



COURT MARTIAL

Citation: *R v Klein*, 2014 CM 4008

Date: 20140911

Docket: 201410

Standing Court Martial

Victoria Courtroom
Esquimalt, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant(N) G.M. Klein, Offender

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

REASONS FOR FINDING

(Orally)

[1] Lieutenant(N) Klein is charged with one count under s. 130 of the *National Defence Act* for assault contrary to s. 266 of the *Criminal Code of Canada*. The particulars of the charge are as follows: "In that he, on or about 10 October 2013, at or near Canadian Forces Base (CFB) Esquimalt, British Columbia, did commit an assault on Edward Gale."

THE EVIDENCE

[2] Following the court's decision to dismiss a defence motion challenging the constitutionality of s. 130 of the *National Defence Act*, the prosecution presented its case, which consisted of Exhibits 3 to 10, introduced by consent, the most important of which were Exhibit 3, a "Statement of Admitted Facts," Exhibit 4, a colour photograph showing the area of the main gate at Her Majesty's Canadian (HMC) Dockyard on CFB Esquimalt and Exhibit 5, an audio-video recording provided by the accused to the investigators and taken from a camera mounted on the handlebars of his bicycle,

showing the entire ride from his residence to HMC Dockyard on the morning of 10 October 2013, including the period of time when the alleged assault took place. In addition to consenting to the admission of these exhibits in evidence, the defence confirmed to the court that the audio-video recording is an accurate and fair representation of the facts as they unfolded. Both counsels have relied heavily on that exhibit for the presentation of their evidence and the court considers it to be a key piece of evidence for its deliberations.

[3] After introducing these exhibits the prosecution called four witnesses:

- (a) the first is the alleged victim of the assault, Commissionaire Edward Gale who described his role with the Canadian Corps of Commissionaire performing security guard duties at CFB Esquimalt for over 10 years, including the morning of 10 October 2013. He described that his job is to stand at a kiosk located in the middle of the roadway and check vehicles and cyclists wishing to gain entry into HMC Dockyard. He is checking for proper vehicle permits, identification cards and safety equipment for bicycles. He stated that his duties also include traffic control when special circumstances require direction to be given to motorists or cyclists. He was shown the video recording at Exhibit 5 which he was seeing for the first time. He described the events as they were shown to him, at times confirming his recollection of the events with the video. He explained the reasons for the things he had done that morning and his intentions in doing those things. The court finds that Commissionaire Gale was a credible witness. Although frailties in his recollection of events could have been in issue of concern, any divergence between his recollection and what was seen and heard in the video recording were for the most part de-conflicted during his testimony. The court finds that Commissionaire Gale acted throughout the incident with professionalism, in good faith and without any contravention of the orders applicable to the performance of his duties.

The next three witnesses called by the prosecution were essentially bystanders who saw various portions of the events as they unfolded:

- (b) Lieutenant-Commander Holland testified that he had taken the bus that morning and was walking towards HMC Dockyard on the sidewalk located to the south of the roadway. He had noticed the presence of Lieutenant(N) Klein on the road earlier as he is known to him as a fellow submariner and they had cycled to work together on occasions. He saw Lieutenant(N) Klein on his bicycle waiting to get access to HMC Dockyard and noticed an altercation underway with a commissionaire but could not hear what was said as he was initially too far. He did see Lieutenant(N) Klein shove the commissionaire with one hand and saw the commissionaire step back. As he was closer by then he could hear Lieutenant(N) Klein yell his name and his unit shortly after the

encounter. As Lieutenant-Commander Holland proceeded into HMC Dockyard, he changed his intended destination to go report what he had seen;

- (c) Commissionaire Neuman is a parking enforcement commissionaire at CFB Esquimalt. At the time of the altercation subject to this charge, he was exiting HMC Dockyard in a vehicle and heading for the visitor's parking lot north of the roadway and near the kiosk. He is visible in the audio-video recording both driving his vehicle and later upon exiting it in the parking lot. His recollection of events is sketchy. He could not describe the exact movement of the persons involved and has not seen Lieutenant(N) Klein push Commissionaire Gale;
- (d) Mr Eric Smethurst is a DND civilian employee who was proceeding to HMC Dockyard using the sidewalk to the north of the roadway. He can be seen on the video recording as he was quite close throughout the action. He had an impressive recollection of events which he relayed to the court before being shown the video recording for the first time at the very end of his testimony, for the purposes of identifying who he was on the recording. He recalled the verbal exchanges between Lieutenant(N) Klein and Commissionaire Gale and witnessed the physical contacts between them. I find this witness to be reliable as to what he observed but I do not take into account the perceptions that he expressed in his testimony. Also, he could not recall exactly the position of the hands of Lieutenant(N) Klein when he pushed Commissionaire Gale. Mr Smethurst explained that he reported the incident following a discussion with his supervisor once he arrived at work about what had transpired at HMC Dockyard's gate that morning.

[4] Each of these prosecution witnesses introduced in evidence an annotated copy of the photograph at Exhibit 4 showing their exact location when they witnessed the events. Those were produced as Exhibits 11 to 14.

[5] A defence was produced and consisted of the testimony of the accused, Lieutenant(N) Klein. He testified that he became upset after having been stopped by the commissionaire despite having priority at the four way stop immediately before the entrance to HMC Dockyard. He stated that he felt unsafe as there were trucks coming out of the visitor's parking lot without stopping and he did not know what was going on at the time. He said that he had shown his ID card to Commissionaire Gale as he was in the middle of the intersection. As the traffic started moving again he said he proceeded at slow speed through the gate, heard the commissionaire say "stop" and was stopping when all of a sudden he was hit in the area of his left shoulder. He described the contact as sufficient to cause him to fall to his right, said that he took his foot out of the pedals to avoid falling and as he regained balance he was still not sure of what had happened but saw Commissionaire Gale right in front of him. He then pushed him away with his left hand in order to make space. He qualified his push to Commissionaire Gale as

being very gentle while describing feeling muscle pain to his shoulder from the initial contact with Commissionaire Gale, adding that as a result of that contact he found out upon exiting the commissionaire's building, building D-214, that the rear wheel of his bicycle was damaged, making the bike un-rideable.

[6] The court finds the testimony of Lieutenant(N) Klein to be essentially consistent with the testimony of other witnesses as to the facts as they transpired. However, the court is of the view that Lieutenant(N) Klein tended to minimize the force he used against Commissionaire Gale and maximize the force previously used by Commissionaire Gale against him. His testimony to the effect that he gently pushed Commissionaire Gale is not consistent with the significant movement backward by Commissionaire Gale that can be observed on the audio-video recording. Also, the court finds that his testimony to the effect that the force used by Commissionaire Gale made his bicycle un-rideable to be not credible. The audio-video recording shows him proceeding over a fair distance following his interaction with Commissionaire Gale having to veer right while gathering enough speed to have to use the rear brakes so as to stop at the door of building D-214. Lieutenant(N) Klein was offered the opportunity to explain himself on this issue in cross-examination but did not. The court also finds that his testimony about feeling unsafe around the trucks and in finding his balance to be inconsistent with his admission in cross-examination about being an experienced cyclist who had used cycling shoes for about 30 years.

THE FACTS

[7] The facts of this case as it relates to what transpired in the morning of 10 October 2013 are in large part undisputed. This is not a case where the court has to prefer the version of one witness over another in its efforts to find out the facts as to what happened. These are the essential facts as accepted by the court: on the early morning of 10 October 2013 the accused, Lieutenant(N) Klein, set out on his bicycle from his residence to HMC Dockyard, on CFB Esquimalt. The ride was entirely uneventful until Lieutenant(N) Klein stopped at the last intersection prior to entering HMC Dockyard where a four way stop regulates traffic and the right of way in what is an unusually large and untypical intersection. As a black car proceeded through ahead of him, he stopped at the white "stop" line where he could see on his right a white van advancing out of the visitor's parking lot into the intersection. Once the white van was through, it would have been Lieutenant(N) Klein's turn to proceed through the intersection. He did release his breaks and started moving. However at this point Commissionaire Gale walked from his position at the kiosk near the gate to HMC Dockyard to position himself at the centre of the intersection, blocking Lieutenant(N) Klein's progression and waving four pick-up trucks through from the parking lot so that they would be positioned immediately behind the white van while proceeding through the gate and beyond. It is at this point that Lieutenant(N) Klein is heard uttering a profanity and complaining that he would report Commissionaire Gale to the cops, apparently for his failure to recognize who has the right of way in a four way stop.

[8] The court is of the view that from Lieutenant(N) Klein's perspective, it could have looked like four pick-up trucks had gone out of the parking lot out of turn to the detriment of his position in the traffic line going into HMC Dockyard. However, the court finds that the actions of Commissionaire Gale in taking the steps he took to allow escorted vehicles to proceed as a convoy were entirely reasonable. As Commissionaire Gale explained in his testimony, he walked away from the kiosk as he had to wave through a number of vehicles from the visitor's parking lot adjacent to the gate so they could proceed together as a convoy. In order to do so, he had to order a cyclist, Lieutenant(N) Klein, to hold at the stop line. He did so with hand signals. These actions are clearly visible in the video recording at Exhibit 5 and the reasons for them were adequately explained to Lieutenant(N) Klein by Commissionaire Gale in a professional and polite manner. What occurred could be characterized as a misunderstanding between Lieutenant(N) Klein and Commissionaire Gale. It was not going to be the last one.

[9] For a moment afterwards both Lieutenant(N) Klein and Commissionaire Gale are in close proximity in the middle of the intersection. Lieutenant(N) Klein continues to be verbally confrontational as Commissionaire Gale waves the four pick-up trucks through for some time as the traffic at the gate and beyond crawled to a halt. Commissionaire Gale approaches close to Lieutenant(N) Klein and appears to look him in the eyes. A few seconds later the traffic starts moving again. The white van and the four pick-up trucks are through the intersection and proceeding in line to enter HMC Dockyard. Commissionaire Gale walks back on the left hand edge of the incoming roadway to regain his position at the kiosk. Lieutenant(N) Klein starts to move on his bicycle. Being slightly faster than Commissionaire Gale on foot, he is in the process of overtaking Commissionaire Gale and proceeding through the gate when Commissionaire Gale yells "stop" three times. Lieutenant(N) Klein immediately applies both breaks on his bicycle and comes to a stop.

[10] It is shortly before the bicycle came to a complete stop that physical contact occurred between Commissionaire Gale's left hand or arm and Lieutenant(N) Klein's shoulder. This contact is not visible nor audible from the audio-video recording and Lieutenant(N) Klein testified that he had not seen it. Commissionaire Gale testified that he saw Lieutenant(N) Klein was not stopping so he put his arm out while yelling "stop" to make Lieutenant(N) Klein stop. Lieutenant(N) Klein ran into his hand, Commissionaire Gale pushed a little bit and immediately pulled his hand out. Mr. Smethurst is the only one of the bystanders who saw that contact. He testified that the commissionaire had his arm out in a gate-like fashion and that the cyclist, Lieutenant(N) Klein, ran into it. He added that he perceived that the cyclist was not stopping, a perception that is inaccurate on the basis of the video showing both brake levers being activated at the time of the contact. Lieutenant(N) Klein was almost stopped when the contact occurred.

[11] What happened is in all likelihood the result of a second misunderstanding between Lieutenant(N) Klein and Commissionaire Gale that morning. Given the close proximity between the two men in the intersection earlier, Lieutenant(N) Klein may

have reasonably believed that Commissionaire Gale had verified his ID. From Commissionaire Gale's perspective he was then busy with directing traffic and careful about staying out of the way of the vehicles turning from the parking lot. It was reasonable for him to intend in verifying ID cards at his usual location near the kiosk when that exceptional traffic would have been through.

[12] What is important in relation to the charge before the court is what happened immediately after the bicycle was stopped. The court finds that Lieutenant(N) Klein moved his left hand from the brake lever of his bicycle to Commissionaire Gale's right shoulder, giving a push or shove. Commissionaire Gale is seen on the audio-video recording recoiling back but immediately regaining his balance. Following that second contact Commissionaire Gale removed his gloves to take a pad and pen and note Lieutenant(N) Klein's particulars for his report. Again, harsh words were exchanged. Afterwards Lieutenant(N) Klein proceeded on his bicycle not to enter HMC Dockyard but rather to proceed to building D-241 located on the right side of the roadway to discuss the situation with Master Warrant Officer Commissionaire Larry Krutz.

THE LAW

The elements of the Offence of Assault under s. 266 of the *Criminal Code*

[13] The elements of identity of the accused as the person who committed the offence on the date and in the place described in the charge sheet were admitted in the "Statement of Admitted Facts" produced as Exhibit 3.

[14] In addition the prosecution had the burden of proving each of the following essential elements of the offence beyond a reasonable doubt:

- (a) that Lieutenant(N) Klein applied force to Commissionaire Gale;
- (b) that Lieutenant(N) Klein intentionally applied the force;
- (c) that Commissionaire Gale did not consent to the force that Lieutenant(N) Klein applied; and
- (d) that Lieutenant(N) Klein knew that Commissionaire Gale did not consent to the force that he applied.

The defence of self-defence

[15] Even if the court is satisfied beyond a reasonable doubt that all of these essential elements of the offence of assault are present, the court must also consider whether the defence of self-defence raised by the accused in this case should be considered. Indeed these were two specific occurrences of physical contact between Lieutenant(N) Klein and Commissionaire Gale. The first contact involved Commissionaire Gale using his hand to restrain Lieutenant(N) Klein's progression through the gate, touching him in the

area of Lieutenant(N) Klein's left shoulder. The second occurred immediately thereafter, when Lieutenant(N) Klein pushed Commissionaire Gale with his left hand causing the latter to step back.

[16] If on the basis of those facts it is open for Lieutenant(N) Klein to raise the defence of self-defence, the applicable law, codified at s. 34 of the *Criminal Code*, provides that Lieutenant(N) Klein is not guilty of assault if all of the following three conditions were present:

- (a) Lieutenant(N) Klein believed on reasonable grounds that force was being used against him;
- (b) Lieutenant(N) Klein committed the act for the purposes of defending or protecting himself from the use of force; and
- (c) Lieutenant(N) Klein's act was reasonable in the circumstances.

[17] Lieutenant(N) Klein is not required to prove that he has acted in self-defence. The prosecution must prove beyond a reasonable doubt that he did not.

[18] Unless the prosecution proves beyond a reasonable doubt that at least one of the conditions for self-defence was absent, a further matter must be considered by the court in the circumstances of this case.

[19] Indeed self-defence does not apply if Commissionaire Gale, who used the initial force, was authorized by law to do so, unless Lieutenant(N) Klein believed on reasonable grounds that Commissionaire Gale did not have that lawful authority.

[20] Therefore, unless one of the conditions for self-defence was absent, the court must consider whether the prosecution proved beyond a reasonable doubt that Commissionaire Gale was required or authorized by law to do so in the administration of enforcement of the law. If so, the prosecution is also required to prove beyond a reasonable doubt that Lieutenant(N) Klein did not believe on reasonable grounds that Commissionaire Gale was acting unlawfully. If the answer to both questions is "yes" then self-defence cannot apply in the circumstances of this case and Lieutenant(N) Klein will be found guilty.

ANALYSIS

The elements of the offence of assault

[21] The court finds that the prosecution has proven beyond a reasonable doubt that an assault was committed by Lieutenant(N) Klein when he pushed Commissionaire Gale on 10 October 2013.

[22] Indeed, the evidence of witnesses called by the prosecution and the evidence of Lieutenant(N) Klein himself in direct examination is overwhelming to the effect that he applied force to Commissionaire Gale intentionally, without Commissionaire Gale's consent. He confirmed that Commissionaire Gale appeared shocked to have been pushed, which convinces the court beyond a reasonable doubt that Lieutenant(N) Klein knew that Commissionaire Gale did not consent to the force that he applied.

[23] In fact, the defence tested the prosecution's witnesses on the elements of the offence of assault as it should, but in presenting its evidence did not challenge that an assault had been committed. Defence counsel's submissions did not contest at all that an assault had been committed by Lieutenant(N) Klein, a position entirely consistent with Lieutenant(N) Klein's testimony.

The defence of self-defence

[24] Defence counsel submissions were focussed on arguing that Lieutenant(N) Klein was acting in self-defence when he pushed Commissionaire Gale and that he should consequently be acquitted. The prosecution did not argue that self-defence had no air of reality on the facts of this case. Evidence was heard to the effect that the touching by Commissionaire Gale immediately before the "push" by Lieutenant(N) Klein was more than trivial. Consequently, the court finds that self-defence is a live issue.

[25] The question of fact to be resolved is whether or not the facts of this case support the defence of self-defence presented by the accused. As explained earlier, the prosecution must prove beyond a reasonable doubt that Lieutenant(N) Klein did not act in self-defence; namely, that one of the conditions for self-defence was absent.

[26] The first condition found at subparagraph 34(1)(a) of the *Criminal Code* is whether the prosecution has proven beyond a reasonable doubt that Lieutenant(N) Klein did not believe on reasonable grounds that force was being used against him. If it has, the defence of self-defence fails.

[27] The evidence is to the effect that force had been applied to Lieutenant(N) Klein no more than three seconds before he, in turn, applied force on Commissionaire Gale. The prosecution argued that the physical contact initiated by Commissionaire Gale did not amount to "force" being applied on Lieutenant(N) Klein as it amounted simply to directional touching which did not amount to "force" given that Commissionaire Gale was performing his duties in a professional manner, absent any connotation of anger, revengefulness, rudeness or insolence. Having consulted the authorities cited by the prosecution in support of this position, I am not convinced beyond a reasonable doubt that on the facts of this case, especially the context of the entire altercation where both persons involved are in movement, are equivalent to the facts revealed in *R v Bochar*, where a school principal reached out and took hold of the complainant's right elbow with the intention of directing her to his office for a meeting. The court therefore rejects this interpretation.

[28] Another aspect that the court must consider, however, is the requirement, from the wording of paragraph 34(1)(a) that the person pleading self-defence believes that force is "being used." And in French we read "*la force est employée contre elle.*" This requires an element of immediacy as indeed, where the attack or its threat has "passed" so that the accused is no longer in danger, then self-defence is no longer available. The authority for this proposition is the case of *R v Clegg*, [1995] 1 Cr. App. R. 507 at page 513.

[29] On the facts of this case, although there had been force applied to the accused prior to him responding by pushing Commissionaire Gale, the court is of the view that any use of force or threat or use of force had passed by the time Lieutenant(N) Klein committed the assault. Indeed, Commissionaire Gale had yelled "stop" three times as Lieutenant(N) Klein was slowly overtaking him on his bicycle and entering HMC Dockyard passing in front of the kiosk where Commissionaire Gale was in the process of re-positioning himself to resume checking persons, bicycles and vehicles entering dockyard by the one lane entryway. Upon hearing "stop" Lieutenant(N) Klein operated both brake levers on his bicycle to stop. The initial contact would have occurred at the moment when Lieutenant(N) Klein was almost stopped at the white line before the kiosk. Upon completely stopping a fraction of a second later, Lieutenant(N) Klein had his right foot on the road and moved his left hand from the left brake lever to push Commissionaire Gale on the shoulder. At that point there were no ongoing threats as Lieutenant(N) Klein had stopped, complying with the order given by Commissionaire Gale. He was stopped with his right foot on the ground, the same foot he had placed on the ground every time he had stopped throughout his bicycle ride that morning.

[30] Despite this court's finding of fact to the effect that any use of force or threat of use of force had passed by the time Lieutenant(N) Klein committed the assault, it may still be that Lieutenant(N) Klein believed an attack was still ongoing. It is important to remember that the proper test to be applied is not related to the court's finding of what happened but rather the accused's belief about what was happening at the time. The burden on the prosecution is to prove beyond a reasonable doubt that Lieutenant(N) Klein did not believe on reasonable grounds that force was being used against him. Indeed, Lieutenant(N) Klein is entitled to be mistaken in his perception as long as his mistake is reasonable.

[31] Would it be reasonable for Lieutenant(N) Klein to believe he was the victim of a continuing assault by Commissionaire Gale? Lieutenant(N) Klein testified that he had 30 years' experience as a cyclist and had gone through HMC Dockyard's gate hundreds of times. Despite the speed at which the events took place, and accepting that Lieutenant(N) Klein may have been reasonably mistaken as to the need to show his ID card given his proximity to Commissionaire Gale moments before in the middle of the intersection, the court is of the view that it would have been entirely unreasonable for Lieutenant(N) Klein to believe that he was the object of an ongoing attack or use of force from Commissionaire Gale. He has not been grabbed for unknown reasons by a stranger in a dark back alley at night. Lieutenant(N) Klein was touched by a

commissionaire on duty who was yelling at him to stop and whose job it is to verify ID from a kiosk located at the entrance to HMC Dockyard, a task requiring cyclists to be stopped. Indeed, once he heard "stop", Lieutenant(N) Klein applied the brakes on his bicycle to stop. It was rush-hour traffic at the gate and a number of persons were going about entering or exiting HMC Dockyard by foot, in cars or on bicycle. In these circumstances, it was entirely unreasonable for Lieutenant(N) Klein to believe that he was the object of a continuing assault by Commissionaire Gale.

[32] The court is of the view that the prosecution has proven beyond a reasonable doubt that Lieutenant(N) Klein did not believe on reasonable grounds that force was being used against him. Therefore, on that ground alone, the defence of self-defence must fail.

[33] The court adds that even if the court agreed with the defence to the effect that a past assault so close in time to the act allegedly done in self-defence necessarily meets the requirement of subparagraph 34(1)(a) of the *Criminal Code*, the court is nevertheless of the view that the prosecution has proven beyond a reasonable doubt that Lieutenant(N) Klein did not commit the act for the purpose of defending or protecting himself from the use of force as required by paragraph 34(1)(b) of the *Criminal Code*.

[34] Lieutenant(N) Klein's testimony is to the effect that he pushed Commissionaire Gale to make space. Yet he was by then in balance with his right foot on the ground. If Commissionaire Gale was too close, Lieutenant(N) Klein had other options than to push him. He could simply step back.

[35] Indeed as recognized by the Supreme Court of Canada in *R v Lavallée* [1990] 1 S.C.R. 852, the law of self-defence is designed to ensure that the use of defensive force is really necessary. It justifies the act because the defender reasonably believed he had no alternative but to repel the attacker.

[36] Furthermore, as decided by the Ontario Court of Appeal in *R v F.(D.S.)* (1999), 132 C.C.C. (3d) 97, self-defence proceeds from necessity and the need for self-preservation and must not be used as a cloak for aggression, retaliation or revenge.

[37] This law is valid today despite the 2013 legislative changes to the *Criminal Code* provisions governing self-defence.

[38] On that ground also, the defence of self-defence must fail.

FOR THESE REASONS, THE COURT:

[39] The court finds the accused, Lieutenant(N) Klein, guilty of the first and only charge remaining on the charge sheet.

Counsel:

Major J.G. Simpson, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Major L. Boutin, Directorate of Defence Counsel Services
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