



## COURT MARTIAL

**Citation:** *R. v. Abao*, 2017 CM 1004

**Date:** 20170317

**Docket:** 201721

Standing Court Martial

Canadian Forces Base Edmonton  
Edmonton, Alberta, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Corporal A.P. Abao, Accused**

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

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### REASONS FOR FINDING

(Orally)

#### Introduction

[1] Corporal Abao is charged with two offences. The charges arose from an incident that occurred during a night live firing range on 21 September 2015 in Wainwright, Alberta, involving Corporal Abao who fired live ammunition in circumstances that led to the conduct of this trial. They read as follows:

FIRST CHARGE	NEGLIGENTLY OMITTED TO DO SOMETHING IN RELATION TO A THING THAT MAY BE DANGEROUS TO LIFE, WHICH OMISSION WAS LIKELY TO CAUSE BODILY INJURY TO SOME PERSON
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Section 127 NDA	<i>Particulars:</i> In that he, on or about, 21 September 2015, at or near 3rd Canadian Division Support Base Detachment Wainwright, Alberta, negligently omitted to comply with a
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command to “Stop” by firing his C7 rifle, the result of which omission was likely to cause bodily injury to Private D.W. Levasseur.

SECOND CHARGE      NEGLECT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE

Section 129 *NDA*      *Particulars:* In that he, on or about, 21 September 2015, at or near 3rd Canadian Division Support Base Detachment Wainwright, Alberta, failed to follow a command “stop” by firing his C7 rifle.

**Evidence**

[2] The evidence before this court martial consists of the testimony of Warrant Officer Stratford, Sergeant Hall, Sergeant Taylor, Captain Prowse, Corporal Levasseur, Corporal Abao and Corporal Beattie. In addition, the parties filed an agreed statement of facts and admissions by accused (Exhibit 3) and a document entitled “Pairs Fire and Movement, Day and Night Range Introduction and Safety Briefing” (Exhibit 4). These documents establish that Corporal Abao was a member of the Canadian Armed Forces, Regular Force. His trade was that of Infantryman, and he was a member of B Company, 3rd Battalion, Princess Patricia’s Canadian Light Infantry. He was employed as a rifleman, holding the rank of corporal. B Company deployed to Wainwright to conduct individual battle task standards and firing ranges. The company conducted personal weapons tests for all members. The training progressed to individual and then pairs fire and movement by day and by night. Corporal Abao attended all such training prior to the incident and completed it without incident.

[3] The range in question was a pairs fire and movement range, to be conducted at night. A safety briefing was given to all participants prior to commencing the range as well as the scenario brief. This scenario covered the situation enemy, the situation friendly, as well as the mission and the execution. The mission was to conduct a clearance patrol in front of friendly positions in order to clear dead ground of possible enemy positions. The safety briefing included words of command, “Load”, “Ready”, “Unload”, for inspection clear weapons, “Make Safe”, “Stop” and “Advance”. Part of the briefing also expressly mentioned that should an unsafe act occur, anyone could call a “Stop, Stop, Stop” and only the Range Safety Officer (RSO) could lift the “Stop, Stop, Stop” and only when the unsafe act had been rectified. Every participant had to wear ear protection and participants were told they were to place their weapon on “safe” and await further orders if one heard the word of command “Stop”.

[4] Corporal Abao attended that briefing. On completion of the briefing, at approximately 2100 hours, the range commenced. Corporal Abao and his partner, Private Beattie, were the first pair. The start point of the range was in low ground behind a hill. Participants would have to move forward, over the hill, to enter the target

area. The range was conducted using remote-controlled targets. A target operator, using a remote control in radio contact with the targets, triggered the targets to pop up at an appropriate time in the training scenario.

[5] Identity, date, time and place of the offences are admitted. The defence also admits that a C7 rifle, loaded with live ammunition, is a thing that may be dangerous to life, thereby dispensing the burden on the prosecution to prove this element with respect to all charges and that Corporal Abao carried and fired a C7 rifle, loaded with live ammunition, on the range in Wainwright at the material time.

### **Facts**

[6] The facts surrounding this case are straightforward. During the night of 21 September 2015, members of B Company, were conducting the said live firing range exercise. Corporal Abao and then Private Beattie volunteered to be the first pair to execute themselves on the range. Warrant Officer Stratford was the Officer in Charge (OIC) of the range and ultimately responsible for safety on the range that night. After giving a condensed version of the safety briefing after supper, it was understood that a red flag was in place and when the words of command "Load", "Ready" and "Advance" were given, it gave a member of the firing team authority to fire his or her weapon, unless the words "Stop", or "Stop, Stop, Stop" were issued. During this range, all participants wore helmets, gloves, eyewear, monocular night vision goggles, laser sight, flak vests, webbing, as well as various types of hearing protection. Some participants also had a personal role radio (PRR). The testimonies of various witnesses revealed that the combination of this equipment would slow down the movement of a person and also that the night vision goggles significantly affects someone's depth perception and vision. Corporal Abao and then Private Beattie wore night vision goggles and a laser sight on the rifle, two-piece standard yellow earplugs and a PRR carried on the left side of gear with headset in place.

[7] According to his testimony, Warrant Officer Stratford testified that prior to the step off, he took everyone down to a waiting area and assumed everybody was there. He then gave the command, "Load and Ready"; gave the team leader his last instructions; and finally he gave the command, "Advance." Corporal Abao and Private Beattie were at the crest of a small hill and as they were advancing, while everybody shook out, Warrant Officer Stratford realized that one man was missing and he then issued the command, "Stop, Stop, Stop." He said that he realized that Private Levasseur was missing and started to call his name. Warrant Officer Stratford stated that once he had issued the "Stop, Stop, Stop," the RSOs also called the "Stop, Stop, Stop" or "Stop", and the firing took place five seconds later. He described that when the firing took place, Corporal Abao was approximately ten feet in front of him. He said that he was roughly in the middle of the pair and more at the base of the hill, offset and closer to Private Beattie. Private Beattie may have been closer to him, on the right. He believed that Corporal Abao was further on his left. According to Warrant Officer Stratford, Corporal Abao and Private Beattie may have been six feet apart at the time of the "Stop, Stop, Stop." He said that at the time of the command to "Stop", Sergeant Hall was

directly in front of himself; Sergeant Taylor was two or three feet behind and to the left of Corporal Abao. As for Captain Prowse, Warrant Officer Stratford said that he believed that he was behind him and to his left at approximately ten feet. He also said that he ordered the command to "Stop", in a fairly loud voice, which was followed within a few seconds by the same order of command by Sergeant Hall. Warrant Officer Stratford stated that he did not see what Sergeant Taylor did, when he issued the "Stop, Stop, Stop," but he said that Sergeant Taylor would have issued the same order at some point. He could not recall what Private Beattie did at the time, but he believed that he took a knee down the range. He stated that when the shots were fired, his focus was to find Private Levasseur, the target operator. He then moved in the direction of Corporal Abao and someone had Corporal Abao's weapon cleared and placed it on the ground. He called Private Levasseur's name again and he saw him show up, coming from behind, shortly after in their red light circle.

[8] During his cross-examination, Warrant Officer Stratford stated the absence of Private Levasseur was not raised by someone else and that he realized it on his own. When the question was put to him, he possibly said, "Take a knee," after the command, "Stop, Stop, Stop". He was adamant that he was the first person to call a "Stop," or "Stop, Stop, Stop". Warrant Officer Stratford said that it is possible that he said, "Take a knee" before he issued the command, "Stop". He also believed that Corporal Abao fired from a prone position within five seconds of being in a kneeling position. Finally, he confirmed having heard Corporal Abao say "Contact", or words to that effect, before the shots were fired, which means that you are about to engage. When asked if he would call "Contact" immediately after hearing the command, "Stop", Warrant Officer Stratford said that he would not and that no reasonable soldier in the same circumstances would call "Contact" and engage. This last statement was abundantly corroborated by the other witness. Warrant Officer Stratford admitted that he should not have issued the order to advance unless he was certain of the position of all staff. He was not the subject of an investigation with regard to this incident.

[9] Sergeant Hall testified that during the live firing that night, participants were expected to advance to "Contact". He testified that he was one of the RSOs that night. Sergeant Hall said that before Corporal Abao and Private Beattie stepped up after receiving the order to "Load," "Ready" and "Advance" by Warrant Officer Stratford they were free to go and engage. As he was counting the number of personnel on the range and realized that one was missing, Sergeant Hall said that he then called "Stop" in a very loud manner. Sergeant Hall testified that Corporal Abao and Private Beattie were located ten feet in front of him, four feet apart. According to Sergeant Hall, Warrant Officer Stratford was in front of himself, contrary to the version of events described by Warrant Officer Stratford. He also recalled that Sergeant Taylor was about ten feet in front of him, and within two feet behind and to the side of Corporal Abao. He did not remember where Captain Prowse was on the range.

[10] Sergeant Hall testified that once he issued the command "Stop," Corporal Abao took a knee. He then turned half around in his direction and looked back at him. Private Beattie did the same. He described that, at this time, there was a lull. He then started to

call for Levasseur. Within three seconds, he heard Corporal Abao call "Contact" and three rounds were fired from a kneeling position. Sergeant Hall called "Stop" again. He does not remember the immediate actions of Sergeant Taylor at the time and he does not recall Warrant Officer Stratford saying anything. Sergeant Hall described that after he ordered a second "Stop," he went up to Corporal Abao and yelled at him to place his weapon on "Safe" and put it down. Sergeant Hall stated that shortly after that, five to ten seconds, he heard Private Levasseur down the range. He saw Private Levasseur with his headlamp on at about 100 metres away from the starting point in the vicinity of the targets within 30 seconds after the firing occurred. During his cross-examination, Sergeant Hall stated that he was the first person to call "Stop, Stop, Stop" when he realized that someone was missing. He added also that the target operator had no radio communication with the RSO.

[11] Sergeant Taylor was an Acting Range Safety Officer (ARSO) during that exercise. He said that just prior to Corporal Abao and Private Beattie stepping off, he passed on the command, "Load and Ready" and then the command to "Advance." He was located behind Corporal Abao and five to six feet to his left. Private Beattie was located 10 to 20 meters off to his right. Shortly after they commenced advancing, he heard the command, "Stop, Stop, Stop" from not too far, as he was hearing several voices from the rear. Warrant Officer Stratford and Sergeant Hall were halfway to the bottom 10 to 15 metres from his and to his right. Sergeant Taylor passed on in a talking voice the commands "Stop, Stop, Stop, "Take a knee", "Weapon on Safe". He observed Corporal Abao take a knee a few seconds after that command. Corporal Abao was in a kneeling position. Sergeant Taylor looked in to have more details and understand the situation as Sergeant Hall was yelling the name of Levasseur. He then saw Corporal Abao look in and yell, "What?" towards the group in the center, looked back, make contact and fire a couple shots from a kneeling to a prone position. He was not sure. Once the shots were fired, he yelled "Stop" again. To his recollection, Private Levasseur was between their position and the targets shortly after the shots were fired, approximately ten seconds later, at about 100 meters. He did not know where Private Levasseur was when the shots were fired. During cross-examination, Sergeant Taylor testified that no one answered the question voiced by Corporal Abao when he said "What?" including himself. He said that maybe Corporal Abao may have been waiting for further directions, but he did not give him any. Sergeant Taylor stated that the communication behind the firers was confusing and a lot of persons were talking. To him, this situation might have been confusing for Corporal Abao and Private Beattie.

[12] As to the evidence of Captain Prowse, he heard Sergeant Hall call a "Stop, Stop, Stop," not Warrant Officer Stratford. He heard another one, but he does not know who called it. When he heard the said command, he ran up the firing line. He saw Private Levasseur after Corporal Abao and Private Beattie were told to put their weapons down, approximately 20 seconds later. Captain Prowse agreed that it was possible not to hear things on a range.

[13] Private Levasseur, now Corporal, was the target operator during the live firing exercise. He stated that Warrant Officer Stratford told him to go down the range that

night before the range went live to fix the targets. He added that the OIC told him to go ahead and that they would wait. He testified that he believed he was halfway from the top of the hill and the target when the shots were fired at approximately 50 feet from the targets. He stated that within a few seconds after the shots were fired, he stopped and turned on his infrared light. Corporal Levasseur said that he had no other light source. When that happened, he could have been as far as 45 metres on the right side of the target.

[14] Corporal Abao testified in a very clear, concise and straightforward manner. He stated that he and Private Beattie were the first pair to step off that night as he volunteered his team to go first. Private Beattie was three meters away from him to his right. He understood his duties that evening on the range were to close in and destroy the enemy. He explained the meaning and understanding of the words of command "Load", "Ready", "Stop", "Stop, Stop, Stop" and "Advance". Corporal Abao testified that after they had received the command "Load" and "Ready", they were given the order to "Advance". He and Private Beattie, on his side, started to walk up the hill. As he reached the top of the hill, he barely heard the word of command, "Take a knee." He did. Then he looked as he turned halfway back to his right and he said "What?" He was curious. Corporal Abao heard no answer by Sergeant Taylor or others. They appeared to be talking amongst each other and no attention was given to him and his partner in response to his inquiry. As he felt he was still under the word of command "Advance", the range was still open to him. He then scanned his left and right arcs and that is where he believed he spotted a human shape target. He opened fired after contact and heard the words "Stop, Stop, Stop." After hearing that command, he placed his weapon on safe, put it on the ground and did not touch it. He explained his thought process when heard "Take a knee." He said, "It meant have a good view as to what you are about to assault." As best as he could remember when he took a knee, Private Beattie was three meters to his right. He stated that he used the word "Contact" because he believed that he had confirmed visual on an enemy and he felt it was in his right to engage with the target. Corporal Abao said that he only heard the command "Stop" or "Stop, Stop, Stop" from behind and after he had fired his weapon. Corporal Abao said that after receiving the command "Advance", he felt ready to go and that it was he and his partner that had volunteered to go first. Corporal Abao explained that, in the past, he has had some difficulty to hear a word of command and that he would look left to right and that's where they have people from the chain of command who are echoing the words of command.

[15] During his cross-examination, Corporal Abao testified in a very firm and coherent manner. He stated that he knew the words of command and that he was familiar with all the equipment. Asked why he had taken a chance that night, Corporal Abao paused before saying, in a very calm and firm manner, "As I was moving up the range, and been told it is mine after they had given the order to advance, there was nothing else passed down from what I can remember, or whatever it was, I did not hear it, therefore the range to me was open." Asked as to why he did not repeat his enquiry when he received no answer, Corporal Abao said that he did not because usually, as

they are trained to do, when they are only asked to take a knee it is because they advance too fast and need to take more time to observe.

[16] As to Private Beattie, he testified also that he heard the word “stop” only after the shots were fired by Corporal Abao. He said that before firing his weapon, Corporal Abao called “Contact” because he had seen the target.

**Presumption of innocence and the standard of proof beyond a reasonable doubt**

[17] The first and most important principle of law applicable to every criminal case and cases dealt with under the Code of Service Discipline for a service offence is the presumption of innocence. Corporal Abao entered the proceedings presumed to be innocent, and the presumption of innocence remains throughout the case unless the prosecution, on the evidence put before the Court, satisfies the Court beyond a reasonable doubt that he is guilty.

[18] 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.

[19] The burden of proof rests with the prosecution and never shifts. There is no burden on Corporal Abao to prove that he is innocent. He does not have to prove anything.

[20] Now what does the expression “beyond a reasonable doubt” mean? 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 a doubt that arises logically from the evidence or from an absence of evidence.

[21] 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. Corporal Abao can only be convicted if the Court is sure that he is guilty. Even if the Court believes that the accused is probably or likely guilty, this is not enough. In these circumstances, the Court must give him the benefit of the doubt and find him not guilty as the prosecution failed to satisfy the Court of his guilt beyond a reasonable doubt.

[22] 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 of or none of the evidence given by a witness. Many factors will influence a witness’s version of events, including the passage of time, the position to

make accurate and complete observations about the event. Did he 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? Did the witness's 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's 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?

[23] The requirement for proof beyond a reasonable doubt applies to each of the essential elements of each charge. It does not apply to individual pieces of evidence. The standard of proof beyond a reasonable doubt also applies to questions of credibility, and the Court need not make a definitive determination of the credibility of a witness or group of witnesses.

[24] The testimonies heard at trial raise significant concerns. These concerns relate to several aspects of the testimonial evidence, including what was said by whom and to whom, when was it said, who heard it and what was heard and what was said by various individuals at different moments. The evidence is also problematic in many ways in relation to the exact position of those involved during the live firing range at a specific moment. Other than a basic and unexplained diagram of the range attached as Exhibit 4, no evidence was provided to Court that would provide a clear representation of the firing range, including its width, length, elevation, as well as any natural and artificial obstacles found on the terrain.

[25] 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 Corporal Abao's guilt arising from the credibility of the witnesses, the prosecution has failed to establish guilt beyond a reasonable doubt.

[26] Corporal Abao testified at his trial. His evidence is not assessed differently than the testimony of any other witness. However if the Court believes his testimony that he did not commit the offences 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.

[27] The Court found him a highly credible and reliable witness. His testimony was internally and externally coherent. He testified in a straightforward manner and was never evasive or argumentative. When questions were asked in cross-examination, he answered calmly and respectfully and never tried to justify or embellish his testimony. The Court has no reason to disbelieve any part of his testimony, which is entirely consistent with the evidence as a whole.

**The First Charge: Injurious or destructive handling of dangerous substances under section 127 of the National Defence Act**

[28] Corporal Abao is charged under section 127 of the *National Defence Act* for having negligently omitted to do something in relation to a thing that may be dangerous to life, which omission was likely to cause bodily injury to some person. Section 127 of the Act provides, in part:

**127** Every person who wilfully or negligently or by neglect of or contrary to regulations, orders or instructions does any act or omits to do anything, in relation to any thing or substance that may be dangerous to life or property, which act or omission causes or is likely to cause loss of life or bodily injury to any person or damage to or destruction of any property, is guilty of an offence . . .

[29] As to the first charge, the prosecution submits that the issues can be narrowed as follows:

- (a) Did Corporal Abao hear the word of command “stop” and, if YES, did he respond to that command in an appropriate way?
- (b) Did his actions likely pose a danger to Private Levasseur?
- (c) Did Corporal Abao have the required blameworthy state of mind?

[30] The prosecution must establish beyond a reasonable doubt all the essential elements of the offence under section 127 of the Act:

- (a) That Corporal Abao is the person that committed the offence alleged;
- (b) That Corporal Abao did commit the offence on or about the date and at the place alleged in the particulars of the charge;
- (c) That a C7 rifle is a thing that may be dangerous to life;
- (d) That Corporal Abao’s omission to comply with a command to “stop” by firing his C7 rifle was likely to cause bodily injury to Private Levasseur;

- (e) That Corporal Abao's omission to comply with the command "stop" by firing his C7 rifle was negligent; and
- (f) That Corporal Abao had the requisite blameworthy state of mind when the alleged offence took place.

Identity, date, time and place of the offences are admitted. The defence also admits that a C7 rifle, loaded with live ammunition, is a thing that may be dangerous to life, thereby dispensing the burden on the prosecution to prove this element with respect to all charges and that Corporal Abao carried and fired a C7 rifle, loaded with live ammunition, on the range in Wainwright at the material time.

[31] The evidence leaves no doubt that the live firing range that night was not conducted safely. It is also clear that the firing of shots by Corporal Abao is the last event of a sequence of events that started when Warrant Officer Stratford, the OIC of the range, gave the words of command "Load", "Ready" and "Advance" shortly after having told Private Levasseur, the target operator, to go down the range before the range went live to fix the targets and that they would wait for his return. All that combined with the fact that there was no radio communications between the target operator and the OIC on a night live firing range when that took place. The fact that someone realized that Private Levasseur was missing created a chain reaction that led to the firing of shots by Corporal Abao. The evidence reveals a significant level of confusion that night, particularly when the focus of the range staff shifted on the absence and whereabouts of the target operator, thereby forgetting that two persons, focused on their task and achieve their mission as they are trained to do, had received the command "Advance" and were looking ahead fully concentrated on their mission and equipped that night with equipment that affected their perceptions, and movements, including their hearing capacity.

[32] The prosecution suggested that Corporal Abao was too focused on his mission that he failed to pay attention to his surroundings. The prosecution almost argued that Corporal Abao should have implicitly assumed that when he heard to "Take a knee," it included the word of command "Stop". In addition, the prosecution suggested that Corporal Abao should have inquired further when he received no answer from anyone, as he turned halfway in the direction of the group in the center. In other words, the prosecution would like the Court and Corporal Abao, to assume that he should have known at the time that the target operator was missing because everyone else behind him knew about that.

[33] Based on the totality of the evidence and lack of evidence, the Court has no reasons not to believe the testimony of Corporal Abao. He acted reasonably in the circumstances and his actions to engage and fire his shots after contact are consistent with the words of command that he heard, as well as the briefing and training he received. This is far from constituting a marked departure from the conduct expected of a reasonable and prudent infantryman placed in the same circumstances that night. Whether his actions of firing his weapon may have posed a danger to the safety of

others is not sufficient to find him guilty. As the Court believes the testimony of the accused, the Court is not only left with a reasonable doubt but the Court finds that Corporal Abao's actions did not amount to penal negligence in the circumstances.

**The Second Charge: Neglect to the prejudice of good order and discipline under section 129 of the National Defence Act**

[34] Corporal Abao is also charged with neglect to the prejudice of good order and discipline under section 129 of the *National Defence Act*, which partially provides as follows:

**129** (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence ...

[35] I agree with the approach described by d'Auteuil M.J. in *R v Nauss*, 2013 CM 3008, at paragraphs 34 to 36:

[34] The essential elements of the offence of neglect to the prejudice to good order and discipline under section 129 of the *National Defence Act* are:

- a. the identity of the accused as the offender;
- b. the date and place of the offence;
- c. the omission as alleged in the charge really occurred;
- d. that the omission amounted to a blameworthy negligence, which includes to prove that:
  - i. there was a standard of care to be exercised by the accused;
  - ii. the omission of the accused was in relation with the standard of care;
  - iii. the omission of the accused breached the required standard of care; and
  - iv. the omission of the accused amounted to a negligence, which means that the acts or omissions of the accused constituted a marked departure from the expected standard of care.
- e. the prejudice to good order and discipline, which includes to prove:
  - i. the standard of conduct required;
  - ii. the fact that the accused knew or ought to have known the standard of conduct required;
  - iii. the fact that the omission of the accused amounted to a contravention of the standard of conduct.

[35] Concerning the essential element of neglect, this court has to find out if some evidence has been adduced by the prosecution concerning the conduct of the accused

itself, which is the *actus reus*, and the requisite mental element of it, which is the *mens rea*.

[36] First, the negligence concept under section 129 of the *National Defence Act* must be addressed as a penal concept as I already stated in my decision in *R v Gardiner*, 2008 CM 3021. Generally speaking, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. Fundamental principles of military law justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, but also with the offender's mental state. As established in *R. v. Beatty*, 2008 SCC 5, at paragraph 7, the modify objective test established in *R. v. Hundal*, [1993] 1 S.C.R. 867 remains the appropriate test to determine the requisite *mens rea* for negligence-based military service offences under the Code of Service Discipline. Concerning the *actus reus*, it must be defined by the applicable standard and the fact that the conduct of the accused did not respect it.

[36] The analysis of d'Auteuil M.J. in *Nauss*, at paragraphs 56, 58 and 59 is persuasive. There, he makes the following observations:

[56] Properly handling a weapon when unloading it appears to the court as a standard of conduct, not a standard of care, for which the court cannot rely on to assess negligence in this case. As pointed out earlier, the notion of negligence refers to the concept of standard of care, which is different from a standard of conduct. As established by the prosecution through the particulars of both charges, the standard of care in this case is about handling a C7 rifle in a safe manner, not in a proper or correct manner. However, it is true that in some situations, by handling a weapon in an incorrect or improper manner, it may result in an unsafe way to handle a weapon, which is not the case here.

[58] It is the conclusion of the court, having regard to the evidence as a whole concerning this essential element of the offence that the prosecution has not proved beyond a reasonable doubt that the omission amounted to a blameworthy negligence for both charges.

[59] I would like to add that from the court's perspective, when a weapon's drill is done improperly causing a weapon to fire when it is not supposed to or when it is not authorized to, it does not constitute automatically a penal negligence offence in the meaning of section 129 of the *National Defence Act*.

[37] Even though the *Beatty* decision dealt with penal negligence with respect to the offence of dangerous operation of a motor vehicle under section 249 of the *Criminal Code*, it is relevant in several regards. The comments made by Charron J. at paragraphs 34 to 35 are not without significance:

[34] Therefore, as noted by Cory J., the difficulty of requiring positive proof of a particular subjective state of mind lends further support to the notion that *mens rea* should be assessed by objectively measuring the driver's conduct against the standard of a reasonably prudent driver. In addition, I would note that the automatic and reflexive nature of driving gives rise to the following consideration. Because driving, in large part, is automatic and reflexive, some departures from the standard expected of a reasonably prudent person will inevitably be the product, as Cory J. states, of "little conscious thought". Even the most able and prudent driver will from time to time suffer from momentary lapses of attention. These lapses may well result in conduct that, when viewed objectively, falls below the standard expected of a reasonably prudent

driver. Such automatic and reflexive conduct may even pose a danger to other users of the highway. Indeed, the facts in this case provide a graphic example. The fact that the danger may be the product of little conscious thought becomes of concern because, as McLachlin J. (as she then was) aptly put it in *R. v. Creighton*, [1993] 3 S.C.R. 3, at p. 59: “The law does not lightly brand a person as a criminal.” In addition to the largely automatic and reflexive nature of driving, we must also consider the fact that driving, although inherently risky, is a legal activity that has social value. If every departure from the civil norm is to be criminalized, regardless of the degree, we risk casting the net too widely and branding as criminals persons who are in reality not morally blameworthy. Such an approach risks violating the principle of fundamental justice that the morally innocent not be deprived of liberty.

[35] In a civil setting, it does not matter how far the driver fell short of the standard of care required by law. The extent of the driver’s liability depends not on the degree of negligence, but on the amount of damage done. Also, the mental state (or lack thereof) of the tortfeasor is immaterial, except in respect of punitive damages. In a criminal setting, the driver’s mental state does matter because the punishment of an innocent person is contrary to fundamental principles of criminal justice. The degree of negligence is the determinative question because criminal fault must be based on conduct that merits punishment.

[38] For the reasons expressed earlier, I am satisfied that the conduct of Corporal Abao that night was not negligent in the circumstances, needless to say that it falls short of the required penal negligence. Accordingly, there is no requirement for the Court to address the element of the offence related to the prejudice of good order and discipline. Therefore, Corporal Abao must be acquitted of the second charge.

#### **FOR THESE REASONS, THE COURT:**

[39] **FINDS** the accused not guilty of all charges.

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#### **Counsel:**

Captain G.J. Moorehead and Major A.J. van der Linde for the Director of Military Prosecutions

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Corporal A.P. Abao