COURT MARTIAL

Citation: *R. v. Rollman*, 2017 CM 2005

Date: 20170803
Docket: 201706

Standing Court Martial

5th Canadian Division Support Base Gagetown, Detachment Aldershot
Kentville, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Corporal G. Rollman, Accused

Before: Commander S.M. Sukstorf, M.J.

REASONS FOR FINDING

(Orally)

The case

[1] Corporal Rollman is charged with three offences namely: one count of striking a superior officer, contrary to section 84 of the *National Defence Act (NDA)* and two counts of conduct to the prejudice of good order and discipline, contrary to section 129 of the *NDA*.

[2] In reaching the Court's decision, I reviewed and summarized the facts of the case emerging from the evidence presented to the Court. I then reviewed the applicable law and made findings with regard to the credibility of the witnesses. I then applied the law to the facts, conducting my analysis before coming to a determination on each of the charges.

Evidence

[3] The following evidence was adduced at the court martial:

(a) In court, testimonies of the following witnesses, in order of appearance:

i. Ms Cheryl Richard;

ii. Ms Sharon Angel;

iii. Sergeant Christopher Jones; and

iv. Corporal G. Rollman

(b) Exhibit 3, Photo – view of steam line in the servery;

(c) Exhibit 4, Photo – view of steam line showing the exit door from servery;

(d) Exhibit 5, Photo – view of the servery from its entrance;

(e) Exhibit 6, Photo – view from the entranceway into the kitchen area;

(f) Exhibit 7, 14 photos of the kitchen, servery and dining area where the incidents of 20 and 21 February 2016 were alleged to have occurred; and

(g) The Court also took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence (MRE)*.

Facts

[4] In February 2016, Corporal Rollman, a reservist with approximately 19 years of combined pensionable service, was working on a Class B assignment as a military cook in the position of second in command of the kitchen in Food Services 5 Canadian Division Support Base (CDSB) Detachment Aldershot. During the same time, Ms Cheryl Richard worked as a Food Services (FOS 2) Kitchen Helper on the same shift in the kitchen.

[5] Corporal Rollman and Ms Richard began working together in the summer of 2009 and around November 2010, their relationship started to deteriorate. Corporal Rollman testified that, in his opinion, the conflict began when he started to date Ms Richard's cousin. On cross-examination, Ms Richard denied this. In any event, it is clear from their individual testimonies that their relationship deteriorated to a toxic level.

[6] Corporal Rollman testified that Ms Richard had been caught bad-mouthing him to diners, other staff and military subordinates, such as privates doing on-job training. He testified that she would tell them he did not know what he was doing, and advised

them not to listen to him. He stated that Ms Richard also told the office staff that he did not know what he was doing in the bake shop, that he was lousy in the salad shop and that he should be removed from the work. Under cross-examination, Ms Richard admitted that she "sometimes" complained and bad-mouthed Corporal Rollman to others. Ms Richard also confirmed that she had threatened not to work important functions if Corporal Rollman was working. The events included a Black Watch dinner in August 2013 as well as a retirement dinner in October of the same year.

[7] Sergeant Jones, who is also a military cook and the person responsible for ration procurement at Detachment Aldershot, testified that prior to the incidents before the Court, he was well aware of the personal conflict between Corporal Rollman and Ms Richard. He stated that he asked Corporal Rollman specifically, "Why do the two of you not like each other" – wondering if there was something deeper that could explain why she did not like him. Sergeant Jones admitted he was frustrated with the poor relationship between the two, but he blamed it on Ms Richard herself. Under cross-examination, Ms Richard also admitted that in 2009 she had been suspended without pay for being verbally abusive to other employees.

[8] In her testimony, Ms Richard told the Court that she attended a summary trial where Corporal Rollman was found not guilty. Sergeant Jones testified that after the summary trial, when he advised the rest of the staff that Corporal Rollman had been found not guilty, he overheard Ms Richard say that if she had anything to do with it she would see him "gone". Sergeant Jones testified that at the time, he thought to himself that she would find a way to succeed. Under cross-examination, Ms Richard denied making this comment.

[9] Corporal Rollman testified that when the conflict between he and Ms Richard began, he tried to resolve the conflict with her personally, but he eventually reported his concerns to his chain of command. He told the court that over the course of several years, he made complaints to his chain of command both in writing and in emails. He also testified, and Ms Richard admitted on cross-examination, that in 2013, he submitted a formal harassment complaint against Ms Richard. Both Corporal Rollman and Ms Richard testified that the harassment was resolved in December 2013 through a professional mediator and that a formal minutes of settlement were agreed upon.

[10] Corporal Rollman testified that Ms Richard's behaviour improved for a short period then she resorted back to her previous highly critical conduct of him, which he reported again in 2014 to the Food Services Officer. Eventually, in June/July 2014, at his personal request, they were both moved to different shifts for approximately one year. However, during the summer of 2015, for what appears to have been operational reasons, they were both placed on the same shift together.

[11] The charges before the Court arise from two different incidents that occurred during the evening shift on 20 February 2016 and the morning shift of February 21, 2016. Based on the consistency of the evidence presented by both Ms Richard and Corporal Rollman, the ensuing facts can be determined.

[12] On February 20, 2016, Ms Richard testified that she was in the dish room having something to eat while waiting for dishes. She stated that Corporal Rollman, who had been working on the steam line in the servery, came into the kitchen and they started talking. During the conversation, he told Ms Richard about a hairstyle technique that both he and his girlfriend had watched on a video. He mentioned that, in the video, a lady had taken a sponge to her hair and while working the sponge in circles, she created a specific hairstyle. Corporal Rollman advised the Court that he had engaged in the discussion because he was impressed with the technique and how beautiful the hairstyle was. His girlfriend at that time was of African-Canadian descent. While recounting what he viewed in the video, he commented that the woman in the video had nappy hair, similar to that of Ms Richard. He testified that he believed the term "nappy" to be related to hair or a hairstyle.

[13] In her testimony, Ms Richard stated that she immediately reacted negatively to what Corporal Rollman was saying, chastising him that he did not know what he was talking about. Ms Richard testified that she then said, "Johnson out" (referring to her maiden name), sending him a signal that she did not want to discuss it any longer and she left. Ms Richard testified that to her the term "nappy" is a racial slur that was used a long time ago. It refers to black people's knotty hair. She testified that she was in disbelief.

[14] Ms Richard testified that after she left the dish room, she went to wipe the tables down when she saw Sergeants Smith and Jones talking. Sergeant Jones was on base duty and Sergeant Smith was working that evening as kitchen shift supervisor. She told them both what had occurred when she was in the dish room.

[15] The next morning, Sunday, 21 February 2016, both Ms Richard and Corporal Rollman were working together again. Corporal Rollman testified that, early in his shift, Sergeant Smith advised him that Ms Richard had made a complaint against him for allegedly making a racial slur. Corporal Rollman stated that Sergeant Smith told him that Ms Richard had reported something to the effect that "You called her a nigger and made reference to her hairstyle."

[16] Corporal Rollman testified that he was shocked and insisted that he had not used the "N" word at all. He said he had not made a negative comment towards her, or her hairstyle. Corporal Rollman testified that Sergeant Smith told him that he had to write up the complaint and send it to Sergeant Covyeow. Corporal Rollman stated that he told Sergeant Smith that he did not understand why he was reporting it because nothing had happened.

[17] In his testimony, Corporal Rollman stated that Sergeant Smith started to become louder and louder and began throwing his hands around. He stated that when Sergeant Smith started to approach him in an aggressive manner, he took up a boxing stance as he was unsure what was going to happen. Corporal Rollman testified that although he and Sergeant Smith have worked together for approximately seven years and are friends

outside of work, Sergeant Smith is known for reacting aggressively and loudly when he is upset. He also testified that in the past, Sergeant Smith grabbed him by the shoulder and pulled him back. The Court heard that, at the time of the incident, Sergeant Smith was about 59 years old and stood approximately 6 feet 3 inches in height with a medium build. At the same time, Corporal Rollman was 44 years old and stood 5 feet 6 inches and weighed approximately 165 pounds.

[18] After that interchange, Corporal Rollman testified that he left Sergeant Smith's office, went back to work and then pushed the compost bucket down the aisle until it bounced against the wall. Ms Richard testified that she was doing work in the salad area where she could hear Corporal Rollman mumbling. She stated that Corporal Rollman pushed a garbage bin down the aisle and the sound of the garbage bin hitting the lip of the old garburator and falling over caused her to look up.

[19] It is at this point where the various testimonies of the witnesses deviate to some degree. Ms Richard claims that Corporal Rollman followed the garbage can down the aisle in the direction where the can was headed, cursing and calling her everything but "Cheryl", including such names as "fucking bitch" and then he came at her with a "look in the eye" that scared her. She stated that he came within two feet of her before she ran to the computer room, which was the office occupied by the kitchen supervisor, Sergeant Smith.

[20] In his testimony, Corporal Rollman denied yelling profanities at Ms Richard after he pushed the compost can. He admitted he was upset about the situation that was starting to unfold. After he pushed the compost can, he admitted that he did confront Ms Richard, but it was regarding a completely unrelated incident. He testified that he wanted to know, from Ms Richard, what had been so funny on the 7th of February that she made fun of and humiliated his fiancé in the workplace. He testified that on the 7th of February, his fiancé had come into the kitchen to get his personal items because he had been injured. He stated that his fiancé told him that Ms. Richard had snickered and laughed at her. He told the Court that he brought this up because he was upset.

[21] Ms Richard testified that when she got to Sergeant Smith's office, she told him he needed to take care of the situation. Ms Richard testified that when she entered the computer room, Sergeant Smith was sitting in a chair at his desk. He then jumped up. Within seconds, Corporal Rollman appeared at the doorway. She testified that she stood behind Sergeant Smith to his left as he stood at the doorway. She saw Sergeant Smith raise his right hand. She testified his right hand was open and facing towards Corporal Rollman like a stop sign. Under cross-examination, she firmly stated Sergeant Smith's hand was not extended out towards Corporal Rollman.

[22] Ms Richard stated that while Corporal Rollman was standing outside the office, he called her a "fucking bitch", speaking quite loudly and he yelled at Sergeant Smith that he needed to take care of her. Corporal Rollman testified that it was only at that time that he ever referred to Ms Richard as a "fucking bitch". Corporal Rollman stated that he accused Sergeant Smith of constantly defending her and not doing anything

about her conduct. Ms Richard stated that if there were diners, they would have been able to hear what was going on. She also testified that Sergeant Smith's tone of voice was calm at first but later became louder. She stated that Sergeant Smith was very upset and red (as she motioned to the face).

[23] Ms Sharon Angel testified that she did not hear the first incident regarding the garbage can as she was working on the steam line. However, at a quiet time after the diners had been fed, she heard loud voices and shouting coming from the preparatory area. Ms Angel confirmed that she went to the kitchen preparatory area and saw Sergeant Smith standing in the doorway, with Ms Richard behind him and Corporal Rollman standing outside the doorway. Although Ms Angel testified that she had an unobstructed view from where she was standing, she stated that she did not see Corporal Rollman hit Sergeant Smith. In all testimonies, it was clear that while in the office, Ms Richard was standing behind Sergeant Smith who was standing in the doorway.

[24] Ms Richard testified that at first Corporal Rollman had his arms crossed and eventually he took a fighting stance with Sergeant Smith. She stated she saw Corporal Rollman with a fist and that he hit Sergeant Smith's hand as she saw Sergeant Smith's hand go back. She stated that Sergeant Smith then put his hand down and Corporal Rollman said he was out of there. Ms Richard further testified that she did not see Sergeant Smith touch Corporal Rollman. She testified that afterwards Corporal Rollman went to stir the big soup pot.

[25] Corporal Rollman testified that when he arrived at the office, Sergeant Smith was excited and yelling and telling him to stop and let it go. He stated that Sergeant Smith was moving towards him and waving his hands around and that he touched him on his chest, pushing him back.

[26] Corporal Rollman testified that he slapped Sergeant Smith's hand away from him in an aggressive manner, but only slapping his hand; he did not punch him. Then he took a few steps back and went into a defensive position; a stance putting his hands up as a boxer. Corporal Rollman stated he went into the defensive position because Sergeant Smith was overreacting and being aggressive and he was not sure what Sergeant Smith's reaction would be given that Corporal Rollman had slapped away his hand.

[27] Sergeant Smith did not testify.

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

[28] Before the trier of fact provides its assessment of the charges before the Court, it is appropriate to 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 two rules are linked to the presumption of innocence to ensure that no innocent person is convicted.

[29] The accused enters these proceedings presumed to be innocent. That presumption of innocence remains throughout the case until such time as the prosecution has, on the evidence put before the Court, satisfied me beyond a reasonable doubt that the accused is guilty on each of the charges.

[30] So, what does the expression "beyond a reasonable doubt" mean? The term "beyond a reasonable doubt" has been used for a very long time and is part of our history and traditions of justice. It is so engrained in our criminal law that some think it needs no explanation, yet something must be said regarding its meaning.

[31] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence.

[32] Even if I believe the accused is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to the accused and acquit because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt.

[33] On the other hand, it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. So, in short, in order to find Corporal Rollman guilty of any of the charges, the onus is on the prosecution to prove something less than an absolute certainty but something more than probable guilt for each charge set out in the charge sheet.

Credibility of the witnesses

[34] In proving the allegations set out in the particulars for the charges before the Court, the prosecution must establish all elements for the respective offences as particularized to a standard beyond a reasonable doubt. However, there is no standard of proof that applies in assessing the credibility or the reliability of the testimony of individual witnesses.

[35] It is not unusual that evidence presented before the court is contradictory. Witnesses may have different recollections of events and the court has to determine what evidence it finds credible and reliable.

[36] Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events

noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect?

[37] Does a witness have an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? The last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where the accused chooses to testify.

[38] The evidence before the Court consisted of the oral testimony of three witnesses called by the prosecution, as well as the testimony of Corporal Rollman in his own defence. As already alluded to, Sergeant Smith, who was the superior officer particularized in the first charge before the Court, did not testify. Several of the witnesses testified regarding the incident and there were a few occasions where the witnesses gave evidence as to what Sergeant Smith said, where the statements were provided for the intended purpose of the truth of their contents. In light of the fact that Sergeant Smith was not available for cross-examination and the inherent lack of reliability in these statements, I found that they were inadmissible. I provided these statements no weight in my assessment of the evidence.

Ms Cheryl Richard

[39] In her testimony, I found Ms Richard to be consistently responsive, even when faced with difficult and uncomfortable questions put to her by the defence under cross-examination. At times, she was hesitant and somewhat evasive regarding her own conduct in the years prior to the event. Her answers were not as clear as they should be. Nonetheless, while under cross-examination, she reluctantly admitted that her relationship with the accused had been far from harmonious and she admitted a number of incidents where she herself had acted inappropriately.

[40] With respect to the specific events that gave rise to the charges before the Court, she was very clear and consistent throughout her testimony. There were, however, many occasions where she stated she could not remember or could not recall facts as they were put to her by the defence. When faced with this sort of situation, she simply stated that the assertion put to her was wrong and she was not argumentative.

[41] Despite her forthright testimony, based on the history of the personal conflict between Ms Richard and Corporal Rollman, this Court was concerned with her bias against Corporal Rollman. There were a few incidents described before the Court where I had to consider the appropriate weight to be given to Ms Richard's testimony. Fortunately, based on the uncontested evidence before the Court with respect to the offences as charged, the Court was not required to choose between Ms Richard's or Corporal Rollman's version of events on the essential elements of the offences.

Ms. Sharon Angel

[42] Ms Angel came across as credible, truthful and very straightforward. She testified consistently and resisted a challenge that she had changed her statement. Her testimony was limited to what she witnessed.

Sergeant Christopher Jones

[43] Sergeant Jones, a military cook for 39 years, worked in the kitchen and was responsible for ration procurement. With respect to the underlying facts important to the elements of the charges, Sergeant Jones's evidence is of limited value. Sergeant Jones was in the dining hall and did not witness any of the events. He testified that he was about 20 metres and two doors away. Sergeant Jones was candid in what he heard and honest with his impression of the conflict as it existed within the workplace. Although he was a witness called by the prosecution, he was not personally invested in more than testifying to the truth. I found him to be highly credible and reliable on the matters that he could testify to.

Corporal G. Rollman

[44] In this case, the accused, Corporal Rollman testified. Corporal Rollman testified in a forthright and confident manner. I found him very credible. His version of events was reconcilable with that of Ms Richard's as well as the other witnesses'.

First charge – Striking a superior officer

[45] The first charge alleges that Corporal Rollman struck a superior officer, contrary to section 84 of the *NDA*. It is particularized as follows:

> In that he, on or about 21 February 2016, at or near 5th Canadian Division Support Base Detachment Aldershot, Nova Scotia, struck Sergeant EK Smith with his hand.

Essential elements of the offence

[46] Section 84 of the *NDA* provides:

> Every person who strikes or attempts to strike, or draws or lifts up a weapon against, or uses, attempts to use or offers violence against, a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

In addition to identity, the date and place of the offence, which are not in dispute, the prosecution had to prove beyond a reasonable doubt that:

(a) violence was used against a person;

(b) the use of violence was intentional; and

(c) the person to whom violence was offered was a superior officer; and

(d) the accused knew that the person was a superior officer.

[47] In order to prove that the violence was intentional, the prosecution must prove that Corporal Rollman intended to use violence against Sergeant Smith. Concerning the essential element that the person was a superior officer, the expression "superior officer" is defined in section 2 of the *NDA* to mean:

> any officer or non-commissioned member who, in relation to any other officer or non-commissioned member, is by this Act, or by regulations or custom of the service, authorized to give a lawful command to that other officer or non-commissioned member.

[48] In his testimony, Corporal Rollman admitted that he knew Sergeant Smith was a superior officer to him at the time of the events. These elements are not in dispute.

[49] The particulars allege that Corporal Rollman struck Sergeant Smith with his hand which Corporal Rollman admitted, although he testified that he did so in self-defence. In light of Corporal Rollman's admission that he did slap Sergeant Smith's hand in an effort to push it away, I conclude that the *actus reus* of the offence has been proved beyond a reasonable doubt.

[50] On this charge, the only issue for the Court to decide is whether Corporal Rollman acted in self-defence. A successful defence of self-defence provides justification for what would otherwise be an unlawful act of striking a superior officer. If an accused wants to rely on self-defence, he must satisfy an air of reality test before I can consider it. In applying the air of reality test, I considered the totality of the evidence, and assumed the evidence relied upon by the accused was true. The evidential foundation emanated from the examination-in-chief and cross-examination of the accused as well as the three Crown witnesses. The Court accepts the testimony of Corporal Rollman and is satisfied that there is an air of reality to the defence of self-defence.

[51] Now, the onus is on the prosecution to prove beyond a reasonable doubt that self-defence does not apply. Section 34 of the *Criminal Code* provides that self-defence is justified if the requirements of the section are met. The prosecution must prove that one or more of the section 34(1) conditions set out below do not apply in the circumstances.

> **34.** (1) A person is not guilty of an offence if
>
> (a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

> (b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and
>
> (c) the act committed is reasonable in the circumstances.
>
> (2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:
>
> (a) the nature of the force or threat;
>
> (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;
>
> (c) the person's role in the incident;
>
> (d) whether any party to the incident used or threatened to use a weapon;
>
> (e) the size, age, gender and physical capabilities of the parties to the incident;
>
> (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
>
> (f. 1) any history of interaction or communication between the parties to the incident;
>
> (g) the nature and proportionality of the person's response to the use or threat of force; and
>
> (h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

[52] The first condition: The first question to be asked is whether a reasonable person, placed in the same situation as Corporal Rollman, would have concluded that force or the threat of force was being used against him. Pursuant to section 34(2) of the *Criminal Code*, characteristics of the accused will have to be considered, such as size and the history of the relationship between the two persons. The prosecution argued that Ms Richard testified that Sergeant Smith's hand was raised and gestured in a stop motion. He argued that Sergeant Smith's hand was not presented in a threatening or attacking motion and that it was unreasonable for Corporal Rollman to believe that the Sergeant was threatening or attacking the accused. However, it was also clear on Ms Richard's evidence that Sgt Smith's hand was out and although she stated it was presented in a stop type gesture, it was nonetheless pointed towards Corporal Rollman. The Court is concerned with the fact that Sergeant Smith did not testify and could not be cross-examined on exactly what he was doing with his hand. Each of the witnesses indicated that Sergeant Smith was very upset, red in the face and yelling. Standing 6 feet 3 inches, he would have not just been imposing, but he would have almost filled the

entire doorway. Sergeant Jones testified that he heard Sergeant Smith yelling from where he was sitting in the dining room, through two different doors. By all witness accounts, Ms Richard was standing behind Sergeant Smith and as such could not appreciate how Sergeant Jones hand and demeanour appeared to Corporal Rollman. Further, Corporal Rollman testified that Sergeant Smith touched his chest pushing him back slightly. With Sergeant Smith not testifying, the only eyewitness to the alleged striking was Ms Richard and based on the facts, her view would have been limited. Further, given her history of undermining and bad-mouthing the accused, the Court had concerns with her credibility and weighed this into its assessment. In my view, this element is met.

[53] The second condition of section 34 (1) relates to Corporal Rollman's state of mind. He must have committed the act solely for the purpose of defending or protecting himself as opposed to seeking revenge or any other purpose. This part of the test is purely a subjective test. Corporal Rollman stated that at the time, Sergeant Smith was very upset and Corporal Rollman believed Sergeant Smith was going to hit him. The Court heard evidence that Sergeant Smith was known to get upset, loud and overreact and that he had previously touched or grabbed Corporal Rollman. Evidence about the reputation of Sergeant Smith for grabbing or touching Corporal Rollman is admissible to the Court in considering Corporal Rollman's subjective belief. Corporal Rollman stated he slapped Sergeant Smith's hand away, which is an action somewhat consistent with what Ms Richard visually witnessed. Ms Richard stated that she saw Sergeant Smith's hand go back. It is also clear on the facts that Corporal Rollman only made contact once with Sergeant Smith's hand.

[54] The prosecution argued that there was no reasonable threat or apprehension that force was going to be used and that if anything, Corporal Rollman reacted by impulse and through lack of discipline given he had already taken a boxing stance with Sergeant Smith that morning. As this is a subjective element that relates only to what was going on in the mind of the accused, I am not persuaded by an argument based on objective reasonableness. However, as the defence argued, and as alluded to earlier, it is questionable whether Ms Richard, who was standing behind Sergeant Smith, either from the right or to the left, could possibly see exactly how Sergeant Smith's hand appeared to Corporal Rollman. In fact, given the evidence that Corporal Rollman had previously reverted to a boxing stance earlier in the morning when he feared that Sergeant Smith would hit him, I believe that his behaviour of adopting a boxing stance supports his subjective belief in fear. I find that this condition is met.

[55] The third condition requires an assessment of Corporal Rollman's response to the perceived threat. This element is evaluated objectively; namely, was Corporal Rollman's response to the threat reasonable? When Corporal Rollman's response is examined in the context of the wording in subsection 34(2) of the *Criminal Code*, it is clear that proportionality is not an issue here. In response to the third condition, the prosecution argued that although the force may have been reasonable, it was in itself an unjustified use of force and that Corporal Rollman was simply angry and reacted badly.

As quoted by the defence and stated in Ewaschuk, E. G. 1987. *Criminal pleadings & practice in Canada,* Aurora, Ont: Canada Law Book at paragraph 21:5180:

> In repelling an unlawful assault, an accused is *not* required to measure the force he uses in the necessitous circumstance to a nicety. For the frenzy of the occasion does *not* allow for detached reflection.
> [Emphasis in original.]

Based on the testimony before the court and the fact that Corporal Rollman pushed away Sgt Smith's hand only once, I find that the third condition requiring the reasonable use of force has been met.

Conclusion on the first charge

[56] I find that Corporal Rollman believed on reasonable grounds that force was about to be used by Sergeant Smith and that he slapped away Sergeant Smith's hand to defend and protect himself against Sergeant Smith's first use of force, and that the act, in the circumstances, was reasonable. I find that the prosecution has failed to prove beyond a reasonable doubt that self-defence is not available to Corporal Rollman on the facts of charge 1.

Second charge – Conduct to the prejudice of good order and discipline

[57] The second charge alleges conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*. The particulars read as follows:

> In that he, on or about 20 February 2016, at or near 5th Canadian Division Support Base Detachment Aldershot, Nova Scotia, did use a racial slur, to wit, the term "nappy", in the presence of Cheryl Richard.

The law

Section 129 offence

[58] The Court has benefited from excellent submissions on the required elements of proof for section 129 offences and discussion on both the *mens rea* requirements and the test for prejudice. It is extremely helpful to begin with the summary from Létourneau J. A. of the constituent elements of a section 129 offence as he set it out in the case of *R. v. Winters*, 2011 CMAC 1, paragraph 24:

> 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.
> [Emphasis mine.]

Although this summary of Létourneau, J.A. focuses principally on whether the consequence of an act or omission is prejudicial to good order and discipline, it also highlights the need for a blameworthy state of mind.

Analysis

[59] In her testimony, Ms Richard stated that Corporal Rollman used the term "nappy" in the context of telling her about a video he watched with his girlfriend, who was also of African-Canadian descent, as he described how a specific hairstyle was achieved. He told her that the woman in the video had hair similar to hers which Corporal Rollman testified he described as "nappy". These facts are not contested and were readily admitted by both the accused and Ms Richard, the recipient of the alleged racial slur.

[60] In the context of the second charge, in order to prove that the racial slur of "nappy" was intentional, the prosecution must prove that Corporal Rollman intended to use this term against Ms Richard while knowing that it was, in fact, a racial slur. To quote my colleague, d'Auteuil M.J. in the case of *R. v. Mader*, 2015 CM 3002, paragraph 32

> When people intend to do things, they do them deliberately; it is different when people are careless and do things accidentally. When people do things accidentally, they do not intend to do them.

[61] The prosecution also needed to provide evidence that the term "nappy" was a racial slur. On the facts related to the second charge, the Court is troubled by the lack of evidence to assist it in determining whether the *actus reus* of the offence as well as the blameworthy state of mind of the accused have been met.

[62] It is clear that Ms Richard was deeply offended by the use of the term "nappy" and, based on her testimony, the Court acknowledges that she understood the term to be a racial slur. But we also heard through the testimony of Corporal Rollman that he did not believe the term "nappy" to be a racial slur, but rather, he understood that it was a word used in describing hair texture or used in the context of a hairstyle. In his submissions, the prosecution contended that there is no air of reality to Corporal Rollman being mistaken as to what the term meant and the potential demeaning effect it would have, if used. As the Court heard, Corporal Rollman's girlfriend, at the time, was also of African-Canadian descent so the prosecution suggested that Corporal Rollman had the experience to know what the term meant.

[63] However, the Court also heard evidence from Sergeant Jones, one of the prosecution's witnesses who is also of African-Canadian descent. He stated that when he heard of the alleged incident and the use of the term "nappy" was brought to his attention, he needed to look the term up. He advised the Court that he discovered that it had various meanings depending on where and how it was used.

[64] It was only in closing submissions that the Court heard a definition of "nappy" from the *Concise Oxford Dictionary* and it was provided by the defence. In fact, there are two definitions. Firstly, it is described as a noun and as defined in Britain, it means:

> a piece of absorbent material wrapped round a baby's bottom and between its legs to absorb and retain urine and faeces.

Secondly, a US informal definition defines "nappy" as:

> (of a black person's hair) frizzy (in the sense 'shaggy').

Defence invited the Court to compare this definition to the term "nigger", where the *Concise Oxford Dictionary* defines it as a noun and a contemptuous term for a black and dark-skinned person. Today, it is used as a strongly negative term of contempt for a black person. It remains one of the most racially offensive words in our language.

[65] In this case, the Court could have benefited from evidence on the term "nappy" as a racial slur and its understanding in various contexts. Without this type of evidence, it is impossible for the Court to decide that the term "nappy" is a racial slur for the purpose of the *actus reus*.

[66] Furthermore, based on all the testimony of the witnesses, even if there was evidence that the term was a racial slur, there was no evidence that Corporal Rollman perceived it to be a racial slur. The Court accepts his testimony that in the context of the conversation, he was referring to a hairstyle and he did not intend to convey anything negative, particularly not a racial slur.

Conclusion on the second charge

[67] I conclude that the *actus reus* particularized as the use of a racial slur "nappy" has not been proved. Secondly, I conclude that there was no proof that Corporal Rollman had a blameworthy state of mind and knew in the context of his conversation with Ms Richard that he was using a racial slur.

Third charge – Conduct to the prejudice of good order and discipline

[68] The third charge alleges conduct to the prejudice of good order and discipline contrary to section 129 of the NDA. The particulars read as follows:

> In that he, on or about 21 February 2016, at or near 5th Canadian Division Support Base Detachment Aldershot, Nova Scotia, did act in an intimidating manner towards Cheryl Richard.

Positions of the parties

Prosecution

[69] Prosecution submitted that the *actus reus* for the offence was met as Corporal Rollman intentionally pushed the garbage across the floor, as corroborated by Corporal Rollman, but for the fact that he said that it was a compost can, which is inconsequential. Although there was disagreement as to the substance of what was said

during the next few minutes, the commonality in the testimonies of the witnesses is that Corporal Rollman was angry. Based on Corporal Rollman's own admission, he intentionally pushed the compost bin and he angrily confronted Ms Richard. Ms Richard was afraid and sought protection in the supervisor's office.

[70] Prosecution also submitted that the *mens rea* of general intent of the particulars were met. He further submitted that the only element left for the Court's consideration was whether or not the proven conduct was prejudicial to good order and discipline. He referred the Court to the latest Court Martial Appeal Court (CMAC) decision in *R. v. Golzari*, 2017 CMAC 3 and paragraphs 77–80. He suggested that as the trial judge, I am able to determine whether the proven conduct was prejudicial to good order and discipline based on my own experience and general service knowledge. He further submitted that pursuant to paragraph 77 of *Golzari* that:

> [T]he totality of the circumstances supports the finding that the conduct in question would *likely* result in prejudice to good order and discipline.
> [Emphasis in original.]

Defence

[71] Defence argued there was no direct evidence before the Court to prove that Corporal Rollman's actions resulted in prejudice to good order and discipline. He submitted that the prosecution could have asked Sergeant Smith or Sergeant Jones for evidence of the prejudice or he could have called other evidence, but he did not. He also stated that the only question left of the court was whether it can find, beyond a reasonable doubt that Corporal Rollman's conduct resulted in prejudice. He also pointed out that the Court did not take judicial notice of the consequences of such conduct during the evidentiary phase and that the prosecution cannot otherwise ask the Court to do so now in his final submissions.

[72] Defence argued that the comments on prejudice in the recent CMAC case of *Golzari* are *obiter* and are no more binding on this Court than other CMAC decisions. He submitted that it must be proved beyond a reasonable doubt that the act of the accused caused prejudice to the good order and discipline. Defence argued that the prosecution's submission that the trial judge can apply its experience and general service knowledge to infer prejudice is in effect asking the Court to take judicial notice, at the close of proceedings, without following the evidentiary requirements set out within the *MRE*. Furthermore, he argued that in reviewing the CMAC decision in *Smith v. The Queen*, (1961) 2 CMAR 159, at paragraphs 12 and 15, it was clear that decisions on judicial notice are to occur during the hearing phase of the evidence. Defence also referred the Court to the Supreme Court of Canada (SCC) decision *R. v. Spence*, [2005] 3 S.C.R. 458, 2005 SCC 71 on judicial notice.

Summary

[73] The court notes that the alleged intimidating conduct took place out of sight of most of the witnesses who testified. However, based on the testimony of the

complainant and Corporal Rollman, the Court finds that an intimidating act occurred. As alluded to by both the prosecution and the defence, the only element left for the court to assess is whether the conduct in question resulted in prejudice to the good order and discipline.

The law

[74] Case law is clear that proof of prejudice is an essential element of the offence and must be proved beyond a reasonable doubt. I refer to Heneghan J.A. in the CMAC decision of *R. v. Tomczyk*, 2012 CMAC 4 at paragraph 25, while quoting *Winters*, he said:

> [25] 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 proved acts; see *R. v. Bradt (B.P.)*, 2010 CMAC 2, 414 N.R. 219 at paras. 40–41.

At paragraphs 76 and 77 of *Golzari*, Mosley J.A. addressed the proof of prejudice in referring to the CMAC decision of *Jones*:

> [76] However, a close reading of *Jones* demonstrates that the Court was careful to emphasize that prejudice need not be confined to a physical manifestation of injury to good order and discipline. At paragraph 7, the Court stated:
>
> > Proof of prejudice can, of course, be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is, however, proof beyond a reasonable doubt.
>
> [77] This language suggests that prejudice will be proved, beyond a reasonable doubt, so long as the totality of the circumstances supports the finding that the conduct in question would *likely* result in prejudice to good order and discipline. Since the Court in *Jones* left the window open to <u>infer</u> prejudice from the circumstances, I agree with the Appellant that "prejudice" encapsulates conduct that "tends to" or is "likely to" result in prejudice.
> [Emphasis in original.]

[75] Further, after a review of the meaning of the word "prejudice", Mosley J.A. concluded the following:

> [78] Prejudice in its ordinary grammatical sense means "harm or injury that results or may result" (Concise Oxford English Dictionary). The addition of the words "to the" before "prejudice" incorporates an element of risk or potential and the expression, read as a whole, does not require that harmful effects be established in every instance. Though evidence of actual harmful effects may exist, it is not required for conduct to be punished in the context of military discipline. Military discipline requires that conduct be punished if it carries a real risk of adverse effects on good order within the unit; this is more than a mere possibility of harm. If the conduct tends to or is likely to adversely affect discipline, then it is prejudicial to good order and discipline.

[76] In its *Golzari* decision, Mosley J.A. writing for the CMAC commented only briefly at paragraph 68 that although the Court was not required to consider the respondent's second argument, he would comment very briefly on it. I view much of what follows as *obiter* statements. The specific paragraph that prosecution seeks to rely upon is that of paragraph 79, which reads as follows:

> [79] I also agree with the Appellant that in most instances, the trier of fact in a Court Martial should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge: *Smith*, above, at 164.

[77] The brief comments of the Mosley J.A. regarding prejudice must be considered in light of the earlier CMAC jurisprudence on this issue. The statements at paragraphs 79 - 81 provide tidy and succinct suggestion to the effect that a trier of fact, applying his or her own military experience and general service knowledge could determine whether proved "conduct tended to adversely affect good order and discipline."

[78] Although the defence and prosecution have taken different approaches to interpreting this *obiter* statement, this Court interprets paragraph 79 as a powerful reminder that the application of military experience and general service knowledge can be relied upon in proving section 129 offences. However, in the view of this court, if a trier of fact wishes to rely upon such experience and knowledge, it must be done in accordance with the law of evidence.

[79] Much of the concern with the wider interpretation advanced by the prosecution is the uncertainty that exists if the trier of fact relies upon his or her own subjective experience and general service knowledge in order to infer an essential element of an offence. An accused cannot be left in the unfair position of having to speculate on what fact, matter, custom or general military knowledge as evidence that the trier of fact might rely upon in order to convict him. An accused must have all the legal evidence adduced before him in court to ensure that he is given the opportunity to meet, explain or contradict this evidence and to determine on what grounds he should argue his defence. No interpretation of the law may limit this principle.

[80] As we know, a judge may only rely upon the evidence before the Court, whether real, testimonial, direct or circumstantial, etc., or evidence by way of judicial notice that meets the requirements of the *MRE* or the common law rules of evidence. It is considered to be an error of law when a judge, through his or her own independent research and study, finds new information, or cases and without seeking submissions from counsel, he then applies them to the case before him.

[81] The brief comment of Mosley J.A. must therefore be considered in light of the above principles. In the view of this Court, the *obiter* comment in *Golzari* made in the context of very different facts, is not a licence for myself, as a trier of fact, to augment the evidence before the court, by relying upon my subjective general service knowledge and experience.

[82] In making his comment at paragraph 79, Mosley J.A. references the CMAC decision of *Smith*. In *Smith*, although there were a number of issues on appeal, the one relied upon in *Golzari* was the appellant's argument that the Court failed to comply with the judicial notice provisions under the *MRE*. However, in rendering its decision, the CMAC panel in *Smith* stated at paragraph 12 of its decision, that it had "read the record with great care and was unable to find that *during the hearing of the evidence* any question arose as to whether the Court could or could not take judicial notice of matters of general service knowledge." However, at paragraph 25, the Court also found that it was "abundantly clear that each ingredient of the charge was fully established by the evidence of Crown witnesses and not denied by the appellant or his witnesses." As such, it was clear that on the facts of the *Smith* case, the trier of fact did not have to rely upon an inference drawn from its own general service knowledge, but rather there was specific evidence before the Court upon which the decision could be made.

[83] There is nothing new here. One of the ways in which matters of general service knowledge can be specifically relied upon by a trier of fact is through the taking of judicial notice under the *MRE*. Judicial notice in the context of a court martial is codified in the *MRE* and permits the trial judge to take into consideration all matters of general service knowledge as well as a range of other facts and propositions of general knowledge. Judicial notice is the acceptance by the court, without the requirement of proof, of any fact or matter regarding general service knowledge that is so generally known and accepted in the military community that it cannot be reasonably questioned, or any fact or matter that can readily be determined or verified by resort to sources whose accuracy cannot reasonably be questioned. Even where judicial notice has been taken, the trier of fact must be careful to limit it to matters of general knowledge or facts known to the "ordinary" military person and is not entitled to apply knowledge that he or she might have by reason of a military specialty or personal experience.

[84] However, the propriety and competence of the Court to take judicial notice is not absolute. Following the SCC's decision in *Spence*, the strictness of the analysis in the test for judicial notice varies with the centrality of the issue. In other words, the closer the fact is to the centre of the controversy, the more stringent the test. What this means is that although the Court may take judicial notice of matters of general service knowledge and experience, given that prejudice is an element of the offence that must be proved beyond a reasonable doubt, the Court must exercise extreme caution and apply the strictest test.

[85] Turning now to the facts before the Court, pursuant to section 14 of the *MRE*, the Court may not take judicial notice of a fact or matter except as authorized in accordance with the *MRE*. Pursuant to section 17 of the *MRE*, counsel may formally ask the Court to take judicial notice of certain facts or matters within section 15 or 16. With respect to the taking of discretionary judicial notice, section 16 applies. The taking of judicial notice of all matters of general service knowledge is found at section 16(2). It reads as follows:

> 16 (2) Subject to section 18, a court may, whether or not requested to do so by the prosecutor or the accused, take judicial notice of
>
> (a) all matters of general service knowledge;
>
> (b) particular facts and propositions of general knowledge that, in view of the state of commerce, industry, history, language, science or human activity, are at the time of the trial so well known in the community where the offence is alleged to have been committed that they are not the subject of reasonable dispute; and
>
> (c) particular facts and propositions of general knowledge, the accuracy of which is not the subject of reasonable dispute, that are capable of immediate and accurate verification by means of readily available sources.

[86] Under MRE 18, counsel have the opportunity to present argument and, if need be, to call evidence on the point. If the Court takes judicial notice of the fact, pursuant to section 19, then that fact can be conclusively taken to be true and no evidence on that fact would need to be proved and no allegedly contradictory evidence is thereafter admissible. In the opening phase of the Court, I specifically inquired of both counsel if either of them had any requests under s. 16 of the MRE for the Court to consider taking judicial notice. In response, the prosecution stated he had no issues. After the negative response to my enquiry, I proceeded only to take judicial notice with respect to those matters and publications set out within section 15 of the *MRE*.

[87] If the prosecution's submission is for the Court to rely upon general service knowledge to augment the evidence or fill in the gaps to infer prejudice, then such a request is akin to a request for the court to take judicial notice. As this was only brought forward by the prosecution in its final submissions, then such a request is tantamount to the prosecution asking the court to reopen its case. It is not appropriate to take judicial notice of an element of the offence after the case has been closed. As such, in light of the Court not having taken judicial notice of any matters of general service knowledge under section 16(2) of the MRE, as the trier of fact, I may only rely upon evidence before the Court, whether real, testimonial, direct or circumstantial or by way of judicial notice (as taken for matters under section 15 of the *MRE*) or evidence that otherwise meets the requirements of the *MRE* or common law rules of evidence. In summary, I am of the view that the Court cannot rely upon its own general service knowledge to import or supplement evidence that is lacking and not recorded in the court martial proceedings.

Determination of prejudice

[88] Based on my reading of the CMAC guidance in *Golzari*, the failure to request judicial notice of matters related to military service knowledge is not necessarily fatal. I interpret the *Golzari* decision to mean that the prosecution does not need to wrap up evidence of prejudice and label it as prejudice for the trier of fact to be able to determine or infer that the proven conduct is prejudicial to good order and discipline.

The trier of fact can rely on the evidence before the Court to infer prejudice to good order and discipline.

[89] The Court heard a great deal of evidence on the incidents in question, but was not provided with any evidence on the unit's role or its operations in general. Specifically, the Court was not provided with evidence about the state of order and discipline in the kitchen, either before or after the incident and none of the witnesses testified as to any prejudice, or effect that flowed from the circumstances that gave rise to the charges before the Court.

[90] Under normal circumstances, based on the evidence it might be possible for the trier of fact to infer that the proven conduct is likely to cause prejudice to the conduct of good order and discipline. However, based on the facts before the Court here, I am unable to draw such an inference.

[91] The Court heard extensive evidence of the personal animosity that existed between Corporal Rollman and Ms Richard. It is clear that Ms Richard did not like Corporal Rollman and she made this clear to her supervisors, cooks in training and other members within the kitchen. Based on the totality of the evidence, I have determined that Corporal Rollman was the recipient of very poor treatment at the hands of his colleague, Ms Richard, over several years. Despite the complaints he made to his chain of command, including filing a formal harassment complaint and submitting to the formal conflict resolution procedure, the conflict was not resolved. On the evidence before the Court, it is clear Corporal Rollman suffered personal consequences, but we have no evidence on how the incident affected the unit itself. The prosecution's witness, Sergeant Jones, was the closest the Court had to a witness who could speak to what was going on in the unit itself. Through his testimony, the Court only heard that the personal conflict between the two was very real and that, in his view, most of it was caused by Ms Richard herself. As I referred to earlier in my decision, Sergeant Jones even went so far as to question Corporal Rollman to try and understand why the two really did not like each other.

[92] In the absence of any evidence on the state of morale and discipline in the unit, it is not an easy task for this Court to infer prejudice as a result of Corporal Rollman's conduct. The Court heard evidence regarding the fact that Ms Richard had mistreated other employees as well. Is this a case where a member who has been subjected to continual criticism, including a very serious and personal false allegation made against him, gets frustrated and stands up for himself? Did his reaction resolve the issue between the two? Did it send the complainant a message to stop, thereby indirectly improving the work environment for all employees? Is this a case where an employee had been able to bully others and get away with it? I am not saying that this was the situation, but based on the evidence, I cannot rule it out either. It is also quite possible that this incident served as a catalyst forcing the chain of command to address underlying conflict issues within the workplace. However, without evidence before the court to assist it in this regard, I cannot infer that prejudice is the likely natural consequence of Corporal Rollman's conduct.

Conclusion on the third charge

[93] As such, I am left with reasonable doubt that there was prejudice to good order and discipline that flowed from the alleged conduct in question.

FOR THESE REASONS, THE COURT:

[94] **FINDS** you not guilty of the three charges on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Captain G. J. Moorehead

Lieutenant-Commander B.G. Walden, Defence Counsel Services, Counsel for Corporal G. Rollman