COURT MARTIAL

Citation: *R. v. Sketcher,* 2016 CM 4014

Date: 20160922
Docket: 201554

Standing Court Martial

Canadian Forces Base Trenton
Trenton, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.J. Sketcher, Accused

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

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Corporal Sketcher stands charged under the Code of Service Discipline in relation to two different events, both having occurred at or near Canadian Forces Base (CFB) Trenton. First, on 25 September 2014, it is alleged that he knowingly uttered a threat to Corporal Doiron to cause death or bodily harm to Corporal Doiron and to the chain of command. In relation to that incident, he is charged with one count under section 130 of the *National Defence Act* for uttering threats, contrary to section 264.1(1) of the *Criminal Code* and an alternative count under section 86 of the *National Defence Act* for using provoking speeches toward a person subject to the Code of Service Discipline, tending to cause a quarrel. As for the second incident, it is alleged to have occurred on 28 January 2015 in the course of a medical appointment with Dr. Snow. Corporal Sketcher is charged under section 130 of the *National Defence Act* for uttering a threat to cause bodily harm to Master Warrant Officer Vanwesten, contrary to section 264.1(1) of the *Criminal Code*.

THE EVIDENCE

[2] The evidence consists of the oral testimony of the three witnesses called by the prosecution during the trial. The defence elected not to call any evidence. In relation to the first incident, Master Corporal Deslauriers and Corporal Wade testified as to what they have heard of the discussion between Corporals Sketcher and Doiron on 25 September 2014. In addition to providing evidence as to the words that have been spoken, both witnesses provided elements of context on the circumstances in which the words attributed to Corporal Sketcher were uttered. As for the second incident, the prosecution called Dr. Snow who related her interaction of 28 January 2015 with the accused, as well as explained the initial perception she had of the words she heard and how that perception changed the next day, leading to a complaint she then made to the military police.

[3] Master Corporal Deslauriers, as second in command (2 i/c) of his section, was the immediate supervisor of Corporal Sketcher in September 2014, in the rank of corporal. He said that he recalled a conversation taking place on the shop floor of his workplace on CFB Trenton involving Corporal Doiron and the accused, Corporal Sketcher. He said he heard Corporal Doiron make a negative comment about Corporal Sketcher, complaining about Sketcher's work ethics stating that, given Corporal Sketcher's attitude, he would not hire him as a worker and if he was his employee, he would just let him go. He could not recall what triggered that comment, but said that Corporal Sketcher appeared unhappy with Doiron's comment and replied right back that "if [he] was a civvy and was not kept up to Army's regulations, [he] would get [him]," referring to Corporal Doiron. Master Corporal Deslauriers said Corporal Sketcher appeared to be serious when he said these words, based on what was said, the tone of voice he used and his facial expression. He took these comments seriously based on the fact that he had heard Corporal Sketcher say on two or three occasions previously that when he was "pissed off" enough about his place of work, he would "show up and shoot people." He also knew Corporal Sketcher had weapons based on conversations they had in the past and based on having seen one of Corporal Sketcher's antique weapons. Asked about what he did once the words had been said, Master Corporal Deslauriers testified that he found the situation to be uncomfortable and tense. As he was not part of the conversation, he decided to leave the area.

[4] In cross-examination, Master Corporal Deslauriers was presented with a prior statement he made immediately following the incident and subsequently provided to police. He adopted what he had affirmed in that statement when differences with his evidence in direct examination were noted. First, he admitted that Corporal Doiron's words would have been "If I were Commander of the Army, I would kick you out." As for the reply by Corporal Sketcher, the prior statement revealed that Master Corporal Deslauriers stated he did not clearly hear the words spoken by the accused and that it was either "kill you" or "get you." He said that the gist of it was "I'll get you." Regarding the content of his previous statement, Master Corporal Deslauriers admitted that he did not quote the words said by Corporal Doiron, instead implying that Corporal

Doiron had made a joke. In cross-examination, he admitted, that indeed, Doiron was "taking a poke" at Corporal Sketcher with his comments. As for his belief that Corporal Sketcher had many firearms, Master Corporal Deslauriers admitted that it was speculation as he only ever saw one of Corporal Sketcher's firearms, an antique weapon fired by black powder.

[5] For his part, Corporal Wade testified that he was also present when conversations took place on the shop floor on 25 September 2014 involving Corporals Doiron and Sketcher, in the presence of Master Corporal Deslauriers. He can't recall how the conversation developed, but said he remembered a comment by Corporal Doiron directed at Corporal Sketcher to the effect that it would then be good if the lazy people could be taken out and booted out of the military. He heard Corporal Sketcher respond "then I'll be a civvy and I can come back and kick the crap out of anyone here that I wanted to." He said Corporal Doiron's reaction was to widen his eyes. He said that following that comment, the conversation was stalled and those gathered went their separate ways. When asked by the prosecutor about who those comments were targeted to, he said he could not say that someone was targeted specifically, but said that Corporal Sketcher appeared to take offence to the words uttered by Corporal Doiron and was essentially saying "back off." He said the demeanor of Corporal Sketcher was defensive and Corporal Doiron appeared to have been taken aback a bit by the reply by Corporal Sketcher and did not appear to be taking it as a joke.

[6] On cross-examination, Corporal Wade agreed to the suggestion that Doiron had taken a verbal jab at Corporal Sketcher with his statement regarding lazy people, adding that Corporal Sketcher took offence to the comment made to him and replied that he could "come back and kick the crap out of anyone that [he] wanted." Yet, he did not say he would "kill" or "kick the crap out of" Corporal Doiron or anyone in the chain of command. Corporal Wade agreed to the suggestion that it was a general statement, the gist of it being "right back at you." He agreed it was nothing more than banter between two colleagues who did not like each other. He did not feel there was any intention that the comments be taken seriously or made to intimidate anyone. In re-examination, Corporal Wade was referred to a portion of his statement of 25 September 2014 in which he stated on the day of the event, "Corporal Doiron did not appear to believe this comment by Corporal Sketcher was meant in a joking manner and I was not completely sure it was a joke either."

[7] The final witness called by the prosecution was Dr. Snow who testified in relation to the second incident of 28 January 2015, the subject of the third charge. She said that Corporal Sketcher had come to her office to request that she endorse a recommendation by a civilian specialist for 60 days of sick leave to be granted to Corporal Sketcher ahead of testing to be performed in relation to workplace allergies. Dr. Snow did not agree with the request to grant 60 days sick leave and discussed the potential alternatives to a total exclusion from the workplace, which lead to Corporal Sketcher expressing how dissatisfied he was with the manner in which he was being treated by his superior, eventually naming Master Warrant Officer Vanwesten. She testified that Corporal Sketcher was incredibly angry about many things which he all

attributed to Master Warrant Officer Vanwesten, including administrative sanctions consecutive to the incident of 25 September 2014, which resulted in him not being able to be posted to another unit as he was by then on counselling and probation. In the course of what was a lengthy discussion, Corporal Sketcher stated on three occasions that he would like to "punch [Master Warrant Officer Vanwesten] in the head." Dr. Snow stated that she was not initially concerned by the words themselves given that she had heard patients hold this kind of language before in her office, to blow steam in a safe place, within the confines of a clinical consultation. She considered these words as "angry talk," a way for Corporal Sketcher to say that he hated Master Warrant Officer Vanwesten. Yet, given the high level of anger displayed and focussed on one individual, she did ask Corporal Sketcher if he intended to act on his words. Corporal Sketcher responded in the negative, stating that acting in such a way would simply facilitate Master Warrant Officer Vanwesten's efforts to destroy his career. She did not feel at that point that she needed to take further action as he stated he did not intend to act on what he had said, was quite lucid and had not been diagnosed with any mental illness following a recent evaluation. She interpreted Corporal Sketcher's words as him "just blowing off steam." The meeting concluded with Dr. Snow placing Corporal Sketcher in a permanent medical category because of what she perceived as a refusal to facilitate the accommodations offered by his chain of command. Corporal Sketcher was unhappy with that outcome; he who had come to see Dr. Snow for approval of the 60 days leave recommended by his doctor was now facing the prospects of a compulsory medical release from the Canadian Armed Forces.

[8] Dr. Snow stated that she came back to the office early the next day to complete and sign her notes. At that point, a member of the clinic staff reported to her that Corporal Sketcher, upon leaving the previous day, had commented aloud that he would punch Master Warrant Officer Vanwesten in the head until he was "in a coma" and said he was "going home and drink away the day." That statement concerned Dr. Snow, as Corporal Sketcher was no longer voicing his frustration within the confines of a clinical consultation. She decided to obtain information from records and other professionals who had been in contact with Corporal Sketcher. She was informed that he had bad drinking habits, was collecting guns and was socially isolated. Based on that information, she decided to inform police about the words uttered by Corporal Sketcher during the previous day's meeting and eventually got in contact with Master Warrant Officer Vanwesten to inform him of the situation.

THE CHARGES OF UTTERING THREATS

Essential elements to be proven

[9] The essential elements of the first and third charges under section 130 of the *National Defence Act* for uttering threats contrary to section 264.1(1) of the *Criminal Code* are as follows:

(a) identity of the accused;

(b) date and place of the offence;

(c) the prohibited act (*actus reus*): that the accused knowingly uttered or conveyed a threat of death or bodily harm; and

(d) the fault element (*mens rea)*: that the words uttered were meant to convey a threat. This element is proven either by establishing that the accused:

i. intended to intimidate; or

ii. intended that the threats be taken seriously.

[10] The elements of identity, time and place of the offence are not in issue, neither is the fact that Corporal Sketcher would have knowingly uttered the words attributed to him. What is in issue is whether these words constitute a threat to cause death or bodily harm and, if so, whether it has been established that Corporal Sketcher intended to intimidate or intended that the threats be taken seriously.

The applicable law

[11] As for that first issue of the prohibited act, the question of whether the words attributed to Corporal Sketcher constitute a threat is a question of law to be decided on an objective standard, meaning that the nature of the threat must be looked at as it would be by the ordinary reasonable person in the circumstances in which the words were uttered. That reasonable person is one who is objective, fully informed of the circumstances of the case, right-minded, dispassionate, practical and realist. The prosecution is not required to prove that the intended recipient of the threat was aware of it, that he or she was intimidated by it or took it seriously. Further, the words do not have to be directed towards a specific person; a threat against an ascertained group of people is sufficient.

[12] As for the second issue, the fault element is subjective. What matters is what Corporal Sketcher actually intended: did he intend, by the words he uttered, to intimidate or to be taken seriously? This question will be determined based on inferences drawn from all of the circumstances. It is not necessary to prove that the accused intended that the words be conveyed to the recipient or to the subject of the threat. It is important to remember that whether the accused specifically intended to intimidate anyone is not required for the fault element to be made out, as long as he or she intended the threats to be taken seriously. Indeed, as stated by the Supreme Court in *R. v. McRae*, 2013 SCC 68:

> Threats are tools of intimidation and violence. As such, in any circumstance where threats are spoken with the intent that they be taken seriously, even to third parties, the elements of the offence will be made out.

[13] Underlying the analysis of those two issues and indeed any charge by a court is the constitutional requirement for the prosecution to prove its case beyond a reasonable doubt. Indeed, the accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that before an accused can be convicted of an offence, the judge must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence.

[14] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. It is not sufficient for me to believe the accused is probably guilty or likely guilty. In those circumstances, the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand, I must keep in mind that it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so.

Analysis of the first charge

[15] The first charge of uttering threats has been particularized as follows:

> "In that he, on or about 25 September 2014, at or near Canadian Forces Base Trenton, did knowingly utter to Cpl Doiron a threat to cause death or bodily harm to Cpl Doiron and to the chain of command."

[16] The Supreme Court stated in *McRae*, at paragraph 11, that the starting point of the analysis should always be the plain and ordinary meaning of the words uttered. This is proving difficult in this case because in their testimony, the two witnesses called by the prosecution did not agree as to what words were said by Corporal Sketcher. Indeed, Master Corporal Deslauriers heard Corporal Sketcher say to Corporal Doiron that "if [he] was a civvy and was not kept up to Army's regulations," he would either "kill" or "get" Corporal Doiron. However, he is not entirely certain of which of the two expressions was used. For his part, Corporal Wade heard Corporal Sketcher say to Corporal Doiron that he "could come back and kick the crap out of anyone that [he] wanted." There is a significant difference in the version of these two witnesses as to the exact words spoken by the accused. There is also a difference between the testimony and the charge as particularized; no witnesses heard the chain of command being mentioned and no evidence was introduced to assist me in ascertaining what that group of people was composed of at the time of the alleged offence on 25 September 2014.

[17] There is, therefore, some doubt regarding the words alleged to have been uttered by Corporal Sketcher on 25 September 2014. That being said, this is not a case of conflicting testimony where one or more witnesses would have heard the accused utter clearly threatening words and another group of witness present at the time would have heard the accused utter clearly non-threatening words. Here, both witnesses related

words that may constitute a threat. However, as agreed by the prosecution, there are reasons to analyze the context in which these words were uttered as they may have a less serious meaning. Indeed, in some cases, the context reveals that words that would, on their face, appear threatening may not constitute threats within the meaning of the *Criminal Code*, while in other cases, contextual factors might have the effect of elevating to the level of threats words that would, on their face, appear relatively innocent. (*McRae*, paragraph 11).

[18] The most important element of context that I must consider is the fact that the words attributed to Corporal Sketcher were in direct and immediate response to words uttered by Corporal Doiron. Both witnesses agreed that Corporal Doiron made a comment implying that Corporal Sketcher was lazy and either said "If I were the Commander of the Army, I would kick you out." or "It would be good if the lazy people could be taken out and booted out of the military." I am not surprised that a corporal who is the target of such a comment from a colleague in the presence of another colleague and his immediate supervisor feels the need to reply, yet the words used in reply by Corporal Sketcher were highly inappropriate. However, my role is not to rule on whether a given behaviour is inappropriate. It is to determine whether those words make up the criminal offence charged, beyond a reasonable doubt. In arriving at that determination, my consideration of the words uttered by Corporal Doiron has nothing to do with provocation. It relates to the proper context for the alleged threats and to my obligation to apply a reasonable person standard in light of all of the circumstances.

[19] What strikes me from the evidence is the word "if" that both witnesses heard in the statement by Corporal Doiron, as in "if I were Commander of the Army" and "if the lazy people could be taken out." The reply they remembered hearing also included "if" or the more direct reply "then", as in "If I were a civvy" and "then I can come back." In determining the meaning that a reasonable person would attach to Corporal Sketcher's reply, it is appropriate to consider the meaning that same person would attach to Corporal Doiron's initial comment. That comment, regardless of the version chosen, is a statement of an extremely far-fetched hypothesis. The odds of Corporal Doiron becoming Commander of the Army or of the invention of a means to detect and take out lazy people from the Army would appear minute to any reasonable person. In that context, the odds of Corporal Sketcher becoming a civilian as a result of the materialization of what Corporal Doiron alluded to would also appear minute. This is not a case of conditional threats. Corporal Sketcher did not say he would do something once he became a civilian. There is no evidence he had any plans to become a civilian on 25 September 2014. In fact, there is evidence he intended to stay in the military as he was then seeking a voluntary occupational transfer. The words attributed to him did not suggest that force could be used if a certain person did or did not do anything or if a plausible state of affairs materialized.

[20] Corporal Doiron did not testify, but I doubt the words he used were meant to be taken literally. It is more likely that he was expressing an opinion about Corporal Sketcher's work ethics and his preference that people like him not be part of the Army. It seems to me that in replying, Corporal Sketcher played into the hypothesis initiated

by Corporal Doiron. The words he chose to use should not, in the circumstances, be taken literally.

[21] I have also considered the other circumstances testified to by the witnesses. Master Corporal Deslauriers provided neither context nor details regarding previous comments by Corporal Sketcher to the effect that he was going to come in and shoot people. His preoccupations concerning the possession of firearms by Corporal Sketcher were, in my opinion, exaggerated. I find that Corporal Wade's assessment of the exchange as banter between two Army colleagues who did not like each other to be more in line with what a reasonable person would conclude about the words uttered.

Conclusion on the first charge

[22] As a result, I am left with a reasonable doubt as to whether a reasonable person aware of the context of the conversation during which Corporal Sketcher uttered the words attributed to him would have perceived them as a threat. Consequently, I find that the prohibited act of the first charge has not been proven beyond a reasonable doubt. There is no need to analyze the fault element. Corporal Sketcher cannot be found guilty of that first charge.

Analysis of the third charge

[23] The third charge for uttering threats has been particularized as follows:

> "In that he, on or about 28 January 2015, at or near Canadian Forces Base Trenton, did knowingly utter to Lieutenant Colonel Snow a threat to cause bodily harm to Master Warrant Officer VanWesten."

[24] In relation to that charge, there was only one person present to hear these words. The evidence of Dr. Snow is accepted as to what was said. Dr. Snow testified that Corporal Sketcher said on three occasions during his consultation with her that he "would like to punch [Master Warrant Officer Vanwesten] in the head." The prosecution submits that these words clearly constitute a threat. Given that there is no reason to believe that they had a secondary or less obvious meaning, the prosecution argues the analysis should end there as far as the fault element is concerned. For its part, the defence submits that even if the words would, on their face, appear threatening, I must look at the context, specifically that the words were uttered in the privacy of a doctor's office in the course of a lengthy discussion.

[25] I do believe that accepting the words uttered at face value could lead to an injustice for the accused. This is not a charge where words were uttered in the course of an altercation, directly at the person who is the target of the threats. Corporal Sketcher was referring to a superior, in the course of what was described by Dr. Snow as a very lengthy conversation which covered, in part, the issue of the accommodations consented to by Corporal Sketcher's superiors in relation to his medical condition, on which Dr.

Snow and Corporal Sketcher did not see eye to eye. This is a case where there are reasons to believe that the words uttered may have had a secondary meaning.

[26] In her testimony, Dr. Snow provided the general context of the 28 January 2015 meeting with Corporal Sketcher, mentioning in general terms what was discussed, including, of course, the fact that Corporal Sketcher had stated three times that he "would like to punch [Master Warrant Officer Vanwesten] in the head." However, she did not provide any specific context for the utterances of these words. I have not been informed of what was being discussed precisely on the three occasions the words attributed to Corporal Sketcher were uttered. I have no precise information as to the tone or volume of voice used and what Corporal Sketcher would have said immediately before or after uttering the alleged threats.

[27] What I do have, however, is the opinion that Dr. Snow formed as to the nature of these words. As recognized by the Supreme Court at paragraph 15 of *McRae*, witness opinions are relevant to the application of the reasonable person standard; however, they are not determinative, given that one's personal opinion does not necessarily satisfy the requirement of the legal test, which is whether the words uttered would be considered as threats by the ordinary reasonable person, in all the circumstances.

[28] Dr. Snow stated in her testimony, both in direct and cross-examination, that she had to interpret the words uttered by Corporal Sketcher, to the effect that "he would like to punch [Master Warrant Officer Vanwesten] in the head," in their context. In her office on 28 January 2015, she considered those words to be "angry talk", a way for Corporal Sketcher to state that he hated Master Warrant Officer Vanwesten and to blow off steam, as she has seen patients do before, within the confines of a clinical consultation.

[29] Dr. Snow also testified that, given the high level of anger displayed by Corporal Sketcher which was focussed on one individual, she decided to ask Corporal Sketcher if he intended to act on his words. My interpretation of her evidence is that Dr. Snow was then making sure that her initial assessment was accurate. She was also attempting to assess the risk that could be posed by Corporal Sketcher in the future. Given the response given by Corporal Sketcher, which was a coherent, consequence-based explanation as to why it was undesirable for him, career-wise, to assault a superior, she did not feel that any other action was required.

[30] As stated, Dr. Snow's opinion is not determinative, but there is no other evidence which could lead me to believe that a reasonable person would have come to a different opinion as to whether Corporal Sketcher uttered a threat on 28 January 2015, based on the circumstances at the time.

[31] I am not disregarding the evidence of Dr. Snow to the effect that her views on the nature of the words uttered by Corporal Sketcher changed the following day. She explained fully in her testimony why she came to reconsider the issue. Essentially, she was informed by the front desk clerk at her office that Corporal Sketcher, upon leaving

the previous day, had commented aloud that he would punch Master Warrant Officer Vanwesten in the head until he was "in a coma" and said he would "go home and drink away the day." She testified that although the words uttered then were no different than those Corporal Sketcher had uttered to her in her office, the context of stating those words aloud to medical clinic staff, within earshot of patients in the waiting room, was completely different.

[32] I disagree with the continuum theory advanced by the prosecution in its argument. Even if the information related to Dr. Snow on 29 January had the effect of altering her opinion of the nature of the words uttered to her the previous day, it does not constitute a circumstance relevant to my task of assessing the nature of those words. As she said herself, the information received on 29 January constituted a new circumstance. That circumstance was relevant to a very different task that she undertook to perform starting on the morning of 29 January, namely assessing the risk posed by Corporal Sketcher in the future. It is in that sense that her view changed. She became worried and placed her efforts into performing a fuller assessment of the risk posed by Corporal Sketcher, not only to Master Warrant Officer Vanwesten, but to himself and possibly others, including herself, as she had not given him what he wanted in the course of their meeting the previous day. She consulted mental health files and obtained information about bad drinking habits, a passion for guns to the point of going into debt and social isolation. She discussed with other professionals, including a psychiatrist. During those consultations, she considered whether a "Form 1" would be required to essentially hospitalize Corporal Sketcher against his will. All of that information, including the hearsay evidence relating to what is alleged to have been uttered at the reception area of the clinic on 29 January, was admitted in evidence as part of the narrative, but it is important to remember that there are no charges before the court relating to that alleged utterance. The information gained by Dr. Snow cannot be considered a circumstance relevant to her assessment of the words uttered in her office that are the object of the third charge. Neither Dr. Snow nor a reasonable person hearing Corporal Sketcher's words on 28 January 2015 had access to the information subsequently obtained.

Conclusion on the third charge

[33] I am left with a reasonable doubt as to whether a reasonable person aware of the context of the conversation during which Corporal Sketcher uttered the words attributed to him in Dr. Snow's office on 28 January 2015 would have perceived them as a threat. Consequently, I find that the prohibited act of the third charge has not been proven beyond a reasonable doubt. There is no need to analyze the fault element, but if there was, the reply of Corporal Sketcher to Dr. Snow's inquiry about his intention would be determinative in my conclusion that the fault element had not been made out. On both the prohibited act and the fault element, Corporal Sketcher cannot be found guilty of the third charge.

THE ALTERNATIVE CHARGE OF USING PROVOKING SPEECHES TENDING TO CAUSE A QUARREL

[34] Turning now to the second, alternative charge under section 86, of the *National Defence Act*, for using provoking speeches tending to cause a quarrel. The particulars of that charge read as follows:

> "In that he, on or about 25 September 2014, at or near Canadian Forces Base Trenton, said to Cpl Doiron "if I were not chained to the military, I would kill you and everyone in the chain of command" or words to that effect."

[35] This charge relates to the same words related to the court by Master Corporal Deslauriers and Corporal Wade in their testimony. As for the first charge, the elements of identity, time and place of the offence are not in issue. The fact that the speeches were directed at Corporal Doiron, a person subject to the Code of Service Discipline, is beyond argument.

[36] It is admitted that Corporal Sketcher would have knowingly uttered the words attributed to him. Yet, the defence argues that the fault element or *mens rea* of the offence requires the application of a subjective test relating to whether the accused intended to provoke with his speeches. This is a departure from previous statements of the elements of the offence at courts martial such as in *R. v. Donald*, 2012 CM 4022, where Judge Perron identified the fault element of the offence as being whether the words were uttered intentionally. Defence counsel argued that the behaviour intended to be caught by section 86 is the deliberate attempt at provoking someone. The prosecution suggests an equally convincing argument to the effect that those subject to the Code of Service Discipline are responsible for the words they utter willingly and, if those words are found to be objectively provocative in nature, then the offence under section 86 of the *National Defence Act* is made out. The defence did not present an extended analysis bolstered by legal authorities in support of its argument. In the circumstances, I am reluctant to modify what is a long-standing understanding of the elements of this offence, especially that I don't need to on the facts of this case.

[37] The parties agree as to the prohibited acts or *actus reus* that must be proven. The following two essential elements must be determined objectively, that is, on the basis of a reasonable person standard, in light of all of the circumstances:

(a) Whether Corporal Sketcher used provoking speeches; and

(b) Whether those speeches tend to cause a quarrel.

[38] The remaining issue is whether the *actus reus* is present in the circumstances of this case, that is whether Corporal Sketcher used provoking speeches which tend to cause a quarrel. To understand the requirements, it is useful, as counsel advised, to look at the ordinary meaning of the key words in each of these elements:

(a) "Provoking speeches" are those which provoke; that is, stimulate a reaction or emotion, typically a strong or unwelcome one, in someone.

(b) A "quarrel" has been defined as an angry argument or disagreement.

[39] Despite the agreement of counsel as to how the conduct must be assessed, the parties do not entirely agree as to the kind of conduct that should be captured by the offence of using provoking speeches, contrary to section 86 of the *National Defence Act*. The defence is of the view that mere disagreements should not be covered by the offence. The provoking speeches must be of the kind to cause an objectively reasonable person to either engage in an angry exchange or disagreement or to cause a disturbance. In other words, the defence invites me to look beyond the word "quarrel" to import from its definition the adjective "angry."

[40] I find this approach attractive. I believe that frank discussions and voicing of disagreement between colleagues subject to the Code of Service Discipline should not be discouraged by the application of penal sanctions. This accords with the Note to *Queen's Regulations and Orders for the Canadian Forces* article 103.19, to the effect that charges should not be laid indiscriminately under section 86 of the *National Defence Act* for mere isolated squabbles (In French,"*simples chamailleries isolées*.") Yet, what tends to provoke a quarrel needs to be assessed in all of the circumstances. There are times and places for arguments and the standard of what is acceptable to a reasonable person must be adapted to the circumstances. Sometimes, causing an argument may be detrimental to discipline and worthy of penal sanctions in light of the specific disciplinary needs applicable at the time of an alleged offence. I believe the conduct in this case should be assessed on the basis of the following questions:

(a) Did Corporal Sketcher utter words which would be perceived by a reasonable person to be of the type to stimulate a strong or unwelcome reaction or emotion?

(b) Would those words cause an ordinary person to engage in an angry argument or disagreement?

Analysis

[41] As for the first question, I believe that either the words "If I was a civvy and was not kept up to Army's regulations, I would get or kill you" related by Master Corporal Deslauriers or the words "then I'll be a civvy and I can come back and kick the crap out of anyone here that I wanted to" related by Corporal Wade are of the type which would be perceived by a reasonable person to be of the type to stimulate a strong or unwelcome reaction or emotion. These are very inadequate words indeed, even in the circumstances in which they were uttered, namely, in response to the insulting words uttered by Corporal Doiron.

[42] As for the second question, the considerations I expressed in relation to the first charge are especially applicable on the issue of whether the words uttered would cause an ordinary person to engage in an angry argument or disagreement. Indeed, the words attributed to Corporal Sketcher were in direct and immediate response to words uttered by Corporal Doiron to the effect that Corporal Sketcher was lazy. Corporal Doiron's initial comment stated a far-fetched hypothesis which was not meant to be taken literally. In replying, Corporal Sketcher played into the hypothesis initiated by Corporal Doiron and used words which did not specifically address the point made by his colleague and were not meant to be taken literally. By talking back to Corporal Doiron, Corporal Sketcher, at most, participated in a quarrel which had already been started. As he was clearly not a civilian and he was not to become one in the foreseeable future, I am not convinced his provocative words were of a nature to elevate the level of anger in the ongoing quarrel. His words did not invite any aggressive action or reply and, in fact, those words closed the discussion and everyone present went their own way shortly thereafter.

Conclusion

[43] In all of these circumstances, therefore, I am left with a reasonable doubt as to whether the words uttered by Corporal Sketcher would cause an ordinary person to engage in an angry argument or disagreement. Consequently, Corporal Sketcher cannot be found guilty of having used provoking speeches tending to cause a quarrel.

FOR THESE REASONS, THE COURT

[44] Finds you not guilty of the three charges on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Captain M.L.P.P. Germain

Lieutenant Commander B.G. Walden and Major A.H. Bolik, Defence Counsel Services, Counsel for Corporal D.J. Sketcher