Date: 20030326

Docket: CMAC-454

Citation: 2003 CMAC 2

CORAM: **DESROCHES J.A.**
ROUSSEAU-HOULE J.A.
MARTINEAU J.A.

BETWEEN:

SECOND LIEUTENANT SHEEHY-TREMBLAY

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Québec, Quebec, on Friday, February 21, 2003.

Judgment delivered at Ottawa, Ontario, on Wednesday March 26, 2003.

REASONS FOR JUDGMENT OF THE COURT BY: DESROCHES J.A.
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REASONS FOR JUDGMENT

BY THE COURT

[1] Second Lieutenant Sheehy-Tremblay is appealing a judgment dated October 20, 2001, by Lieutenant-Colonel J.M. Dutil of the Standing Court Martial, who found him guilty on the first, second, fourth, fifth and eighth charges against him. He is also appealing the sentence of the same date which imposed a demotion to the rank of Second Lieutenant and a fine of $4,500.00

[2] Eight charges were laid against the appellant. The first charge, under sections 130 of the *National Defence Act* and 153(1) of the *Criminal Code*, alleges that he touched a young person,

with whom he was in a position of trust or authority, for a sexual purpose. The seven other charges were laid under paragraph 129(2)(*c*) of the *National Defence Act*, namely, that he had committed acts to the prejudice of good order and discipline by contravening various Standard Operating Procedures (SOP) of the Canadian Forces Leadership and Recruit School (CFLRS). Under the second, fourth, fifth and eighth charges, the appellant was charged with familiarity inwards officer cadets contrary to SOP 203.2. He was acquitted of the third, sixth and seventh charges accusing him of encouraging officer cadets under 18 years of age to consume alcohol contrary to SOP 203.6 and section 72(1)(*b*) of the *National Defence Act*.

[3] The events occurred during a party in the officers' mess at the end of a training session. The appellant was the commander and instructor of the 8th Platoon of C Company for officers' basic training. The officer cadets whose graduation was being celebrated were 18 years old on average, but some of them, like the complainant DS, were only 17 years old.

[4] During the party, the appellant offered a challenge to graduates Bouchard, McLean Ste-Marie, Girard, Bergeron and Brassard. He asked the five young women to find as many ties as possible belonging to the young men of the 10th Platoon and promised to pay for all the winner's drinks for the evening. The five young women decided that only one of them would bring back all the ties but they would all share the prize. Instead of what he had originally proposed, the appellant paid for three rounds of shooters: a Jack Daniel's, a Tequila and a Sambuca for each of the five participants and for himself. He told them that drinking those three shooters in that order was called "[TRANSLATION] A Tour of Alberta". The Tequila was drunk in a certain way. Brassard and

McLean Ste-Marie drank it while doing “body slams” with the appellant. This game consisted of licking the partner’s neck, putting salt on it, licking the partner’s neck again to retrieve the salt and then drinking the Tequila while biting a piece of lemon that the partner was holding between his or her teeth. The appellant himself drank his Tequila that way with officer cadet Brassard. As for the Sambuca shooter, the appellant lit it in his mouth with a match and then swallowed it. The five young women drank it the same way and then heard the appellant make a remark with a sexual connotation. Sergeant Lavallée, a section commander of Platoon 9, told the appellant that his behaviour was unacceptable, asked him to stop the games and to leave the premises. It was common knowledge that officer cadet Brassard was strongly attracted to the appellant. After drinking the shooters, Brassard challenged him to use his teeth to find the remote control for the sound system that she had earlier placed under her bra strap. The appellant met the challenge. Later, they both left the mess for about an hour. He showed her travel photos and told her that he would like to see her again after the course.

[5] The complainant, D. S., had not been formally invited to the party because she had been removed from the course that the appellant was supervising and transferred to the Holding Platoon as a result of her academic failures. Nonetheless, she arrived at the party around 9 p.m. During the evening, she and the appellant discussed how she could improve her performance when she recoursed, and the fact that the degree of difficulty varied from one platoon to another, the appellant being the most demanding instructor. The two of them were the last to leave the premises around 4 or 4:30 a.m. The complainant testified that the appellant gave her his hand to help her get up from her chair. When their bodies brushed against each other, he kissed her on the cheek and on the neck.

They then went into the elevator. The complaining pressed the button for the eighth floor and the appellant for the tenth. During the ride up, the appellant put his arms around her and kissed her, putting his tongue into her mouth. The kiss lasted until the sixth floor, then the appellant moved away. On the eighth floor, the complainant left the elevator to go to her room alone. She waited a week before saying anything about this incident because she was ashamed that she had not pushed the appellant away. The appellant denied touching her. He stated that, as she left the elevator, the complainant leaned against the rubber door and stayed there for a minutes or a minutes and a half. He asked her what was going on, and she replied: "[TRANSLATION] Nothing, good night, Captain" and then left. Because he was in no condition to drive, he then went to the room of a female officer cadet who had invited him to spend the night, although that was contrary to regulations.

[6] Regarding the first charge, the Military Judge was confronted with two contradictory versions of the essential elements of the offence. After referring to the rulings of the Supreme Court in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, he analyzed the testimony of the various witnesses, starting with the appellant. He stated that he did not believe the appellant when he denied kissing the complainant in the officers' mess and in the elevator. Nor did he believe him when he said that the complaining leaned against the elevator door for a minute or a minute and a half without moving or saying anything until the appellant asked her what was going on, and she replied: "Nothing, good night, Captain".

[7] The Judge noted that during the cross-examination of the complainant, the appellant did not cross-examine her at all about the wait in front of the elevator, whereas he cross-examined her at

length about her consent to the kiss, despite denying that he had kissed her. The appellant wrongly criticizes the Judge for having drawn an unfavourable conclusion as to his credibility from the absence of such a cross-examination, because these were essential facts that the appellant intended to contradict in his defence (*R. v. Paris*, [2000] O.J. No. 4687 (Ont. C.A.)). In any event, the Judge explicitly stated that he did not believe that the complainant had leaned against the elevator door for nearly a minute and a half without saying anything, because that time period was much too long.

[8] After giving reasons for his findings on the appellant's lack of credibility, the Judge commented generally on the credibility of the witnesses for the prosecution, specifying certain factors that could have put their testimony in doubt. He concluded that analysis by reviewing the complainant's testimony. After doing that, and after properly considering that the appellant was a person in a position of authority towards the complainant at the time of these events, he concluded that he was satisfied beyond a reasonable doubt that the appellant had directly touched a part of the body of the complainant, who was a young person, with a part of his body, for a sexual purpose.

[9] If it is correct that the authority is not necessarily derived from the status of one person in relation to another, but from the exercise of such authority on the facts (*R. v. Audet*, [1996] 2 S.C.R. 171; *R. V. Léon*, [1992] R.L. 478 (Que. C.A.)), the facts in this case supported the finding that the appellant was a person in a position of authority towards the complainant. He had been her instructor during the first six weeks of the course. Although she had been transferred to the Holding Platoon because she had failed the course, the appellant could give her orders or instructions at any time. Moreover, the complainant testified that the appellant had freely given her a number of

pointers to prepare her for her interview before the review board and to assist her in improving her performance when she recoursed. Under those circumstances, she could certainly not allow herself to defy his authority. Therefore, the Judge did not err in finding the appellant guilty on the first charge.

[10] The second, fourth, fifth and eighth charges accused the appellant of familiarity towards the complainant and officer cadets Brassard and McLean Ste-Marie. The charges specify that acts to the prejudice of good order and discipline (paragraph 129(2)(*c*) of the *National Defence Act* constitute a breach of section 3 of chapter 203.2 of the SOP and the CFLRS.

[11] Paragraphs (*b*) and (*f*) state:

> 3(*b*) Good discipline requires that certain attitudes exist in unites and other elements of the CF. These attitudes include respect for authority, immediate obedience to orders and confidence that authority will be used fairly and impartially. Among other factors, high cohesion and morale depend on members of a unit being treated, and perceiving that all other members are treated, without favouritism;…
>
> (*f*) familiarity: all contracts, outings and meetings between instructors/supervisors and students are forbidden except when their purpose is to promote the objectives of the CFLRS. Hence, among others, contacts, outings and meetings in restaurants, bars, movie theatres, dance halls, coffee houses, discos, residences, and respective quarters are strictly forbidden, as well as any other socializing that might possibly lead to close, intimate, friendly or bitter relationships between instructors/supervisors and students.

[12] The facts, as accepted by the Judge, indicate that the appellant had discussions of a personal nature with the complainant and that he kissed her. Regarding officer cadet Brassard, the appellant licked her neck, took a slice of citrus fruit from between her teeth and retried the remote control for the sound system from her bra. In addition, he went outside with her to show her travel photos and

made certain statements to her. Lastly, regarding officer cadet McLean Ste-Marie, the accused licked her neck and took a slice of citrus fruit from between her teeth.

[13] AS for the comments of a sexual nature, the Judge thought it necessary to clarify that, in his view, they did not constitute harassment. However, he found that they were in the same category as the appellant's other acts of familiarity towards the female officer cadets from his platoon throughout the evening. Those words constituted an act to the prejudice of good order and discipline in breach of paragraph 129(2)(*c*) of the *National Defence Act* and certainly did not promote the objectives of the CFLRS.

[14] The guilty findings under charges 2, 4, 5 and 8 are supported by the evidence and are far from being unreasonable under the circumstances.

[15] Before imposing the sentence, the judge weighed four principles: the protection of the public including, in this case, the interest of the Canadian Forces, the fair punishment of the offender considering the nature and circumstances of the offences, the deterrent effect on the offender and on other members of the Armed Forces and, finally, the rehabilitation and reform of the offender. He concluded that imprisonment or dismissal from Her Majesty's service would be inappropriate in the particular circumstances of the case. He sentenced the appellant to demotion to Second Lieutenant, a downgrading of two ranks, and to a fine of $4,500.

[16] An appellate court will only interfere with a sentence if there has been an error in principle, a failure to consider a relevant factor or an overstressing of factors to be considered. The discretion of the trial judge must be respected. The sentence will only be altered if it is patently wrong (*R. v. Shropshire*, [1995] 4 S.C.R. 227; *R. v. McDonnell*, [1997] 1 S.C.R. 498).

[17] The sentence imposed by the Military Judge is not manifestly inadequate, and the appellant's submissions do not warrant the intervention of the Court.

[18] **FOR THESE REASONS:**

[19] The appeal is **DISMISSED**;

[20] The motion for leave to appeal the sentence is **DISMISSED**.

(S) "J.A. DesRoches"
J. Armand DesRoches, J.A.

(S) « Thérèse Rousseau Houle »
Thérèse Rousseau-Houle, J.A.

(S) « Luc Martineau »
Luc Martineau, J.A.

Certified true translation

May Jo Egan, LLB

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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DATED:	March 26, 2003

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