**COURT MARTIAL**

**Citation:** *R. v. Wylie*, 2017 CM 1005

**Date:** 20170412
**Docket:** 201631

Standing Court Martial

Canadian Forces Base Edmonton
Edmonton, Alberta

**Between:**

**Her Majesty the Queen**

- and -

**Master Corporal J.W.D. Wylie, Accused**

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

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NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's *"Use of Personal Information in Judgments and Recommended Protocol".*

## REASONS FOR FINDING

(Orally)

### ***Introduction***

[1] Master Corporal Wylie is facing three charges. They arose from an incident that occurred on 28 August 2015 at the Edmonton Garrison Junior Ranks Mess Hall, Canadian Forces Base (CFB) Edmonton. They read as follows:

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| FIRST CHARGE | AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, |
| s. 130 *NDA* | UTTERING THREATS, CONTRARY TO SECTION 264.1(1) OF THE CRIMINAL CODE |

*Particulars*: In that he, on 28 August 2015, at the Edmonton Garrison, Junior Ranks Mess Hall, CFB Edmonton, Edmonton, Alberta, knowingly uttered a threat to John Christian Robinson and Barbara Rose Woodland to cause death to XXXX MWO John Robinson, YYYY WO Alain Doucet and ZZZZ WO Patrick Joseph Flanagan, or any of them.

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| SECOND CHARGE<br><br>s. 130 *NDA* | AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, UTTERING THREATS, CONTRARY TO SECTION 264.1(1) OF THE CRIMINAL CODE |

*Particulars*: In that he, on 28 August 2015, at the Edmonton Garrison, Junior ranks Mess Hall, CFB Edmonton, Edmonton, Alberta, knowingly uttered a threat to John Christian Robinson and Barbara Rose Woodland to cause death to "the coloured people".

| | |
|---|---|
| THIRD CHARGE<br><br>s. 129 *NDA* | AN ACT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE |

Particulars: In that he, on 28 August 2015, at the Edmonton Garrison, Junior ranks Mess Hall, CFB Edmonton, Edmonton, Alberta, said to John Christian Robinson "maybe I'll get your father to run and see if I can hit 900 yards," or words to that effect.

***Evidence***

[2] The evidence before this court martial consists of the testimony of John Christian Robinson, Barbara Woodland, Jerome Sutton and Warrant Officer Alain Doucet. In addition, the parties filed an agreed statement of facts and a document, by consent of the defence, entitled, "Representations of the Person in Custody" signed by the accused on 29 August 2015. Identity, date, time and place of the offences are admitted.

***Facts***

[3] The facts surrounding this case are straightforward. At approximately 1030 hours on 28 August 2015, at the Junior Ranks Mess Hall at CFB Edmonton, about nine members of the staff were having their usual lunch coffee break in the break room. Christian Robinson, a young casual worker, and Barbara Woodland, a 16-year kitchen helper, were sitting at a six-foot-long table across from each other. According to Mrs Woodland, Master Corporal Wylie, whom she has known for approximately 12 years, came to their table and asked to borrow money from her, which she had accepted to do

on numerous occasions in the past. Although they were friends during their first years, she no longer considered him a friend because of Master Corporal Wylie's personal issues, but she still considered him a good person. She testified that she told him that she would not lend him money because she feared he would use it to buy drugs. According to Mrs Woodland, Master Corporal Wylie got hostile and replied that he wanted to buy cigarettes. He then started to rant that if the guys in the military would move up in rank, there would be more room for guys like him to move up and he then named three specific persons: Warrant Officer Doucet, Warrant Officer Flanagan and Warrant Officer Robinson. Mrs Woodland then stated that Master Corporal Wylie started to shoot his mouth off, saying that he could get rid of those three guys and that they could move up the ranks. She added that he continued talking about John Robinson, the father of Christian Robinson, who was sitting in front of him. Mrs Woodland said that she then asked the accused to please shut up, because it was about Christian Robinson's dad that he was talking about. Master Corporal Wylie would have replied that he did not care and continued. She tried to kick him under the table and punch his arm to stop him and Master Corporal Wylie would have said that he could line them all up and shoot them. She did not take him seriously at first, but she observed Christian Robinson and described him as shaky and white when they left the table, presumably when he heard Wylie say that he had "five rounds in [his] glove box". She testified that the words did not come out jokingly, but she said that she had known Wylie for a long time and she does not think he would do something like that, adding that sometimes desperate people do weird things and you can't predict that. She stated that it was overwhelming at the time. Asked if she took it seriously, she replied that it was 50-50. Mrs Woodland mentioned that Master Corporal Wylie was getting vocal and that he was threatening other people at the time. However, she gave no names to the police about that. Mrs Woodland said that only she and Christian Robinson know what happened that morning, which is consistent with the testimony of Jerome Sutton who was present in the room and did not notice anything.

[4] Christian Robinson stated that Master Corporal Wylie came to their table around 1050 hours that morning. He recalled Wylie asking for cigarettes because he had no money. According to his testimony, there was an exchange between Mrs Woodland and the accused as Master Corporal Wylie sat beside her about three feet across from him on a diagonal. Mr Robinson testified that Master Corporal Wylie started to talk about weapons and firearms and how the military police would escort him to the range for him to use the weapons. Mr Robinson felt that this topic of conversation came from nowhere. He testified that the accused started to talk about himself hurting his back previously, which precluded him from being posted. He then heard the accused talking about his father for the first time, Master Warrant Officer Robinson, who was the G4 Foods at the time, and why he could not be posted. Mr Robinson recalls that Master Corporal Wylie brought up the names of Warrant Officers Flanagan and Doucet as being the reasons why they could not be promoted as the older guys were in the way. He believed that Master Corporal Wylie went back to talk again about the weapons and that he needed to go to the range again. Mr Robinson stated that Master Corporal Wylie then stood up, looked at him and said, "Maybe I will take the old guys to the range, see how far they can run before I hit them." Mr Robinson added that as Master Corporal

Wylie was walking, he heard him say that he had five rounds in his glove box. Mr Robinson said that he was quiet and uncomfortable about that conversation. Despite Mrs Woodland's reaction and attempts to stop him as they were scared, Master Corporal Wylie continued to talk. In response to a question from Mrs Woodland about having a list, Mr Robinson thought that Master Corporal Wylie replied that, as he was walking away, "It [was] starting with the coloured people." Mr Robinson said that he was not sure what he meant by that comment, but that it came from nowhere. Mr Robinson felt that Master Corporal Wylie would carry out his threats, as he appeared on edge, anxious, agitated and on a mission. He had known the accused for two years, but he had not talked to him previously. When they left the table, he observed that Mrs Woodland was scared and that she cried. Mr Robinson stated that he had overheard comments from the accused to others in the past that he considered as idle threats, but that others would not; the difference that day being that Master Corporal Wylie was talking about Mr Robinson's own father and that he found this upsetting. According to Mr Robinson, Master Corporal Wylie did not attempt to borrow money that morning from Mrs Woodland or others.

[5] Mr Jerome Sutton was present in the break room that morning as he is one of the cooks in the combined mess. He has known and worked with the accused for a couple of years. He stated that the accused talked a lot and bragged. Mr Sutton stated that at the end of that coffee break, as he and the accused walked back together from the break room, there was some discussion about weapons and the accused said that someone asked him if his weapons were for hunting and the accused replied that they were "to kill people". Mr Sutton told the accused that he should be careful about what he was saying because you don't know who is listening to you. Master Corporal Wylie asked him, "Are you gonna rat on me?" To which Mr Sutton replied, "Of course not." He did not hear anything from the accused during the coffee break and he does not believe that the accused had any intention of using any weapon against anybody that morning, otherwise he would have done something. He did not take it seriously, but as a stupid and flippant remark.

[6] Warrant Officer Doucet testified that after receiving reports about that incident, he met with Mrs Woodland who was very emotional and Mr Robinson looked worried for his father. He called the military police and took safety measures since some of the staff were concerned. However, it is unknown what the staff had observed or if the basis of their concern was first-hand or hearsay. In the statement made by the accused while in custody the day following the incident (Exhibit 4), Master Corporal Wylie stated that he was sorry for the situation and that he was talking stupid and trying to be a tough guy. On 31 August 2015, Master Corporal Wylie's residence and vehicle were searched. No firearms or ammunition were found.

***Presumption of Innocence and the Standard of Proof Beyond a Reasonable Doubt***

[7] 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. Master Corporal Wylie 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.

[8] 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.

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

[10] Now what does the expression "beyond a reasonable doubt" mean? I said earlier that 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.

[11] 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. Master Corporal Wylie 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.

[12] 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's version of events, including the passage of time, the position to make accurate and complete observations about the event. 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.

[13] Reasonable doubt applies to the issue of credibility. The Court may, on any given point, believe a witness, disbelieve a witness, or simply 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 Master Corporal Wylie's guilt arising from the credibility of the witnesses, the prosecution has failed to establish guilt beyond a reasonable doubt.

***The First and Second Charge: Uttering Threats Contrary to Section 264.1(1) of the Criminal Code***

[14] Master Corporal Wylie is charged with two offences under section 264.1(1)(*a*) of the *Criminal Code*, which reads in part:

> **264.1**(1) Uttering threats — Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> (*a*) to cause death or bodily harm to any person;

[15] The statement of particulars of the first charge reads as follows:

> *Particulars*: In that he, on 28 August 2015, at the Edmonton Garrison, Junior ranks Mess Hall, CFB Edmonton, Edmonton, Alberta, knowingly uttered a threat to John Christian Robinson and Barbara Rose Woodland to cause death to XXXX MWO John Robinson, YYYY WO Alain Doucet and ZZZZ WO Patrick Joseph Flanagan, or any of them.
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> Whereas, the statement of particulars of the second charge reads:
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> *Particulars*: In that he, on 28 August 2015, at the Edmonton Garrison, Junior ranks Mess Hall, CFB Edmonton, Edmonton, Alberta, knowingly uttered a threat to John Christian Robinson and Barbara Rose Woodland to cause death to "the coloured people."

[16] In *R. v. McRae*, 2013 SCC 68, [2013] 3 S.C.R. 931, the Supreme Court of Canada considered the offence of threatening under section 264.1(1)(*a*) of the *Criminal Code*. The threats can be uttered, conveyed, or in any way caused to be received by any person. The question of whether words constitute a threat is a question of law to be decided on an objective standard. The Court described the *actus reus* of the offence at paras 11-16:

> [11] The starting point of the analysis should always be the plain and ordinary meaning of the words uttered. Where the words clearly constitute a threat and there is no reason to believe that they had a secondary or less obvious meaning, the analysis is complete. However, in some cases, the context reveals that words that would on their face appear threatening may not constitute threats within the meaning of s. 264.1(1)(*a*) (see, e.g., *O'Brien*, at paras. 10-12). In other cases, contextual factors might have the effect of elevating to the level of threats words that would, on their face, appear relatively innocent (see, e.g., *R. v. MacDonald* (2002), 166 O.A.C. 121, where the words uttered were "You're next").
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> [12] For example, in *R. v. Felteau*, 2010 ONCA 821 (CanLII), the accused had told a mental health care worker that he was going to follow Ms. G, his former probation officer, and "assault" her (paras. 1-2). The trial judge found that the words did not constitute a threat because the threat must be of death or bodily harm and the accused's reference to "assault" did not necessarily include bodily harm (para. 3). The Court of Appeal for Ontario found that the trial judge had erred in looking at the word "assault"

in isolation from the circumstances (para. 7). The court held that the factors relevant to the determination of the meaning of the words included the facts that: the accused was fixated upon Ms. G and had very recently been convicted of harassing her; he was angry with Ms. G when he uttered the words; he blamed her for his arrest and detention; and he was mentally unstable, had been consuming cocaine and had a known history of serious violence directed at women (para. 8). The Court of Appeal concluded that the accused's words, viewed in these circumstances, would convey a threat of bodily harm to a reasonable person (para. 9).

[13] Thus, the legal question of whether the accused uttered a threat of death or bodily harm turns solely on the meaning that a reasonable person would attach to the words viewed in the circumstances in which they were uttered or conveyed. The Crown need not prove that the intended recipient of the threat was made aware of it, or if aware of it, that he or she was intimidated by it or took it seriously (*Clemente*, at p. 763; *O'Brien*, at para. 13; *R. v. LeBlanc*, [1989] 1 S.C.R. 1583 (confirming the trial judge's instruction that it was not necessary that "the person threatened be ever aware that the threat was made": (1988), 90 N.B.R. (2d) 63 (C.A.), at para. 13)). Further, the words do not have to be directed towards a specific person; a threat against an ascertained group of people is sufficient (*R. v. Rémy* (1993), 82 C.C.C. (3d) 176 (Que. C.A.), at p. 185, leave to appeal refused, [1993] 4 S.C.R. vii (threat against "police officers" generally); *R. v. Upson*, 2001 NSCA 89, 194 N.S.R. (2d) 87, at para. 31 (threat against "members of the black race" generally)).

[14] The reasonable person standard must be applied in light of the particular circumstances of a case. As the Court of Appeal for Ontario explained in *R. v. Batista*, 2008 ONCA 804, 62 C.R. (6th) 376:

> An ordinary reasonable person considering an alleged threat objectively would be one informed of all the circumstances relevant to his or her determination. The characteristics of a reasonable person were considered by the Supreme Court of Canada in *R. v. S. (R.D.)*, [1997] 3 S.C.R. 484 (S.C.C.), in the context of the test for bias. In that case, L'Heureux-Dubé and McLachlin JJ., at para. 36, described such a person as a:
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> > reasonable, informed, practical and realistic person who considers the matter in some detail. . . . The person postulated is not a "very sensitive or scrupulous" person, but rather a right-minded person familiar with the circumstances of the case.
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> Similarly, in *R. v. Collins*, [1987] 1 S.C.R. 265 (S.C.C.), at p. 282, in the context of the test for bringing the administration of justice into disrepute, Lamer J. for the majority describes a reasonable person as "dispassionate and fully apprised of the circumstances of the case": see also *R. v. Burlingham*, [1995] 2 S.C.R. 206 (S.C.C.), at para. 71.
>
> It follows that a reasonable person considering whether the impugned words amount to a threat at law is one who is objective, fully-informed, right-minded, dispassionate, practical and realistic. [emphasis in original]

[15] Thus, while testimony from persons who heard or were the object of the threat may be considered in applying this objective test, the question in relation to the prohibited act is not whether people in fact felt threatened. As the Court of Appeal for Ontario put it in *Batista*, witness opinions are relevant to the application of the reasonable person standard; however, they are not determinative, given that they

amount to personal opinions and "d[o] not necessarily satisfy the requirements of the legal test" (para. 26).

[16] To conclude on this point, the prohibited act of the offence of uttering threats will be made out if a reasonable person fully aware of the circumstances in which the words were uttered or conveyed would have perceived them to be a threat of death or bodily harm.

[17] As to the *mens rea* of this offence, the Supreme Court of Canada made the following remarks at paras 17-23:

[17] The fault element is made out if it is shown that threatening words uttered or conveyed "were meant to intimidate or to be taken seriously" (*Clemente*, at p. 763).

[18] It is not necessary to prove that the threat was uttered with the intent that it be conveyed to its intended recipient (*Clemente*, at p. 763) or that the accused intended to carry out the threat (*McCraw*, at p. 82). Further, the fault element is disjunctive: it can be established by showing either that the accused intended to intimidate *or* intended that the threats be taken seriously (see, e.g., *Clemente*, at p. 763; *O'Brien*, at para. 7; *R. v. Neve* (1993), 145 A.R. 311 (C.A.); *R. v. Hiscox*, 2002 BCCA 312, 167 B.C.A.C. 315, at paras. 18 and 20; *R. v. Noble*, 2009 MBQB 98, 247 Man. R. (2d) 6, at paras. 28 and 32-35, aff'd 2010 MBCA 60, 255 Man. R. (2d) 144, at paras. 16-17; *R. v. Heaney*, 2013 BCCA 177 (CanLII), at para. 40; *R. v. Rudnicki*, [2004] R.J.Q. 2954 (C.A.), at para. 41; *R. v. Beyo* (2000), 47 O.R. (3d) 712 (C.A.), at para. 46).

[19] The fault element here is subjective; what matters is what the accused actually intended. However, as is generally the case, the decision about what the accused actually intended may depend on inferences drawn from all of the circumstances (see, e.g., *McCraw*, at p. 82). Drawing these inferences is not a departure from the subjective standard of fault. In *R. v. Hundal*, [1993] 1 S.C.R. 867, Justice Cory cites the following words from Professor Stuart which explain this point:

> In trying to ascertain what was going on in the accused's mind, as the subjective approach demands, the trier of fact may draw reasonable inferences from the accused's actions or words at the time of his act or in the witness box. The accused may or may not be believed. To conclude that, considering all the evidence, the Crown has proved beyond a reasonable doubt that the accused "must" have thought in the penalized way is no departure from the subjective substantive standard. Resort to an objective substantive standard would only occur if the reasoning became that the accused "must have realized it if he had thought about it". [emphasis in original]

[20] *O'Brien* is an example. The person targeted by the threat — the accused's ex-girlfriend — had testified that she had not been frightened by the accused's words. The trial judge strongly relied on this evidence to conclude that, despite the fact that the words on their own appeared threatening, she was left with a reasonable doubt as to whether the accused had the necessary intent to threaten (2012 MBCA 6, 275 Man. R. (2d) 144, at para. 34). The perception of the alleged victim was not directly in issue, but was relevant evidence of the accused's intent.

[21] Similarly, in *Noble*, the court had to determine if the accused intended to be taken seriously when he uttered the words "I guess we know whose house is going to burn down", immediately followed by "just kidding" and laughter (trial decision, at para. 1). The accused had uttered the words to a sheriff's officer as he was returning to

> prison from court after having been sentenced for threatening to kill the Crown attorney who had successfully prosecuted him for robbery. The trial judge found that in spite of the remark's off-the-cuff nature and the absence of any indication that the accused was angry or upset when he uttered the words, when viewed in the larger context, the accused was aware that his words, which were very specific, would be taken seriously as a threat against that same Crown attorney (paras. 33-35). After the first time the accused had threatened the Crown attorney, she had been the victim of an attempted home invasion. Although it was not alleged that the accused was involved, he told the media that the Crown attorney had gotten what she deserved. After she was made aware of the accused's reference to a house burning, the Crown attorney took the comment seriously and was very frightened by it. As a result, she and her partner sold their house (trial decision, at paras. 2-19). In addition to the Crown attorney's reaction to the threats, the fact that the accused knew that criminal sanctions flowed from threatening language, as a result of having just been sentenced to two years' imprisonment for uttering threats, was also an important factor with regard to the fault element in this case (para. 34). The trial judge concluded that the words might "have been blurted out on the spur of the moment, or driven by bravado, but given all the circumstances . . . the evidence demonstrate[d] that the accused was aware that it would be taken seriously" (para. 35).
>
> [22] The Court of Appeal for Manitoba confirmed the factual findings of the trial judge, specifically the contextual analysis she undertook with regard to the fault element (*Noble*, at para. 17).
>
> [23] To sum up, the fault element of the offence is made out if the accused intended the words uttered or conveyed to intimidate *or* to be taken seriously. It is not necessary to prove an intent that the words be conveyed to the subject of the threat. A subjective standard of fault applies. However, in order to determine what was in the accused's mind, a court will often have to draw reasonable inferences from the words and the circumstances, including how the words were perceived by those hearing them.

[18] The prosecution must establish beyond a reasonable doubt all the essential elements of the offence of threatening under section. 264.1 (1) of the *Criminal Code* :

(a) that Master Corporal Wylie made a threat;

(b) that the threat was to cause death to XXXX MWO John Robinson, YYYY WO Alain Doucet and ZZZZ WO Patrick Joseph Flanagan, or any of them; and

(c) that Master Corporal Wylie made the threat knowingly.

[19] Mrs Woodland testified that after her refusal to give money or cigarettes to the accused during the coffee break, the accused said that if the guys in the military would move up in ranks, there would be more room for guys like him to move up and he then named three specific persons, Warrant Officer Doucet, Warrant Officer Flanagan and Warrant Officer Robinson. Mrs Woodland then stated that Master Corporal Wylie started to shoot his mouth off saying that he could get rid of those three guys and that they could move up in the ranks. She added that he continued talking about John Robinson, the father of Christian Robinson, who was sitting in front of her. Mrs Woodland said that she then asked the accused to please shut up because it was about Christian Robinson's dad that he was talking about. Master Corporal Wylie would have

replied that he did not care and continued. She tried to kick him under the table and punch his arm to stop him and Master Corporal Wylie would have said that he could line them all up and shoot them. Although, she did not take him seriously at first, but she observed Christian Robinson and described him as shaky and white and they left the table, presumably when he heard Wylie say that he had five rounds in his glove box. Mr Robinson testified that the accused started to talk about himself hurting his back previously, which precluded him from being posted. He then heard the accused talking about his father for the first time, Master Warrant Officer Robinson, who was the G4 Foods at the time as being the person responsible for why he could not be posted. Mr Robinson recalls that Master Corporal Wylie brought up the names of Warrant Officers Flanagan and Doucet as being the reasons why they could not be promoted as the older guys were in the way. He believed that Master Corporal Wylie went back to talk again about the weapons and that he needed to go to the range again. Mr Robinson stated that Master Corporal Wylie then stood up, looked at him and said, "Maybe I will take the old guys to the range, see how far they can run before I hit them." Mr Robinson added that as Master Corporal Wylie was walking, he heard him say that he had five rounds in his glove box.

[20] Looking at the circumstances of the exchange, there is no doubt that the comments made by Master Corporal Wylie were ugly, offensive, abhorrent and disrespectful to his chain of command. However, I agree with the comments made by defence counsel that actual threats or conditional threats were not made in the context in which the comments were expressed. A reasonable person would conclude that Master Corporal Wylie was just very upset because no one would lend him money. In frustration, he decided to go on a rampage in blaming his chain of command for his financial difficulties because of the lack of promotion opportunity. He displayed a very insubordinate behaviour in making those comments and he conducted himself as he had done so many other times as described by Mr Sutton and even Mr Robinson. Even if they were uttered in the presence of the son of Master Warrant Officer Robinson, the Court is left with a reasonable doubt that the words uttered or conveyed were meant to intimidate or to be taken seriously.

[21] As to the second charge, namely the comment made about the "coloured people", the evidence of Mr Robinson indicates that it came from nowhere and it was part of an inflammatory exchange of words between Mrs Woodland and Master Corporal Wylie. These comments were not meant to intimidate or to be taken seriously in the circumstances. It appears that Master Corporal Wylie wanted to add fuel to the fire in a stupid and ugly exchange he had with Mrs Woodland who was already overwhelmed by the situation.

***The Third Charge: An Act to the Prejudice of Good Order and Discipline Under Section 129 of the National Defence Act***

[22] Master Corporal Wylie is also charged with an act to the prejudice of good order and discipline under section 129 of the *National Defence Act*, which partially provides as follows:

> (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.

[23] The statement of particulars of the third charge reads as follows:

> Particulars: In that he, on 28 August 2015, at the Edmonton Garrison, Junior ranks Mess Hall, CFB Edmonton, Edmonton, Alberta, said to John Christian Robinson "maybe I'll get your father to run and see if I can hit 900 yards," or words to that effect.

[24] In addition to the elements of the offence related to the identity of the accused, the date and the place of the alleged offence, the prosecution must establish beyond a reasonable doubt:

(a) the act as alleged in the charge;

(b) the prejudice to good order and discipline;

(c) the standard of conduct expected of the accused;

(d) that the accused knew or ought to have known of the standard of conduct required;

(e) the act constitutes a breach to the standard of conduct required; and

(f) the fault element (*mens rea*) or the blameworthy state of mind of the accused.

[25] The evidence heard during the trial does not reveal that the words alleged in the statement of particulars were uttered by the accused to John Christian Robinson. Christian Robinson testified that Master Corporal Wylie then stood up, looked at him and said, "Maybe I will take the old guys to the range, see how far they can run before I hit them." The prosecution agrees that the particulars alleged in the charge differ from the evidence heard at trial. Relying on the expression "or words to that effect" contained in the statement of particulars, it asks the Court to conclude that the offence is proven because it does not differ materially from the original charge or at least it is open for the Court to pronounce a special finding of guilt as the prosecution feels that the defence was not prejudiced in the circumstances. I disagree.

[26] In the matter of special findings, section 138 of the Act 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.

[27] Particulars serve to enable an accused person to fully assess the case against him, define the issues and prepare his or her defence, including whether or not to call evidence and testify at trial. It also assists the Court in managing the trial as it relates to issues concerning the admissibility of evidence. It is trite law that 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 that 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. In this case, substituting new particulars based on the evidence of Mr Robinson could simply modify the standard of conduct expected from the accused. The line of questions during the cross-examination of the prosecution witnesses reflects the defence strategy to defend the case against the accused. Allowing a special finding on the third charge would simply have the effect of substituting another count of the same offence. 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, the difference between the facts proved and the facts alleged in the statement of particulars would prejudice Master Corporal Wylie in the conduct of his defence.

**FOR THESE REASONS, THE COURT:**

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

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**Counsel:**

Major E.J. Cottrill for the Director of Military Prosecutions

Mr C.E. Thomas, Defence Counsel Services, Counsel for Master Corporal J.W.D. Wylie