COURT MARTIAL

Citation: *R. v. Carlyon*, 2017 CM 4013

Date: 20171013
Docket: 201711

Standing Court Martial

Asticou Centre
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant-Commander R.Y. Carlyon, Accused

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

REASONS FOR FINDING

(Orally)

Introduction

The charges

[1] Lieutenant-Commander Carlyon stands charged as a result of what is, factually, a simple set of circumstances. While on a one-year deployment to the Sinai Peninsula in Egypt with Task Force El Ghora (TFEG), part of the Multinational Force and Observers (MFO), she left the C8 rifle issued to her in an unlocked filing cabinet in her locked office prior to going on leave for a planned duration of 18 days on 17 December 2015. Also in her office was a vest containing ammunition magazines. Her subordinate, Chief Warrant Officer 3 Cook, United States Army, had the key to her office. In her absence, he noticed the rifle while accessing her office to obtain a binder required for his duties. He entered Lieutenant-Commander Carlyon's office subsequently at the request of Captain Rivera, Canadian Contingent Adjutant, who was looking for documents needed by Lieutenant-Commander Carlyon to replace her passport, stolen during her leave.

Chief Warrant Officer 3 Cook showed Captain Rivera how the rifle was stored. She was evidently not impressed; the rifle was returned to the quartermaster on 30 December 2015 and a unit investigation was conducted shortly thereafter. As a result of an election for court martial on 1 April 2016 and following over eight months of post charge review, three charges were preferred by a representative of the Director of Military Prosecutions on 8 February 2017 for trial by this Standing Court Martial.

[2] Lieutenant-Commander Carlyon is charged with two counts under section 129 of the *National Defence Act* (*NDA)* for neglect to the prejudice of good order and discipline. The particulars of the first charge refer to a failure to secure her C8 rifle in a manner required by TFEG Theatre Standing Order (TSO) 10.00 on weapon security while the particulars of the second charge refer to storing her C8 rifle in a careless manner. The third charge is laid under section 130 of the *NDA* for careless storage of a firearm contrary to subsection 86(1) of the *Criminal Code*.

The evidence

[3] The evidence consists in the oral testimony of the six witnesses called in the trial, four for the prosecution and two for the defence, including the accused, Lieutenant-Commander Carlyon. First, Chief Warrant Officer 3 Cook testified as to his duties with the MFO in relation with Lieutenant-Commander Carlyon, his supervisor at the time. He explained that he had a key to Lieutenant-Commander Carlyon's office and that he had only used it to enter her office in her absence twice on the occasions described previously. The second witness for the prosecution was Colonel John Alexander, who was the Canadian Contingent and TFEG's commander at the time of Lieutenant-Commander Carlyon's tour. He was followed by Captain Rivera. Both of these witnesses provided information and context as to how orders and instructions were issued and transmitted within the contingent and how they dealt with what they considered to be the failure of Lieutenant-Commander Carlyon to meet expectations in relation to the storage of her rifle before going on leave. I will refer more specifically to parts of their testimony in the analysis pertaining to each charge. Finally, the prosecution called Chief Warrant Officer Stoicescu, who was serving, at the time of the incident, as the Canadian Contingent Sergeant Major as well as safety officer for the MFO. He did not have personal knowledge of the events but explained the applicable orders and policies pertaining to weapons safety generally, as he had observed throughout his career. His testimony provided limited assistance to the Court as it did not add much clarity from what had been provided by previous witnesses on the specific norms or duty of care applicable to Lieutenant-Commander Carlyon in the context of her deployment. For its part, the defence called Lieutenant-Commander Robert Carlyon, husband of the accused, who testified about the duration of phone calls between his wife and Captain Rivera in Spain, in an attempt to attack the credibility of Captain Rivera's testimony. That was not particularly helpful as the credibility or reliability of Captain Rivera is not essential for the outcome of this case. As for the accused's testimony, it will be referred to in the course of the analysis.

[4] A number of documents were also entered as exhibits, essentially orders in force within TFEG and associated documents dealing in one way or another with personal weapons. Amongst those were, of course, TSO 10.00 on weapon security referred to in the particulars of the first charge, entered as Exhibit 4. The printout of an email dated 6 August 2015 from Colonel Alexander to members of the Canadian Contingent on the subject of alcohol restrictions was entered as Exhibit 6. In that document, the Canadian Contingent Commander forwards an email he had received less than an hour previously from the MFO Force Commander and directs the implementation of part of its content. Notably, Colonel Alexander exercises the authority granted to him to lift a previously imposed ban on alcohol consumption. He also provides guidance on direction received from the Force Commander to the effect that no more than 50 percent of his contingent had to be unarmed; that military personnel would not carry weapons while consuming alcohol and that personal weapons had to be secured as per contingent regulations. That direction from Colonel Alexander appeared almost verbatim at article 3.01 of the "current items" section of eight sets of TFEG Routine Orders that he issued between 1 September and 15 December 2015 either under the title "Revised Alcohol Restrictions" or, starting on 15 October, under the title "In Routine Directive". All of those were produced as Exhibit 5, along with associated emails pertaining to the publication and notification of each set of routine orders, as exhibits 7 and 8 respectively. The defence produced one document as Exhibit 9, the Force Movement Directive promulgated by the MFO Force Commander on 28 September 2015 which highlights, amongst other things, the requirements for carrying of personal weapons and protection equipment while travelling by MFO bus, as Lieutenant-Commander Carlyon was when departing for leave on 17 December 2015.

[5] In addition, a joint Statement of Facts was produced as Exhibit 3 to provide some common ground as to peripheral facts that are beyond contention. In the same vein, the defence admitted before the Court the elements of identity, time and place of the three offences and these elements are not in dispute in the trial.

Determinations to be made

[6] It is important to clarify that my job is not to determine whether the storage arrangements adopted by Lieutenant-Commander Carlyon in relation to her C8 rifle were acceptable, in light of the fact that she was leaving the camp for a planned 18-day holiday, and then determine if she should be guilty of a charge as a consequence. Rather, I must start my analysis from the charges as laid. Any opinion I might have on Lieutenant-Commander Carlyon's actions in storing her C8 rifle is not in itself relevant. What I must do is decide, on the basis of the evidence I heard, whether the essential elements of the charges laid were proven beyond a reasonable doubt.

[7] Underlying my analysis of the charges, as for any charge analyzed by a court, is the constitutional requirement for the prosecution to prove its case beyond a reasonable doubt. Indeed, the accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The standard of proof beyond a reasonable doubt is inextricably intertwined

with a principle fundamental to all criminal trials: the presumption of innocence. This means that, before an accused can be convicted of an offence, the judge must be satisfied beyond reasonable doubt of the existence of all of the essential elements of the offence.

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

First charge of neglect to the prejudice of good order and discipline

[9] The particulars of the first charge read as follows:

> "In that she, on or about 30 December 2015, at El Gorah, Egypt, failed to secure her C-8 rifle in a manner required by Task Force El Gorah Theatre Standing Order 10.00, Weapons Security."

[10] The elements of identity, time and place of the offence have been admitted and are not in issue. What is in dispute are the remaining elements: the neglect alleged in the charge; the prejudice to good order and discipline; and Lieutenant-Commander Carlyon's blameworthy state of mind.

[11] As it pertains to the first of those contested elements, the prosecution must prove beyond a reasonable doubt the neglect alleged in the particulars, namely that Lieutenant-Commander Carlyon failed to secure her C8 rifle in a manner required by TFEG TSO 10.00, Weapons Security. On the basis of how the offence has been stated, as a *neglect*, and the way it was particularized, in relation to an order, this element requires proof of three sub-elements:

a. whether TSO 10.00 establishes a standard of conduct applicable to Lieutenant-Commander Carlyon in the circumstances in which she found herself at the time of the offence;

b. whether she knew or ought to have known of that standard of conduct either by virtue of her actual knowledge of the order or by its publication and notification; and

c. whether she breached that required standard of conduct by the manner in which she secured her C8 rifle.

Analysis

[12] On the basis of the evidence presented at trial, I am unable to find beyond a reasonable doubt that the TSO referred to in charge one establishes a standard of conduct applicable to Lieutenant-Commander Carlyon in the circumstances in which she found herself at the time of the offence by which her conduct can be assessed.

[13] TSO 10.00 on weapons security was first issued on 8 March 2009 and reviewed by Colonel Alexander on 15 June 2015 upon arriving in theatre, ahead of taking over as the commander of TFEG in early July 2015. Following that revision, however, the TSO had been overtaken by events and was no longer relevant to the weapons posture that had to be adopted by TFEG starting in July 2015 and continuing at the time of the alleged offences. Indeed, the testimony of Colonel Alexander is to the effect that on 1 July 2015, an attack on Egyptian security forces on the outside perimeter of the MFO North Camp triggered a heightened security posture which required MFO personnel to be armed at all times in the camps. That proved challenging during the period of the turnover between incoming and outgoing personnel as there were not enough weapons to go around. For one, Lieutenant-Commander Carlyon was not issued a C8 rifle until 11 days after her arrival in theatre.

[14] More importantly, the requirement for everyone to be armed at all times went against the structure of TSO 10.00 on weapons security which was drafted from the perspective of weapons being normally in storage and exceptionally in the possession of task force members. Indeed, TSO 10.00 provided that unless authorized by the TFEG commander, Canadian weapons should be stored in the weapons vault, understood to mean the one converted sea container located within exclusive Canadian Contingent accommodations, and not stored in quarters. In reality, at Exhibit 6 and in subsequent Routine Orders at Exhibit 5, Colonel Alexander, in exercising his authority to lift alcohol restrictions, stated that "[p]ersonnel may retain their weapons in their individual quarters." Paragraph 2(e) of TSO 10.00 also provided that weapons and ammunition not stored in the weapons vault shall be stored in approved containers and referred to a list of persons who, by position within the MFO, are authorized to store their weapons and ammunition at a location other than the weapons vault. In reality, no list was promulgated, likely because everyone had to have a weapon, albeit not at all times. No instructions were promulgated on ammunition either. The wording of that paragraph contemplates storage of weapons and ammunition at locations other than quarters, including offices, as demonstrated in the evidence of both Colonel Alexander who had an approved container in the form of a bolted weapons rack in his office, and by the testimony of Captain Rivera who stored her rifle in two parts, bolt and rifle, in two different drawers of the same filing cabinet in her office, under one lock. Finally, paragraph 2(b) of TSO 10.00 provided that bolts would be removed from weapons and stored separately. No exception was made for that direction. Yet, in reality at Exhibit 6 and in subsequent Routine Orders at Exhibit 5, Colonel Alexander allowed personnel who had what was casually referred to as an "actual vault" meaning an approved container to store weapons and bolts together, as he was himself doing in his office. As for those who did not have an approved container, the direction on securing bolts or barrel under separate locks was limited to the statement to the effect that "[t]wo barrack

boxes, each with locks may suffice." Yet, it has been established that barrack boxes were not approved containers under the *National Defence Security Orders and Directives,* reference A to TSO 10.00 on weapons security. However, I perceived confusion on this issue as Colonel Alexander considered he had approved the use of barrack boxes and Captain Rivera considered that anything that locks was approved. Chief Warrant Officer Stoicescu expressed some skepticism about the adequacy of barrack boxes to store weapons, especially if they are not bolted to the ground or otherwise rendered difficult to move.

[15] The written direction was drafted in a manner that expressed what was permissible. Captain Rivera provided context for that permissive direction when she explained that there was a shortage of approved containers in theatre as a result of the unexpected requirements for individuals to store their weapons at a place other than the contingent vault. She did not secure the bolt separately from her weapon in her office, even if she did in her quarters where she had separate locks and two barrack boxes. Captain Rivera also commented on the language used in the Routine Orders. She stated that grey areas were purposely left in the written direction promulgated so that practical adaptations could be made for changes in circumstances on the ground. This is in line with the testimony of Colonel Alexander who stated that he did not have the flexibility to amend the TSO on his own; any proposed changes had to be approved by the Canadian Joint Operations Command in Ottawa before being implemented. That evidence provides context for the use of permissive language such as "may" in the Routine Orders as opposed to using formal prohibitions. Both witnesses stated verbal direction was provided at regular contingent's O Groups, so that members of the contingent were aware of the expectations. Clearly, some of that direction was followed-up with written correspondence, as highlighted by the content of Exhibit 6. However, the evidence did not reveal, in any level of specificity, direction on weapons storage in the course of O Groups.

[16] The evidence offered does not establish the promulgation of a mandated interpretation of TSO 10.00 or Routine Orders. The written orders forming the basis of the first charge were either not applicable in practice in the case of the TSO or drafted using loose language formulating a number of options to store weapons without clear prohibition or firm direction. This includes paragraph 7 of TSO 10.00 requiring TFEG personnel to carry a weapon when travelling away from North Camp and securing that weapon in a number of listed locations. Lieutenant-Commander Carlyon decided to travel on leave without her rifle. This may have been contrary to expectations mentioned verbally in O Groups as testified by Captain Rivera, an interpretation strengthened by the testimony of Lieutenant-Commander Carlyon about taking a copy of the MFO Force Movement Directive at Exhibit 9 with her to show to a colleague who challenged her about the absence of her rifle while on the bus. Yet, that was not a violation of TSO 10.00 which required, at paragraph 7, that she carry a personal weapon. The evidence is that upon departing on leave on 17 December 2015, Lieutenant-Commander Carlyon did carry a personal weapon, namely a 9-mm pistol, and secured that weapon at the border crossing as prescribed. She did not violate TSO

10.00 by leaving her C8 rifle at the camp. She has not been charged with violating verbal direction regarding what weapon to bring on the MFO bus.

Conclusion on the first charge

[17] On the evidence I heard, I must conclude that the standard promulgated by TSO 10.00, even when read in conjunction with the Routine Orders, does not have the level of certainty or precision required to define a standard by which the conduct of Lieutenant-Commander Carlyon can be assessed as a neglect under the first charge. The TSO had been overtaken by events and was no longer reliable and the Routine Orders were too imprecise. This cannot be fixed by a special finding. Therefore, Lieutenant-Commander Carlyon must be found not guilty of charge one. Consequently, there is no need to analyze the other elements of that charge.

[18] It should be noted that I chose to analyze the elements of the offence in the manner in which they were stated and particularized by the prosecution, likely in an attempt to obtain the benefit of the deeming provision in paragraph 129(2)(b) of the *NDA*. I am conscious of the fact that there is only one offence under section 129 as explained by the Court Martial Appeal Court in *R. v. Winters*, 2011 CMAC 1 at paragraph 23 and that there could still be a standard of conduct applicable outside of the order specifically referred to in the particulars of the charge. Yet, in this case this eventuality was apparently foreseen by the laying of a second charge of neglect to the prejudice of good order and discipline in which the offence is particularized as "did store a firearm. . . in a careless manner", allowing neglect to be established without reference to a specific order but requiring proof of prejudice without the benefit of the deeming provision of paragraph 129(2)(b) of the *NDA*.

Second charge of neglect to the prejudice of good order and discipline

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

> "In that she, on or about 30 December 2015, at El Gorah, Egypt, did store a firearm, to wit, a C8 rifle in a careless manner."

[20] Again, the elements of identity, time and place of the offence have been admitted and are not in issue. What is in dispute are both the *actus reus* and the *mens rea* of the offence, specifically the following essential elements: the neglect alleged in the charge and the prejudice to good order and discipline as distinct elements of the *actus reus* as well as Lieutenant-Commander Carlyon's blameworthy state of mind.

[21] As it pertains to the first of those contested elements, the prosecution must prove beyond a reasonable doubt the neglect alleged in the particulars, namely that Lieutenant-Commander Carlyon did store a firearm in a careless manner. Considering how the offence has been stated, as a *neglect*, the prosecution must prove a failure of the accused to perform a duty imposed by law, practice or custom and of which the accused

knew or ought to have known. Accordingly, as per the way the offence was particularized, three things must be proven:

a. the existence of a standard of care applicable to Lieutenant-Commander Carlyon in the circumstances in which she found herself at the time of the offence;

b. that Lieutenant-Commander Carlyon knew or ought to have known of that standard of care; and

c. that she breached that standard of care by the manner in which she stored her C8 rifle.

The Issues

[22] The defence argues that the prosecution has failed to prove a neglect. If that is not the case, the defence argues that the neglect established had no impact on good order and discipline and, therefore, the *actus reus* of charge two has not been made out. Finally, the defence argues that the conduct of Lieutenant-Commander Carlyon in the circumstances should not be judged so blameworthy as to justify conviction and punishment, suggesting that her conduct did not constitute a marked departure from the standard of care of a reasonably prudent person in the circumstances, in light of Lieutenant-Commander Carlyon's explanations for storing her weapon the way she did.

Analysis

[23] The first important element to be analyzed in determining whether a neglect on the part of the accused was proven is the existence of a failure to perform a duty. On the basis of the evidence heard in this trial, I am convinced beyond a reasonable doubt that, despite some confusion on specific norms pertaining to storage of firearms within TFEG, there was one constant norm which appeared understood by all witnesses and found in the orders introduced as exhibits: weapons had to be stored behind a double layer of security, which was described in this trial as behind two sets of locks. That means, for instance, that if one person leaves his or her weapon behind in one location, the door of that place must be locked and the weapon must be locked within that place. The duty to ensure that it is done rests with the person to whom the weapon is issued.

[24] I conclude from Lieutenant-Commander Carlyon's testimony that she was aware of a requirement for double security. She explained that she thought she had double security as the door of her office was what she called a double-lock door, meaning that the locking mechanism allowed two turns of the key for the bolt to be entirely secured. She also testified that in the course of a meeting with Colonel Alexander she explained to him that she had double security and said that she had consequently obtained permission to store her weapon in her office. She testified that Colonel Alexander's reply was non-committal at first, but that he eventually told her that "as long as you

have double security, you are okay" which, as I looked at her, she immediately corrected, stating that Colonel Alexander had actually said "a double-lock."

[25] The term "double-lock" matched her defence and testimony, to the effect that she believed she could store her C8 rifle unlocked in her office as she had a double-locking mechanism on her office door.

[26] That explanation, however, constitutes an exculpatory defence of mistake of facts. She provided what she portrayed as a reasonable perception of a fact, namely that the double-lock on her door provided the required double security. If I accept that fact as a reasonably held belief on her part, I would accept that she was mistaken in thinking that her conduct measured up to the requisite standard of care and was morally innocent. Yet, this goes to the *mens rea* or fault element of the offence. As far as the *actus reus* is concerned, I find that that additional layer or double security was required. I also find that Lieutenant-Commander Carlyon knew that double security was required. It is uncontested that only one key was sufficient to open her office door, regardless of the number of turns one could make to lock or unlock the door. Once the door was open, no additional layer of security protected her rifle as it was stored in an unlocked filing cabinet. The evidence and Lieutenant-Commander Carlyon's testimony leaves me without reasonable doubt to the effect that the prosecution has demonstrated the existence of a standard of care applicable to Lieutenant-Commander Carlyon in the circumstances in which she found herself at the time of the offence, that she knew about that standard of care and that this standard of care was indeed breached by the way she stored her C8 rifle. I conclude, therefore, that a neglect was proven beyond a reasonable doubt.

[27] I must now turn to the other elements. I will leave aside, for now, the issue of whether the neglect found is to the prejudice of good order and discipline to, instead, analyze the fault element or *mens rea* of the offence given the close relationship, in cases of neglect, between the prohibited act and the blameworthy state of mind of the accused. Indeed, as stated at Note B to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 103.60:

> The word "neglect" refers to a failure to perform any duty imposed by law, practice or custom and of which the accused knew or ought to have known. To be punishable under section 129 of the *National Defence Act* "neglect" must be blameworthy. If neglect is willful, i.e., intentional, it is clearly blameworthy. If it is caused by an honest error of judgement and involves no lack of zeal and no element of careless or intentional failure to take the proper action it is equally clear that is blameless and cannot be a ground for conviction. . . . The essential thing for the court to consider is whether in the whole circumstances of the case as they existed at the time of the offence the degree of neglect proved is such as, having regard to the evidence and their military knowledge as to the amount of care that ought to have been exercised, renders the neglect so substantially blameworthy as to be deserving of punishment.

[28] This statement of law illustrates well, in a key instrument of Canadian military law, that it takes more than mere neglect to find an accused guilty of neglect to the prejudice of good order and discipline. That note may not be entirely accurate as to

what blameworthy conduct specifically means given that it dates back from at least 1995 and deals with an area of the law that has evolved considerably in the last 30 years. A better and more contemporary explanation of the law is found in the 2008 reasons of Charron J for a majority of five judges of the Supreme Court of Canada in *R. v. Beatty*, 2008 SCC 5, a decision adopted by a number of courts martial since.

[29] In *Beatty*, which involved an offence of dangerous driving causing death, Charron J recognizes that conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, the civil standard of negligence must be different than the test for penal negligence which aim is the punishment of *blameworthy* conduct. Fundamental principles of criminal justice require that the law on penal negligence concerns itself not only with conduct that deviates from the norm, which establishes the *actus reus* of the offence, but with the offender's mental state. The onus lies on the Crown to prove both the *actus reus* and the *mens rea*. Moreover, where liability for penal negligence includes potential imprisonment, as is this case, the distinction between civil and penal negligence acquires a constitutional dimension requiring proof at the level of penal negligence even for minor regulatory offences, thereby opening a defence of due diligence to an accused.

[30] I respectfully disagree with the prosecution's submission to the effect that a charge of neglect under section 129 of the *NDA* does not require a *mens rea* of penal negligence. I also disagree with the submission of the prosecution to the effect that the fact that Lieutenant-Commander Carlyon willingly secured her weapon under one level of security with the knowledge of the existence of a standard of care requiring two layers of security suffices to find her conduct to be blameworthy. It does not as such a conclusion would be contrary to the modified objective test for negligence explained at length in *Beatty*.

[31] The *modified* objective test established by the Supreme Court must be used to determine the requisite *mens rea* for negligence-based criminal and penal offences. This test modifies the purely objective norm for determining civil negligence in two important respects. First, there must be a "marked departure" from the civil norm in the circumstances of the case. A mere departure from the standard expected of a reasonably prudent person will meet the threshold for civil negligence, but will not suffice to ground liability for penal negligence. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that the court may find, on the basis of that conduct alone, a blameworthy state of mind. This notion of marked departure is found in note B to QR&O 103.60 and is not new. But there is a second important modification. Unlike the test for civil negligence, the modified objective test for penal negligence cannot ignore the actual mental state of the accused. The accused may raise a reasonable doubt whether a reasonable person in his or her position would have been aware of the risks arising from the conduct. The analysis must be contextualized, and allowances made for defences such as incapacity and mistake of fact. This is necessary to ensure compliance with the fundamental principle of criminal justice that the innocent not be punished.

[32] On the basis of the arguments raised by the defence, both of these modifications to the objective test must be considered in determining the appropriate findings on this charge.

[33] I have already determined that the manner in which Lieutenant-Commander Carlyon stored her C8 rifle did constitute a departure from the applicable standard of care. The issue is whether I am convinced beyond a reasonable doubt that her storage of her rifle constituted a *marked* departure from that standard, making her neglect blameworthy. I must also determine whether a defence of mistake of facts was made out as alluded to earlier. Indeed, both Lieutenant-Commander Carlyon's testimony and the rest of the evidence impact on these two elements.

[34] As for the defence of mistake of facts relating to Lieutenant-Commander Carlyon's explanation to the effect that she considered the locking mechanism on her office door to be sufficient to constitute double security, I must say that it does not raise a reasonable doubt in my mind on the blameworthy nature of her conduct. To provide a defence, an accused's perception of the facts needs to be reasonable. I find that her explanation on what she believed was a double-locking feature on her office door to be non-credible and implausible. Equating what she described as a "double-lock door" with double security is an entirely unreasonable perception of the facts that is incompatible with her obvious intelligence, her lengthy military experience and accomplishments, her position overseeing supply and quartermaster functions within TFEG and her excellent knowledge of regulations as displayed in her testimony. I am convinced she knew that the locking mechanism on her office door was insufficient to provide double security.

[35] Yet her testimony was not limited to that double-lock explanation. She did say that she believed that securing her weapon in her office was a better solution than securing it in her quarters, a room in a house. It has been determined that her office was in a building of cement construction, sturdy, her office door was made of steel, her windows had steel bars, etc. She also said that she sought approval to store her rifle in her office from Colonel Alexander. I very much doubt that she provided the appropriate information to allow Colonel Alexander to make an informed assessment to authorize her proposed arrangement. However, what strikes me most about that aspect of her testimony, in the context of the rest of the evidence, is that even if Colonel Alexander did not recall the conversation, it did not strike me from his or Captain Rivera's testimony that the idea of Lieutenant-Commander Carlyon deciding for herself what might be an acceptable arrangement to store her rifle and submitting such an arrangement for approval was unacceptable. As I alluded to in the analysis of the orders under charge one, the written direction put in evidence from the TSO, as modified by events and practice, as well as by the email at Exhibit 6 or the Routine Orders entry provided a number of acceptable options. For instance: "Personnel may retain their weapon in their individual quarters. . . Two barrack boxes. . . may suffice." This leaves other options open. In doubt, personnel could seek clarification but there did not seem to be any formal process for approval of individual arrangements nor any program of

inspection or similar mechanisms to ensure the leadership of TFEG was satisfied with the steps taken by personnel for storage of their weapons.

[36] I cannot find Lieutenant-Commander Carlyon's explanation unreasonable, even considering the factors raised by the prosecution such as the length of her absence from camp on leave, the uncertain number of keys giving access to her office and the alleged orders given in relation to travel on MFO buses while going on leave. I find the prosecution's argument on the danger generated by Lieutenant-Commander Carlyon's action to be speculative at best, especially the risk generated by an ill-intentioned insider gaining easy access to her rifle. Indeed, given the fact that the published and accessible Routine Orders envisaged the option of leaving weapons in Canadian quarters, an argument can be made that it would have been easier for an ill-intentioned insider to access quarters through a window or by breaking a wooden door and taking away a few barrack boxes than breaking into an office controlled by MFO, especially given how sturdy the office occupied by Lieutenant-Commander Carlyon was.

[37] It is important to remember that the analysis of what constitutes a marked departure is contextual. Even if the standard against which the conduct must be measured is always the same, it is the conduct expected of the reasonably prudent person in the circumstances. The reasonable person, however, must be put in the *circumstances* the accused found herself in when the events occurred in order to assess the reasonableness of her conduct. The circumstances here reflected a climate of uncertainty about storage of weapons which very much opened the door to personal preferences. If that door is open and a person makes a choice that is based on logical and reasonable grounds, it can be sufficient to raise a reasonable doubt as to whether any departure from the norm renders the neglect so substantially blameworthy as to be deserving of punishment.

Conclusion on the second charge

[38] Lieutenant-Commander Carlyon is charged with storing her rifle in a careless manner. Yet her evidence is that she applied care in storing her rifle, preferring to use her office. In the context of this case as illustrated in the evidence, especially the lack of firm direction on the manner of storage of rifles and the loose, adaptive nature of the direction in that regard, I cannot dismiss Lieutenant-Commander Carlyon's explanation of her actions outright. Her testimony is not implausible. It is sufficient to raise a reasonable doubt in my mind about whether her conduct constitutes a marked departure from the conduct expected of a reasonably prudent person in the circumstances. As a consequence, I do have a reasonable doubt about the blameworthiness of her conduct. She must be found not guilty of charge two.

[39] As a result, there is no need for me to analyze the element of prejudice to good order and discipline. Despite having heard and considered the arguments of counsel on this issue rendered interesting by recent jurisprudence, I will reserve my opinion for a future case when it is truly needed.

Third charge under section 130 NDA for careless storage of a firearm, contrary to s. 86(1) of the Criminal Code

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

> "In that she, on or about, 30 December 2015, at El Gorah, Egypt did, without lawful excuse, store a firearm, to wit, a C8 rifle in a careless manner, contrary to section 86(1) of the *Criminal Code*."

[41] As is apparent from these particulars, in order to find guilt on this charge, I must conclude that Lieutenant-Commander Carlyon's conduct in storing her C8 rifle breached the required standard of care, and that this breach amounted to negligence, a marked departure from the standard of care of a reasonably prudent person in the circumstances.

[42] I understand how it was felt that a charge under the *Criminal Code* was necessary, given the potential challenge of proving the element of prejudice to good order and discipline under charge two. Yet, having concluded that I have a reasonable doubt on the *mens rea* for negligence on charge two, this conclusion must be applied to charge 3 three as well, given it has the same particulars. As a result, Lieutenant-Commander Carlyon must be found not guilty of charge three.

FOR THESE REASONS, THE COURT:

[43] **FINDS** Lieutenant-Commander Carlyon not guilty of the three charges on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Major M.L.P.P. Germain and Captain M.H. Gaugh

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Lieutenant-Commander R.Y. Carlyon