**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS**
**WASHINGTON NAVY YARD**
**WASHINGTON, D.C.**

**BEFORE**

**C.L. CARVER** **W.L. RITTER** **R.W. REDCLIFF**

**UNITED STATES**

**v.**

**Jonathan JONES**
**Sergeant (E-5), U.S. Marine Corps**

NMCCA 200001846 Decided 20 August 2004

Sentence adjudged 11 June 1999. Military Judge: J.F. Havranek. Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commanding General, Marine Corps Base, Camp Pendleton, CA.

Maj CHARLES HALE, USMC, Appellate Defense Counsel
LT LORI MCCURDY, JAGC, USNR, Appellate Government Counsel



RITTER, Senior Judge:

A military judge sitting as a general court-martial convicted the appellant, contrary to his pleas, of carnal knowledge, adultery (2 specifications), and indecent acts with a child under 16 years of age, in violation of Articles 120 and 134, Uniform Code of Military Justice, 10 U.S.C. §§ 920 and 934. The appellant was sentenced to a bad-conduct discharge, confinement for one year, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged.

We have carefully considered the record of trial, the appellant's seven assignments of error, and the Government's response. Except as noted below, we conclude that the findings and sentence are correct in law and fact and that no error materially prejudicial to the substantial rights of the appellant was committed. Arts. 59(a) and 66(c), UCMJ.

## Sufficiency of the Evidence

In three assignments of error, the appellant contends that the evidence is legally and factually insufficient to sustain his convictions for any of the charged offenses. We disagree, and for convenience, will combine them for discussion.

The test for legal sufficiency is whether, considering the evidence in the light most favorable to the Government, any rational fact finder could have found that all the necessary elements of the offense beyond a reasonable doubt. *United States v. Turner*, 25 M.J. 324, 325 (C.M.A. 1987)(citing *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)). The test for factual sufficiency is whether, after weighing all the evidence in the record of trial and making allowances for not having personally observed the witnesses, this court is convinced of the appellant's guilt beyond a reasonable doubt. *Turner*, 25 M.J. at 325.

The evidence in this case is largely undisputed. The appellant, who was married, met AP, who was then 13 years old and the daughter of another Marine, in late October 1998. They met after AP made a seductive gesture at the appellant as he drove past. The appellant struck up a conversation with AP, during which he asked her about her age. AP lied, telling him she was 17 years old. The appellant gave AP and her 14-year-old female friend BK a ride to the base store, and the appellant and AP exchanged telephone numbers. They spoke or had chance encounters on a couple occasions over the next several weeks. On 4 January 1999, AP called the appellant at work and arranged a meeting. The appellant picked her up near the store on base, where AP was waiting with a different 14-year-old female friend. AP and her friend had just finished school, so AP left her backpack with the friend as she rode away with the appellant. The appellant took AP to a Quonset hut on base, where the two engaged in consensual sexual intercourse. The appellant then drove AP back to the store, where he dropped her off.

On the evening of 11 January 1999, AP contacted the appellant by telephone and made similar arrangements for the next day. During that conversation, AP introduced the subject of age, first asking the appellant whether "14 years old was too young for him." Record at 69. She then told the appellant that she was really 16, not 17. The appellant asked AP what year she was born, to which she replied, "1979." That year would have made AP 19 or 20 at the time. Recognizing her mistake, AP then asked the appellant to trust her about her age. Despite this exchange, on 12 January 1999, the appellant picked up AP and BK at the base store, dropping BK off at another house on base.[1] The appellant

[1] The charge sheet alleges that the second sexual intercourse and the indecent act occurred on 11 January 1999, but the testimony established that these events actually occurred on 12 January 1999. The charge sheet was not modified to conform to the evidence.

and AP went to the same Quonset hut and again engaged in consensual sexual intercourse. While the appellant was driving AP back to BK's location, he digitally penetrated her vagina. This act was also consensual.

At trial, the military judge found the appellant not guilty of carnal knowledge for his sexual intercourse with AP on 4 January 1999, finding the appellant reasonably believed AP's assertion that she was 17 years old. However, the military judge found the appellant guilty of adultery on both 4 and 12 January, and for carnal knowledge and committing an indecent act on 12 January 1999.

A. Carnal Knowledge

With regard to the offense of carnal knowledge on 12 January 1999, the appellant maintains that he reasonably believed that AP was at least 16 years old. The military judge addressed this contention, *sua sponte*, by making the following comments regarding the findings:

> The court found a reasonable doubt as to the knowledge of the -- by the accused, that is, the defense met its burden in establishing that on that first occasion the accused had an honest and reasonable doubt [sic] as to the age of [AP]; that is, that he honestly and reasonably believed her to be 17 based upon her assertion. In the interim, between those dates, conversations took place between the two them [sic] in which her age was questioned and discussions about her age occurred.
>
> Those discussions, *coupled with my observation of the two other young ladies that [AP] associated with* lead me to believe that at that point the accused was not being reasonable in his belief as to the age of [AP].

Record at 128-29 (emphasis added).

We agree with the military judge's conclusion. AP's inconsistent comments about her age on 11 January 1999 should have caused a reasonable person to doubt that she was at least 16 years old. In addition, the military judge had the opportunity to observe the demeanor and appearance of AP and her two young friends, which are extremely relevant factors in making this determination. We are confident that the evidence, viewed in the light most favorable to the prosecution, is legally sufficient for the carnal knowledge conviction based on the second instance of sexual intercourse. Moreover, recognizing that the trial court saw and heard these three witnesses, we ourselves are convinced beyond a reasonable doubt that the appellant did not have an honest and reasonable belief that AP was at least 16 years of age when they engaged in sexual intercourse on the second occasion. *See* Art. 66(c), UCMJ.

B. Adultery

The appellant contends that the Government failed to offer any evidence of a lawful marriage, and that the two adultery offenses were therefore unproven. The Government did not offer documentary evidence of the appellant's marriage during the merits phase of the trial. However, AP's testimony indicated that the appellant wore a wedding ring, and that, in several conversations, he told AP his marriage was failing and generally discussed his wife and children.

Although we think the better practice in an adultery prosecution is to offer as evidence a marriage certificate or service record document, there is no *per se* rule requiring it. In a prosecution for adultery, "it is now well settled that the marriage of the accused may be proved by his admissions, oral or in writing." *United States v. Rener*, 37 C.M.R. 329, 334 (C.M.A. 1967)(citations omitted); *see also United States v. Cyrus*, 46 M.J. 722, 726-27 (Army Ct.Crim.App. 1997)(acknowledging different methods of proof of marriage, including reputation testimony). There is thus no issue of legal sufficiency based solely on the method of proof of the appellant's marital status.

AP testified that the appellant wore a wedding ring and talked about his wife and children. The appellant also told AP that he would be seeking a divorce in the near future. As a result of the appellant's admissions, AP knew only to contact the appellant at work, rather than at home, and their liaisons took place at discrete locations on base. The appellant offered no evidence in any way rebutting or challenging these facts. In this context, we are satisfied that the evidence established the fact of the appellant's marriage, and that the evidence was both legally and factually sufficient to prove beyond a reasonable doubt that the appellant committed adultery by having sexual intercourse with AP.

C. Indecent Act

With regard to the offense of indecent acts with a child, the appellant contends that the appellant's act of putting his finger in AP's vagina while in a moving vehicle was not indecent because it was "discrete and not open and notorious." Appellant's Brief of 5 Mar 2002 at 17. The military judge found the act of fondling and penetrating AP's vagina was indecent because, at that point, the appellant had reason to believe that AP was under 16 years of age and because the act occurred in a public area while driving aboard the base. While we view the record as insufficiently developed to establish that the act was done in a public setting, we find the act indecent on the basis of the victim's age.

The appellant fondled AP while driving around on a military installation. The act may well have been sufficiently "public" in nature to be service-discrediting conduct even had the

appellant reasonably believed that AP was at least 16 years old. *See United States v. Sims*, 57 M.J. 419, 422 (C.A.A.F. 2002)(finding that otherwise lawful sexual conduct may be indecent if committed in public); *United States v. Carr*, 28 M.J. 661, 663 (N.M.C.M.R. 1989)(holding that acts are "open and notorious" when performed under such circumstances that they are *reasonably likely* to be seen by others). However, we see nothing in the record that clearly indicates the act occurred during daylight hours and in a setting where it would be reasonably likely to have been seen by others. We thus agree with the appellant that the evidence is insufficient to prove the act was done in an "open and notorious" fashion.

But proof of the offense of indecent acts with a child under Article 134, UCMJ, does not require a showing that the conduct was public in nature to be service-discrediting. On the contrary, we are confident that the act of an adult male putting his finger in a 13-year-old girl's vagina for the purpose of satisfying his or her lust is conduct that "has a tendency to bring the service into disrepute" or "lower it in public esteem." MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), Part IV, ¶ 60c(3). Moreover, since we have found the appellant failed to meet his burden to establish that he honestly and *reasonably* believed AP to be under 16 years of age at the time of the second act of intercourse, the mistake of fact defense obviously does not apply to an offense committed *after* the second act of intercourse. Accordingly, we find the evidence legally and factually sufficient to support the finding that the appellant committed an indecent act with a child.

**Testimony Regarding AP's Sexual History**

The appellant contends that the military judge erred by excluding testimony regarding AP's sexual knowledge and experience. Specifically, the defense sought to question several of AP's friends and the mother of one of those friends regarding statements made by AP, outside the appellant's presence and unknown to him at the time of the offenses, about her level of sexual experience. The appellant contends that such testimony would reinforce evidence pertaining to his belief that AP was at least 16 years of age, because her level of sexual prowess and sophistication was above what one would expect of a younger girl. While neither party has cited any authority directly on point for this proposition, and we have found none, we disagree with the appellant's contention.

As a preliminary matter, we note that the appellant apparently conceded at trial and on appeal that Military Rule of Evidence 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.), applies to the offense of carnal knowledge, which is not by definition a "nonconsensual sexual offense." *See* MIL. R. EVID. 412(e). This is not yet a settled question among the service courts. *Compare United States v. Banker*, 57 M.J. 699, 702-703 (A.F.Ct.Crim.App. 2002), *rev. granted*, 58 M.J. 245 (C.A.A.F.

2003)(holding that an adultery charge triggers the protections of MIL. R. EVID. 412); *United States v. Johnson*, 17 M.J. 517 (A.F.C.M.R. 1983)(holding MIL. R. EVID. 412 applied to carnal knowledge charges); and *United States v. Stirewalt*, 53 M.J. 582, 589 (C.G.Ct.Crim.App. 2000)(holding that MIL. R. EVID. 412 applies only to nonconsensual sexual conduct). Since neither party has briefed this issue and it does not affect our decision in this case, we decline to decide it here.

We do not believe the proffered evidence meets minimal thresholds of relevance, let alone the stricter standard under MIL. R. EVID. 412. "Relevant evidence" must make a fact at issue more or less probable. *See* MIL. R. EVID. 401. The proffered evidence, as described in the record, consists only of statements made by AP to others outside the presence of the appellant. We view any evidence of the victim's prior sexual history *not known by the appellant* at the time of the offenses to be irrelevant to the affirmative defense that he reasonably believed AP to be at least 16 years of age. The nexus the appellant attempts to make between these statements and the reasonableness of his belief that AP was over 16 is far too attenuated to permit their admission. There is no evidence in the record that AP even engaged in the underlying conduct; rather, there are only hearsay statements proffered by counsel that she *said* she had. Thus, even assuming that evidence of sexual prowess would be relevant and admissible to bolster a mistake of fact defense, the proffered evidence in this case would not establish that fact.

Moreover, to the extent that AP's statements to third parties might be marginally relevant to show a level of sexual sophistication, we can find no possibility of prejudice by their exclusion. Consent was not at issue in this case, and there was other evidence before the military judge concerning AP's sexual sophistication. By her own admission, AP initiated contact with the appellant by making a sexually suggestive gesture. She further admitted telling the appellant about her prior sexual exploits, such as having sexual intercourse with another person before and engaging in "phone sex." The military judge thus had ample evidence of AP's level of sexual knowledge to consider, along with her appearance and demeanor, in determining the reasonableness of the appellant's belief as to her age. The evidence of statements of sexual prowess AP might have made to third parties would be cumulative at best.

We review a military judge's decision on admission of evidence for a clear abuse of discretion. *See United States v. Johnson*, 46 M.J. 8, 10 (C.A.A.F. 1997). The judge's decision must be "arbitrary," "clearly unreasonable," or "clearly erroneous" to be reversed on appeal. *United States v. Travers*, 25 M.J. 61, 62 (C.M.A. 1987). We find no abuse of discretion in this case.

**Pretrial Punishment**

The appellant also contends that he was subjected to illegal pretrial punishment due to the conditions of his pretrial confinement. We agree.

Whether a pretrial detainee suffered unlawful punishment is a mixed question of law and fact that qualifies for independent review. *See United States v. Pryor*, 57 M.J. 821, 825 (N.M.Ct.Crim.App. 2003), *rev. denied*, 59 M.J. 32 (C.A.A.F. 2003). The burden of proof is on the appellant to show a violation of Article 13, UCMJ. *See United States v. Mosby*, 56 M.J. 309, 310 (C.A.A.F. 2002). Article 13 prohibits two things: (1) the intentional imposition of punishment on an accused before his or her guilt is established at trial, i.e., illegal pretrial punishment, and (2) arrest or pretrial confinement conditions that are more rigorous than necessary to ensure the accused's presence at trial, i.e., illegal pretrial confinement. *See United States v. Inong*, 58 M.J. 460, 463 (C.A.A.F. 2003) (citations omitted).

The "punishment prong" of Article 13 focuses on intent, while the "rigorous circumstances" prong focuses on the conditions of pretrial restraint. *See Pryor*, 57 M.J. at 825 (citing *United States v. McCarthy*, 47 M.J. 162, 165 (C.A.A.F. 1997)). Conditions are not deemed "unduly rigorous" if, under the totality of the circumstances, they are reasonably imposed pursuant to legitimate governmental interests. *See McCarthy*, 47 M.J. at 168; *United States v. Singleton*, 59 M.J. 618, 621 (Army Ct.Crim.App. 2003). When an arbitrary brig policy results in particularly egregious conditions of confinement, the court may infer that an accused has been subject to pretrial punishment. *See United States v. Mazer*, 58 M.J. 691, 702 (N.M.Ct.Crim.App. 2003). However, if the conditions of pretrial restraint were reasonably related to a legitimate government objective, an appellant will not be entitled to relief. *See McCarthy*, 47 M.J. at 167; *see also United States v. Sittingbear*, 54 M.J. 737, 741 (N.M.Ct.Crim.App. 2001).

It is undisputed that the appellant spent 27 days in "special quarters" at the Camp Pendleton Base Brig, based upon initial allegations of rape and kidnapping that were unsubstantiated at the initial review hearing and never formally charged. "Special quarters" involved being placed in "maximum" vice "medium" custody, which had numerous consequences to the appellant, as detailed in his unrefuted testimony on the motion during the sentencing hearing. It is also undisputed that the appellant did not cause any disciplinary problems while in the brig that would affect his confinement status, and was later released from pretrial confinement and allowed to travel out-of-state for a family funeral prior to his court-martial. Finally, the appellant's civilian defense counsel sent three letters via facsimile to the brig, demanding a review of his confinement custody clarrification status and challenging the unsubstantiated

allegations considered by the initial review officer. He further raised the issue by timely motion at trial.

The sole information regarding the appellant's alleged offenses at the initial review hearing came from the Naval Criminal Investigative Service (NCIS) agent assigned to the case. This agent testified at trial that at the time of the initial review hearing, she had nothing more than rumor and innuendo to suspect that sexual intercourse occurred, or that any such contact occurred through the use of force. At that time, neither the appellant nor AP had admitted to having sexual intercourse. In fact, the NCIS agent believed that AP was fond of the appellant and minimized the extent of their relationship to protect him. In addition, the only evidence of an alleged kidnapping was AP's statement that she was unable to unlock the door of the Quonset hut, and that after unlocking the door for her, the appellant told her to "wait a little while" before leaving the room.

We find these facts insufficient to establish probable cause for the offenses of rape and kidnapping. *See* RULE FOR COURTS-MARTIAL 305(d), MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.). The military judge found that "the government believed that *the possibility existed* that force may have been used," Record at 184, but that finding falls short of probable cause. Even the NCIS agent acknowledged that she was "leaning more to the side of consensual" sex in evaluating the appellant's conduct. Record at 166.

Brig officials unknowingly exacerbated this problem by placing the appellant in special quarters based upon the "seriousness of the offenses." Even assuming that the Brig was initially justified in relying upon the faulty information from the initial review officer, they were placed on notice that there was a problem after the appellant's civilian counsel sent repeated requests for a new hearing. Instead, the appellant was kept in special quarters for nearly a month without any credible evidence that he was either a flight risk or a violent offender. *See* R.C.M. 305(h)(2)(B). Although prison officials should be "accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline," *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), we cannot uphold the decision to place the appellant in special quarters under the circumstances in this case.

Based upon the weakest of evidence, the appellant was suspected of rape and kidnapping. Based on those suspected offenses, the appellant was presumed to be both violent and a flight risk, and placed in special quarters. We find that his initial conditions of confinement were far more rigorous than necessary to ensure his presence at trial, in violation of Article 13, UCMJ. Accordingly, we will grant the appellant an additional two days of confinement credit for each day the

appellant spent in special quarters. *See United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).

**Remaining Assignments of Error**

We have considered but find no merit in the appellant's contention that the charges were improperly referred for trial because the charges were not forwarded by an appropriate special court-martial convening authority. *See United States v. Hundley*, 56 M.J. 858, 859 (N.M.Ct.Crim.App. 2002). We also find no merit in the appellant's contention that the charges were multiplicious or unreasonably multiplied.

**Conclusion**

Accordingly, the findings of guilty and sentence, as approved below, are affirmed. The appellant is credited with an additional 54 days toward his sentence, pursuant to *United States v. Suzuki*, 14 M.J. 491 (C.M.A. 1983).

Senior Judge CARVER and Judge REDCLIFF concur.

For the Court

R.H. TROIDL
Clerk of Court