Date: 20081215

Docket: CMAC-509

Citation: 2008 CMAC 8

CORAM: **BLANCHARD C.J.**
O'REILLY J.A.
HARRINGTON J.A.

BETWEEN:

MASTER SEAMAN WILLMS, B.B.J.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 31, 2008

Judgment delivered at Ottawa, Ontario, on December 15, 2008

REASONS FOR JUDGMENT BY: **BLANCHARD C.J.**

CONCURRED IN BY: **O'REILLY J.A.**
HARRINGTON J.A.

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REASONS FOR JUDGMENT

THE CHIEF JUSTICE

I. Introduction

[1] The Appellant, Master Seaman Willms, (MS Willms) appeals his conviction by a Standing Court Martial on a charge of assault under section 130 of the *National Defence Act* (NDA), contrary to section 266 of the *Criminal Code of Canada* (CCC). The Appellant appeals his guilty verdict and the legality of any or all of the findings of the trial judge pursuant to section 230(*b*) of the NDA.

II. Facts

[2] On May 5, 2006, MS Willms was serving as a recruit instructor at the Naval Reserve Training Division (NRTD), Canadian Forces Base (CFB) Borden, Ontario.

[3] In May 2006, members of 2 Platoon, C Company, NRTD, were attending a 3-month basic recruit course. Among the recruits were the Complainant and her roommate at the base military quarters, Ordinary Seaman (OS) Wolfe.

[4] On May 5, 2006, together with her platoon-mates, the Complainant was completing a physical fitness test at the swimming pool at CFB Borden. While exercising in the pool, she suffered an accidental kick that broke and dislodged one of her contact lenses. She was assisted by OS Wolfe, and taken into the women's washroom to remove the other contact lens. Without contact lenses, her vision was reduced to the point of her being effectively blind.

[5] After changing into her "PT training gear", the Complainant was escorted by OS Wolfe to the bus bringing the recruits back to the classroom. On the bus, her instructor, MS Willms, was informed of the accident. MS Willms claims he offered to arrange for the Complainant to be taken to the base hospital for immediate assistance. The Complainant states that she does not remember this offer but does remember that "he did offer to go back to quarters or I asked to go back to quarters." She did not recall the exact conversation. In any event, she asked that OS Wolfe be called back on the bus to assist her and she was taken back to her room to tend to her eye.

[6] On the bus, another recruit offered the Complainant eye drops for her eye lid. The Complainant states that MS Willms leaned over to put these eye drops in her eyes and that she refused the eye drops stating that she did not know what they were. In contrast, MS Willms testified that he knew from his training and from common sense that medication should not be shared and instructed the Complainant, therefore, to not share medication. The Complainant acquiesced to his instruction.

[7] The Complainant was accompanied back to the barracks by MS Willms and OS Wolfe. Upon arrival, she was assisted off the bus to the barracks entrance and up the stairs to her room. This "assistance" is the heart of the entire matter.

[8] There is conflicting evidence as to what role OS Wolfe played in assisting the Complainant off the bus and up the two flights of stairs to her room. MS Willms testified that both he and OS Wolfe helped the Complainant to the barracks building and they both helped her up the stairs holding her by the arm. From the bus to the barracks, he stated that he held her right arm with his left hand and OS Wolfe was on the other side. Once inside the building, he switched sides to help her up the stairs and, while carrying his pace stick under his left arm, he held her left arm with his right hand. MS Willms testified that all three went up the stairs. He on the Complainant's left hand side and OS Wolfe on her right hand side. At some point, MS Willms told OS Wolfe to let go of the Complainant's hand since that could be construed as fraternization and to hold her by the arm instead. OS Wolfe stated that MS Willms grabbed the Complainant and pulled her away from OS Wolfe while yelling "Don't touch her. You'll get charged with

fraternization." This occurred, according to OS Wolfe about midway up the first set of stairs. From that point on, OS Wolfe states that she did not touch the Complainant.

[9] MS Willms claimed that they proceeded up the stairs at a slower than usual pace because the Complainant could not see and was stumbling. His evidence is that she stumbled a few times while going up the stairs and when this occurred most of her weight fell to his right hand. He said once they reached the landing, OS Wolfe went ahead to open the door to the room she shared with the Complainant. MS Willms indicated that at all times his intention was to help the Complainant since she was injured and needed assistance.

[10] The Complainant, on the other hand, testified that she did not consent to MS Willms' assistance. She testified that while she needed help, she did not need his help because OS Wolfe could have helped her. She claims that she said nothing to MS Willms about his holding her arm or helping her because she was too scared. She states that she was coming up the stairs pretty fast and was stumbling over her feet, but does not remember falling.

[11] The Complainant admitted to bruising easily and does not remember the exact time she noticed the bruises under her arm, but did show them to OS Wolfe either in the evening of May 5, 2006, or the next morning. She claims that the bruises were caused by MS Willms "grabbing" her arm to "aggressively" help her or take her up the stairs. At the trial, OS Wolfe testified that she observed the bruises on the Complainant's upper arm. Her testimony at trial conflicts with her earlier statement to the investigating officer, made twelve days after the incident, wherein she indicated that she had observed the bruises the next morning.

[12] The Complainant states that others reported the incident but she made a statement to the Military Police, nearly two weeks after the incident, indicating she didn't think much of it at the time it occurred.

[13] On June 18, 2006, MS Willms was charged with the following two charges: (1) assault contrary to section 266 of the CCC, an offence punishable under section 130 of the NDA; and (2) that he ill-treated a person who by reason of rank was subordinate to him contrary to section 95 of the NDA.

II. The Trial Judge's Finding

[14] The trial judge found MS Willms guilty of assault and directed a stay of proceedings in respect to the second charge.

[15] The trial judge wrote:

> … [The Complainant] had asked her friend and roommate, Wolfe, for assistance but had not made any request of the accused nor had she said anything to the accused that would entitle him to believe that he could contact her physically. On all the evidence he seems to have thought that he was entitled to render to her such assistance as he saw fit. He, himself, made no inquiries as to whether or not [the Complainant] needed or wanted his help. In my view, he was at least reckless as to whether or not [the Complainant] consented to being assisted by him by the taking of her arm.
>
> …
>
> It is argued by counsel that even if the accused did assault [the Complainant], it was under the mistaken belief that she consented to the contact. In my view, this submission is simply not supported by the evidence. At no point did the accused in his evidence claim that he thought the Complainant was consenting to him taking her

arm. His counsel argues correctly that in law such a finding of fact can be made on the basis of all the evidence showing that his intention was merely to assist the Complainant whether or not there is direct evidence of the state of mind of the accused at the relevant time.

I have already dealt with this argument in my finding that the accused was reckless as to whether the Complainant consented. But in any event, such a finding is at odd with the clear evidence of injury, albeit of a relatively minor nature, caused to the Complainant by the grabbing of her arm by the accused. In my view, there is no merit of force to the suggestion that the accused honestly believed that the Complainant was consenting to his application of force to her arm. The accused is therefore guilty of the assault charged in charge number 1.

III. The Applicable Provisions of the *Criminal Code*

[16] Assault is defined at section 265 of the CCC as follows:

Assault 265. (1) A person commits an assault when	Voies de fait 265.(1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas :
(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;	a) d'une manière intentionnelle, emploie la force, directement ou indirectement, contre une autre personne sans son consentement.
(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or	b) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein.
(c) while openly wearing or carrying a weapon or an imitation thereof; he accosts or impedes another person or begs.	c) en portant ostensiblement une arme ou une imitation, aborde ou importune une autre personne ou mendie.

(2) This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

(2) Le présent article s'applique à toutes les espèces de voies de fait, y compris les agressions sexuelles, les agressions sexuelles armées, menaces à une tierce personne ou infliction de lésions corporelles et les agressions sexuelles graves.

Consent
(3) For the purposes of this section, no consent is obtained where the Complainant submits or does not resist by reason of
(a) the application of force to the Complainant or to a person other than the Complainant;

Consentement
(3) Pour l'application du présent article, ne constitue pas un consentement le fait pour le plaignant de se soumettre ou de ne pas résister en raison :
a) soit de l'emploi de la force envers le plaignant ou une autre personne;

(b) threats or fear of the application of force to the Complainant or to a person other than the Complainant;

b) soit des menaces d'emploi de la force ou de la crainte de cet emploi envers le plaignant ou une autre personne;

(c) fraud; or

c) soit de la fraude;

(d) the exercise of authority.

d) soit de l'exercice de l'autorité.

Accused's belief as to consent
(4) Where an accused alleges that he believe that the Complainant consented to the conduct that is the subject matter of the charge, a judge, if satisfied that there is sufficient evidence and that, if believed by the jury, the evidence would constitute a defence, shall instruct the jury, when reviewing all the evidence relating to the determination of the honesty of the accused's belief, to consider the presence or absence of reasonable grounds for that belief.

Croyance de l'accusé quant au consentement
(4) Lorsque l'accusé allègue qu'il croyait que le plaignant avait consenti aux actes sur lesquels l'accusation est fondée, le juge, s'il est convaincu qu'il y a une preuve suffisante et que cette preuve constituerait une défense si elle était acceptée par le jury, demande à ce dernier de prendre en considération, en évaluant l'ensemble de la preuve qui concerne la détermination de la sincérité de la croyance de l'accusé, la présence ou l'absence de motifs raisonnables pour celle-

ci.

[17] Section 266 of the CCC provides:

Assault 266. Every one who commits an assault is guilty of	Voies de fait 266. Quiconque commet des voies de fait est coupable :
(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or	a) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;
(b) an offence punishable on summary conviction.	b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

IV. Standard of Review

[18] The role of an appellate court sitting on appeal of a guilty verdict, where the legality of any or all of the findings of the trial judge are challenged was set out as follows by this Court in *R v. Nystrom,* 2005 CMAC 7 at para. 51:

> … 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 (S.C.C.); *R. v. Molodowic*, [2000] 1 S.C.R. 420 (S.C.C.).

See also paragraph 88 of *Nystrom*, above.

[19] In *R. v. W.(R.)*, [1992] 2 S.C.R. 122, Madam Justice McLachlin writing for the Supreme Court expressed the following view at page 131 of her reasons:

> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the

> accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence.

[20] This test is equally applicable to a verdict rendered by a judge sitting at trial without a jury. In such a case, and as explained by Madam Justice Arbour in *R. v. Biniaris*, 2000 SCC 15, at para. 37:

> …the reviewing appellate court may be able to identify a flaw in the evaluation of the evidence, or in the analysis, that will serve to explain the unreasonable conclusion reached, and justify the reversal.

V. Analysis

[21] The Burden is on the Crown to prove all of the elements of the offence beyond a reasonable doubt. In this case, there is no issue that MS Willms applied force to the Complainant. He took hold of her arm with the stated intention of assisting her up the stairs to her room inside the barracks. Nor is there any dispute that he did so intentionally. This case turns on consent.

[22] Consent figures in both the *actus reus* and *mens rea* for assault. This duality is explained, in the equally applicable context of sexual assault, in *R v. Ewanchuk*, [1999] 1 S.C.R. 330 at paragraphs 27 to 42:

> Confusion has arisen from time to time on the meaning of consent as an element of the *actus reus* of sexual assault. … [F]or the purposes of determining the absence of consent as an element of the *actus reus*, the actual state of mind of the Complainant is determinative. At this point, the trier of fact is only concerned with the Complainant's perspective. The approach is purely subjective.
>
> …

> While the Complainant's testimony is the only source of direct evidence as to her state of mind, credibility must still be assessed by the trial judge, or jury, in light of all the evidence. It is open to the accused to claim that the Complainant's words and actions, before and during the incident, raise a reasonable doubt against her assertion that she, in her mind, did not want the sexual touching to take place. If, however, as occurred in this case, the trial judge believes the Complainant that she subjectively did not consent, the Crown has discharged its obligation to prove the absence of consent.
>
> The Complainant's statement that she did not consent is a matter of credibility to be weighed in light of all the evidence including any ambiguous conduct. The question at this stage is purely one of credibility, and whether the totality of the Complainant's conduct is consistent with her claim of non-consent. The accused's perception of the Complainant's state of mind is not relevant. That perception only arises when a defence of honest but mistaken belief in consent is raised in the *mens rea* stage of the inquiry.
>
> …
>
> Sexual assault is a crime of general intent. Therefore, the Crown need only prove that the accused intended to touch the Complainant in order to satisfy the basic *mens rea* requirement. See *R. v. Daviault*, [1994] 3 S.C.R. 63.
>
> However, since sexual assault only becomes a crime in the absence of the Complainant's consent, the common law recognizes a defence of mistake of fact which removes culpability for those who honestly but mistakenly believed that they had consent to touch the Complainant. To do otherwise would result in the injustice of convicting individuals who are morally innocent: see *R. v. Creighton*, [1993] 3 S.C.R. 3. As such, the *mens rea* of sexual assault contains two elements: intention to touch and knowing of, or being reckless of or wilfully blind to, a lack of consent on the part of the person touched….

Actus Reus

[23] Consent requires the Complainant’s voluntary agreement, without the influence of force, threats, fear, fraud or abuse of authority to let the physical contact occur. As indicated above, to

determine whether the Complainant consented to the physical contact, all of the evidence surrounding the incident must be considered and in particular the Complainant's actual state of mind. I review below this evidence.

[24] At trial, the Complainant clearly stated that she did not consent to MS Willms assisting her, and particularly not to the aggressive manner in which he assisted her. She testified that while she needed assistance, she had on the bus requested the assistance of her roommate, OS Wolfe, whom she knew and with whom she felt comfortable. The trial judge accepted the Complainant's evidence that she did not consent to the taking of her arm by the accused and that the grip of the accused, MS Willms, caused her pain and left her with bruises.

[25] The Complainant stated that she did not remember the accused's offer to take her to the hospital. She did remember, however, that either "he did offer to go back to quarters or [she] asked to go back to quarters." Therefore, she either accepted his offer or he followed her direction. In any event, she did return to quarters without expressly objecting to his assistance.

[26] Once at the barracks, the Complainant acknowledges that she said nothing about MS Willms taking hold of her arm. At no time did she object, nor did she indicate verbally to him that she did not consent. While her silence cannot be determinative, it is an element to be considered with all of the evidence.

[27] The evidence reveals that it is the Complainant's testimony that she was too scared to say anything at the time and that she may have been distracted by the fact that she was dizzy and

uncomfortable as a result of her injury. The evidence also shows, however, that the Complainant testified that she had been able to say "no" to the accused when he allegedly leaned over to put eye drops in her eyes, and that when she was safely in her room, she "jerked" her arm out of his grasp. These actions are not totally consistent with a person being too scared to speak up about her arm being "grabbed aggressively" as she was being assisted up the stairs.

[28] The Complainant denies falling, but admits to stumbling a number of times on her way up the stairs while MS Willms was holding her arm. MS Willms testified that when she stumbled/fell most of her weight was in his hand and that this could explain the bruising. This is plausible since it is likely that the Appellant would have had to tighten his grip when the Complainant stumbled to prevent her from falling and injuring herself. It is not unreasonable to accept that this would have caused the bruises on the Complainant's arm, particularly given her evidence that she bruises easily.

[29] Whether the above evidence raises a reasonable doubt as to the Complainant's lack of consent, and whether the verdict, by reason of this finding, is one which a properly instructed trier of fact, acting judicially, could reasonably have rendered, are not questions that need be decided by this Court. As will become clear later in these reasons, the main concern with the decision under appeal relates to the trial judge's conclusion on *mens rea* and his concomitant rejection of the defence of honest but mistaken belief in consent. On the evidence, I have reservations about the trial judge's finding on the Complainant's lack of consent. It is, however, a credibility finding within the bailiwick of the trial judge and for which heightened deference must be accorded by an appellate court. I now turn to the trial judge's conclusion on *mens rea.*

Mens Rea

[30] As indicated in *Ewanchuk,* above, physical contact only becomes assault when there is an absence of consent to the contact. As such, an accused can only be found guilty of assault if he or she was aware of, reckless to, or wilfully blind to the absence of consent. In order not to convict the morally innocent, the courts have recognized the defence of honest but mistaken belief in consent. The Appellant in this case raises such a defence. For the reasons that follow, I am of the view that the trial judge erred in failing to make a clear finding on the issue of *mens rea*, leading in turn to a failure to consider the defence of honest but mistaken belief in consent.

[31] The onus is on the Crown to prove, beyond a reasonable doubt, that the accused was aware that the Complainant did not consent to the physical contact in question. The Crown may meet its burden by establishing any one of the following: (1) that the accused actually knew that the Complainant did not consent; (2) that the accused knew there was a risk the Complainant did not consent and the accused proceeded in the face of that risk; or (3) that the accused was aware of the indications that the Complainant did not consent, but deliberately chose to ignore them because the accused did not want to know the truth. Put differently, the *mens rea* for assault is satisfied if the accused was reckless or wilfully blind to, or knew of, lack of consent. If the accused raises a reasonable doubt about *mens rea*, the accused must be acquitted. The defence of honest but mistaken belief in consent is one way of raising such a doubt.

[32] In considering the defence of honest but mistaken belief in consent we are concerned with the accused's state of mind as the criminal law is not intended to convict the morally

innocent (*Ewanchuk*, above, at paras. 42-43). To determine whether the accused honestly believed that the Complainant consented to the physical contact in question, all of the circumstances surrounding the activity must be considered. The accused must have an honest belief, but it need not be a reasonable belief. However, the presence or absence of reasonable grounds for the accused's belief may assist in determining whether the belief was honest.

[33] The trial judge must first decide whether any evidence exists to lend an air of reality to the defence. That is to say whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it believed the evidence to be true (*R. v. Cinous*, [2002] 2 SC.R. 3). If such evidence exists, then the judge must go on to consider the defence of honest but mistaken belief in consent. In the final analysis, the Crown must prove beyond a reasonable doubt that the accused had no such belief.

[34] Here, the trial judge simply said that the accused "seems to have thought that he was entitled to render to her such assistance as he saw fit". By these words, the trial judge seemed to have concluded that the accused either assumed that the Complainant had consented or that he had not turned his mind to whether or not the Complainant had consented. The trial judge does not explain his conclusion further. He then found that the accused was reckless, without referring to any evidence that would have allowed him to conclude that the accused was either reckless or wilfully blind. The trial judge erred by failing to substantiate his finding of recklessness. The trial judge did find that the Complainant had not said anything that amounted to express consent, but that is not the same as determining that the accused was aware of a risk that she had not consented, or that he deliberately refused to consider whether or not she consented. The trial

judge went on to find that the defence of honest belief was not available to the accused because the defence was inconsistent with a finding of recklessness. Since the trial judge erred in his finding of recklessness, there was no basis for rejecting the defence of honest but mistaken belief in consent. I will now turn to the evidence supporting the Appellant's honest belief, which the trial judge failed to consider.

[35] The incident which led to the laying of charges against the Appellant arose on a military base and was triggered by an injury to the Complainant who was attending basic training as a recruit. At the time of the incident, she was under the command of the Appellant who was serving as a recruit instructor at the base. As an instructor, the Appellant was responsible for the training and welfare of his recruits. The Appellant had a duty to ensure that any recruit injured on his watch was given the proper attention and care. This may involve, in the appropriate circumstance, physical contact with the recruit in order to assist and with the view of preventing further injury.

[36] MS Willms testified that as a Marching NCO (Non Commissioned Officer), he had certain responsibilities *vis-a-vis* the recruits, including, "…handling any administrative problems, handling any personal affairs and any injuries, attending to any injuries and receiving-providing the proper medical attention if need be." MS Willms testified that all recruits provided an informal consent at the beginning of the course to be physically handled in exceptional circumstances. One such circumstance was in case of injury.

[37] MS Willms indicated that when he first noticed the Complainant after she sustained her eye injury, she appeared to be in extreme pain. He expressed concern for her welfare as he would for any of his recruits. He stated that his number one priority as an instructor is about the recruits' welfare and just wanted to help the Complainant. The Appellant was of the view that, when he was assisting the Complainant back to her quarters, he was acting in accordance with his obligations and responsibilities as a training officer. There is no evidence of any inappropriate touching by MS Willms.

[38] The above evidence dealing with the Appellant's subjective understanding of his obligations and duty owed to the Complainant, combined with the evidence reviewed earlier in these reasons regarding the Complainant's conduct, provide a sufficient evidentiary basis to lend an air of reality to the defence of mistaken belief in consent. Therefore, the trial judge had an obligation to consider the defence of honest but mistaken belief in consent. In so doing, all of the circumstances surrounding the activity would have had to be considered in determining whether the Crown had established the absence of an honest belief beyond a reasonable doubt. This analysis was simply not conducted by the trial judge because of his earlier unfounded recklessness finding. In the result, the Appellant did not receive the benefit of his defence of honest but mistaken belief in consent to which he was entitled.

[39] I am satisfied that, had the defence of honest but mistaken belief in consent and the corresponding evidence outlined above been properly considered, no reasonable trier of fact could have concluded that the Crown had met its burden of proof on the issue of *mens rea*.

VI. Disposition of the Appeal

[40] I find that the trial judge erred in his *mens rea* analysis. His finding of recklessness is unsubstantiated, and resulted in the improper dismissal of the Appellant's defence of honest but mistaken belief in consent. Further, in light of the evidence supporting that defence, I conclude that the verdict is unreasonable and is not one that a properly instructed trier of fact, acting judicially, could reasonably have rendered.

[41] Given the circumstances and the relatively minor nature of the impugned incident, the most appropriate disposition of this appeal is to set aside the guilty verdict and to enter a verdict of acquittal in its place.

VI. Conclusion

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

"Edmond P. Blanchard"
Chief Justice

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

I agree:
"Sean Harrington"
Sean Harrington J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-509
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PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	October 31, 2008
REASONS FOR JUDGMENT BY:	Chief Justice Blanchard
CONCURRED IN BY:	O'Reilly J.A. Harrington J.A.
DATED:	December 15, 2008

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