



COURT MARTIAL

Citation: *R. v. Beaudry*, 2016 CM 4010

Date: 20160714

Docket: 201523

Standing Court Martial

Canadian Forces Base Wainwright
Wainwright, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Corporal R.P. Beaudry, Accused

Before: Commander J.B.M. Pelletier, M.J.

[OFFICIAL ENGLISH TRANSLATION]

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Corporal Beaudry is facing two counts under section 130 of the *National Defence Act (NDA)*. The first count alleges sexual assault causing bodily harm, contrary to section 272 of the *Criminal Code*, and the second alleges overcoming resistance to commission of an offence, contrary to paragraph 246(a) of the *Criminal Code*.

EVIDENCE

[2] The parties submitted an agreed statement of facts at the start of the proceedings. It includes several details which were not subsequently referenced by the parties, with the exception of a brief reference to the DNA samples which were analyzed but could not be linked to the individuals concerned. I considered this evidence, but I have concluded that it is irrelevant to the findings I am required to make.

[3] The prosecution called three witnesses during the course of the trial. The complainant, Private L.D., testified first. She gave an account of what happened on the evening of 5 September 2014, an evening which started in the company of her friend, Marilyn Danis, who had travelled from Quebec to pay her a visit. She stated that they shared a bottle of wine while eating dinner at her residence on the base and then went to a bar called JD's, in the municipality of Wainwright, where they met a number of friends, including Corporal Charles Drouin. This is also where she met the accused, Corporal Raphael Beaudry, an acquaintance she had met on two previous occasions, during nights out at a neighbouring establishment. She identified the locations from images obtained from the bar's surveillance cameras, which show some of the interaction between these individuals as well as staff members. Private L.D. had a few drinks at the bar. Her mood and energy were positively affected by the alcohol, but she could certainly keep her balance and speak coherently. She recounted the conversations she had with Corporal Beaudry during the course of the evening and the fact that he asked her if she liked sex and repeatedly said that he would be interested in having sexual relations with her and, if possible, with her friend Marilyn so they could have a [TRANSLATION] "threesome". Corporal Beaudry also touched her buttocks and crotch during the evening, and she testified that she did not make a big deal about this and found his actions amusing. She testified that she clearly indicated that they would not be having sex and that she would not go back to his place with him alone. However, she agreed to go to his place, accompanied by Marilyn and Charles, approximately 30 minutes before last call at the bar, for a few more drinks and to chat.

[4] When they arrived at Corporal Beaudry's residence, located on the military base in Wainwright, he served a can of beer to each of his guests. Private L.D. testified that Charles and Marilyn were sitting in the living room and that Corporal Beaudry then asked her if she wanted to go upstairs to his room. She declined his invitation, saying that they were not going to have sex. Corporal Beaudry insisted, saying that they were just going to talk. She said, [TRANSLATION] "all right", but again repeated that they would not be having sex. She went upstairs while Marilyn and Charles stayed downstairs. When they got upstairs, the accused opened the door to his bedroom. She remained in the doorway while Corporal Beaudry headed for the bathroom located on the other side of the hallway. She later realized that Corporal Beaudry had gone downstairs and was talking to Marilyn and Charles, although she could not hear what they were saying. During this time, she used her phone to send a text message to Marilyn to the effect that she could leave with Charles if she wanted to, knowing that they had a good rapport between the two of them. Corporal Beaudry then returned to the bedroom, but this time he was undressed, with only a towel around the hips. Private L.D. testified that Corporal Beaudry then closed the door and announced,

[TRANSLATION] “We’re going to have sex.” She said that her answer was [TRANSLATION] “no” and that at that point, Corporal Beaudry grabbed her by the throat with one hand, pushing her onto the bed. He then told her that he didn’t want to hear another word from her, that if she screamed or cried she had no idea what he could do to her. She testified that she got scared and froze. He moved towards her, removed her pants and underwear and penetrated her forcibly, first vaginally and then orally. He also bit and pinched various parts of her body in a violent manner. After he had ejaculated partly in her vagina and partly in her mouth, he lay on his back. She then gathered her clothing and left on the pretext that she had to get to work for a shift starting in an hour.

[5] She then left the house. Charles and Marilyn were no longer there. After a number of attempts, she was able to get in touch with Marilyn who joined her on base to walk back to her residence accompanied by Charles. Private L.D. did not immediately disclose what had happened in Corporal Beaudry’s bedroom, despite Marilyn’s insistence, as Marilyn had immediately noticed the injuries on her body when they returned to her home. It was more than a day later and after a visit to her friend Kelly that Private L.D. went to the hospital for tests and was put in touch with the military police; she gave the military police an initial statement on 7 September 2014. During her testimony, Private L.D. identified and described photos taken on that day showing marks on her body and explained how they had been caused by Corporal Beaudry.

[6] Under cross-examination, Private L.D. admitted that she had flirted with Corporal Beaudry at the bar and that she had laughed after his comments and actions. When confronted about why she had agreed to go upstairs to Corporal Beaudry’s bedroom, she denied having ulterior motives, admitting that she suspected that Corporal Beaudry might bring up his sexual requests again, but that she could still, at that time, tell him “no” again. She denied suggestions that the sexual activity in the bedroom was consensual and confirmed that she had clearly communicated non-consent to any sexual activity.

[7] Marilyn Danis was the second witness called by the prosecution. She testified via videoconference from the base in Montreal, on consent of the parties. She confirmed the general sequence of events that occurred during the evening and night of 5 to 6 September 2014, as recounted by Private L.D., although there were some differences in the details provided, such as the sequence of events before they arrived at the bar. She indicated that Corporal Beaudry had used sexually explicit language when talking to her and her friend L.D. during the course of the evening, particularly when she heard him suggest having a [TRANSLATION] “threesome”. He had also put his arm around her waist a couple of times. She said that she verbally rebuffed these advances even though she had not been overly shocked by this behaviour, which she simply found to be foolish. She testified that she heard Corporal Beaudry offer to continue the evening at his place and that she had been fine with the idea, as her understanding was that they were going to have drinks and chat. She said that she was served a beer when they got there and that she heard Corporal Beaudry invite L.D. to go upstairs; she heard L.D. say no in response to this request and then heard Corporal Beaudry reply that they were just going to talk. Private L.D. then went upstairs. For her part, Ms. Danis had remained in

the living room with Charles Drouin. She said that shortly thereafter, Corporal Beaudry came back downstairs to the living room, dressed in just a towel, and said to them, [TRANSLATION] "If you are both not completely naked within 10 minutes, you need to leave." At this point, he also tried to kiss her. She stayed in the living room with Charles until she read the text message sent earlier by L.D., letting her know that she could leave, which is exactly what she did shortly afterwards, accompanied by Charles, and headed to his place.

[8] Ms. Danis testified that when they got to Charles' place, she noticed shortly after 0310 hours that she had missed four calls from her friend L.D. between 0306 and 0310. She explained that her phone had been on silent mode at the time. The two friends communicated with each other via text message and agreed to meet and walk to L.D.'s residence together. Charles accompanied them to the lobby of the building. Ms. Danis testified that her friend L.D. did not seem to be feeling very well at all, but that she refrained from questioning her in Charles' presence. Once they got to the residence, she noticed significant marks on her friend's body, including on her neck, arms, thighs and back, and most notably a bite mark on her arm. She asked her what had happened and heard her friend say that she had just had non-consensual sex. She was left with the impression that something bad had happened, but since they were both tired, it was decided that they would talk about it again the next day.

[9] The third and last prosecution witness was Corporal Charles Drouin. He also recounted the events that occurred during the evening and night of 5 to 6 September 2014, although, once again, there were some differences in the details provided by the other witnesses. He testified that he had introduced the accused to his friend, Private L.D. and her friend, Marilyn Danis, when they went to JD's bar. He described the accused as being a little bit drunk at the time, as he had also been, but indicated that he was not misbehaving. However, at one point during the evening, the accused became more animated, making remarks of a sexual nature when talking to the women and even touching Private L.D. During a cigarette break, Corporal Beaudry even told him that he could take Marilyn and that he would make the sacrifice of taking the [TRANSLATION] "grenade for the team", referring to the more corpulent Private L.D. Corporal Drouin had not taken these comments seriously, even though he found Marilyn to be his type and had chatted a lot with her at the bar. They left shortly before last call to go to Corporal Beaudry's place for a few drinks and continue talking. He testified that shortly after they arrived, Corporal Beaudry took Private L.D. by the hand and went upstairs. He did not witness any conversation between the two of them at that time. A scantily clad Corporal Beaudry later came back downstairs to tell him and Marilyn that they should [TRANSLATION] "start screwing or leave", while demonstrating what they should do by cupping Marilyn's face in his hands and trying to kiss her. Corporal Beaudry then went back upstairs. Corporal Drouin said that he stayed downstairs with Marilyn for some time, until she read a text message from Private L.D. indicating that she could leave. They therefore went to his place. Less than one hour later, Marilyn learned that L.D. was walking alone on the base, heading to her home. He accompanied Marilyn to meet her and walked with the two women until they got to L.D.'s home. He could not

remember the conversation at that time but mentioned that L.D. did not seem to be all right.

[10] The defence called the accused, Corporal Beaudry. He described the events of the evening and night of 5 to 6 September 2014. Essentially, he testified that he had gone to the bar primarily to pick up a sexual partner and indicated that he had been very clear in this regard with the people that he met, specifically Private L.D., whom he knew by sight, and her friend, Marilyn Danis. He testified that L.D. had reacted positively towards him. He said that she had told him that she was sexually excited by his comments, that she was [TRANSLATION] “getting wet” and that, when he had asked her if she wanted to go to his place, she replied, [TRANSLATION] “Not right now”, which he interpreted as a favourable response. He also said that Private L.D. had reacted favourably to his caresses, that is, when he put his hand on her waist or, on one occasion, between her legs. During his examination, Corporal Beaudry was not able to specifically describe what Private L.D. had supposedly said to communicate consent to specific sexual activities. He responded to this line of questioning by describing her actions while at his place, for example, he said that she laid down on his bed as soon as she entered the bedroom after he had asked her to go upstairs. He confirmed that he had undressed and wrapped a towel around his waist to go downstairs and get three beers, but indicated that he undressed in front of Private L.D. in his room. He mentioned joking with Marilyn and Charles and saying that if they were not going to “screw,” Marilyn could come upstairs and join him and Private L.D.

[11] He testified that when he went upstairs to his bedroom, he placed two beers on the bedside table and gave the other one to Private L.D. before rubbing her back and initiating sex. Throughout his entire testimony, he firmly maintained that what happened in his bedroom involved sexual relations between two consenting adults. In order to illustrate his point, he testified, under direct examination, that he initially had difficulty obtaining an erection and had asked Private L.D. to perform fellatio on him and that she had in fact done so. He was subsequently able to penetrate her vaginally but lost his erection, explaining this situation by saying that Private L.D. wasn't [TRANSLATION] “a good fuck”, that no one [TRANSLATION] “likes to fuck a starfish”. I have reproduced the exact language used by the accused in order to accurately reflect what he said, which I interpreted as meaning that Private L.D. was not an active participant during sexual intercourse at the time. The accused offered an explanation for this lack of involvement by suggesting that it could perhaps be attributed to the fact that she had not been [TRANSLATION] “fucked properly before”. He explained that she became more active after performing fellatio on him a second time. He said that she climaxed with a big smile of intense satisfaction and that, when they had finished, her eyes revealed a state of ecstasy that meant, [TRANSLATION] “I have never been fucked like that in my life.”

[12] With respect to the injuries alleged by Private L.D. and illustrated by the photos that she produced in evidence, Corporal Beaudry admitted that he liked “rough sex” in bed and that the marks on his partner's body were perhaps the result of a tendency to bruise easily, considering that he had only bitten her gently between the legs when

[TRANSLATION] “eating her pussy”. In responding to his lawyer, Corporal Beaudry testified that Private L.D. must have been fine with his sexual style and his bites because if she had any issues she just needed to say so. He said that he did not notice any resistance at any time.

ASSESSMENT OF THE EVIDENCE

Issues

[13] In terms of evidence and arguments, the parties essentially focused their efforts on the first count. In my opinion, what is at issue in this trial is the determination that I am required to make based on the facts, that is, whether it has been proven beyond a reasonable doubt that Private L.D. suffered bodily harm and, if so, whether such bodily harm was caused by Corporal Beaudry while he intended to cause these injuries. If the injuries were not intended by the accused, I must determine whether Private L.D. did not consent to the use of force against her by Corporal Beaudry. This issue of consent was the focus of the defence’s efforts during arguments.

[14] With respect to this issue, the Court’s conclusion shall depend on the manner in which the testimonial evidence is assessed, particularly the testimony of the complainant and the accused, since they were the only ones present in Corporal Beaudry’s bedroom during the early hours of the morning of 6 September 2014, where and when the alleged bodily harm was sustained and the alleged force was used.

Assessment of credibility

[15] Notwithstanding the preceding summary of the various testimonies in the order they were heard at trial, the method of evaluating the impact of testimony on the required verdicts responds to distinct imperatives. As Cory J. of the Supreme Court of Canada provided in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at page 757, I am required to use the following method of assessing credibility in order to respect the fundamental principle obliging the prosecution to prove the offences beyond a reasonable doubt:

- (a) if I believe the testimony of the accused, I must acquit him;
- (b) if I do not believe the testimony of the accused, but it leaves me with reasonable doubt, I must acquit him; and
- (c) even if the deposition of the accused does not leave me in doubt, I must ask myself whether, on the basis of the evidence which I do accept, I am convinced beyond a reasonable doubt of the guilt of the accused.

Credibility of the accused

[16] Corporal Beaudry testified in his own defence. During direct examination, his testimony was confused. His responses were incomplete and often evasive, and he

repeatedly showed signs of impatience when his lawyer asked questions requiring him to provide a minimum of detail concerning the incidents that form the basis of the alleged offences. It is deplorable that Corporal Beaudry expressed himself in a disrespectful manner before the Court, including in the excerpts from his testimony cited earlier. That said, I shall refrain from considering his use of disrespectful terms *per se* as an indicator of a lack of credibility. However, these disrespectful terms are an essential element of the impulsive conduct he demonstrated during his testimony. For example, at one point during his testimony, when his lawyer asked him to explain what happened next, his response was, [TRANSLATION] “I have had it up to here with this fucking bullshit!” Together with the comments that the other witnesses overheard during the events that unfolded and the non-verbal language that I was able to observe from the excerpts of the video footage obtained from the bar, I now have a portrait of an overexcited and impulsive man. This leads me to question his credibility with regard to certain elements of his version of the facts.

[17] For example, he admits that he went downstairs, in just a towel, to get beers from the fridge and tell Marilyn and Charles that if they were not going to screw, Marilyn could come upstairs. The version of events provided by these two individuals was that he had instead said that if they were not naked or screwing within the next 10 minutes, they could leave his house, and that he had then took Marilyn’s face in his hands in order to try to kiss her. Regardless of the version of events, I have a great deal of difficulty believing that immediately after such a display, Corporal Beaudry would go upstairs to his bedroom to sit beside Private L.D. and rub her back like he said.

[18] I also doubt the veracity of the testimony he provided in responding to questions from his lawyer concerning the intensity of the bites that he admits inflicting on Private L.D. In response to suggestions that the bites seemed to be more severe than average, he made circular gestures with his hand to signal to his lawyer to move on to something else, responding that he had proceeded [TRANSLATION] “gradually.” Later, in the context of his preference for “rough sex,” he added that he respected the comfort zone of his partners, including, I presume, Private L.D. Moreover, his response to the bruises revealed by the photos of Private L.D. illustrates his tendency to provide evasive answers when he initially said that the bruises were a sign of an hematoma under the skin. He later admitted that the bruises on Private L.D.’s inner thighs had probably been caused by the fact that he had bitten her in the crotch area. However, under cross-examination, he denied causing any of the bruises photographed on Private L.D.’s body. These comments demonstrate significant internal contradiction.

[19] His version of what he perceived to be the ecstasy of satisfaction felt by Private L.D. during and at the end of the sexual encounter with him is also inconsistent with his testimony. He said that she left after collecting her things, without saying anything. Moreover, he could not remember the response she would have given to his question about whether they would be seeing each other again later. I see that as another example of his contradictions and confused answers. Furthermore, Corporal Beaudry’s tendency to avoid questions by saying that he could not remember was clear throughout his

testimony, even after having provided an answer to the same question or a similar question earlier.

[20] For all these reasons, I do not believe the accused's version of events that took place in his bedroom while he was in the company of Private L.D. I only believe the accused insofar as his comments are corroborated by other witnesses, not because of a conscious choice on my part but, rather, due to the accused's complete lack of credibility. However, I shall keep this disbelieved testimony in mind in anticipation of the pending analysis of the essential elements of the offences just in case it serves to raise reasonable doubt in my mind. I must therefore ask myself whether, based on the evidence that I accept, I am convinced beyond a reasonable doubt of the guilt of the accused. At this point, I must therefore assess the strength of the prosecution's evidence.

Credibility and reliability of the prosecution witnesses

[21] The three prosecution witnesses testified in a frank and objective manner, without any excessive animosity towards the accused. Private L.D. is a credible witness. She was able to recount emotionally painful incidents, and despite the inherent stress of testifying in public, in close physical proximity to someone she considers to have caused her harm, she maintained a clear voice and a determined tone. She also provided detailed information throughout her entire testimony and candidly admitted when her recollections of the events did not allow her to draw a particular conclusion about a specific fact. She freely admitted to flirting with Corporal Beaudry and laughing at his sexual remarks and caresses at the bar. She also did not shy away from providing any additional information required, even when this information benefitted the accused. For example, when questioned about the marks on her back, shown in the photos that she had produced, she said that she was not sure how the injuries had occurred and that they may have predated the events. Such responses demonstrate that Private L.D. did not try to embellish facts at the accused's expense, an aspect of her testimony which is consistent with her noted lack of excessive animosity towards the accused in the context of her testimony.

[22] The defence submits that Private L.D.'s claim that she did not consent to physical contacts of a sexual nature is inconsistent with the circumstances revealed by the facts in evidence. In support of this claim, the defence mentioned the fact that Private L.D. sent a text message to her friend indicating that she could leave, which, according to the defence, revealed that she was comfortable staying alone in the house with Corporal Beaudry, who had just undressed in front of her. After listening to Private L.D.'s testimony again, I conclude that it is free of contradiction on this point. Indeed, according to Private L.D., Corporal Beaudry was dressed when he left the bedroom to go into the bathroom. She did not subsequently see him leave the bathroom to go downstairs, but had heard him talking to the two individuals in the living room. Since she had not seen him, she could not have known that he had undressed before returning to the bedroom in just a towel. At this point, she had already sent her text message to Marilyn. She had no reason to suspect that Corporal Beaudry, by his lack of clothing,

had taken steps to have sexual relations, which put her in danger. In any case, she was justified in believing that she could still say no if he insisted on having sexual relations, as she frankly indicated during her cross-examination.

[23] I cannot subscribe to the more general claims made by the defence that the entire set of circumstances, starting from what happened at the bar up to the point when the two protagonists found themselves in Corporal Beaudry's bedroom, renders Private L.D.'s claim that she did not provide consent, not credible. In fact, Private L.D. could very well have decided to go upstairs to Corporal Beaudry's bedroom, and, in fact, she also clearly explained why she decided to do so, and I quote: [TRANSLATION] "He was nice and funny, and we were having 'fun' that evening." This decision did not obligate her to have sexual relations with Corporal Beaudry, especially since she had clearly stated, just before going upstairs, that she was only going to his room to talk, a conversation which was corroborated by the testimony of Marilyn Danis. Private L.D. did not give up her independence. Even if she had not completely ruled out the possibility that their discussion could lead to something else, or, at worst, if she had agreed to go upstairs with the intention of having sexual relations, she could still change her mind and say "no" at any time. Indeed, it would be correct to presume that people wish to preserve their sexual integrity; this is all the more true in a situation where Private L.D. had repeatedly said [TRANSLATION] "no" in response to sexual overtures throughout the evening, despite the fact that she had flirted with Corporal Beaudry or laughed at his caresses. The fact that Private L.D. repeatedly said "no" is also part of the circumstances relevant to the factual framework of the evidence.

[24] I also find the two other prosecution witnesses to be completely credible, considering the frank manner in which they testified, having freely admitted that they could not remember certain elements. As mentioned earlier, Marilyn Danis confirmed the discussion that occurred prior to Private L.D.'s decision to go upstairs to Corporal Beaudry's bedroom, which I consider to be corroborating evidence that this conversation did in fact take place even though it was not overheard by Corporal Drouin. However, one point on which both these witnesses could agree was that Private L.D., who both these individuals had known for some time, did not seem to be herself at all when they joined her to walk to her residence on the base in the early hours of the morning of 6 September. These observations were consistent with the substance of Private L.D.'s testimony to the effect that, a few minutes earlier, she had been the victim of a non-consensual and painful sexual encounter. They are not consistent with the accused's testimony to the effect that Private L.D. had experienced ecstasy and appeared to have had the best sexual experience of her life.

[25] In his arguments, counsel for the defence alluded to the fact that the complaint had only been filed on 7 September, that is, not at the first opportunity to do so. It is my opinion that the existence of an earlier complaint, the time that it was presented, and the reason why it was filed or not filed at the first opportunity, could prove to be relevant and admissible issues required to establish the conduct of the complainant in a criminal case, based on which the trier of fact may draw inferences concerning the credibility of the complainant's testimony. However, in this case, Private L.D.'s evidence is that she

confided in her friend Marilyn immediately after they returned to her home in the early hours of the morning of 6 September and that they had then agreed to go to bed, since Private L.D. needed to go to work a few hours later. During cross-examination, Private L.D. explained her reluctance to contact the police, how she had discussed this reluctance with her friend Kelly, as well as the efforts made by the latter to obtain information on the complaint process by consulting a friend who was a police officer. In the context of this case, it is my opinion that the delay preceding the steps that were taken to file a formal complaint has no impact on the credibility of the complainant.

[26] I therefore accept the testimony of the three prosecution witnesses as being credible and trustworthy; I also believe this to be true of the exhibits produced by these witnesses. To recap, I have determined that I do not believe the testimony provided by the accused, and therefore, in the context of this case, he will not be acquitted based on his version of the facts. It is therefore my duty to examine the essential elements of the offences to determine whether the testimony of the accused, even if I do not believe it to be true, raises reasonable doubt in my mind as to his guilt. I must then ask myself whether the evidence which I accept, namely, the testimony of the prosecution witnesses and the exhibits, convinces me beyond a reasonable doubt of the guilt of the accused. I would first like to consider the concept of reasonable doubt.

Reasonable doubt

[27] The accused is presumed to be innocent right from the beginning of every court martial. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that, before an accused can be convicted of an offence, the trier of fact must be satisfied, beyond a reasonable doubt, of the existence of all of the essential elements of the offence.

[28] As for the meaning of the expression “beyond a reasonable doubt”, the Supreme Court of Canada in *R. v. Lifchus* [1997] 3 S.C.R. 320 tells us that a reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. It is not sufficient for me, as the trier of fact, to believe the accused is probably guilty or likely guilty. In those circumstances, the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand, I must keep in mind that it is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so.

THE EVIDENCE APPLIED TO THE ELEMENTS OF THE OFFENCES

First count

[29] There is no dispute regarding the fact that the elements concerning identity, date and location have been proven in accordance with the requisite standard, and I am convinced beyond a reasonable doubt that both of the alleged offences were attributable to the actions of Corporal Beaudry and were committed on 6 September 2014, at Wainwright, in Alberta.

[30] With respect to the first count, the onus was on the prosecution to prove each of the following essential elements of this offence beyond a reasonable doubt in accordance with the findings of the Court of Appeal for Ontario in *R. v. Zhao*, 2013 ONCA 293 at paragraphs 105 to 109:

- (a) the accused assaulted Private L.D., i.e., he intentionally applied force against her;
- (b) the intentional application of this force against Private L.D. took place in circumstances of a sexual nature such that the victim's sexual integrity was violated;
- (c) the intentional application of force by the accused caused bodily harm to Private L.D.; and
- (d) if the accused intended to cause bodily harm to Private L.D., then the issue of whether Private L.D. provided consent is irrelevant and the accused must be found guilty of sexual assault causing bodily harm. Otherwise, I must consider whether it has been proven, beyond a reasonable doubt, that Private L.D. did not consent to this intentional use of force.

[31] First, based on the version that I accept, it has been established beyond a reasonable doubt that Corporal Beaudry intentionally used force against Private L.D., including by grabbing her by the neck to push her onto the bed, holding her arms, biting her left arm, biting her inner thigh, etc. All the above involved actions committed voluntarily by Corporal Beaudry.

[32] Second, it has been established beyond a reasonable doubt that the intentional use of force by Corporal Beaudry against Private L.D. took place in circumstances of a sexual nature, such as to violate the sexual integrity of the victim. The two protagonists agree that there were sexual activities at the time of the alleged assault. According to the version that I accept, force was used in circumstances where Corporal Beaudry forcibly inserted his penis into the vagina and mouth of Private L.D.

[33] The third element requires evidence beyond a reasonable doubt that the intentional use of force by the accused caused bodily harm to Private L.D. According to Private L.D.'s version of events, which I accept, I am convinced beyond a reasonable doubt that the marks shown in Exhibit 4, with the exception of the marks on the back shown in photo 3, were all caused by the intentional use of force by Corporal Beaudry.

That said, the defence submits that these injuries are too minor to constitute bodily harm as defined in section 2 of the *Criminal Code*, that is, “any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature”. Private L.D. testified about the pain that she suffered at the time of her interaction with Corporal Beaudry and the period of time required for the marks on her body to disappear, ranging from a few days to two weeks. The photos of these marks, taken over 24 hours after the events, reveal what I consider to be injuries which meet the definition of bodily harm, especially those on the neck and the sizeable bruise on the left arm which shows teeth marks resulting from a bite. Further to a reading of the cases submitted by the prosecution, it is my opinion that these types of bruises were considered to constitute bodily harm by both the Ontario Court of Appeal in *R. v. Rabieifar* (3 October 2003), C39072, (C.A. Ont.) [2003] O.J. No. 3833, at paragraphs 4 and 9 of the reasons (not published), and the Manitoba Court of Appeal in *R. v. Moquin*, [2010] M.J. No. 46 at paragraphs 23 to 25. It is therefore my opinion that the prosecution has discharged its burden of proving this element of the offence beyond a reasonable doubt.

[34] The fourth element is more complex and includes two components. First, I must determine whether Corporal Beaudry intentionally caused bodily harm to Private L.D. This is a subjective test which must be applied in light of all the circumstances of the case. In my opinion, there are two material circumstances in this case: first of all, the type of force used was not of such intensity as to necessarily cause bodily harm, and I say this even after considering the bites. Even though bodily harm was caused in this case, the injuries involved are ultimately minor if they were to be placed on a severity scale for injuries that could potentially be caused. It is therefore difficult for me to believe, beyond a reasonable doubt, that Corporal Beaudry intended to cause these types of injuries, even if he clearly wanted to hurt Private L.D., in part, to overcome her resistance. I believe that, in reality, Corporal Beaudry did not care one iota about any injuries that he may or may not have caused Private L.D., a fact which was evident in both the tone and content of his testimony on the bruises that she suffered. Nevertheless, his testimony raises doubt in my mind, considering that it is indeed possible that Private L.D. was particularly susceptible to bruising. I, therefore, believe that I must give the accused the benefit of the doubt on this first component of the fourth element.

[35] Since I am not convinced based on the applicable standard that Corporal Beaudry intended to cause bodily harm to Private L.D., I must now consider whether it has been proven beyond a reasonable doubt that Private L.D. did not consent to the intentional use of force against her. In my opinion, this is clearly the case. Private L.D. never consented to being attacked in this way. I believe her testimony when she says that the accused entered the bedroom with just a towel around him, closed the door and announced that they were going to have sex, and that in reaction to Private L.D.’s negative response he put his hand on her throat to push her onto the bed. In such an eloquent display, by his attitude as well as the language that he used during his testimony, Corporal Beaudry does not strike me as being the kind of person to tolerate such [TRANSLATION] “fucking bullshit”. He had wanted to have sex since the beginning of the evening. He had convinced himself that this was what Private L.D. wanted as

well, despite the fact that she had verbally rejected him more than once. When he entered his bedroom, he had no intention of just chatting as he had promised when he convinced her to go upstairs. I am convinced that the last time that Private L.D. said “no” was the last straw for him and that he attacked her.

[36] The testimony of Corporal Beaudry, even though I do not believe it, does not raise any reasonable doubt in my mind regarding his guilt. The evidence that I accept, namely, the testimony of the prosecution witnesses and the exhibits, convince me beyond a reasonable doubt that the accused is guilty of the offence of sexual assault causing bodily harm.

[37] I must clarify that even though counsel for the defence submitted arguments based on the *actus reus* and *mens rea* of sexual assault as opposed to sexual assault causing bodily harm, the application of the facts to the law applicable to the essential elements of the offence of sexual assault would have led to exactly the same result. As mentioned earlier during the analysis of the credibility of witnesses, it is my opinion that the subjective belief that Private L.D. did in fact express non-consent is entirely credible under the circumstances. This element of the *actus reus* was, in my opinion, demonstrated beyond a reasonable doubt. With respect to the *mens rea*, Corporal Beaudry completely failed to convince me that he believed that Private L.D. had agreed to have sex with him. Corporal Beaudry was not able to provide any testimony to indicate that Private L.D. had verbally consented to sexual relations at any point whatsoever. His version of the events suggests that silence, passivity or certain positive signals from Private L.D. could be interpreted as being equivalent to consent. This understanding is erroneous as a matter of law. Private L.D. verbally said [TRANSLATION] “no” repeatedly and unambiguously. In these circumstances, Private L.D.’s consent could not be inferred. Corporal Beaudry never obtained a “yes” consenting to sexual activity. He did not take reasonable measures to ensure consent and demonstrated obvious recklessness in this regard. The defence of reasonable belief in consent is therefore not available to him and his conduct would constitute sexual assault if this had been the charge brought against him.

Second count

[38] I must now proceed to apply the facts to the elements of the second count, which, as mentioned earlier, has been the subject of very little discussion in the context of this trial. The facts related to this count are the same as the relevant facts in the first count. As mentioned at the beginning of the analysis of the first count, the identity of the accused as well as the time and location of the offence have been established, and these elements are not in dispute.

[39] The other essential elements of this offence are as follows:

- (a) the accused’s attempt to choke, suffocate or strangle another person, or render this person insensible, unconscious or incapable of resisting; and

- (b) intent to enable an indictable offence or to assist himself or another person to commit an indictable offence.

[40] In this case, the particulars provided in the charge sheet prepared by the prosecution accuse Corporal Beaudry of choking Private L.D. by putting his hand around her throat. According to *Le Petit Robert de la langue française*, the definition of the word “*étouffé*” [choked] implies being deprived of air by an obstruction to respiration. It is this deprivation which, in my opinion, gives rise to the offence under paragraph 246(a) of the *Criminal Code*, which applies to actions intended to alter a person’s state of consciousness or capacity to resist by using one of the three methods mentioned, namely, by choking, suffocating or strangling. The consequence of all of these three methods is to limit the victim’s supply of air.

[41] As was mentioned, the version of facts which I accept is the one recounted by Private L.D. During her testimony, she made two references to having the accused’s hand on her throat. First, she provided general testimony about the sequence of events and was able to explain that Corporal Beaudry had put his hand around her throat and steered her towards the bed. When the prosecutor seized the opportunity and subsequently asked her a specific question, whether Private L.D. could describe how she had felt when Corporal Beaudry’s hand was on her throat, she responded, [TRANSLATION] “I choked a bit at that moment. It’s always surprising when you are grabbed by the throat. I was scared. I froze. I didn’t do anything.” When later asked to comment on the photographs showing the injuries suffered, she commented, in reference to the second photo, at Tab 2 of Exhibit 4, that the marks on her neck had been caused when Corporal Beaudry grabbed her by the throat, explaining that the mark in the middle was from the accused’s thumb, which choked her a bit, then and there, and that the other, closer to the left ear, was a mark left by one of his fingers. Considering that the accused allegedly used only one hand, I note that the hand must have been placed on the left side of Private L.D.’s throat only and not around her throat as mentioned in the particulars of this charge.

[42] The testimony provided by Private L.D. convinces me that the accused used his thumb and at least one finger to hit her in the throat with enough force to leave marks. However, both Private L.D.’s description of this incident and the fact that there were only these two marks lead me to question whether she did in fact suffer the kind of deprivation of air required to constitute choking within the meaning of paragraph 246(a) of the *Criminal Code*. I entertain this doubt with the full knowledge that Private L.D. used the word [TRANSLATION] “choked” twice. However, the words [TRANSLATION] “I choked a bit” are insufficient to convince me, beyond a reasonable doubt, that the offence, as described in the particulars of the second charge, was committed or even attempted. Based on the evidence that I heard, it also seems plausible to me to conclude that Private L.D. sustained a push to the throat to get her onto the bed. This is not the same as choking.

[43] As mentioned earlier, the accused is presumed to be innocent. The onus is on the prosecution to reverse this situation by producing evidence to establish the accused’s

guilt beyond a reasonable doubt. It is my estimation that the prosecution did not discharge its burden concerning the second count. Based on the circumstances of this case and the evidence presented, it is my opinion that the accused cannot be found guilty of this charge.

FOR THESE REASONS, THE COURT:

[44] **FINDS** Corporal Beaudry guilty of the first count.

[45] **FINDS** Corporal Beaudry not guilty of the second count.

Counsel:

The Director of Military Prosecutions, as represented by Lieutenant-Commander S.C. Leonard and Major P. Rawal

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