

**Date: 20090327**

**Docket: CMAC-510**

**Citation: 2009 CMAC 2**

**CORAM: NOËL J.A.  
HANSEN J.A.  
MACTAVISH J.A.**

**BETWEEN:**

**PETTY OFFICER FIRST CLASS MCDUGALL J.R.**

**Applicant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Ottawa, Ontario, on March 20, 2009.

Judgment delivered at Ottawa, Ontario, on March 27, 2009.

**REASONS FOR JUDGMENT BY:**

**MACTAVISH J.A.**

**CONCURRED IN BY:**

**NOËL J.A.  
HANSEN J.A.**

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**REASONS FOR JUDGMENT**

**MACTAVISH J.A.**

[1] Petty Officer First Class McDougall appeals his conviction by a Standing Court Martial on a charge of sexual assault under section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5, and section 271 of the *Criminal Code of Canada*. 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 Act. An appeal against sentence has been abandoned.

[2] PO1 McDougall admits to having had sexual intercourse with the complainant. The issue at his trial was whether the complainant had consented to the sexual activity, or whether she was too intoxicated to have been able to consent to sex. Reasonable belief in consent on the part of PO1 McDougall was not argued.

### **Background**

[3] Petty Officer McDougall and the complainant were both students participating in an Air Medical Evacuation training program. Part of the course took place in Bermuda. As a result of the illness of a pilot, the students had a day and two extra nights in Bermuda, without assigned duties. It appears that everyone got along very well during the course, and there was a great deal of teasing and flirting amongst the students, including between PO1 McDougall and the complainant.

[4] Petty Officer McDougall and the complainant had adjoining hotel rooms, with an interior door leading from one room to the other. The complainant and PO1 McDougall agree that on the night of November 17, 2006 the two slept together in the complainant's bed. Both say that they talked to the other about their respective partners and children, and were "cuddling" or "spooning", but that no sexual activity occurred.

[5] The complainant says that on the morning of November 18, PO1 McDougall touched her breast, and that she told him not to. PO1 McDougall says this never happened. The touching of the complainant's breast was not the subject of a charge, and no finding was made by the military judge in this regard.

[6] The following day, the members of the class participated in various tourist activities. After dinner, they returned to the hotel, and went to the bar. A considerable amount of alcohol was consumed by the group over the course of the evening. PO1 McDougall testified that he consumed 10 drinks over the course of the evening. He says that although he “felt a bit of a buzz” from the alcohol, he did not become intoxicated because of the lengthy time over which the drinks were consumed.

[7] The complainant did not indicate precisely how much she had to drink that night. While her level of intoxication at the end of the evening was the central issue in the case, it is undisputed that she consumed a number of drinks over the evening.

[8] Some time around 12:30 or 1:00 in the morning, the complainant left the table quite abruptly, as if she suddenly needed to be sick. The complainant climbed or vaulted over a nearby railing, and went down to the beach. When a few minutes passed and she had not returned to the table, PO1 McDougall and a second student, Master Corporal Mothus, went to look for her.

[9] Master Corporal Mothus and PO1 McDougall found the complainant in the water. Master Corporal Mothus states that the complainant was vomiting when he found her. It is unclear from the evidence as to whether PO1 McDougall actually saw her vomiting, or was subsequently made aware that she had been ill. He denies being aware of the fact, and no finding was made by the military judge in this regard.

[10] PO1 McDougall left the complainant with Master Corporal Mothus and returned to the bar. Master Corporal Mothus testified that the complainant was very intoxicated at this point, and required assistance in getting out of the water and returning to her room. At some point, the complainant realized that she did not have her room key with her.

[11] Both PO1 McDougall and the complainant testified that they had agreed earlier in the evening that PO1 McDougall would bring his room key, as the complainant was wearing her bathing suit and did not want to carry her own key with her. The plan was that they would return to PO1 McDougall's room at the end of the evening, and the complainant would then be able to enter her own room through the interior door between the two rooms.

[12] When Master Corporal Mothus realized that the complainant did not have her room key with her, he took the complainant to his own room, where she lay down and went to sleep. Master Corporal Mothus then went to find PO1 McDougall to have him let the complainant into her room with his key. Master Corporal Mothus met PO1 McDougall on the way to the bar, and the two men returned to Master Corporal Mothus's room.

[13] After waking the complainant, PO1 McDougall and Master Corporal Mothus both escorted her to PO1 McDougall's room. The complainant testified that she did not recall much about returning to her room. Master Corporal Mothus testified that the complainant was very intoxicated at this point, and required assistance in walking. PO1 McDougall testified that he walked ahead of

the complainant and Master Corporal Mothus, but that when he turned around at one point along the way, the complainant appeared to be walking on her own.

[14] Once they got to PO1 McDougall's room, Master Corporal Mothus left. The complainant went into her room and got into her bed. Both the complainant and PO1 McDougall agree that there was a discussion between them and that PO1 McDougall expressed his concern about the complainant disappearing down to the beach by herself.

[15] It is at this point that the testimony of the complainant and PO1 McDougall diverges sharply. The complainant says that she went to sleep in her bed, by herself. She woke some time later to find PO1 McDougall lying on top of her with his penis inside of her. According to the complainant, she "froze", and did not say anything to PO1 McDougall. After he completed the sexual act, he got up and left the room, leaving her alone.

[16] In contrast, PO1 McDougall testified that once they got back to the complainant's room, she complained of being cold. He asked her if she would like him to warm her up, and she agreed. He then took off all of his clothes except for his undershorts, and got into bed with her. PO1 McDougall says that he lay behind the complainant, and put his arm around her to warm her up. The complainant responded by rubbing her buttocks against his groin. PO1 McDougall testified that he backed then away from her, creating a space between their bodies.

[17] When the complainant moved herself back towards him, and again rubbed her buttocks against his groin, he says that he then asked her “is this what you want?”, to which the complainant answered “yes”. Although the complainant’s speech was slower than usual at this point, as if she was tired, it was not slurred.

[18] PO1 McDougall testified that the pair then engaged in a consensual act of sexual intercourse, with the complainant playing an active role in the activity. After the act was completed, PO1 McDougall says that he began to feel badly for having cheated on his wife, and got up and left the room.

[19] It is common ground that the complainant did not appear to be herself the following day. PO1 McDougall stated that he thought that it was because she also felt guilty for having cheated on her partner. Neither of them discussed the incident with the other, either that day, or at any time after that. They both participated in tourist activities with others in the group, and worked together in course-related exercises together for the duration of the course.

[20] Upon her return to Canada, and after confiding in a friend who had also been a student on the trip to Bermuda, the complainant went to a hospital to make sure that she was not pregnant, and had not contracted a sexually-transmitted disease. The complainant says that she ultimately decided to file a complaint against PO1 McDougall because she did not want the same thing to happen to someone else.

## The Applicable Provisions of the *Criminal Code*

[21] The relevant provisions of section 265 of the Criminal Code define an “assault” in the following terms:

265. (1) A person commits an assault when	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...
(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.
(3) For the purposes of this section, no consent is obtained where the Complainant submits or does not resist by reason of	(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) the application of force to the Complainant or to a person other than the Complainant;	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 ...

[22] Section 271 of the *Criminal Code* provides that:

<b>271. (1)</b> Every one who commits a sexual assault is guilty of	<b>271. (1)</b> Quiconque commet une agression sexuelle est coupable :
(a) an indictable offence and is liable to imprisonment for a term not exceeding ten years; or	a) soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;
(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.	b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.

### Standard of Review

[23] The parties are in agreement that the standard of review to be applied to the decision of the military judge is that described in cases such as *R. v. Clark*, 2005 SCC 2, [2005] S.C.J. No. 4, *R. v. Rose* [2005] C.M.A.J. No. 4, and *R. v. W.(R.)* [1992] 74 C.C.C. (3d) 134. That is, when assessing a conviction as a whole, an appeal court must ask whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have returned. Additionally, an appellate court should not interfere with findings of fact made by the trial judge, or with factual inferences drawn by the trial judge, unless such findings and inferences are clearly wrong, unsupported by the evidence or otherwise unreasonable: *R. v. Clark*, at para. 9.

[24] Insofar as findings based on the credibility of witnesses are concerned, such findings may only be reversed on appeal if it is established that the trial judge made some palpable and overriding error which affected his or her assessment of the facts: *R. v. Rose* at para. 14. In reviewing the

evidence, the appellate court must satisfy itself that the verdict can be supported by it: see *R. v. Nystrom*, 2005 CMAC 7, at para. 53.

[25] Lastly, the adequacy of the reasons for conviction provided by the military judge is to be evaluated in accordance with the principles articulated by the Supreme Court of Canada in *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26.

### **Analysis**

[26] The central issue at trial was whether the complainant was so intoxicated as to be incapable of consenting to sexual intercourse with PO1 McDougall. The military judge provided a number of reasons for concluding that it had been established beyond a reasonable doubt that this was in fact the case. Notwithstanding the considerable deference to be accorded to such findings to the extent that they were based upon an assessment of the credibility of the various witnesses, I have concluded that several of these findings are either not supported by the evidence, or that the reasons given for making the findings are inadequate.

### **The Failure to Address the Inconsistencies in Master Corporal Mothus' Evidence**

[27] Only PO1 McDougall and the complainant were present in the complainant's room at the time of the alleged assault. Each told a very different story as to what occurred that night, particularly as it related to the complainant's degree of intoxication, and her capacity to consent to sexual activity. As a consequence, the military judge understandably placed considerable weight on the testimony of Master Corporal Mothus, who the judge found to be an impartial witness.

[28] Parts of Master Corporal Mothus' testimony at trial were very damaging to PO1 McDougall. According to Master Corporal Mothus, PO1 McDougall was present when the complainant was vomiting in the water. Master Corporal Mothus stated that at the time that he and PO1 McDougall escorted the complainant back to her room, the complainant was intoxicated to the point of unconsciousness, and needed help just to walk. According to Master Corporal Mothus, the complainant's speech was slurred and she was "pretty much incoherent". All of this of course suggested that PO1 McDougall would have been well aware of the fact that the complainant was severely intoxicated, and would thus have been in no condition to consent to sexual activity. All of this testimony was accepted as credible and reliable by the military judge.

[29] However, when Master Corporal Mothus was interviewed shortly after the alleged assault, he was asked if "overall" the complainant had been intoxicated on the evening in question, to which he replied that "she was just drinking". He was also asked if the complainant had been able to talk during the evening, to which Master Corporal Mothus responded "over all the evening, yes, she was able to talk". No mention was made in his earlier statement of the complainant slurring her words or becoming incoherent, or being unable to walk without assistance.

[30] Master Corporal Mothus also testified to witnessing the complainant navigate a three foot high railing at approximately one in the morning, on her way down to the beach. He also stated that at the time that he was in the water with the complainant while she was vomiting, he was carrying on a conversation with her, and she was aware, answering appropriately, and fairly coordinated.

[31] While Master Corporal Mothus testified that as a result of the complainant's level of intoxication, he and PO1 McDougall had to act as a "human crutch" in order to support the complainant on her way back to her room, he also acknowledged having indicated in a statement provided shortly after the alleged assault that he had just put one arm around the complainant as they walked back to her room.

[32] It was, of course, open to the military judge to accept the testimony of Master Corporal Mothus regarding the complainant's extreme intoxication, notwithstanding the inconsistencies in his story in this regard. However, given that Master Corporal Mothus was an important witness, and that the testimony in question went to the central issue in the case, PO1 McDougall was entitled to know why the most damaging portions of Master Corporal Mothus' testimony were being accepted, notwithstanding the fact that he had told quite a different story some months earlier. This is not apparent from the reasons of the military judge, and the reasons are thus insufficient in this regard.

### **The "Lack of Coherence" in PO1 McDougall's Recollection of Events and His Demeanour**

[33] In reviewing the testimony provided by PO1 McDougall at trial, the military judge observed that "the lack of coherence in the recollection of events he provided to the court and his general demeanour make his testimony hard to believe".

[34] It should first be observed that the "the lack of coherence" identified by the military judge related not to potential discrepancies between the testimony provided by PO1 McDougall and that provided by other witnesses, nor does it relate to incongruities between PO1 McDougall's testimony

and physical or other forms of evidence before the Court. Rather, it is the incoherence within PO1 McDougall's own version of events that appears to have concerned the military judge.

[35] The internal "coherence" of testimony is a function of the consistency of the evidence, and whether it is comprehensible and logical.

[36] Insofar as "the lack of coherence" in PO1 McDougall's recollection of events is concerned, no explanation was provided by the military judge as to what it was that he perceived to be incoherent in PO1 McDougall's testimony. No internal inconsistencies in his story are identified in the reasons, and no significant or material inconsistencies in his testimony are apparent from a careful review of the record.

[37] Insofar as the logic of PO1 McDougall's account is concerned, the military judge did identify one aspect of his testimony as 'defying logic'. This related to the failure of PO1 McDougall to speak to the complainant about "personal issues" at any time after the alleged assault.

[38] In this regard, the military judge stated that:

He explained his behavior by the fact that he started to have second thoughts about what he did to his wife. However, he never provided in his evidence, implicitly or explicitly, that he regretted what he did. To the contrary, it looked like life was going on and nothing happened for him.

[39] What PO1 McDougall actually stated in his testimony was the following:

Q. So after you had had sex with her you didn't want any further contact with her?

A. I was feeling terribly guilty for having cheated on my wife. I was disappointed in myself. I was saddened in [...] myself that I could do that to my wife. I closed the door so that I would close off the temptation of going back into that room.

Q. So there was a temptation to go back there?

A. At that point there wasn't. I was making sure I did not have a temptation.

Q. And you weren't concerned about how [the complainant] might interpret that? You weren't concerned about her feelings?

A. I was concerned. I was going to deal with my own issues.

Q. And you didn't ever approach [the complainant] to discuss what had happened?

A. I assumed that she was dealing with the issues as I was which was with myself, within myself. It's a big thing when you realize that you've cheated on somebody that you made a promise to in front of your family, friends, in front of God, to love and honour and when you mess that up, it's a huge thing. So that was something that I was dealing with in myself. I didn't want to talk with anybody about it and I had made the assumption that she was of the same mind set, where she was internalizing it and trying to work through it on her own.

Q. But it didn't occur to you to clarify that?

A. I probably could have. As I said, I was dealing it my way and I just figured out that she would have dealt with it in the same fashion. [transcript at p. 347]

[40] There is always a danger inherent in a finding of this nature, in light of the highly subjective nature of the finding, and the infinite variety of ways that people deal with difficult situations.

[41] PO1 McDougall provided a clear and coherent explanation as to why it was that he did not speak to the complainant about “personal issues” at any point after the night of November 18<sup>th</sup>, 2006, and there is nothing inherently illogical in that explanation. While it was certainly up to the military judge to decide whether or not to accept PO1 McDougall’s explanation, the finding that the explanation simply “defies logic” is clearly one that is not supported by the evidence.

[42] Insofar as PO1 McDougall’s “general demeanour” is concerned, the military judge noted that he “testified mainly in a straightforward manner”. The judge then went on to observe that:

It was without any particular emotion that he delivered his testimony. He provided his evidence with many details without being prompted. The care he took to provide minor details on all things he testified on made it difficult for the Court to differentiate what was notorious or not for him. It is clear for the Court that he put many thoughts in his testimony before he delivered it ...

[43] As was noted above, the military judge found that PO1 McDougall “testified mainly in a straightforward manner”. His concern with respect to PO1 McDougall’s “general demeanour” appears to relate, at least in part, to his lack of emotion while testifying.

[44] A credibility assessment based upon the demeanour of a witness is always potentially problematic, given the differing ways in which people deal with things such as the stress of the courtroom situation or the emotions associated with the underlying facts of the case. There are any number of factors relating to individual personality, psychology, culture and the like that may cause individuals to respond in differing ways within the courtroom setting.

[45] Moreover, the comments of the military judge with respect to the level of detail provided by PO1 McDougall in his testimony in relation to minor matters are puzzling, as they are not borne out by a review of the record.

[46] Finally, the fact that PO1 McDougall may have given some thought to his testimony prior to testifying at his trial is hardly surprising. He was, after all, facing a Court Martial as a result of having been charged with sexual assault. In the circumstances, it would have been very surprising if he had not thought carefully about what it was that he was going to say at his trial.

[47] In light of the above, I am satisfied that the reasons provided by the military judge for finding that the testimony of PO1 McDougall was not credible were insufficient, and further, that this finding was unsupported by the evidence that was before him.

### **Disposition of the Appeal**

[48] PO1 McDougall concedes that this is not an appropriate case for this Court to substitute a verdict of acquittal. I agree that the proper disposition of the appeal is to order that a new trial be held, in accordance with the provisions of paragraph 238(1)(b) of the *National Defence Act*.

### **Costs**

[49] PO1 McDougall submits that he should be entitled to his legal costs associated with the appeal in accordance with Rule 21 of the *Court Martial Appeal Court Rules*, as he is no longer a member of the Canadian Forces, and retained counsel at his own expense to represent him in this matter. Although the Court has a broad discretion in relation to costs, costs are not routinely awarded in proceedings such as this: see *Rose v. Her Majesty the Queen*, 2005 CMAC 4, at para. 2. In my view, there is nothing unusual about this matter that would justify an award of costs in PO1 McDougall's favour.

### **Conclusion**

[50] The appeal is allowed. The verdict of the Standing Court Martial is set aside, and a new trial is ordered.

\_\_\_\_\_  
"Anne Mactavish"

Judge

I agree:

\_\_\_\_\_  
"Marc Noël"

Marc Noël J.A.

I agree:

\_\_\_\_\_  
"Dolores Hansen"

Dolores Hansen J.A.

**COURT MARTIAL APPEAL COURT OF CANADA**

**SOLICITORS OF RECORD**

**DOCKET:** CMAC-510

**STYLE OF CAUSE:** PETTY OFFICER FIRST CLASS MCDOUGALL J.R.  
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**CONCURRED BY:** Noël J.A.  
Hansen J.A.

**DATED:** March 27, 2009

**APPEARANCES:**

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