



## COURT MARTIAL

**Citation:** *R. v. Yanchus*, 2016 CM 1014

**Date:** 20160815

**Docket:** 201535

Standing Court Martial

Canadian Forces Base Esquimalt  
Victoria, British Columbia

**Between:**

**Her Majesty the Queen**

- and -

**Commander Yanchus J.A., Accused**

**Before:** Colonel M. Dutil, C.M.J.

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### **REASONS FOR FINDING**

(Orally)

#### **Introduction**

[1] Commander Yanchus is charged with three offences, namely one count of disobedience of a lawful command, contrary to section 83 of the *National Defence Act*, one count of conduct to the prejudice of good order and discipline, contrary to section 129 of the Act, and one count of drunkenness, contrary to section 97 of the Act.

#### **The evidence**

[2] The evidence consists of the following:

- (a) the testimonies, in order of appearance before the court, of Leading Seaman J. Lawrence; Captain(N) John Wilson; Petty Officer 2nd Class William Lafontaine; Master Seaman Damian Cayer; Master Seaman Leblanc, and Commander Yanchus, the accused at this court martial; and

- (b) the facts and matters for which the court has taken judicial notice under section 15 of the *Military Rules of Evidence* including the contents of, but not of the publication or sufficiency of notification of, the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) and the Royal Canadian Navy (RCN) Ships Standing Orders (SSO) AL9, change 1, Chapter 2, section 2101 (Abuse of Alcohol).

**The facts**

[3] The events that led to the charges before the court took place on 25 June 2014 onboard Her Majesty's Canadian Ship (HMCS) *Calgary* near Hawaii, alongside Pearl Harbour, during the multinational exercise called Rim of the Pacific (RIMPAC) 14. RIMPAC is a large international maritime exercise comprised of nations with an interest in the Pacific Rim region. It takes place every two years and it includes army, air and naval forces. It involved over twenty nations and forty-five warships. Senior members of the Canadian Armed Forces held key leadership positions during RIMPAC 14. HMCS *Calgary* was one of the Canadian ships deployed for that exercise and it was her first major exercise after being the first Canadian frigate to benefit from a full modernization. As such, she would be the subject of significant interest from other countries and dignitaries and the ship command team had been advised that she would be often used as the Canadian flagship since the Maritime Component Commander during RIMPAC was a Canadian naval officer. Therefore, HMCS *Calgary* would play a major role for Canada during that exercise and she would also have a busy schedule in hosting visitors, including on Canada Day. Captain(N) John Wilson, who held the rank of Commander at the time of the events, was the commanding officer of that ship, i.e. the ship's captain. Commander Yanchus, who held the rank of Lieutenant-Commander at the time of the events, was the Executive Officer (XO) and Chief Petty Officer First Class L'Espérance was the ship's Coxswain. These three persons formed the ship's command team.

[4] During the transit to Hawaii, through San Diego, the ship would conduct serialized programmes, gunnery exercises, briefings and other activities. It would be done in interaction with ships and personnel of other nations, including U.S. naval forces, and Chilean forces, for example. This cross-pollination meant that some Canadian personnel of various ranks would be embedded on foreign ships and vice-versa. Cross-pollination had been used successfully in the past, including when personnel spoke different languages. Onboard ship, foreign personnel would be assigned to a mess appropriate to their rank, but they would be permitted to attend at another mess to be with persons who spoke the same language if appropriate, for example.

[5] Captain(N) Wilson explained the role of the XO on a ship. First and foremost, the XO must be ready to assume command of the ship should the ship's captain becomes incapacitated. Only the ship's captain and the XO are qualified to run the ship. In addition, he or she is part of the command team and responsible for the

administration of the ship, leads the sections of the ship, is responsible to the ship's captain for the morale and welfare of personnel, and he or she plays an important role as an advisor to the commanding officer. Finally, the XO plays a direct role in matters of discipline in presiding at summary trials as a delegated officer.

[6] Prior to the ship's arrival alongside Pearl Harbour on 25 June 2014, Captain(N) Wilson and his command team had several discussions on a daily basis. They discussed various subjects, operational and administrative, including the ship's alongside program and the upcoming receptions that would be held on HMCS *Calgary*.

[7] A few days prior to arriving alongside Pearl Harbour, a discussion of the command team took place in Captain(N) Wilson's cabin with regard to mixed-messing or open messing. The discussion was prompted further to the offer made by the Master Seaman and Below Mess President of the Mess Committee (PMC), Master Seaman Lafontaine, now Petty Officer 2nd Class Lafontaine, in order to hold a reception in their mess for everyone when the ship would arrive alongside Pearl Harbour. They would serve the traditional "Moose Milk", a beverage that is made with ice cream and liquor.

[8] Captain(N) Wilson found that it was not a good idea and he expressed his views to his command team. He decided that, alternatively, the Moose Milk would be served in a neutral place at the hands fall in, more precisely at the ship's hangar and flight deck. The Moose Milk was served at the hands fall in after the ship was secured alongside at approximately 1600 hours. The Moose Milk serving finished at approximately 1700 hours.

[9] Captain(N) Wilson did not like the idea of mixed-messing or open messing onboard ship. He stated that personnel have their own mess to socialize and unwind with their peers. He believed also that open messing had a potential to have people more inclined to voice opinions and act inappropriately with persons of lower or higher ranks. However, Captain(N) Wilson's intent did not preclude people from being invited in another mess if properly invited, although he considered that this situation should be exceptional.

[10] The evidence revealed that it is an accepted practice that a mess PMC can invite someone to his or her mess, even if that person belongs to another mess. This situation would apply whether a ship is at sea or alongside a port. Captain(N) Wilson did not expect mixed-messing or open messing after hands fall in on 25 June 2014 and this is why he had chosen to hold the celebration in a neutral place. Commander Yanchus testified that the issue of open messing was discussed by the command team in light of the offer made by the Master Seaman and Below Mess PMC and that all agreed that there would be no mixed-messing without permission on that occasion.

[11] As the HMCS *Calgary* Commanding Officer, Captain(N) Wilson did not belong to a mess, but he would be invited from time to time to the Wardroom and to the other messes as a guest. The XO was the Wardroom PMC; the Coxswain was the Chiefs' and

Petty Officers' Mess PMC; and Master Seaman (as he then was) Lafontaine was the Master Seaman and Below Mess PMC.

[12] Commander Yanchus testified that on 25 June 2014, at hands fall in, alongside Pearl Harbour, he also addressed the ship's company after Captain(N) Wilson had done so. He said that he was concerned with the presence of visitors onboard ship during that busy period and he wanted the ship's company to understand the messing privileges onboard ship. It was also a special moment for the XO who had been informed of his upcoming promotion and his next appointment as the Commanding Officer of HMCS *Vancouver*.

[13] After the hands fall in on 25 June 2014, Commander Yanchus and Chief Petty Officer First Class L'Espérance joined Captain(N) Wilson in his cabin to share company. Around 1730 to 1830 hours, Captain(N) Wilson served two gin and tonics to Commander Yanchus over one and a half hours. It was a means to celebrate sixteen days of hard work at sea and also to celebrate Commander Yanchus' accomplishments.

[14] Petty Officer Second Class Lafontaine testified that as the PMC of the Master Seaman and Below Mess on HMCS *Calgary*, it was normal for the PMC to invite persons that did not belong to his mess. He did not see orders to the contrary nor was he told that guests were not allowed in the mess. The same practice applied for the PMCs of the Wardroom and the Chiefs' and Petty Officers' Mess. He testified that after having some Moose Milk after hands fall in on 25 June 2014, he encountered the XO on the breezeway who has smoking a cigar in the presence of others. Petty Officer 2nd Class Lafontaine was having a cigarette. They both spoke and the XO invited him to the Wardroom as the PMC. When he arrived in the Wardroom, it was full of people. Unlike the testimony of Commander Yanchus, the Master Seaman and Below Mess PMC does not recall if they discussed mess issues. Commander Yanchus stated that he invited him because the XO expected foreign visitors in the Wardroom in light of the cross-pollination in place amongst various ships of different countries, including of various ranks.

[15] Commander Yanchus testified that after Lafontaine's arrival in the Wardroom, they discussed the nature of the HMCS *Calgary* hosts. Commander Yanchus stated that Captain(N) Wilson arrived in the Wardroom shortly after. They played a game called "flip-cup", and they did so for more than one round. Petty Officer 2nd Class Lafontaine had beer but he does not recall how many drinks he had. In his testimony, he said that his state of sobriety was 4 to 5 on a scale of 10 when he arrived in the Wardroom and that he was more intoxicated when he left, although he said he could "walk and talk straight", but would not have driven a car. Asked about the level of intoxication of his XO, he stated that he appeared "straight and narrow" at the beginning, but that, as the night progressed, he was smiling and talkative. Petty Officer 2nd Class Lafontaine did not notice anything unusual about the XO when they were both in the Wardroom. He said that Commander Yanchus smiled often. Petty Officer 2nd Class Lafontaine observed that some people in the Wardroom could feel their liquor, but not the XO.

[16] Petty Officer 2nd Class Lafontaine stated that he was not aware of, or could not remember, an order about mixed-messing on 25 June 2014, when he was invited to the Wardroom by the XO. Petty Officer 2nd Class Lafontaine stated that he and Commander Yanchus discussed about the foreign guests because he wanted to invite U.S. guests in his mess since most of them were of junior ranks and a few officers, of mixed gender. Petty Officer 2nd Class Lafontaine testified that he invited the XO to attend his mess after the game of flip-cup, immediately after Petty Officer 2nd Class Lafontaine would smoke a cigarette outside. After smoking, he then went down to his mess where some U.S. officers and other ranks were already present. Some were with him and the XO at the entrance of the Master Seaman and Below Mess. Petty Officer 2nd Class Lafontaine said that he announced the presence of the XO and nobody voiced an objection. He asked the XO to come over to the bar with the guests after which the bartender served them a shot of an alcoholic beverage. Petty Officer 2nd Class Lafontaine does not know if Commander Yanchus drank it. He stated that a fair number of individuals came up to talk to Commander Yanchus at the bar as people seemed to like him a lot. He added that the only person he knew onboard ship that did not like the XO was Master Seaman Leblanc, his Vice PMC, because Leblanc had told him before. As to Petty Officer 2nd Class Lafontaine, he thought Commander Yanchus was a great XO.

[17] Petty Officer 2nd Class Lafontaine noticed that people were dancing and talking together. He went talking to the duty PMC and others. There were a lot of people in the mess according to his testimony. The lights were dimmed and it was busy. The television was turned on, playing music. Shortly after, Petty Officer 2nd Class Lafontaine was told by the duty PMC that he should get the XO out. He then saw that the XO was dancing with a female person from the U.S. Coast Guard in a manner described as a "normal and a very polite dance" and he observed him kiss the lady on the cheek. Petty Officer 2nd Class Lafontaine stated that he felt that what he had just observed was enough in his mind to intervene to make sure that nothing more would take place between the XO and the lady. Petty Officer 2nd Class Lafontaine approached Commander Yanchus and told the XO that it was now time to leave the mess. Petty Officer 2nd Class Lafontaine escorted him to his cabin located on the deck above. He said that the XO navigated the flats without any difficulty, including when he climbed the steep ladder to go to his cabin. The XO was polite and Petty Officer 2nd Class Lafontaine did not notice anything with regard to his speech and ability to answer questions. He testified that the XO had no difficulty knowing the layout of the ship. Petty Officer 2nd Class Lafontaine said that the XO was smiling and happy.

[18] Master Seaman Cayer stated that he was in the Master Seaman and Below Mess starting at 1700 hours on 25 June 2014 and that he saw the XO in his mess at approximately 1900 hours that day. Although he was never asked about his consumption of alcohol that day prior to his testimony, Master Seaman Cayer said at first that he had four drinks that night starting at 1700 hours, before stating that he did not remember the number of drinks he had, nor did he remember the type of alcohol he had been drinking that night. Master Seaman Cayer testified that there were other guests in the mess that night, including sailors from other Navies, officers, chief petty officers

and petty officers, whose presence did not surprise him. Master Seaman Cayer was sitting at the bar when he saw the XO enter his mess led by the hand of a female from the U.S. Coast Guard wearing a sundress. Master Seaman Cayer added that they came to the bar within a few feet from him and stayed there for five to ten minutes, during which period the XO and the lady started almost immediately to make out, kissing overtly, and groping each other for at least one minute. He added that the XO's hands were all over her. Master Seaman Cayer said that several people were shocked looking at both of them. They then both left to sit down on a couch as he stopped looking at them. Master Seaman Cayer stated that although he did not see the XO drink, it seemed to him that the XO had had a few drinks. Master Seaman Cayer testified that he does not recall if the XO was announced when he entered the mess and that he did not see the PMC, Petty Officer 2nd Class (Master Seaman at the time) Lafontaine, in the mess that night.

[19] Leading Seaman Lawrence testified that she was one of the stewards onboard HMCS *Calgary* during that period and, as such, she had a professional and cordial relationship with the officers in the Wardroom, including the XO. She said that she got along with him and that he made jokes. She added that the XO was friendly with the Wardroom staff. She remembered seeing Commander Yanchus in the Wardroom that day for the meals. She stated that she saw him alone near the entrance of the Master Seaman and Below Mess a few hours after the meal period. He was dressed in civilian clothes one or two hours after the dinner, which normally took place between 1700 and 1800 hours. Leading Seaman Lawrence said that she had had several alcoholic drinks that evening, as many others did as well. She stated that he then asked her where she was going and placed his hand on her arm and she replied that she was going to the washroom or to the heads. She then said that the XO put his hands on her hips much like a friend would do, but she did not specify whether they were both in movement at the time. She felt uncomfortable but she was not offended or upset about that. She believed that the XO was slightly intoxicated but she provided no explanation as to Commander Yanchus' state of sobriety or the basis for that opinion. She did not recall if Commander Yanchus was affected in any way by the consumption of alcohol. Leading Seaman Lawrence said that Master Seaman Lafontaine, the Master Seaman and Below Mess PMC, broke them up and that the PMC took him back to the mess. She stated that the PMC did not announce the XO when entering the mess at that time and that she then left to go to the bathroom. Leading Seaman Lawrence testified that she believed that mixed-messing was in place that night.

[20] Captain(N) Wilson said that he saw his XO later that night, around 2100 hours, in the Wardroom after being invited by Commander Yanchus. He saw him in the Wardroom with other people including U.S. officers in civilian clothes. Captain(N) Wilson stated that he may have drunk half a beer during that period. He does not recall seeing the XO drink alcohol at that time. The XO introduced him to the U.S. visitors and he played flip-cup and Captain(N) Wilson had another beer while playing the game. Commander Yanchus testified that he played that game for approximately half an hour and that he had less than a pint of beer while doing it. Asked about his XO's behaviour during that period, Captain(N) Wilson testified that Commander Yanchus "did what an

XO would do” with his guests. The ship’s captain left the Wardroom around 2130 hours that night because he wanted to sleep eight hours and go on a run the next morning. He did not see Commander Yanchus later that evening, but he said that his command team got to do their job as usual the next morning, including Commander Yanchus for whom he had no concerns.

[21] Master Seaman Leblanc was the Vice PMC of the Master Seaman and Below Mess on HMCS *Calgary* during RIMPAC 14. He stated that he was in and out of the mess that evening and that he had only a few drinks of hard liquor and did not feel intoxicated the evening of 25 June 2014. He testified that he had mentioned to the military police, after the facts that led to the charges, that his recollection of the events was sketchy, even then, about details such as how many persons were present in the mess at that time, how many drinks the XO had, and who he was speaking with that evening. Questioned as to his relationship with the XO onboard ship, he stated that he had a lot of respect for him and always liked the XO despite the administrative and disciplinary actions against him prior to the events and the involvement of Commander Yanchus about them. He denied having told anyone prior to the events that he did not like Commander Yanchus, including to then-Master Seaman Lafontaine, his mess PMC.

[22] As to the events involving Commander Yanchus with the female U.S. Coast Guard in the Master Seaman and Below Mess, he stated that they took place between 2200 and 2230 hours on 25 June 2014. Master Seaman Leblanc was between the seating area of the mess that has a sofa and settees, and the bar. According to him, there were only 15 persons in the mess at that time.

[23] Master Seaman Leblanc stated that the XO was dressed in civilian clothes, in particular, that he was wearing a white or very light coloured shirt. He said that when he first saw the XO, Commander Yanchus was positioned diagonally and originally behind him before Master Seaman Leblanc turned around because the bartender and the person with whom he was speaking seemed to have a surprised look on their face. As he turned around, it seemed that the XO was dancing to music being played from a sound system, not the television as previously mentioned by Petty Officer 2nd Class Lafontaine. Master Seaman Leblanc testified that it was obvious to him that the XO was intoxicated. He testified that the dancing got “a little closer”. He saw Commander Yanchus kissing and running his hands along the back and buttocks of the female U.S. Coast Guard; no one else around them. Master Seaman Leblanc then stated that it got “more intense” as there was some leaning over the settee going on. He stated that “at one point he was at a loss and turned kind of turned around [his] attention”. In direct-examination, he had difficulty describing the state of the XO’s sobriety. In a nutshell, Master Seaman Leblanc stated that there were little stumbles here and there, some uncoordinated movements as they were dancing.

[24] Master Seaman Leblanc stated that the events did not take place over a long period of time, as the XO was escorted outside the mess shortly after. He could not recall by whom the XO was so escorted. Contrary to the version of events described by Petty Officer 2nd Class Lafontaine, Master Seaman Leblanc never saw the XO give a

kiss on the lady's cheek before being escorted outside of the Master Seaman and Below Mess. Asked to describe how he felt when he saw the XO kissing and touching the female person in the Master Seaman and Below Mess that night, Master Seaman Leblanc said that he was traumatized and did not know what to do about it, as the XO was the second highest ranked officer onboard HMCS *Calgary* and because he worked closely with him being the mess Vice PMC and a special sea duty man.

[25] Questioned in cross-examination with regard to the stumbling of the XO while he was dancing, Master Seaman Leblanc gave more details in saying that the XO even stumbled forward to the point where he had to put his hands down on the settee to brace himself from falling. When reminded that he had originally stated to the military police that his memory was sketchy and that it was the first time he provided those details, did not provide these details to the military police before, or even mentioned it in his direct-examination, he replied that he had memory of this.

[26] Master Seaman Leblanc testified that other persons saw the events, and felt that he had to do something about that because information travels quite quickly on a ship and that some people had come up to him in the following days and asked him what was going to be done about it. He decided to talk to the ship's Harassment Advisor onboard and it was decided that he would write a statement to the commanding officer about the incident. In cross-examination, counsel for the defence put to Master Seaman Leblanc that his decision to report what he said, about the XO's conduct, came after he had sat down and eaten with the XO, where Commander Yanchus was talking about his anniversary. Asked by counsel for the defence if he found that very upsetting and distressing, Master Seaman Leblanc agreed.

[27] Captain(N) Wilson testified that his ship was praised for their entire effort during RIMPAC. They worked exceptionally well as a team and he was very proud of them. At no time before or after the events that would have occurred on 25 June 2014 did he have any concern about the command team or anything that would have involved the command team or would have involved Commander Yanchus, more precisely. He observed nothing nor heard rumours that could have affected the morale, efficiency and effectiveness of the ship's company. To the contrary, the ship's company performed extremely well all along; no rumours about any misconduct.

[28] It is only thirty-five days later that the ship's Harassment Advisor approached him about allegations concerning his XO. It was a shock to Captain(N) Wilson. He met with Commander Yanchus and informed him of the allegations. Captain(N) Wilson observed his XO's reaction. Commander Yanchus was equally shocked and spontaneously told him that he had no recollection of the facts alleged against him and that he was sorry if he had left him down. Commander Yanchus even apologized the next day to the ship's company using the PA system. Captain(N) Wilson testified that these allegations were out of character and that Commander Yanchus never disobeyed one of his orders before.



[29] Commander Yanchus corroborated the testimony of Captain(N) Wilson with regard to the issue of the mixed-messing or open messing that was discussed within the command team and the decision of the ship's captain to decline the invitation of the Master Seaman and Below Mess PMC to serve the traditional Moose Milk in their mess after the hands fall in when they would get alongside Pearl Harbour and hold it instead in a neutral place.

[30] Commander Yanchus testified concerning his own understanding of Captain(N) Wilson's intent with regard to mixed-messing or open messing at that time. As to the events that would have taken place in the Master Seaman and Below Mess, he stated that he has no recollection of the events after playing the game of flip-cup in the Wardroom until he woke up in his cabin slightly after midnight. He has no recollection of drinking to excess on 25 June 2014. He never reported the fact that he blacked out, nor did he feel having an obligation to report it. Commander Yanchus stated that he has no reason to believe that his consumption of alcohol was other than voluntary, and he said that although it seemed possible that he was drunk in the Master Seaman and Below Mess, he does not know if he was. He remembers working the next day as usual and he said that the ship's company continued to work extremely well as a team thereafter. He had heard nothing about any incident that would have involved him in the Master Seaman and Below Mess until he was informed by Captain(N) Wilson more than thirty-five days later. He was shocked by the allegations and told Captain(N) Wilson that he did not remember doing anything like this and that he was sorry for letting him down.

### **Legal analysis and decision**

[31] Let me first deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Two rules flow from the presumption of innocence. One is that the prosecution bears the burden of proving guilt. The other is that guilt must be proved beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[32] The burden of proof rests with the prosecution and never shifts. There is no burden on Commander Yanchus to prove that he is innocent. He does not have to prove anything. A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The court must not find Commander Yanchus guilty unless the court is sure that he is guilty. Probable guilt or likely guilt is not sufficient to secure a conviction on any charge before this Court. Unless the prosecution establishes his guilt beyond a reasonable doubt, the accused is entitled to the benefit of the doubt and the court must enter a finding of not guilty.

[33] It is not unusual that the evidence is contradictory or that the testimony of a witness leaves the court with legitimate concerns unanswered or that a testimony raises more questions that are equally left unanswered. Witnesses may offer contradicting evidence within their own testimony or have different recollection of events. The court may accept all, part, or none of the evidence given by a witness. Many factors will influence a witness' version of events, including the passage of time, the position to make accurate and complete observations about the event. Did the witness have a good opportunity to do so? What were the circumstances in which the observation was made? What was the condition of the witness? Was the event itself unusual or routine? Did the witness seem to have a good memory? Does the witness have any reason to remember the things about which he testified? Did any inability or difficulty that the witness had in remembering events seem genuine, or did it seem made up as an excuse to avoid answering questions?

[34] Did the witness' testimony seem reasonable and consistent? Is it similar to or different from what other witnesses said about the same events? Did the witness say or do something different on an earlier occasion? Do any inconsistencies in the witness' evidence make the main points of the testimony more or less believable and reliable? Is the inconsistency about something important, or a minor detail? Does it seem like an honest mistake? Is it a deliberate lie? Is the inconsistency because the witness said something different, or because he failed to mention something? Is there any explanation for it? Does the explanation make sense?

[35] The witness' demeanour is also another factor to consider; however, looks can be deceiving. Giving evidence at trial is not a common experience for many witnesses. We know that people react and appear differently. There are simply too many variables to make the manner in which a witness testifies the only or most important factor to consider in making a court's decision. At the end of the day, it is for the court to determine what evidence it finds credible and reliable. There is no magic formula for deciding how much or how little to believe of a witness' testimony or how much to rely on it in deciding this case. Did the witness seem honest? Is there any reason why the witness would not be telling the truth? Does the witness have any reason to give evidence that is more favourable to one side than to the other?

[36] Reasonable doubt applies to the issue of credibility. The court may, on any given point, believe a witness, disbelieve a witness, or not be able to decide. It does not have to fully believe or disbelieve one witness or a group of witnesses. If the court has a reasonable doubt about Commander Yanchus' guilt arising from the credibility of the witnesses, the prosecution has failed to establish guilt beyond a reasonable doubt.

[37] Commander Yanchus testified at his trial. His evidence is not assessed differently than the testimony of any other witness. However, if the court believes the testimony of the accused that he did not commit the offence charged, he must be found not guilty. Even if the court does not believe the testimony of the accused, if the court is left with a reasonable doubt about his guilt or about an essential element of an offence charged, the court must find him not guilty of that offence. Finally, even if the

testimony of the accused does not raise a reasonable doubt about his guilt or about an essential element of an offence charged, the court must find him not guilty of that offence. If, after considering all the evidence, the court is not satisfied beyond a reasonable doubt of his guilt, he must be acquitted.

***The First Charge: Section 83 of the National Defence Act — Disobedience of lawful command***

[38] The first charge is laid under section 83 of the *National Defence Act*, which reads in part as follows:

83 Every person who disobeys a lawful command of a superior is guilty of an offence.

This offence covers a large spectrum of situations. In this case, the prosecution alleges that the accused disobeyed an order of Commander Wilson, while onboard HMCS *Calgary*. The particulars of the first charge read as follows:

*Particulars:* In that he, on or about 25 June 2014, while onboard Her Majesty's Canadian Ship *Calgary*, at or near Hawaii, U.S.A. did attend the Master Seaman and Below Mess, contrary to an order given to him by Commander Wilson.

Beyond the elements relating to the time and place of the alleged offence as well as the identity of the accused, the other essential elements for that offence are:

- (a) the fact that a lawful order was given to the accused;
- (b) the fact that the accused received or knew the order;
- (c) the fact that the order was given by a superior officer;
- (d) the fact that the accused knew of the status of the person who gave the order;
- (e) the fact that the accused did not comply with the order; and
- (f) the blameworthy state of mind of the accused.

[39] This offence is a *mens rea* offence as opposed to a strict liability offence. The only issues with regard to this charge relate to the accused's compliance with the order and the requisite mental element of the accused at the time. This issue cannot be determined solely on the basis of the testimonies of Captain(N) Wilson and Commander Yanchus concerning the content and the nature of the discussions that took place within the command team shortly before and Captain(N) Wilson's intent in relation to the rules that would apply to mixed-messing or open messing on HMCS *Calgary* when they would arrive alongside Pearl Harbour because he felt it was not a good idea in the circumstances.

[40] Relevant evidence includes also the testimonies of Leading Seaman Lawrence, Petty Officer 2nd Class Lafontaine and Master Seaman Leblanc with regard to their own understanding of the rules that applied at that time with regard to mixed-messing or open messing. The defence submits that the evidence before the court is not sufficient to establish beyond a reasonable doubt that the accused had the requisite blameworthy state of mind to contravene the order given by Captain(N) Wilson in attending the Master Seaman and Below Mess. The defence also submits that the evidence supports a defence of mistake of fact that would negate the requisite *mens rea*. It is Commander Yanchus' position that he honestly believed that Captain(N) Wilson's order, as agreed by the ship's command team, did not prohibit a person to enter the Master Seaman and Below Mess if properly invited. The accused does not have to prove that this defence applies. It is for the prosecution to prove beyond a reasonable doubt that this defence does not apply. Section 72.1 of the *National Defence Act* provides:

72.1 All rules and principles that are followed from time to time in the civil courts and that would render any circumstance a justification or excuse for any act or omission or a defence to any charge are applicable in any proceedings under the Code of Service Discipline.

[41] The defence of mistake of fact applies when a person is mistaken about a critical ingredient or circumstance concerning the offence. Consequently, the person lacks the requisite intent necessary for that offence. Here, the alleged mistake relates to the intent of Captain(N) Wilson when he voiced to his command team that there would be no mixed-messing or open messing on HMCS *Calgary* while alongside Pearl Harbour. In particular, further to Captain(N) Wilson's refusal of the offer made by the Master Seaman and Below Mess PMC, Master Seaman Lafontaine, to open their mess to everyone on 25 June 2014 and hold a reception in serving the traditional Moose Milk, it was agreed by the command team that the Moose Milk would be served in a neutral zone; namely, the ship's hangar, at hands fall in that day.

[42] Did Captain(N) Wilson intend to negate the traditional authority of a mess PMC to invite a member of another mess and the guest to accept that invitation or did Commander Yanchus honestly believe that it did not, whether the mistake is reasonable or unreasonable? In answering these questions, the court finds that the testimony of Captain(N) Wilson alone is problematic with regard to his clear intent and how he communicated his intent in the circumstances. The discussions of the command team took place in the specific context of an offer made by the Master Seaman and Below Mess PMC, Petty Officer 2nd Class Lafontaine, to hold a get-together that would include all ranks onboard ship, including visitors when the ship would arrive alongside Pearl Harbour. The decision to hold the celebration in a neutral place does not necessarily imply that it served as a blanket prohibition to allow mixed-messing in other situations that same evening, including the accepted practice that allows a mess PMC to invite someone that belongs to another mess or other guests. Captain(N) Wilson stated that this practice should be used in exceptional circumstances, but he did not expand on this issue. Prosecution witnesses had knowledge of the practice. They testified that they were not aware of a prohibition that evening regarding mixed-messing, and that they were not surprised to see members from other messes or foreign guests in the Master

Seaman and Below Mess on 25 June 2014. Commander Yanchus invited Petty Officer 2nd Class Lafontaine in the Wardroom as the PMC of his mess and Petty Officer 2nd Class Lafontaine returned the invitation that same evening.

[43] Based on the totality of the evidence before the court, the Court is satisfied that there is an evidentiary foundation to give an air of reality to the defence of mistake of fact with regard to the first charge. It is for the prosecution to prove beyond a reasonable doubt that this defence does not apply and it has failed to do so. Therefore, the prosecution has failed to establish beyond a reasonable doubt that Commander Yanchus had the requisite blameworthy state of mind when he accepted the invitation of Petty Officer 2nd Class Lafontaine and attended the Master Seaman and Below Mess during the evening of 25 June 2014 onboard HMCS *Calgary*.

***Third Charge: Section 97 of the National Defence Act — Drunkenness***

[44] The second and third charges are laid in the alternative. The second charge alleges a conduct to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act*, where the third charge alleges that the accused committed the offence of drunkenness, contrary to section 97 of the Act. Since the particulars of the second charge allege that the prejudicial conduct would consist in the accused being drunk while attending the Master Seaman and Below Mess, it is logical to deal first with the offence of drunkenness that is the subject of the third charge.

[45] Section 97 of the *National Defence Act* creates the offence of drunkenness. For our purposes, the relevant portions of section 97 of the Act read as follows:

97. (1) Drunkenness is an offence and every person convicted thereof . . .

. . .

(2) For the purposes of subsection (1), the offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug,

(a) is unfit to be entrusted with any duty that the person is or may be required to perform; or

(b) behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[46] The particulars of the third charge read as follows:

*Particulars:* In that he, on or about 25 June 2014, while in the position as the Executive Officer onboard Her Majesty's Canadian Ship *Calgary*, at or near Hawaii, U.S.A. was drunk.

To be found guilty of the offence of drunkenness, the prosecution must prove beyond a reasonable doubt the identity as the offender as well as the date and the place described

in the particulars of the charge. In addition, it must prove beyond a reasonable doubt that:

- (a) the accused was under the influence of alcohol or a drug;
- (b) the accused was unfit to be entrusted with any duty that the person was or may have been required to perform; or behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service; and
- (c) the blameworthy state of mind of the accused.

[47] The issue of credibility and reliability of the evidence is particularly important in order to make the findings with regard to the second and third charges. Captain(N) Wilson, Petty Officer 2nd Class Lafontaine and Leading Seaman Lawrence's testimonies do not raise any significant concerns with regard to their credibility and reliability. Counsel for the prosecution submitted, in particular, that Petty Officer 2nd Class Lafontaine was a reliable and credible witness whose version of events should not undermine that of the other witnesses. However, the testimony of Lafontaine is irreconcilable with the testimonies of Master Seaman Leblanc and Master Seaman Cayer on important issues. For instance, Master Seaman Leblanc stated that the events involving Commander Yanchus with the female U.S. Coast Guard in the Master Seaman and Below Mess took place between 2230 and 2330 hours on 25 June 2014. According to him, there were only 15 persons in the mess at that time. He stated that the XO was dancing to music being played from a sound system, not the television as previously mentioned by Petty Officer 2nd Class Lafontaine.

[48] Master Seaman Leblanc testified that it was obvious to him that the XO was intoxicated. He testified that the dancing got "a little closer". He saw Commander Yanchus kissing and running his hands along the back and buttocks of the female from the U.S. Coast Guard; no one else around them. Master Seaman Leblanc then stated that it got "more intense" as there was some leaning over the settee going on. He stated that "at one point he was at a loss and turned kind of turned around [his] attention."

[49] In direct-examination, he had some difficulty describing the state of the XO's sobriety. In a nutshell, Master Seaman Leblanc stated that there were little stumbles here and there and some uncoordinated movements as they were dancing. Master Seaman Leblanc stated that the events did not take place over a long period of time, as the XO was escorted outside the mess shortly after. He could not recall by whom the XO was so escorted. Contrary to the version of events described by Petty Officer 2nd Class Lafontaine, Master Seaman Leblanc never saw the XO kiss the lady's cheek before being escorted outside of the Master Seaman and Below Mess. Asked to describe how he felt when he saw the XO kissing and touching the female person in that mess that night, Master Seaman Leblanc said that he was traumatized and did not know what to do about it. Questioned in cross-examination with regard to the stumbling of the XO while he was dancing, he added even more details in saying that the XO even stumbled forward to the point where he had to put his hands down on the settee to brace himself

from falling. When reminded that he had originally stated to the military police that his memory was sketchy and that it was the first time he provided those details, did not provide these details to the military police before, or even mentioned it in his direct-examination, he replied that he had memory of this.

[50] This explanation raises concerns for the Court. These details are too precise not to have been mentioned before his testimony in court, more than two years after the events. With regard to Master Seaman Leblanc's opinion of the XO, it is in the opposite direction to what he told Petty Officer 2nd Class Lafontaine prior to the events. The Court accepts that the testimony of Petty Officer 2nd Class Lafontaine is credible and reliable on these issues. The Court found also that the testimony of Master Seaman Leblanc raises concerns of credibility and reliability. The Court found that not only was he adamant about what he saw and how he respected the XO, to the extent that he portrayed himself in the best possible light and justified his explanations in adding more details, in particular, about his observations of the accused's stumbling. These details were never disclosed prior to the cross-examination, more than two years after the alleged incidents. It is a good example of a memory that was sketchy at a time that was contemporaneous with the alleged facts and became clearer more than two years later. The Court does not believe that the witness lied deliberately on the issue of stumbling; the Court simply does not find this part of Master Seaman Leblanc's testimony reliable, in light of the totality of the evidence, particularly the testimony of Petty Officer 2nd Class Lafontaine.

[51] Petty Officer 2nd Class Lafontaine said that he announced the presence of the XO in the Master Seaman and Below Mess. He asked the XO to come over to the bar with the guests after which the bartender served them a shot of alcoholic beverage. Petty Officer 2nd Class Lafontaine does not know if Commander Yanchus drank it. He stated that a fair number of individuals came up to talk to Commander Yanchus at the bar, as people seemed to like him a lot. He added that the only person he knew that did not like the XO was Master Seaman Leblanc, his Vice PMC, because Leblanc had told him before. As to Petty Officer 2nd Class Lafontaine, he thought Commander Yanchus was a great XO. He noticed that people were dancing and talking together and he went to talk to the duty PMC and others. There were a lot of people in the mess according to his testimony. The lights were dimmed and it was busy. The television was turned on, playing music.

[52] It is shortly after that Petty Officer 2nd Class Lafontaine is told by the duty PMC that he should get the XO out. He then saw that the XO was dancing with a female person from the U.S. Coast Guard in a manner described as a "normal and a very polite dance" and he observed him kiss the lady on the cheek. Petty Officer 2nd Class Lafontaine stated that he felt that what he had just observed was enough in his mind to intervene to make sure that nothing more would take place between the XO and the lady. Petty Officer 2nd Class Lafontaine approached Commander Yanchus and told the XO that it was now time to leave the mess. Petty Officer 2nd Class Lafontaine escorted him to his cabin located on the deck above. He said that the XO navigated the flats without any difficulty including when he climbed the steep ladder to go to his cabin.

The XO was polite and Petty Officer 2nd Class Lafontaine did not notice anything with regard to his speech and ability to answer questions. He testified that the XO had no difficulty knowing the layout of the ship. Petty Officer 2nd Class Lafontaine said that the XO was smiling and happy.

[53] Master Seaman Cayer testified that he saw the XO in his mess at approximately 1900 hours that day. This is highly unlikely in light of the testimonies of Leading Seaman Lawrence and Petty Officer 2nd Class Lafontaine. The Court is of the view that the XO entered the mess much later, led by Petty Officer 2nd Class Lafontaine. Although he was never asked about his consumption of alcohol that day prior to his testimony, Master Seaman Cayer said at first that he had four drinks that night starting at 1700 hours, before stating that he did not remember the number of drinks he had, nor did he remember the type of alcohol he had been drinking that night. Master Seaman Cayer was sitting at the bar when he saw the XO enter his mess led by the hand of a female from the U.S. Coast Guard wearing a sundress. Master Seaman Cayer added they came to the bar within a few feet from him and stayed there for five to ten minutes, during which period the XO and the lady started almost immediately to make out, kissing overtly, and groping each other for at least one minute. He added that the XO's hands were all over her. Master Seaman Cayer said that several people were shocked looking at both of them. They then both left to sit down on a couch as he stopped looking at them. Master Seaman Cayer stated that, although he did not see the XO drink, it seemed to him that the XO had had a few drinks. The witness did not testify as to the XO's level of intoxication or the basis of an opinion about it. Master Seaman Cayer testified that he does not recall if the XO was announced when he entered the mess and that he did not see the PMC, Petty Officer 2nd Class Lafontaine, in the mess that night.

[54] Setting aside the examination of the conduct of Commander Yanchus towards a female person of the U.S. Coast Guard, as described by two different persons, that would have taken place in different areas of the mess at different times, the court must first be satisfied beyond a reasonable doubt that the accused was intoxicated by alcohol or drug. As to the quantity of alcohol consumed by the accused on 25 June 2014, the evidence indicates that the XO had two alcoholic drinks in the ship's captain's cabin over one hour, one and a half hours, in the presence of Captain(N) Wilson and Chief Petty Officer First Class L'Espérance. Petty Officer 2nd Class Lafontaine saw the bartender give a shot glass of alcohol to Commander Yanchus at the Master Seaman and Below Mess later that night, but he does not know if the XO drank it. Commander Yanchus testified that he has no recollection of the events after playing the game of flip-cup in the Wardroom, until he woke up in his cabin slightly after midnight. He has no recollection of drinking to excess on 25 June 2014. He said that he drank less than a pint of beer playing flip-cup in the Wardroom and he confirmed that he had two gin and tonics in Captain(N) Wilson's cabin after the hands fall in. He never reported the blackout, nor did he feel that he had an obligation to report it. Commander Yanchus stated that he has no reason to believe that his consumption of alcohol was other than voluntary, and he said that although it seemed possible that he was drunk in the Master Seaman and Below Mess, he does not know if he was. The fact that a person suffered a



blackout and that he may have been drunk is not sufficient proof of drunkenness, if at all. It must be assessed with the totality of the evidence.

[55] The court did not hear any evidence as to the effect and the cause of blackouts on a person. This is not a matter that can be judicially noticed by a court, as it is not a matter of general knowledge, the accuracy of which is not the subject of reasonable dispute that is capable of immediate and accurate verification by means of readily available sources. A blackout is a temporary loss of consciousness, but it requires expert evidence to explain whether a particular loss of consciousness falls within the ambit of this medically-defined condition and also, based on relevant evidence, whether a qualified expert may or may not provide an opinion about the causes of such a blackout and its effect on a human being. In any event, the fact that someone says that he does not remember because he blacked out is proof of an absence of memory, not proof of intoxication. In addition, when the signs of intoxication are limited and the amount of alcohol ingested over a period of time is difficult to assess, it is difficult to establish the impact of alcohol on the behaviour of a human being alone, without considering other factors, including tolerance or fatigue. Although expert evidence may not be required at all times, it may assist in some cases.

[56] Leading Seaman Lawrence herself had been drinking that night. She said that the XO was a bit intoxicated, but she could not describe how, as they all had been drinking. She could not recall how sober the XO was at the time or if he was affected in any way by alcohol. Captain(N) Wilson did not find that his XO was intoxicated when they were both present in his cabin and later in the Wardroom. Asked about the XO's demeanour in the Wardroom, Captain (N) Wilson said that Commander Yanchus "did what an XO would do" with guests, nothing different.

[57] Petty Officer 2nd Class Lafontaine spent a fair amount of time with the XO that evening in the Wardroom and in the Master Seaman and Below Mess. He, too, had been drinking. In the Wardroom, he referred to the XO as being "straight and narrow", but that he was smiling and talkative at the end of the evening when he escorted him to his cabin, but that he was not stumbling or acting in a way that would have raised concerns. Again, Petty Officer 2nd Class Lafontaine stated that the XO navigated the flats without any difficulty, including when he climbed the steep ladder to go to his cabin. The XO was polite and Petty Officer 2nd Class Lafontaine did not notice anything with regard to his speech and ability to answer questions. He also testified, as I said previously, that the XO had no difficulty knowing the layout of the ship.

[58] Master Seaman Cayer told the court, although he did not see the XO drink, that it seemed to him that the XO had had a few drinks. He provided no explanation or observations that would support why he believed the XO had been drinking. Accepting Master Seaman Cayer's testimony with regard to his observations of the interaction between the XO and the female Coast Guard does not assist in determining whether the accused was intoxicated by alcohol or drug at that time. The conduct may be improper or totally inappropriate. The conduct may amount to something disgraceful, but a sober person could have a similar conduct. Finally, Master Seaman Leblanc had not seen the

accused drink that night but his version of events in describing the symptoms of sobriety of the XO as he was dancing with the young lady is not compatible with the evidence of Petty Officer 2nd Class Lafontaine who is the person who escorted the XO to his cabin immediately after; in fact, far from it.

[59] For the purposes of the offence of drunkenness, it is insufficient that the evidence clearly establishes that an accused was totally unfit to be entrusted with any duty that the person was or may have been required to perform or that he may have behaved in a disorderly manner or in manner likely to bring discredit on Her Majesty's service. The evidence may even establish that, beyond a reasonable doubt, an accused behaved in a scandalous manner unbecoming of an officer. That is not sufficient.

[60] It remains that the first essential element of the offence of drunkenness under subsection 97(2) of the *National Defence Act* that must be established beyond a reasonable doubt against the accused is that the behaviour occurred, owing to the influence of alcohol or because the accused was under the influence of alcohol. This meaning is clearly expressed in the French language version of the Act, using the terms "*parce qu'il est sous l'influence de l'alcool ou d'une drogue.*" In other words, it requires more than the proof that the accused had consumed a mere quantity of alcohol. Otherwise, the mere proof that the accused has consumed alcohol would suffice to establish whether or not there is causality with the unbecoming conduct. The fact that a voluntary consumption of alcohol may have contributed is not sufficient. However, it may not be necessary to always call expert evidence as to the effect of the ingestion of alcohol in the human body to prove the offence of drunkenness.

[61] This is not what this Court is saying, but when the evidence is scarce with regard to the symptoms of intoxication, and the quantity of alcohol ingested is relatively unknown, it may prove to be difficult to establish that the requisite level of intoxication exists in a given case to establish the necessary causation of the intoxication with the impugned behaviour. In light of the totality of the evidence, there is a reasonable doubt that the accused was unfit to be entrusted with any duty that he was required or may have been required to perform or that he behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service owing to the influence of alcohol.

***Second Charge: Section 129 of the National Defence Act — Conduct to the Prejudice of Good Order and Discipline***

[62] With regard to the second charge laid in the alternative to the third charge, it alleges a contravention to section 129 of the *National Defence Act* for conduct to the prejudice of good order and discipline. Subsections 129(1) and (2) provide that:

129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

(2) An act or omission constituting an offence under section 72 or a contravention by any person of

- (a) any of the provisions of this Act,
- (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
- (c) any general, garrison, unit, station, standing, local or other orders,

is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[63] The particulars of the second charge read as follows:

*Particulars:* In that he, on or about 25 June 2014, while in the position as the Executive Officer onboard Her Majesty's Canadian Ship Calgary, at or near Hawaii, U.S.A. was drunk while attending the Master Seaman and Below Mess.

[64] In *R. v. Tomczyk*, 2012 CMAC 4, 3 December 2012, the Court Martial Appeal Court explained the nature of the offence under section 129 of the *National Defence Act*, at paragraphs 24 and 25:

Section 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF. Subsection 129(1) creates the offence while subsection 129(2) deems a number of activities to be prejudicial. In *R. v. Winters (S.)*, 2011 CMAC 1, 427 N.R. 311 at para. 24 Létourneau J.A. summarized the constituent elements of a section 129 offence as follows:

When a charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline.

Proof of prejudice is an essential element of the offence. The conduct must have been actually prejudicial (*Winters, supra*, paras. 24-25). According to *R. v. Jones*, 2002 CMAC 11 at para. 7, the standard of proof is that of proof beyond a reasonable doubt. However, prejudice may be inferred if, according to the evidence, prejudice is clearly the natural consequence of proven acts; see *R. v. Bradt (B.P.)*, 2010 CMAC 2, 414 N.R. 219 at paras. 40-41.

[65] It must be emphasized that the conduct alleged to be prejudicial of good order and discipline is that the accused, while in the position as the Executive Officer onboard HMCS *Calgary*, at or near Hawaii, U.S.A. was drunk while attending the Master Seaman and Below Mess. The prosecution is bound by its own particulars. In light of the failure of the prosecution to satisfy the Court beyond a reasonable doubt that the accused was unfit to be entrusted with any duty that he was required or may have been required to perform or that he behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service owing to the influence of alcohol, it should be sufficient for the disposal of the second alternative charge.

[66] In *R. v. McKoena*, 2005 CM 6, 1 March 2005, the accused, an officer of the rank of captain, faced three charges for conduct to the prejudice of good order and discipline

contrary to section 129 of the *National Defence Act*. The events that lead to the charges took place at the beginning of a basic officer training course at the Canadian Forces Leadership and Recruit School, Canadian Forces Base Saint-Jean, Province of Quebec, where the accused was a student. Prosecution then argued that the impugned conduct in the context in which it occurred was to the prejudice of good order and discipline. The alleged conduct referred to the accused misrepresenting himself as having training authority over other members of his platoon. It was also alleged that, without authority, he imposed weekend training on his platoon and that, also without authority, he required an officer cadet to buy a new watch and running shoes for which there was no military requirement. My former colleague and Chief Military Judge Colonel(Ret) Kim Carter made the following remarks at paragraph 7 of her reasons for finding:

The matter before the court is not whether Captain McKoena behaved appropriately or wisely, nor whether his conduct was that expected of an officer in the Canadian Forces, nor whether he is an honest and trustworthy person into whose care members of the Canadian Forces can be safely entrusted. These are all issues which may have been, or may well be, examined by other authorities. The matter before the court is quite simply whether the prosecution has proven beyond a reasonable doubt all the essential elements of the offences charged.

[67] The prosecution could have drafted other particulars that would have addressed directly an alleged improper behaviour by the accused with a U.S. female Coast Guard of a lower rank in the Master Seaman and Below Mess as being prejudicial of good order and discipline if this alleged behaviour was the underlying reason to lay charges in the first place. Whether the evidence could establish that such conduct occurred beyond a reasonable doubt and that it was prejudicial of good order and discipline is a question of mixed law and fact; however, these are not the particulars of the charge before the court. The prosecution chose to allege that the prejudicial conduct was that of being drunk while attending the Master Seaman and Below Mess contrary to section 129 of the Act. That has not been established beyond a reasonable doubt. This decision to prefer charges rests entirely within the discretion of prosecutorial authorities. It is not for the court to comment whether other charges could have been laid in the circumstances.

[68] However, a court martial has the authority to make a special finding of guilty under section 138 of the Act, which provides:

138 Where a service tribunal concludes that

- (a) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and
- (b) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence,

the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.

[69] Particulars serve to enable an accused person to fully assess the case against him or her, define the issues, and prepare his or her defence, including whether or not to call evidence and testify at trial. As I have stated earlier, the prosecution is bound by the essential particulars of the charge, subject to the rule of surplusage. For example, the date and the location, the identity of the victim or the amount of money stolen in a charge of stealing are all particulars that would fall in this category. All particulars that are not surplusage shall be proven by the prosecution, if not, the court will simply find the accused not guilty subject to the rule of special findings. However, the court cannot make a special finding when the facts differ materially from the facts alleged in the particulars if it would prejudice the accused.

[70] In this case, the accused, through his counsel, based his defence on whether there was an honest mistake of fact with regard to his presence in the Master Seaman and Below Mess, as well as the reliability and credibility of the evidence with regard to the level of intoxication of the accused and that of other witnesses and their recollection of certain inappropriate events that would or would not have taken place in the mess on 25 June 2014. The line of questions during the cross-examination of the prosecution witnesses and the calling of the defence witness, the accused, reflect the defence strategy to defend the case against the accused. Allowing a special finding on the second charge would cause irreparable prejudice to the defence and the fairness of the trial.

[71] Should the Court be asked to make a special finding with regard to non-essential particulars such as the date or the location of the offence, the accused could not claim prejudice. In the circumstances of this case, it is not appropriate for the Court to embark on the examination of a potential ruling of special finding under section 138 of the Act.

**FOR ALL THESE REASONS, THE COURT**

[72] **FINDS** Commander Yanchus not guilty of all charges.

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Counsel:

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