COURT MARTIAL

Citation: *R. v. Jonasson,* 2019 CM 2003

Date: 20190208
Docket: 201819

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant-Colonel J.D. Jonasson, Accused

Before: Commander S.M. Sukstorf, M.J.

FINDING

(Orally)

Introduction

[1] Lieutenant-Colonel Jonasson originally faced two charges. This Court granted a motion by defence counsel that no prima facie case had been made out on the second charge. The particulars of the remaining charge read as follows:

"FIRST CHARGE (Alternative to Second Charge) Section 95 *N.D.A.*	ILL-TREATED A PERSON WHO BY REASON OF RANK WAS SUBORDINATE TO HIM *Particulars*: In that he, on or about 13 October 2017, at or near Petawawa, Ontario, pulled the hair of Captain C.T. and kissed her."

[2] In reaching the Court's decision, I reviewed and summarized the facts emerging from the evidence and made findings on the credibility of the witnesses. I instructed myself on the applicable law and applied the law to the facts, conducting my analysis before I came to a determination on the charge.

The evidence

[3] The following evidence was adduced at the court martial:

(a) testimony of the complainant, Captain C. Thibeault;

(b) testimonies of the following nine defence witnesses, in order of appearance:

i. Warrant Officer M. Osmond,

ii. Major D. Ayotte,

iii. Major M.S.R. Britt-Côté,

iv. Captain T. Perrier,

v. Captain L. Stewart,

vi. Lieutenant(N) K.N. Ryan,

vii. Sergeant S.L. Tennant,

viii. Sergeant S.D. Hepburn, and

ix. Master Warrant Officer G.N.R. Short;

(c) Exhibit 1 - Convening Order;

(d) Exhibit 2 - Charge Sheet;

(e) Exhibit 3 – CANFORGEN 130/15 222041Z JUL 15, CDS MESSAGE TO CANADIAN ARMED FORCES ON HARMFUL SEXUAL BEHAVIOUR;

(f) Exhibit 4 – CDS OP ORDER – OP HONOUR, dated 14 August 2015;

(g) Exhibit 5 – FRAG O 001 TO CDS OP ORDER – OP HONOUR, dated 18 March 2016;

(h) Exhibit 6 – FRAG O 002 TO CDS OP ORDER – OP HONOUR, 9 December 2016;

(i) Exhibit 7 – Agreed Statement of Facts;

(j) Exhibits 8, 9, and 10, a series of photographs; and

(k) judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence* (*MRE*).

[4] It was noted by this Court that in the whole of the testimony, many of the witnesses had different recollections of the events. As the events took place over a year ago, it is completely understandable that there will be inconsistencies. In reviewing the charge, the Court has to determine what evidence it finds credible and reliable.

[5] There are many factors that influence the Court's assessment of the credibility of the testimony of a witness. For example, a Court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? There are other factors that come into play as well. For example, does a witness have an interest in the outcome of the trial, that is, a reason to favour the position of the prosecution or the defence, or is the witness impartial?

[6] Below are the pivotal facts that the Court examined in particularly close detail.

Factual overview

[7] The complainant, Captain Caroline Thibeault, is a perioperative nursing officer and Lieutenant-Colonel Jonasson is a medical officer. At the time of the alleged offence, the complainant and the accused were both attending pre-deployment training at Canadian Forces Base (CFB) Petawawa prior to deployment to serve in the Role 2 Medical Treatment Facility in Iraq. Lieutenant-Colonel Jonasson was the commanding officer (CO) of the Role 2 Medical Treatment Facility in Iraq during Operation IMPACT in Iraq. Major Ayotte was the Deputy Commanding Officer (DCO) and Master Warrant Officer Short was the sergeant major. Together, Lieutenant-Colonel Jonasson, Major Ayotte and Master Warrant Officer Short made up the command team for the upcoming rotation.

[8] On Thursday, 12 October 2017, the night before the members completed their pre-deployment training, a social gathering was organized at the golf course club house at CFB Petawawa. The function was held to facilitate the participation of all ranks and for them all to get to know each other before deploying.

[9] Most of the witnesses walked to the golf course club house, which was located behind the medical clinic. Captain Thibeault drove to the club house with Captain Munro. She indicated that she arrived later than most because she had difficulty finding the club house. Captain Thibeault testified that Lieutenant-Colonel Jonasson was at the club house when she arrived. Lieutenant-Colonel Jonasson testified that he arrived at the golf course club house at approximately 6 to 6:30 p.m., after attending a promotion party at the officers' mess with a number of other medical officers and nurses.

[10] During the social function at the club house, Lieutenant-Colonel Jonasson bought a few bottles of wine that were shared amongst various people. All witnesses confirmed that alcohol was available and consumed.

[11] At approximately 10 p.m., when the golf course club house closed, the group decided to migrate to a local civilian bar in Petawawa referred to as the Warehouse. Lieutenant-Colonel Jonasson arrived in a van with a group of other members. Captain Thibeault travelled in Captain Munro's car with Sergeant Tennant and possibly two others. When they arrived at the Warehouse, Captains Thibeault and Munro dropped the other passengers off at the door of the bar and went to park the car in the adjacent parking lot.

[12] Sergeants Hepburn and Tennant testified that during the short drive to the bar, Captain Thibeault was bubbly, adjusting radio stations and that they were all joking and in a positive mood. Captain Thibeault testified that although she did not say anything while the sergeants were in the car, she thought the Warehouse had a bad reputation and she was concerned people were getting drunk and she was not sure it was a good idea to go in. She testified that she and Captain Munro chatted in the car for approximately five or ten minutes, deciding whether to go in. Most witnesses estimated that Captain Thibeault and Munro entered the bar about one hour later.

[13] Lieutenant(N) Ryan testified that when Captain Munro entered the bar, he was very excited and kind of giddy, wanting to buy everyone a drink. She stated that he bought rounds of tequila and paid for her drink which was a Southern Comfort. Sergeant Tennant confirmed that Captains Munro and Thibeault did not enter the bar until at least 45 minutes to an hour later and she testified that she specifically noticed when Captain Munro arrived as she was playing "Crud" and he joined them. She noticed he was wearing a flamboyant shirt. She remembers Captain Munro being in a particularly good mood, jumping over the Crud table, laughing and trying to beat them.

[14] The Warehouse was described by almost all witnesses as being a large open bar, with good lighting. Some witnesses testified to music being played, but it was also acknowledged the volume of the music did not interfere with conversations. At the time of the incident, the bar was under construction, and the area of the bar was described by one witness as a beach-bar set up in a large back open area where the pool tables were located. Witnesses testified that the attendees at the bar were almost entirely from their course.

[15] There were two booths in the bar where some people were seated. Most witnesses confirmed that the height of the booths was just below the shoulder blade area and while seated in one booth, you could see people seated in the other booth. Several witnesses confirmed that the backs of the booths were actually connected and at least one witness told the Court that she easily spoke to someone in the other booth.

[16] Captain Thibeault testified that at one point in the evening, she moved from a booth where she had been sitting to an empty booth. She was seated close to the wall and was later joined by Lieutenant-Colonel Jonasson who sat to her right (at the open end of the booth) and then on the opposite side of the booth Major Ayotte sat on the open end with Sergeant Hepburn opposite her and possibly Sergeant Parizeau in the middle. Sergeant Hepburn testified that in her recollection, she was seated in the booth beside Major Ayotte with Captain Thibeault and Lieutenant-Colonel Jonasson seated on the opposite side. In his testimony, Major Ayotte remembers being seated beside Sergeant Hepburn as he recalled specifically sitting beside her because he wanted to get to know her since she was going to be his Operations Sergeant for the upcoming tour to Iraq. He did not specifically remember Sergeant Parizeau being seated with them.

[17] Captain Thibeault alleged that not long after the accused sat beside her, he started playing with her hair, which she was wearing down. She said that it felt like he was braiding it and he moved closer, touching her right shoulder. She testified that his hand touched her right shoulder with his palm, and as he braided her hair, he whispered something into her ear that she could not make out. She told the Court that she felt uncomfortable so she froze. She stated that he then grabbed all of her hair with his hand, pulled her towards him and then kissed her on the cheek. She further testified that after the kiss on the right cheek, he no longer pulled or played with her hair. She told the Court that when it occurred, she locked eyes with Major Ayotte and, in her view, he witnessed the incident. In his testimony, Major Ayotte strenuously denied that he witnessed this incident. He testified that if he had, he would have immediately acted upon it, as he did when it was reported to him in Iraq.

[18] Shortly thereafter, within five or ten minutes, the complainant stated that she got up, went to the washroom and upon return, prepared to leave the bar with the majority of the other people.

[19] The evidence as a whole suggests that the course members were at the Warehouse for approximately three hours, left the bar and returned to the base on foot sometime after 1 a.m. The evidence also suggests that despite having travelled with other members, Captain Thibeault did not enter the bar until about an hour after everyone else.

[20] The accused testified and his version of the facts is diametrically opposed to the evidence provided by Captain Thibeault with respect to the alleged incident. He admitted to having sat in a booth beside Captain Thibeault in the latter part of the evening, after midnight, which would have been in the last hour before heading back to the base. However, he denied touching her and told the Court that despite having three

daughters, he does not know how to braid hair. He stated that after being seated in the booth, he was tired of sitting, he got up, stretched and got some water to drink.

[21] Counsel submitted the following agreed statement of facts:

> "AGREED STATEMENT OF FACTS
>
> 1. During the morning hours of Tuesday 21 November 2017, while working in the capacity as a Military Police Liaison Officer (MPLO) Maj Casswell was contacted by a counsellor from the Sexual Assault Misconduct Centre (SMRC). An anonymous female caller ("Caller"), had phoned the SMRC and now wished to speak to the MPLO. The counsellor provided Maj Casswell a phone number [which was confirmed in court to belong to the complainant] so that he could phone the Caller back.
>
> 2. Maj Casswell was otherwise engaged in a meeting so he requested MWO O'Brien, Regional Duty Officer, Canadian Forces National Investigation Service (CFNIS) make phone contact with the Caller.
>
> 3. Following the meeting, Maj Casswell met with MWO O'Brien who confirmed he had made contact with the Caller and MWO O'Brien provided Maj Casswell a brief summary of the call.
>
> 4. Maj Casswell, on Tuesday 21 November 2017, then contacted the Caller at the phone number provided by the counsellor. The Caller identified herself as "Caroline" but otherwise wished to remain anonymous. The Caller relayed the reasons for her initial contact with the SMRC. The Caller did not make a formal complaint to Maj Casswell but rather sought only general information."

[22] The complainant testified that she finally reported the alleged incident to the military police (MP) on 8 January 2018, while deployed to Iraq and at Camp Erbil. The facts before the Court from all the witnesses, including the specific testimony of both Major Ayotte and Captain Perrier confirmed that the chain of command understood their responsibilities under Operation HONOUR and their requirement to report allegations brought forward. Despite being in a theatre of operations, they did not hesitate and exercised the appropriate diligence in reporting the allegations.

Analysis

[23] As the Court briefly explained prior to closing submissions, it is imperative that the chain of command and the military police believe victims when they report conduct that makes them feel uncomfortable. If they are not believed, the allegations will not be taken seriously and incidents will not be properly investigated. It will often take time

for victims to fully open up to the police and when an investigation begins it often becomes clear that there may be other victims or similar incidents that have gone unreported.

[24] Conversely, complainants must be made aware that it is an offence under section 96 of the *National Defence Act* (*NDA*) for a person to make a false accusation against an officer or non-commissioned member, knowing the accusation to be false and they should be aware that upon conviction that person is liable to imprisonment for less than two years or to less punishment.

[25] In a military context, minor incidents of inappropriate touching are completely unacceptable and must be stopped. A failure to address even the smallest instance of inappropriate conduct is exactly what threatens and undermines the military ethos, values, norms and ethics expected of every Canadian Armed Forces (CAF) member. If left unchecked, minor misconduct can lead to heightened reprehensible conduct.

[26] However, the increased commitment to addressing inappropriate conduct must not detract from the right of the accused to be treated fairly pursuant to the same Canadian law that we serve to protect. Based on the circumstances of this case and the continuing rise of the “#MeToo” movement in general, as well as the initiation of Operation HONOUR in the CAF, the Court believes it is helpful to explain the varying evidentiary levels of proof required at various stages, starting from the reporting of an incident, to the decision of the police, or the chain of command to lay charges and then to the final criminal trial of an accused.

[27] In the military justice system, the National Investigation Service (NIS) or the chain of command lay charges on the basis of "reasonable grounds to believe" that an offence has been committed. Prosecutions only proceed to trial if the case meets the Crown’s screening standard of there being "a reasonable prospect of conviction". It is imperative that these standards are appropriately applied at these lower levels because, in order to support a conviction in a criminal case, the strength of evidence must go much further and the prosecution must establish the elements of the offence to a standard of proof beyond a reasonable doubt.

[28] Without questioning the decisions made earlier in the process by the NIS, the chain of command or the prosecution, Lieutenant-Colonel Jonasson entered these court martial proceedings presumed innocent. That presumption of innocence remains throughout the court martial until such time as the prosecution has, on the evidence put before the Court, satisfied the Court beyond a reasonable doubt that the accused is guilty on the charge before the Court.

[29] So, what does the expression “beyond a reasonable doubt” mean? The term “beyond a reasonable doubt” is anchored in our history and traditions of justice. It is so entrenched in our criminal law that some think it needs no explanation, but its meaning bears repeating (see *R. v. Lifchus*, [1997] 3 S.C.R. 320, paragraph 39):

> 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.

[30] In essence, this means that even if I believe that Lieutenant-Colonel Jonasson is probably guilty or likely guilty, that is not sufficient. I must give the benefit of the doubt to him and acquit him if the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

[31] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore, in order to find Lieutenant-Colonel Jonasson guilty of the charges before the Court, the onus is on the prosecution to prove something less than an absolute certainty, but something more than probable guilt for the charge set out in the charge sheet. (see *R. v. Starr*, [2000] 2 S.C.R. 144, paragraph 242).

Essential elements of the offence

[32] The finding on charge 1 depends not only on my assessment of the credibility of the witnesses, but also on whether the acts particularized in the charge sheet meet the definition of ill-treatment adopted in the past by courts martial.

[33] Section 95 of the *NDA* provides:

> Abuse of subordinates
>
> 95. Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[34] In addition to identity, the date and place of the offence, the fact that by reason of rank, the alleged victim was a subordinate to the accused were all proven by the prosecution. The remaining elements that the prosecution had to prove beyond a reasonable doubt were:

(a) *The particulars*

The charge before the Court is serious and holds the potential for penal consequences. It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved beyond a reasonable doubt. The onus is on the prosecution. With respect to the first charge, the prosecution is obliged to prove beyond a reasonable doubt that Lieutenant-Colonel Jonasson pulled Captain Thibeault's hair and kissed her.

(b) *Ill-treatment*

Once the particularized acts are proven beyond a reasonable doubt, then an assessment must be made as to whether, in the context in which the incident occurred, the act amounted to ill-treatment. Context is important in making a determination of whether the alleged conduct constitutes ill-treatment. The determination of whether something amounts to ill-treatment is determined objectively by assessing the above definitions with regard to all the circumstances.

The word "ill-treatment" is not defined in the *NDA*; however, on a strict reading of the section, there is no limitation imposed as to the nature or manner of ill-treatment envisaged. The words in the section are "strike or otherwise ill-treat" and includes treating badly or maltreating a subordinate in a different manner than by striking. It is not limited to physical violence or physical harm or injuries. It could be psychological, emotional or any harm or injuries of that nature.

With respect to what constitutes ill-treatment, my colleague Pelletier M.J. set out the following in *R. v. Duhart*, 2015 CM 4022:

> [48] The test that has been developed over time by various courts martial appears to be based on dictionary definitions, specifically as it relates to the expression "ill-treat", which translates as *maltraiter* in French. The relevant terms are defined as follows in the *Concise Oxford English Dictionary*, 11th edition and *Le Nouveau Petit Robert.*
>
> *"ill-treat"* verb: act cruelly towards. DERIVATIVES: ill-treatment, noun.
>
> *"cruel"* adjective: disregarding or taking pleasure in the pain or suffering of others. Causing pain or suffering. DERIVATIVES: cruelly, adverb.
>
> *"maltraiter"* 1. *Traiter avec brutalité*. 2. *Traiter avec rigueur, inhumanité*. 3. *Traiter sévèrement en paroles (une personne à qui l'on parle, ou dont on parle).*

(c) *Blameworthy state of mind*

Once the particulars are proven and it has been determined that the conduct rises to the level of ill-treatment, the Court must then assess whether the accused had the requisite mental intent.

Assessing conflicting versions of events

[35] In the case before me, there were no other eye witnesses, nor physical or other corroborative evidence to support the allegation. The Court must not fall into the trap of

believing that a complainant is always truthful or that when they come forward under Operation HONOUR, they must be believed. To do this transfers the burden of proof from the prosecution to the defence. This would be an error of law and would violate the accused's presumption of innocence.

[36] On the other hand, there is no legal impediment to a court convicting an accused based on uncorroborated evidence of a single complainant. However, in order to do this, the evidence must be capable of standing on its own when measured against the required standard of proof for a criminal conviction.

[37] With respect to the facts giving rise to the charge before the Court, the accused and the complainant gave diametrically opposed versions of what transpired in the early morning hours of 13 October 2017. In assessing a case with competing versions of what happened, credibility is a central issue and in a case where the accused has testified, the Supreme Court of Canada (SCC) recommends that the issue be considered in three steps, commonly referred to as the "*W.(D.)* instruction" found at *R. v. W.(D.)*, [1991] 1 SCR 742, at page 758.

> (a) first, if I believe the evidence of Lieutenant-Colonel Jonasson, I must acquit;
>
> (b) second, if I do not believe the testimony of Lieutenant-Colonel Jonasson, but I am left in reasonable doubt by it, I must acquit; and
>
> (c) third, even if I am left in doubt by the evidence of Lieutenant-Colonel Jonasson, I must ask myself whether, on the basis of the evidence, which I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[38] In *R. v. H. (C.W.)*, [1991] 68 C.C.C. (3d) 146 (B.C. C.A.), Wood J.A. suggested an addition to the second part of the three-part test set out in *W.(D.)*. At page 155 of *H.(C.W.)*, His Lordship said:

> If, after a careful consideration of all of the evidence, you are unable to decide whom to believe, you must acquit.

Court's assessment

[39] Having instructed myself on the presumption of innocence, reasonable doubt, the onus on the prosecution to prove their case, the required standard of proof and the essential elements of the offence, I now turn to address the legal principles and the charge.

[40] The Court was satisfied that the prosecution met its burden of proof on the elements of identity, date, place and the hierarchical relationship with respect to the first charge.

[41] Hence, because the onus is on the prosecution to prove the particulars as alleged, I proceeded first in assessing the credibility of the one prosecution witness, being the complainant, and determining whether the particulars of the charge have been made out.

Evidence with respect to the complainant

[42] In the course of the trial, there was evidence presented that witnesses were shocked and surprised with the delayed disclosure of the incident. There was so much evidence that prosecution sought to lead rebuttal evidence by the complainant to refute a claim of recent fabrication. However, the Court reminded the prosecution that there was already an agreed statement of facts where the defence acknowledged that the complainant had contacted someone about allegations on 21 November 2017, shortly after the alleged incident. Further, the Court advised counsel that in light of the context of the case, the power imbalance between the two members and the pending operational tour to Iraq that could have been jeopardized, the Court would not fall into the trap of believing that there was a specific way or timeline upon which the complainant should have reacted. In other words, the Court's assessment of the complainant's credibility was not affected by her delay in disclosure.

[43] During cross-examination, the complainant admitted that she failed to resist the accused's advances either verbally saying "no" or physically. The Court was particularly attentive to not conflate her lack of resistance with the fact that the incident did not occur. She testified that she froze and was not sure what to do. The fact that she remained passive does not mean the incident did not happen.

[44] It also became evident that no matter what the catalyst was, there was animosity, bitterness and a lack of trust between Captain Thibeault and many of the other medical personnel. However, her relationship with Sergeants Tennant and Hepburn appeared more positive. It is possible that she perceived them to be less threatening and as a result felt more comfortable with them. Hence, the Court provided more weight to their testimony in confirming details on credibility that concerned the Court.

Complainant's testimony

[45] When the complainant began her testimony she spoke very quietly and meekly. She had to be told several times to speak louder, which she eventually did. She testified in a calm and non-argumentative manner, even when challenged by the defence. She came across as very likeable and personable. She was confident in asserting her version of the various incidents she was specifically questioned on. The Court found that she was very talkative and when responding to questioning, she easily expanded her description of events.

[46] In assessing the complainant's credibility, the Court found that when Captain Thibeault's testimony was compared to the evidence as a whole, it became evident that her very calm, sincere and accurate recollection of the facts was, at times, inconsistent with the evidence as a whole, as well as her own evidence given within the court martial

itself. There were many inconsistencies in her evidence, but the following incidents created the greatest concern for the Court.

Description of the incident

[47] When cross-examined on her police statement, the complainant told the Court that not long after the accused sat beside her in the booth, the accused moved towards her and started to play with her hair. However, only a few hours earlier, under direct examination, she stated that when the accused sat down, they continued the discussions they had engaged in earlier that evening, discussing their careers, and Lieutenant-Colonel Jonasson's experience under the military medical training plan. Based on the discussion described, it is fair to assume that this type of discussion would have taken some time.

[48] In describing the incident that led to the charge, she testified that she was wearing her hair down, and Lieutenant-Colonel Jonasson first grabbed her hair. She then testified that it felt like he was braiding it or something of the sort and then he moved closer and was touching her right shoulder. She first told prosecution his hands, plural, were touching her shoulder. She testified that when he started pulling on her hair, he was whispering or saying something in her ear which she could not quite make out and she looked down at the table. When pressed to describe this by the prosecution, she said that he touched her with one hand with the palm facing down. She then clarified that as he braided her hair, he would have touched her shoulder, but could not say what hand touched her. She testified that after the accused started playing with her hair and braiding it, he then started playing more with it and grabbed all her hair with his hand, pulling it towards him, at which point she said she resisted and tried to pull away. She described the pulling as gradual, not a yank and not painful. She stated that she did not scoot over, but moved her torso away from him. She testified that when she pulled away, he pulled her in closer towards him. However, when queried further, she stated that when he leaned forward to kiss her, she turned her face, but, she also said that when she pulled away that he reached in and kissed her on the right cheek. When asked by the prosecution to describe the kiss, she said it felt like it lasted a long time, probably only a second, but was not just a peck, it was lingering.

[49] The Court noted that when the complainant was pressed for specifics on the alleged incident, she gave varying versions of what happened and the length of time involved. After re-listening to her testimony, the Court was still unclear whether the complainant was asserting that the alleged touching occurred all at once or whether it was a two-step process. Further, she was not clear as to whether the accused used one or two hands. Defence asked if Lieutenant-Colonel Jonasson had the entirety of her hair in his hands and she said "yes" and confirmed that when he was braiding her hair, he was using two hands.

[50] While pointing out to the complainant that braiding takes time, defence counsel asked the complainant how long the accused touched her hair. In response, she said that she did not think he completed a full braid, avoiding answering the question. Her

response suggested that the accused did braid her hair. In reviewing the photos in Exhibit 7, the Court noted her hair is very long, thus, as defence counsel suggested to her, if he did in fact braid her hair, he would have had to use two hands and it would have taken time to gather, separate and braid the hair.

[51] However, when the complainant clarified that the accused braided her hair with two hands, she was asked why in her previous statements and during parts of her testimony, she described it as occurring all at once and only one hand touching her shoulder. Defence counsel referred the complainant to her 2 February 2018 statement to Warrant Officer Osmond, the Military Police officer investigating the incident who asked her how long the accused was playing with her hair and she responded, "Not a very long time; it was kind of all at once." In this statement, it was all one action, but she described it differently to this Court. When asked which version was correct, she said that it was the same, which did not help to distinguish and clarify which of the two versions she was adopting.

[52] Under cross-examination, in responding to how the accused managed to reach all the way behind her to braid her hair, she responded that he has long hands, and then when asked how she could tell that, she responded, "Because he is tall." When asked again how long he played with her hair before he kissed her, she gave an unquantifiable answer. She stated it was not for very long. When asked to clarify what "not very long" was and how long his hands were in her hair, she evaded answering the questions and then responded with various assertions such as, "It felt like a long time."

[53] The Court found the complainant's testimony, with respect to the specific allegations before the Court, to be particularly evasive, continually changing and inconsistent with itself. Her inability to provide reliable detail and her calculated avoidance in responding to the questions made it difficult for counsel to properly test which version of the story she was relying upon.

Major Ayotte witnessing the incident

[54] It was brought to the complainant's attention that on 2 February 2018, she told Warrant Officer Osmond that she did not think that anyone saw the incident and that she also said she was not looking at anyone and looking down. However, in her testimony before the court, the complainant described that she was embarrassed and worried that people had seen it so she looked up and did not see anyone looking or making eye contact other than Major Ayotte. The complainant testified that she did not think anyone saw the braiding of the hair, but told the Court that Major Ayotte saw the kiss because they made eye contact. She said she did not catch the gaze of the other women in the booth. She then said that Major Ayotte would deny witnessing it because he was drunk. Major Ayotte testified that he remembers being seated beside Sergeant Hepburn in a booth and he specifically remembers sharing family photos and chatting with her. He testified that he does not have a clear memory of sitting across from Lieutenant-Colonel Jonasson and Captain Thibeault or anything that might have occurred. However, his testimony was clear that in light of the current climate with

Operation HONOUR, he was very sensitized to these issues and he testified that if he had seen anything, he would have reacted immediately. The Court noted that when Major Ayotte was advised of the allegation in Iraq, immediate action was taken.

[55] Under cross-examination, Captain Thibeault stated that the only person in the Task Force she had spoken to about the alleged incident was Captain Munro because he told her the next morning that he had seen the alleged incident. This was the first time that either party learned that Captain Munro had witnessed the incident and it also contradicted her earlier statements that she thought nobody saw the incident other than Major Ayotte, who she said saw the kiss. If Captain Munro had in fact witnessed it, then she would have known that prior to giving her statement to Warrant Officer Osmond on 2 February, 2018. Without having Captain Munro's testimony, the Court provided very little weight to this assertion. Further, the Court wondered why Sergeant Hepburn, who appeared to have a positive relationship with Captain Thibeault and was seated across from her chatting with Major Ayotte, would not have noticed her commanding officer braiding Captain Thibeault's hair. It would not be a fleeting scene that would go unnoticed.

Request for notes/diary

[56] The complainant testified in Court that she remembered making notes on the incident. She told the NIS, Sergeant Comeau, in January 2018 that she had taken notes on the incident in November 2017. When queried by defence, she said the note was something on her Canadian Forces Health Information System (CFHIS) from her social work meeting. Then she said that it was a note that was created when she went to visit the social worker. When challenged further, she said, "I made notes and then went to—this is when I did not know what to do about the situation, and so I decided, because I did not want to bring it forward right then and there, that I would go see social work, so that I would bring my information and sit with the .. to see if they had any advice on what I should do, while at the same time, telling them the events and what happened and the date in order so that she could write it in my constitution note in my CFHIS record, which is my health record." When asked if she brought a copy of the notes with her, she said "no" as she did not have access to it.

[57] When asked why she did not respond to the specific requests for disclosure by Warrant Officer Osmond on 2 February 2018 seeking the note (or notes), she stated that she did not remember being asked. When her memory was specifically refreshed by defence counsel, she said she did not remember the details. Then later, when asked by Warrant Officer Osmond if she had a diary, she said, "Kind of, yeah, in my CFHIS," but she then clarified under cross-examination that this comment did not imply that she had a diary. The complainant confirmed for the Court that she had jotted down notes, but it was not a diary per se. When it was brought to her attention that she offered to provide her notes to Warrant Officer Osmond by asking whether she needed them, she said she did not remember and then deviated from the question to explain why she did not provide access to her medical file. When cross-examined on the issue further she acknowledged that Warrant Officer Osmond had explained that her notes were valuable

because the notes would have been made closer to the incident. She was also reminded that she was asked for the notes again in February 2018, which she then referred to other notes in her statement that she did on her computer and printed out.

[58] In early December 2018, she had a teleconference with Warrant Officer Osmond and Major Gauvin when she was asked again for her notes and she told Warrant Officer Osmond that she had notes here and there and would try to get them together. Then, shortly thereafter, in January 2019, when queried again by the prosecution, she answered that she was not sure what notes they were looking for. Almost a year after being repeatedly asked for her notes, she then told the prosecution and Warrant Officer Osmond that the notes were destroyed while in Iraq, in a burn barrel while they all drank hot chocolate.

[59] It is particularly difficult for this Court to believe in the veracity of Captain Thibeault's testimony on this issue. There are just too many exceptions that she kept making to describe the notes in a different way. It was clear that throughout the investigation that she provided flippant responses to the serious inquiries made by both the MP and the prosecution and then attempted the same thing under both direct and cross-examination.

[60] Each response she provided appeared engineered to avoid personal accountability. It was of particular concern for this Court that despite being asked by the military police five times in an official investigation and the prosecution several times for copies of her notes, and having been given an explanation of their importance to the investigation, the complainant defied this request and then destroyed the copy that she had and made no effort to get another copy that she claimed was replicated in her medical file.

Professional medical concerns

[61] When two professional competency incidents were brought to her attention, such as moving the GlideScope equipment without approval, and the improper handover of a patient to Lieutenant(N) Ryan and a second one with Lieutenant(N) Richard, she pushed back. Despite consistent evidence given by several witnesses including Major Britt-Côté and Lieutenant(N) Ryan that explained the consequences of her conduct and seriousness of the professional issues that occurred, the complainant asserted that they were all false allegations.

Comments about defence counsel

[62] When questioned about concerns she expressed regarding the conduct of defence counsel during a teleconference with the prosecution, she denied that she had expressed any concern. When asked why she told the prosecution that defence was "dragging [her] name through the mud," and after being shown her statement, she clarified that her concern was nested in the fear of what would happen in court as she feared that the defence would challenge her credibility. When asked why she used the

past tense, she rationalized that there were already lies being told about her and she was worried about doing the trial because she thought it would also happen during the court martial. She stated that she does not want to be discredited further.

[63] It is important that all complainants understand that the court martial is the first time the prosecution's evidence is vigorously challenged and the accused puts forward his own defence. Vigorous cross-examination by the defence is not intended to harass or humiliate a complainant who comes forward. In fact, it is a necessary element of criminal proceedings. If cross-examination by the accused is not allowed, the evidence may not fairly be tested. The court is always mindful of the dangers in permitting cross-examination going too far and there are specific evidentiary rules that protect against this, however, cross-examination is the main tool for challenging testimony. In *R. v. Osolin*, [1993] 4 SCR 595, Cory J. reviewed the relevant authorities and, at page 663, explained why cross-examination plays such an important role in the adversarial process, particularly, though, of course, not exclusively, in the context of a criminal trial.

> There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. For example, it can demonstrate a witness's weakness of sight or hearing. It can establish that the existing weather conditions may have limited the ability of a witness to observe, or that medication taken by the witness would have distorted vision or hearing. Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. Cross-examination must be permitted so that an accused can make full answer and defence. The opportunity to cross-examine witnesses is fundamental to providing a fair trial to an accused. This is an old and well-established principle that is closely linked to the presumption of innocence. [References omitted.]

Relationship with Captain Munro

[64] The court martial was convened to try the accused of alleged inappropriate conduct with respect to the complainant. However, it quickly became clear that circumstantial evidence of an inappropriate relationship involving the complainant with another officer, Captain Munro emanated throughout the evidence. Relationships between military members are not prohibited; however, as recognized by witnesses, there are restrictions placed upon members when they are deployed outside of Canada.

[65] To be clear, the complainant was not on trial, nor was her relationship with Captain Munro; however, testifying before this Court under a solemn affirmation, the complainant had a responsibility to be honest and forthright in responding to all questions posed to her. It is an offence under the *NDA*, section 119 for any person, while under oath or solemn affirmation to give false evidence. On conviction for a section 119 offence, a person is liable to imprisonment for a term not exceeding seven years. Further, such a conviction leaves a member with a record under the *Criminal Records Act*.

[66] Under cross-examination, the complainant admitted to being good friends with Captain Munro and having received a drive with him to the golf course club house and the Warehouse. The Court noted that counsel did not once cross the line and ask the complainant any intimate personal questions regarding their relationship; however, the issue attracted concern for this Court with respect to the complainant's responses to questions that had a direct impact on the timeline that affected the events that relate to the charge before the court. When asked about her relationship with Captain Munro, the complainant was consistently evasive and her answers to most questions related to him were inconsistent with witness testimony and other evidence before the Court.

[67] For example, when asked why she travelled by car with Captain Munro to the golf course club house when almost everyone walked, she responded by telling the Court that most of the week she, Captain Munro and Lieutenant(N) Richard had spent a great deal of time playing cards and hanging out. When it was brought to her attention that Lieutenant(N) Richard was not with them at the club house, she confirmed that he had left before that week. When the complainant was asked to provide estimated times, her responses were misleading.

[68] For example, when asked under cross-examination why she was late getting to the club house, she told the Court they had a problem finding it. When asked why she spent so long in the car with Captain Munro before going into the Warehouse, she insisted they were in the car for no longer than ten minutes because they were debating whether or not to go in.

[69] After hearing other witness testimony and evidence, it became clear that the complainant's estimated timings for arriving at both the golf club as well as the Warehouse, were not consistent with the evidence as a whole. When challenged by defence, in a smooth and confident manner, she attempted to rationalize and explain inconsistencies.

[70] In terms of timelines, if the Court is to believe Captain Thibeault's testimony, she would have left the golf course club house after 10 p.m., arriving at the Warehouse around 10:10 p.m. She insisted that she and Captain Munroe had only stayed back in the car for a maximum of ten minutes. If the Court provides her a generous accommodation of time, she would have entered the Warehouse by 10:30 p.m.

[71] When asked in her statement how long she had been in the bar before Lieutenant-Colonel Jonasson sat down beside her, she responded that she had been in the bar for approximately 30 minutes, which would put her seated beside him in a booth around 11 p.m. She confirmed under cross-examination that she was in the bar for a maximum of two hours. She also confirmed that after the alleged incident, they left shortly thereafter. This timeline does not make sense, as the whole of the evidence suggests they all left the bar together after 1 a.m. Based on the complainant's testimony, this leaves two hours in her timeline unaccounted for. Clearly, her estimate is inaccurate in terms of where she spent her time.

[72] When questioned by defence counsel as to why she had been spending so much time with Captain Munro, she deflected the question by saying that herself, Sergeant Comdon, Warrant Officer Belanger, and Captain Munro had all been spending a lot of time together. Although evidence of the other witnesses suggested otherwise, she denied that anyone ever brought to her attention concerns about her not mingling with anyone other than Captain Munro. For example, while in Iraq, Captain Perrier, the senior nurse, testified that she specifically spoke to Captain Thibeault about this issue. She testified that she was concerned that Captain Thibeault was isolating herself too much from the Role 2 personnel and that she tried to include her in activities. However, Captain Perrier stated that Captain Thibeault chose to exclusively hang out with Captain Munro as she only ate and spent time with him. In response to the concerns raised, Captain Perrier stated the complainant told her that if Captain Munro was a female, nobody would care. Master Warrant Officer Short testified that while in Iraq, after seeing Captains Thibeault and Munro coming and going together continually in the Bongo truck, which he said they appeared to be using for their exclusive use, he intervened to limit its use as he was concerned about the perception.

[73] Once again, Captain Thibeault is not on trial nor is her relationship with Captain Munro. However, these specific instances raise concerns in terms of her credibility and reliability. In order to reconcile the evidence of the complainant with the evidence as a whole, with respect to the alleged incident that forms the subject matter of the charges before the Court, it must conclude that she remained in the car with Captain Munro for at least an hour, entering the Warehouse at approximately 11:30 pm. Based on her testimony, if she was in the bar for 30 minutes before she was seated, then it would have been around midnight when she was seated beside the accused. Since all of the witnesses stated that they did not leave the bar until after 1 am, then it would have left 60 minutes for conversations to unfold and the alleged incident to have occurred. This is consistent with the evidence of the Accused. The accused stated that he was not seated beside Captain Thibeault until after midnight and in the last hour before heading back.

Home leave travel assistance (HLTA)

[74] The Task Force Sergeant Major, Master Warrant Officer Short testified that he worked with Sergeant Hepburn in coordinating the HLTA requests and was responsible for staffing any changes, with the final approval by the DCO, Major Ayotte. Master Warrant Officer Short testified that Captain Munro had requested a change in his HLTA dates to coincide with the flights for technical assistance visits and for personal reasons which were not specified. He explained that when he entered Captain Munro's new dates into the HLTA chart, it became clear that the dates matched the same dates that Captain Thibeault would be proceeding on her HLTA.

[75] Sergeant Hepburn was the operations sergeant for the Canadian Task Force on Operation IMPACT and coordinated the planning and HLTA scheduling. She testified that both Captain Munro and Captain Thibeault submitted leave passes to travel to the same location on the same dates.

[76] There is absolutely nothing improper with service members taking their HLTA together, particularly since limitations on fraternization only apply in a theatre of operations. However, when defence counsel queried the complainant as to whether she had planned her HLTA with Captain Munro, she quickly denied it and avoided answering the question directly. When asked specifically if she had planned a trip to Florida, she calmly said that she was going to visit her family. When asked why Captain Munro had the same address on his leave pass, she intimated that she had no knowledge of this, then stated she did not have a leave pass and that it was likely he was going to visit his family there.

[77] Although the evidence of HLTA and her relationship with Captain Munro are not pivotal to the determination of the facts in this case, they are evidence of Captain Thibeault's ability to calmly refute and rationalize the truth in a self-serving way to avoid personal accountability.

[78] For these reasons, the Court found that Captain Thibeault's testimony on her relationship with Captain Munro was not forthright nor credible and as such, none of her evidence provided with respect to Captain Munro is reliable. Further, since two of the above incidents relate specifically to the timeline of the charge before the Court, none of her evidence on the timeline is reliable.

Summary of complainant's testimony

[79] It bothered the Court that the complainant very calmly and confidently asserted differing versions of the alleged incident without the slightest recognition of the apparent inconsistencies and contradictions. Her testimony reflected continual avoidance of responsibility and overall, when assessed against the evidence as a whole, the court found her testimony neither credible nor reliable.

Conclusion on the first charge

[80] As discussed above, the onus is on the prosecution to prove the offence as particularized. On this charge, the prosecution was obliged to prove, beyond a reasonable doubt, that Lieutenant-Colonel Jonasson pulled the hair of Captain Thibeault and kissed her. There was only one prosecution witness, the complainant, and this Court found that with respect to the incident before the court, she was neither credible nor reliable. As a result, in the opinion of this Court, the prosecution has not succeeded in proving its particulars beyond a reasonable doubt.

Additional observations

[81] Although the Court does not need to take a position on whether there was sufficient evidence to establish that Lieutenant-Colonel Jonasson ill-treated Captain Thibeault, I feel compelled to make the following observations.

(a) Firstly, if the evidence of Captain Thibeault had not raised a reasonable doubt, I would have proceeded to the test enunciated in *R. v. W.(D.)* as required. Based on the evidence of the accused, which I believed, and the application of the test, I would have acquitted.

(b) Further, as I discussed above, the determination of whether something amounts to ill-treatment of a subordinate is determined objectively by assessing the above definitions with regard to all the circumstances. If I believed the evidence of the complainant, I am of the opinion that the evidence described would not have met the threshold of "ill-treatment" of a subordinate. The complainant described the action of the accused as braiding her hair, combined with a gentle pull and a kiss on the cheek that lasted no longer than a second. Although the alleged conduct would be inappropriate, the court noted that the complainant did not testify to any abuse, threats or previous conduct that suggests that the alleged conduct amounted to cruelty or it exacerbated known sensitivities. Although a *NDA* section 95 offence is not reserved exclusively for physical contact, being "striking", particular care must be exercised not to broaden the nature of conduct that fits within it. To do so compromises the nature of the offence and when used in the context of unwelcome minor touching directed towards women, it creates mistrust and invites unintended consequences. The proof of a section 95 offence requires a component of cruelty in the conduct, which may be actualized where the senior ranked person disregards or takes pleasure in the pain or suffering of the lower ranked individual. This can occur when he or she knew or ought to have known that the intended conduct would not just be unwelcome, but that it amounted to downright meanness. For example, if the senior person had already been warned that certain conduct was unwelcome or it was done specifically to tantalize the junior member, or if as a senior member, he was aware that the Captain was suffering from post-traumatic stress disorder or some other known sensitivity that could be triggered by someone touching her hair, then strong arguments exist. Similarly, if there had been a prior pattern of conduct such as harassment or a prior incident that would have overly sensitized the complainant and the accused knew or ought to have known that his conduct would aggravate, then there may also be a basis. However, based on the discernable facts as recounted by the complainant, in this Court's opinion, the particulars as proven would be inappropriate, but absent additional evidence, would not rise to the level required to constitute ill-treatment of a subordinate.

[82] I have reasonable doubt that the facts support what is alleged in the particulars of charge number 1, and furthermore, even if the particulars were proven in evidence, although the conduct would be improper and might amount to a different service offence, the facts of the case would not support, beyond a reasonable doubt, that

Lieutenant-Colonel Jonasson ill-treated Captain Thibeault under section 95 of the *NDA*.

FOR ALL THESE REASONS, THE COURT:

[83] **FINDS** Lieutenant-Colonel Jonasson not guilty of the first and only charge remaining on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Major R. Gauvin

Lieutenant-Commander J.E. Léveillé, Defence Counsel Services, Counsel for Lieutenant-Colonel J.D. Jonasson