The Chief Judge correctly cited — since it is also applicable in this case — the following test, taken from the judgments in *R. v. M.G.* (1994), 93 C.C.C. (3d) 347 (Ont. C.A.) *and R. v. B. (R.W.)* (1993), 40 W.A.C. 1 (B.C.C.A.), in relation to the possible impact that some contradictions may have on the credibility of a critical witness:

> Where as here, the case for the Crown is wholly dependent upon the testimony of the complainant, it is essential that the credibility and reliability of the complainant's evidence be tested in the light of all of the other evidence presented.
>
> In this case there were a number of inconsistencies in the complainant's own evidence and a number of inconsistencies between the complainant's evidence and the testimony of other witnesses. While it is true that minor inconsistencies may not diminish the credibility of a witness unduly, a series of inconsistencies may become quite significant and cause the trier of fact to have a reasonable doubt about the reliability of the witness's evidence. There is no rule as to when, in the face of inconsistency, such doubt may arise but at the least the trier of fact should look to the totality of the inconsistencies in order to assess whether the witness's evidence is reliable. This is particularly so when there is no supporting evidence on the central issue, which is the case here.

[54] Unfortunately, as we have seen, she misapprehended the scope and effect a number of the contradictions in the complainant's testimony, either in relation to prior statements she had made or in relation to the conduct she displayed after the assault.

[55] I would add, in closing, that a reading of the complainant's testimony reveals a reticent witness, rather evasive to say the least and with a selective, elusive and, when needed, self-serving memory about the prior statements made to the military police and her friends: see, for example, pages 253, 254, 255 259, 264, 272, 273, 279 281, 285 288, 290, 295 and 296 of Vol. II of the Appeal Book, which contains the transcript of her testimony on cross-examination. After being confronted with her prior statements to the police, and testifying on examination-in-chief that she had objected after the failed attempt at anal penetration, she ended up confessing that she had consented to a second attempt at anal penetration: *id*., at pages 301 and 302.

CREDIBILITY AND RELIABILITY OF THE ACCUSED'S TESTIMONY

[56] The Chief Judge, after hearing the testimony of the accused, found that he had answered each of the questions and that his testimony had clearly stood up to cross-examination: see the reasons for decision, at page 488 of Vol. III of the Appeal Book. However, she did not believe the accused when he stated that all the sexual contacts were consensual. At the heart of her rejection of the accused's testimony is the conversation he had, when he woke up, with Lieutenant Gill.

[57] According to the accused's testimony, he encountered Lieutenant Gill in the bathroom and the latter inquired as to what had happened during the night. The accused says he told him

that apparently things got a little rough. In his testimony, Lieutenant Gill confirmed the existence and content of this conversation, but without mentioning the word "apparently".

[58] The accused testified that he met the complainant and spoke with her before speaking to Lieutenant Gill. While speaking with the complainant, he says, he learned that things had gotten a little rough. The complainant confirms that they talked that morning and that she told him that he had been rough with her: see the complainant's testimony, Appeal Book, Vol. II, at page 248.

[59] The Chief Judge thought the content and timing of this conversation between Lieutenant Gill and the accused were important and significant items in assessing the credibility of the accused on the question of the complainant's consent to the sexual activities. At pages 490 and 491 of her reasons, Vol. III of the Appeal Book, she writes:

> When Lieutenant Nystrom woke up and went to the bathroom the next morning at around 10:30 a.m. to brush his teeth and ran into Lieutenant Gill asking him questions about how things went the night before, according to the account provided by Lieutenant Nystrom, he might appropriately have responded to the effect it was a mutually satisfactory experience from which the complainant's actions indicated she derived pleasure and which lasted an unusually long time before he ejaculated. The court is not indicating that those would necessarily be the words but that would be something that was consistent with the activities that were described by Lieutenant Nystrom.
>
> He would have no reason to use, in any context, the phrase "things got a little rough". The account provided is in total contradiction to that statement. Both Lieutenant Gill and Lieutenant Nystrom, in their testimony, remember the statement being made at that time and in that place.
>
> Lieutenant Nystrom did say that he meant by this things apparently got a little rough in the complainant's mind because of the bruise on her breast.
>
> And, in cross-examination, Lieutenant Nystrom changed his account and concluded that he saw Lieutenant Gill a couple of times and had dinner in there sometime, and that he thinks he must have spoken to the complainant, then to Lieutenant Gill, but the much more detailed account he provides in direct and the account that accords with Lieutenant Gill's testimony is that Lieutenant Nystrom says this in the bathroom just after he gets up, and before he goes to talk to the complainant.

> This is a very significant matter, and the court considers it critical because it is inconsistent with all of Lieutenant Nystrom's account of what occurred in his room.
>
> It is that same fact which , when the court reviews the second step in R. v. W.D.; that is, whether Lieutenant Nystrom's testimony, even if not believed, results in a reasonable doubt about an essential element of the offence, which leads the court to the conclusion that it does not.
>
> (Emphasis added)

[60] According to the Chief Judge, the accused changed his testimony on cross-examination to say that he had spoken to Lieutenant Gill after he had talked to the complainant. I acknowledge that the accused's testimony as a whole is confusing about the time at which and the order in which he spoke to Lieutenant Gill and the complainant. The lawyers doubtless should have clarified this matter. Having said this, I think the Chief Judge was mistaken when she found that the accused had changed his version on cross-examination, because, both on examination and on cross-examination, he says he told Lieutenant Gill about the events of the night after discussing them with the complainant. I reproduce the relevant extracts from the examination and cross-examination, which are at pages 399, 403, 418 and 419 of Vol. III of the Appeal Book:

> Examination of the accused
>
> Q. What did you do when you woke up?
> A. I got up, went to the bathroom and with my toothbrush, brushed my teeth, and that's around, yeah, 10:30 when I actually got out of bed, went over…
> Q. What did you do after you brushed your teeth?
> A. Came back to my room, got dressed, that's when I'd seen Lieutenant Gill in the bathroom, and I went over to speak with [the Complainant].
> …
> Q. I direct your attention to the evidence of Lieutenant Gill concerning some discussion about rough sex?
> A. Yeah, in the bathroom.
> Q. Okay. Can you tell us about the circumstances of that?
> A. Yeah. That's when I woke up, I went to brush my teeth. Lieutenant Gill was shaving and he said, "So…" you know, "what happened last night?" Usual "guy" stuff, talking. "Were you with [the Complainant]?" I said yeah, and I said, "Apparently, things got a little rough".
> Q. Why did you say that?
> A. Because [the Complainant] had alluded to it in our conversation.

Q. Where did this conversation with Gill fit in relative to the conversation with [the Complainant]?
A. After the first conversation. [with the Complainant]

Cross-examination of the accused

Q. And then you, with your toothbrush, went into the washroom, that's where you saw Lieutenant Gill?
A. I believe I saw him, I did see him a couple times that morning. I went and brushed my teeth, I also had dinner in there sometime, later on.
Q. Okay. So just to be clear, when you made the comment to Lieutenant Gill with regards to the "things got rough", you're not talking about the first time you see him then. Is that correct?
A. I don't believe so, sir no.
Q. But it's possible?
A. No, sir.
Q. And it's not because…
A. I'm pretty sure I saw him as soon as I woke up, and then I spoke to [the Complainant], and I came back again to my barracks, and then I had gone back to talk to her again, and I'm not sure when I had supper - not supper, dinner before we left for the beach in there.

(Emphasis added)

[61] On the basis of these statements, it was not open to the Chief Judge, on this issue that she considered significant, to find that there was a contradiction in the accused's testimony. In *R. v. S.D.D.*, 2005 NSCA 71, the Nova Scotia Court of Appeal describes, in these words, at paragraph 10 of its decision, what a misapprehension of the evidence must be taken to mean:

> What is a misapprehension of the evidence? It may consist of "…a failure to consider evidence relevant to a material issue, a mistake…": …A trial judge misapprehends the evidence by failing to give it proper effect if the judge draws an "unsupportable inference" from the evidence or characterizes a witness's evidence as internally inconsistent when that characterization cannot reasonably be supported on the evidence: …In *Morissey*, for example, the trial judge stated that the evidence of two witnesses was "essentially the same", a conclusion not supported by the record. This was held to be a misapprehension of the evidence. In *C.(J.)*, the trial judge was found to have erred by characterizing the accused's evidence as "internally inconsistent" when this conclusion was not reasonably supported by the record: at para. 9.

[62] The principles of *Morrissey (R. v. Morrissey* (1995), 97 C.C.C. (3d) 193 (Ont. C.A.), see also *R. v. Lohrer*, [2004] 1 S.C.R. 627), referred to by the Nova Scotia Court of Appeal, require that the misapprehension concern material parts of the evidence and not some details, that it be fundamental and not simply peripheral to the reasoning adopted by the judge, and that it play an essential role in the process resulting in the conviction.

[63] I believe that these tests are met in the case at bar. This misapprehension, in combination with the errors concerning the assessment of the contradictions in the complainant's testimony, renders the verdict unreasonable.

CHOICE OF MODE OF TRIAL

[64] Although it is not necessary to discuss the constitutionality of section 165.14 of the Act, I am unable to overlook the deep concern this provision raises, particularly in view of the recent expansionist context of the military criminal justice system. I reproduce the section in question:

165.14 When the Director of Military Prosecutions prefers a charge, the Director of Military Prosecutions shall also determine the type of court martial that is to try the accused person and inform the Court Martial Administrator of that determination.	**165.14** Dans la mise en accusation, le directeur des poursuites militaires détermine le type de cour martiale devant juger l'accusé. Il informe l'administrateur de la cour martiale de sa décision.

[65] Traditionally, members of the Armed Forces have enjoyed all the rights normally conferred on Canadian citizens who are criminally prosecuted. In *MacKay v. The Queen*, [1980] 2 S.C.R. 370, McIntyre J., supported by Dickson J., writes at pages 408 and 409:

> It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service. With this concept in mind, I turn to the situation presented in this case.
>
> Section 2 of the *National Defence Act* defines a service offence as "an offence under this Act, the *Criminal Code*, or any other Act of the Parliament of Canada, committed by a person while subject to the Code of Service Discipline". The Act also provides that such offences will be triable and punishable under military law. If we are to apply the definition of service offence literally, then all prosecutions of servicemen for any offences under any penal statute of Canada could be conducted in military courts. In a country with a well-established judicial system serving all parts of the country in which the prosecution of criminal offences and the constitution of courts of criminal jurisdiction is the responsibility of the provincial governments, I find it impossible to accept the proposition that the legitimate needs of the military extend so far. It is not necessary for the attainment of any socially desirable objective connected with the military service to extend the reach of the military courts to that extent. It may well be said that the military courts will not, as a matter of practice, seek to extend their jurisdiction over the whole field of criminal law as it affects the members of the armed services. This may well be so, but we are not concerned here with the actual conduct of military courts. Our problem is one of defining the limits of their jurisdiction and in my view it would offend against the principle of equality before the law to construe the provisions of the National Defence Act so as to give this literal meaning to the definition of a service offence. The all-embracing reach of the questioned provisions of the *National Defence Act* goes far beyond any reasonable or required limit. The serviceman charged with a criminal offence is deprived of the benefit of a preliminary hearing or the right to a jury trial. He is subject to a military code which differs in some particulars from the civil law, to differing rules of evidence, and to a different and more limited appellate procedure. His right to rely upon the special pleas of "autrefois convict" or "autrefois acquit" is altered for, while if convicted of an offence in a civil court he may not be tried again for the same offence in a military court, his conviction in a military court does not bar a second prosecution in a civil court. His right to apply for bail is virtually eliminated. While such differences may be acceptable on the basis of military need in some cases, they cannot be permitted universal effect in respect of the criminal law of Canada as far as it relates to members of the armed services serving in Canada.
>
> (Emphasis added)

[66] Soldiers were prosecuted in the civilian courts unless the alleged offence had a military nexus. In that case, the complaint could be tried in the military court, as the purpose was to

ensure the achievement of military objectives and to strengthen respect for military discipline, whether personal or collective. In *R. v. MacEachern* (1985), 24 C.C.C. (3d) 439, this Court held that provisions of the Act giving military courts jurisdiction over common law offences, also referred to as civilian offences, were unconstitutional when the nature of the offences and the circumstances surrounding their commission had no military nexus. Subsequently, in *Ryan v. The Queen* (1987), 4 C.M.A.C. 563, it reaffirmed the necessity for this military nexus.

[67] However, in *R. v. Reddick* (1996), 5 C.M.A.C. 485, at page 499, this Court held that this nexus is superfluous and potentially misleading in a distribution of powers context, where the issue is whether legislation is within the constitutional jurisdiction of its enactor. This interpretation was made in the context of an analysis of the application of subsection 60(2) of the Act to a former soldier who had returned to civilian life, for an offence he had committed while he was a member of the Canadian Armed Forces. I am not certain that the military nexus doctrine has been abolished for all purposes, as the appellant's counsel contends, given the significant consequences that result for members of the Canadian Armed Forces. The *MacKay* judgment, *supra*, clearly indicates some of those consequences, but the list is not exhaustive. That said, the existence of such a nexus is not disputed in the case at bar.

[68] Furthermore, the 1998 amendments to the Act through Bill C-25, now chapter 35 of the 1998 statutes, section 22, expanded the jurisdiction of the military courts by allowing them to try sexual offences, until then tried only by the civilian courts. Section 165.14 was adopted at the same time, giving the prosecution the power to choose the mode of trial: see S.C. 1998, c. 35, s. 42.

[69] An initial result of this expansion of the military criminal justice system was that members of the Canadian Armed Forces lost the right to trial by jury for common law offences such as those offences provided for in the *Criminal Code*: paragraph 11(*f*) of the *Canadian Charter of Rights and Freedoms* denies members of the Canadian Armed Forces the right to such trials for offences under military law tried before a military tribunal.

[70] Were it not for section 165.14, which is being challenged here, it would not necessarily be unreasonable to think that this loss is to some degree compensated by the possibility of obtaining a trial before either a Disciplinary Court Martial (section 169 of the Act) or a General Court Martial (section 166), which resembles a trial by jury, although it is not. The accused can then be tried by a panel of three or five members of the military, assisted by a military judge, instead of by a military judge alone. But — and this is where the problem lies — the prosecution has the choice of these modes of trial while, as we know, if a soldier were prosecuted before the civilian courts for the same offence giving rise to an election as to mode of trial, the choice of mode would belong to him or her, not the prosecution.

[71] Exercising the power conferred by section 165.14 of the Act includes exercising the discretion regarding the court before which the trial will take place. It is undeniable that a prosecutor, exercising his or her right to prosecution, must have and does have broad discretionary authority. As La Forest J. said in *R. v. Beare*, [1988] 2 S.C.R. 387, at page 410, "Discretion is an essential feature of the criminal justice system"; see also *R. v. Cook*, [1997] 1 S.C.R. 1113; *R. v. Power*, [1994] 1 S.C.R. 601. He added:

> A system that attempted to eliminate discretion would be unworkably complex and rigid. Police necessarily exercise discretion in deciding when to lay charges, to arrest and to conduct incidental searches, as prosecutors do in deciding

> whether or not to withdraw a charge, enter a stay, consent to an adjournment, proceed by way of indictment or summary conviction, launch an appeal and so on.

[72] But this discretionary authority is not absolute and cannot be exercised in an incongruous or improper manner: *R. v. Cook, supra,* at page 1124.

[73] These decisions are relevant to the laying of the complaint, the choice of charge, and the prosecution's option to proceed by indictment or by summary conviction depending on the seriousness of the actions and the circumstances.

[74] In *Krieger v. Law Society of Alberta*, [2002] 3 S.C.R. 372, at page 394, the Supreme Court of Canada provides a non-exhaustive list of the elements included in prosecutorial discretion. On the following page, it defines what is common to the various elements:

> Significantly, what is common to the various elements of prosecutorial discretion is that they involve the ultimate decisions as to <u>whether</u> a prosecution should be brought, continued or ceased, and <u>what</u> the prosecution ought to be for. Put differently, prosecutorial discretion refers to decisions regarding the nature and extent of the prosecution and the Attorney General's participation in it.
>
> (Emphasis in original)

[75] However, decisions that govern a Crown prosecutor's tactics or conduct before the court do not fall within the scope of prosecutorial discretion. The Supreme Court of Canada addresses this necessary distinction as follows:

> <u>Decisions that do not go to the nature and extent of the prosecution, i.e., the decisions that govern a Crown prosecutor's tactics or conduct before the court, do not fall within the scope of prosecutorial discretion</u>. Rather, such decisions are governed by the inherent jurisdiction of the court to control its own processes once the Attorney General has elected to enter into that forum.

(Emphasis added)

[76] The respondent's counsel submits that the power under section 165.14 of the Act to choose the mode of trial is a discretionary prosecutorial power similar to the power that exists in the civilian courts to choose between proceeding by indictment and proceeding by way of summary conviction. I am unable to accept that argument.

[77] I agree that the prosecutor's option to proceed by one mode of prosecution rather than another (indictment or summary proceeding) is an element of prosecutorial discretion. In the words of the Supreme Court of Canada, it is a decision concerning "the nature and extent of the prosecution".

[78] However, with due respect for those who hold a different view, I am of the opinion that the choice of mode of trial partakes of a benefit, an element of strategy or a tactical advantage associated with the right of an accused to present full answer and defence and control the conduct of his or her defence. This right is recognized as a principle of fundamental justice: see *R. v. Swain*, [1991] 1S.C.R. 933, at page 972. The right to elect the mode of trial is, before the civilian courts, a right extended to an accused who makes use of it according to and for the purpose of his defence. In *R. v. Turpin, Siddiqi and Clauzel* (1987), 60 C.R. (3d) 63, the Ontario Court of Appeal held that it was an advantage conferred by law. At paragraph 27, the Court writes:

> What we are faced with in this case is not so much whether one form of trial is more advantageous than another, i.e. whether a person charged with murder is better protected by a judge and jury trial or by a trial by judge alone. Rather, the question is whether having that choice is an advantage in the sense of a benefit of the law. Mr. Gold, on behalf of the respondents in this case, suggested that it is the having of the option, "the ability to elect one's mode of trial", that was a

> benefit which accused persons charged with murder in Alberta had over accused persons charged with murder elsewhere in Canada. We have to agree with that submission. A choice as to having or not having a jury trial (even though limited by the overriding determination by the trial judge), based upon the advantages of one mode of trial over the other because of a wide range of factors, such as the nature and circumstances of the killing, the amount of publicity, the reaction in the community, the size of the community from which the jury is being drawn, and even the preference of defence counsel with respect to trying to convince a jury or a judge of the defence version of the facts (or leave them with a reasonable doubt), indicates that having that choice must be considered a benefit. The absence of that benefit in Ontario must be considered a disadvantage.
>
> (Emphasis added)

[79] There is no doubt in my mind that the choice of mode of trial conferred by section 165.14 is an advantage conferred on the prosecution that could be abused. Cory J. states in *R. v. Bain*, [1992] 1 S.C.R. 91, at pages 103 and 104: "Unfortunately it would seem that whenever the Crown is granted statutory power that can be used abusively then, on occasion, it will indeed be used abusively."

[80] In the case at bar, the circumstances surrounding the exercise of the power under section 165.14 of the Act and the statistics on its use are disturbing.

[81] First, as the respondent's counsel concedes, there is no policy, nor any criteria governing the exercise of the discretion under section 165.14.

[82] Second, the statistics regarding the use of the power indicate either a discretion that is fettered in advance or a refusal to exercise it. In the period from September 1, 1999, to March 31, 2003, only four of the 220 trials were assigned to a panel assisted by a judge, as indicated in the

following table taken from the report to Parliament by the Right Honourable Antonio Lamer, former Chief Justice of the Supreme Court of Canada:

Reporting Period	GCM Judge and panel	DCM Judge and panel	SCM Judge alone	SGCM Judge alone	Total CM
Sept. 1, 1999 to March 31, 2000	0	0	27	0	27
April 1, 2000 to March 31, 2001	0	1	62	0	63
April 1, 2001 to March 31, 2003	1	1	65	0	67
TOTAL	**1**	**3**	**216**	**0**	**220**

[83] This report, entitled *The First Independent Review of the provisions and operation of Bill C 25, An Act to amend the National Defence Act and to make consequential amendments to other Acts*, September 3, 2003, was prepared in response to an obligation imposed by Parliament to review the operation of the Act. Regarding section 165.14 and the fact that it gives the choice of mode of trial to the prosecution, former Chief Justice Lamer writes, at page 40 of the Report:

> I have been unable to find a military justification for disallowing an accused charged with a serious offence the opportunity to choose between a military judge alone and a military judge and panel, other than expediency. When it comes to a choice between expediency on the one hand and the safety of the verdict and fairness to the accused on the other, the factors favouring the accused must prevail. The only possible exception warranting a change to this default position might be during times of war, insurrection or civil strife.
>
> It is my belief that an accused charged with a serious offence should be granted the option to choose between trial by military judge alone or military judge and panel prior to the convening of a court martial.
>
> (Emphasis added)

And this observation leads him to recommend that the Act be amended to give the accused the option as to mode of trial.

[84] From 2003 to date, there were between 120 and 125 trials before courts martial. None of these trials have taken place before a panel of members of the military assisted by a military judge. These figures, on top of the preceding statistics, point to the virtually inescapable conclusion that the power under section 165.14 is being abused.

[85] The respondent's counsel argued that giving the prosecution the power under section 165.14 was justified by the fact that the various courts martial (General Court Martial, Disciplinary Court Martial, Standing Court Martial and Special General Court Martial) have different limits as to the sentences that they can impose, some being more severe than others. I confess that I have some difficulty grasping the merit of this justification, especially since the power under section 165.14 to chose the court and consequently the scale of the sentences to be imposed provides the prosecutor with an additional advantage, open to abuse, that is detrimental to the accused.

[86] Be that as it may, this justification does not stand since the Disciplinary Court Martial (composed of a panel of three members assisted by a military judge) and the Standing Court Martial (composed of a judge alone) – which is the option almost always favoured by the prosecution – have the same powers and the same limitations in terms of sentencing: both can impose a dismissal with disgrace from Her Majesty's service as the maximum punishment (sections 172 and 175). Yet, the accused can never elect between these two modes of trial because of section 165.14 of the Act. He therefore loses the benefit of the advantage offered by a hearing before a panel of three members assisted by a military judge.

DISPOSITION OF THIS APPEAL

[87] The appellant is asking that his conviction be set aside and that a verdict of acquittal be entered in its place. Section 238 of the Act, specifically paragraph 238(1)(*a*), confers this power to this Court. In the alternative, the appellant is asking that a new trial be held, as provided by paragraph 238(1)(*b*), if the Court is not disposed to grant the first request.

[88] Where it is alleged, as it is in the present case, that the verdict is unreasonable or is not supported by the evidence, the role of the appellate court, as stated earlier, is to determine whether the verdict is one that a properly instructed trier of fact, acting judicially, could reasonably have rendered: see *R. v. Hewitt*, [2003] O.J. No. 2618 (Ont. C.A.). In that case, the Court stated at paragraph 5:

> This requires an appellate court to review, analyse, and within the limits of appellate disadvantage, weigh the evidence to ensure that the result "does not conflict with the bulk of judicial experience".

[89] After carefully reviewing the evidence, noting the serious and profound contradictions and the lies and reticence of the complainant with respect to some elements and material circumstances of the offence such as the lack of consent, the seriousness of the injuries and the inconsistency of her conduct with the fear she claimed to have of the accused, I do not think that in this case a guilty verdict could be rendered based on the evidence in the record. I believe that the only way to dispose of the appeal in this case is to set aside the guilty verdict and to enter a verdict of acquittal in its place.

CONCLUSION

[90] For these reasons, I would allow the appeal, set aside the decision of the Standing Court Martial and enter a finding of not guilty.

"Gilles Létourneau"
J.A.

“I concur
Edmond P. Blanchard C.J.”

“I concur
Dolores M. Hansen J.A.”

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-483
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