



COURT MARTIAL

Citation: *R. v. Lewis*, 2018 CM 4016

Date: 20181122

Docket: 201870

Standing Court Martial

17 Wing Winnipeg
Winnipeg, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal N.J. Lewis, Accused

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

REASONS FOR FINDING

Introduction

[1] Master Corporal Lewis is facing two alternative charges under section 86 of the *National Defence Act (NDA)* resulting from two alleged incidents involving a colleague during a social axe-throwing activity attended by members of his unit in Winnipeg on 27 October 2017. The first charge alleges that he quarrelled with a person subject to the Code of Service Discipline, essentially that he entered into an angry argument with Master Corporal VanGenne. The second charge alleges that he used provoking gestures toward a person subject to the Code of Service Discipline by touching the groin of Master Corporal VanGenne without his consent.

[2] The evidence consists of the oral testimony of Master Corporal VanGenne and two other witnesses called by the prosecution during the main trial, as well as a drawing of the incident scene offered by Master Corporal VanGenne. In addition, the testimony of Corporal Crete of the military police and exhibits admitted in the course of a *voir dire* on the admissibility of a statement by the accused to police was added in the main trial at the request of parties to avoid repeating testimony already heard. The defence

called five witnesses, including the accused. In addition, the Court took judicial notice of matters covered by Military Rule of Evidence 15.

[3] Master Corporal VanGenne described the activity organized by his Canadian Armed Forces (CAF) unit at the time, which took place in the afternoon of Friday, 27 October 2017 at a business named “Bad Axe Throwing” in Winnipeg. He provided as an exhibit a drawing he made while testifying showing the layout of the room where the group of twenty or so people were present, essentially to throw axes at targets in two groups. He described three instances when he had been touched in the genitals or groin area unexpectedly and without consent. The first two contacts occurred almost at the same time as he was setting up to throw an axe at a target. He felt a tap on the groin from behind which thought was from an axe handle. He initially believed Sergeant Macaulay was responsible but he is not sure. He said he did not react at the time, decided to just let it go and to continue lining up and preparing to throw at the target. He then felt what he believes was an axe handle come from behind between his legs, to swing at his genitals. He looked and to his right, and behind him was Master Corporal Lewis, chuckling to himself with a grin. He said that then he was not happy, as the look on his face would certainly reveal, but he did not say anything. When Master Corporal VanGenne was done throwing, he left the throwing area to gather alongside colleagues with his back to a wall. Immediately afterwards, Master Corporal Lewis also left the throwing area, passed in front of him and asked, “How is your dick?” He then slapped him in the groin area with the back of his right hand with some force. Master Corporal VanGenne said he then shoved Master Corporal Lewis and some angry words were exchanged between the two. He recalls Master Corporal Lewis telling him not to let his emotions get in the way of logic, to which he replied “When we are back at the unit, you are fucked,” or words to that effect.

[4] In cross-examination, Master Corporal VanGenne conceded that he would have expected the people present to have heard the comments made by Master Corporal Lewis as they were so close, as evidenced in the drawing produced at exhibit, which would explain a comment he testified to making towards Warrant Officer Patterson immediately after having been touched in the groin to the effect that there was “a bystander failure happening.”

[5] The second prosecution witness was Captain Peralta-Huertas, who also participated in the unit activity on 27 October 2017. He knows Master Corporal Lewis as a subordinate in his chain of command. At one point in the activity, as Master Corporal VanGenne was getting ready to throw an axe at the target, Captain Peralta-Huertas saw Master Corporal Lewis approach from behind and touch the crotch of Master Corporal VanGenne with his boot. He was not sure which of the left or right foot was used but described the force used as minimal, “Just a touch”. He testified about the reaction of Master Corporal VanGenne, who looked “kind of disappointed” and “uncomfortable” but mentioned that no words were exchanged between the two. Master Corporal VanGenne threw his axes and returned to the back spectator area. Captain Peralta-Huertas did not notice any other interactions between the two men. He interpreted the contact he had seen as a game the men were playing. He did not do or

say anything at that point. It is only later, after the unscheduled visit of the Wing Commander to discuss unacceptable sexual misconduct on the Tuesday after the event and a discussion with a senior non-commissioned officer at the unit, that he realized something inappropriate involving Master Corporal Lewis was alleged to have taken place during the unit activity at Bad Axe Throwing. As the military police had been called in to investigate, he was subsequently told by the acting commanding officer of the unit that if he had something to say it was the occasion to do it. He decided to go to the police to relate what he had seen.

[6] The third prosecution witness was Master Corporal Mohr, who said he witnessed Master Corporal Lewis touching the genitals of Master Corporal VanGenne as he was waiting outside of the throwing area in the vicinity of most participants. Master Corporal Mohr said that both men had been confrontational with each other before, so when he saw Master Corporal Lewis exiting the throwing area and stopping in front of Master Corporal VanGenne, he thought Master Corporal Lewis was going to add to the ongoing banter but instead he was surprised to see Master Corporal Lewis pushing his left hand against the genitals of Master Corporal VanGenne. Master Corporal Mohr testified that he was standing right next to Master Corporal VanGenne, shoulder to shoulder, at the time. He described the period of contact as very short and was unsure of how much force had been used. He said Master Corporal VanGenne said nothing at the time and that no words were exchanged between the two men at the time of the touching or immediately afterwards. He commented that if something had been said it would have made more people realize what had occurred. In any event, he said nothing at the time. However, he discussed what had happened with Master Corporal VanGenne as the two drove from the event together afterwards. From this discussion, he believed the matter needed to be disclosed and provided a statement to the investigators when asked.

[7] The defence called five witnesses, including the accused, Master Corporal Lewis who testified first in his defence. In a short testimony, he described the events at Bad Axe Throwing, mentioning that the activity became quite competitive and that he was almost throwing at the same time as Master Corporal VanGenne, putting the two in competition somewhat. He said everyone had a good time but there was some bantering going on by virtue of the competitive nature of the activity. He said that after he had made a throw which had missed the intended point of contact, Master Corporal VanGenne made a comment which he considered to be well above what was expected. He then approached Master Corporal VanGenne, leaned into him with his shoulder for a short duration of one second and told him to “tone it down a notch.” There was then an exchange between the two in relation to which Master Corporal Lewis did not expand, preferring not to guess as to what was said exactly. He did speak about a further communication from Master Corporal VanGenne to Sergeant Macauley, words to the effect of, “Don’t worry about it, I will get you as well, Chuckles.” There were no other contacts after that. Master Corporal Lewis was not cross-examined.

[8] The other defence witnesses essentially provided their perspective of the event at Bad Axe Throwing and explained who was there, including the unit disciplinarian

who is known to be quite strict. They did not witness or hear anything unusual, with the exception of Sergeant Macauley who said that Master Corporal VanGenne pointed to him and said, “I have something for you, too” or words to that effect. Notably, Warrant Officer Patterson testified that he was not aware of anything wrong happening at the event and he was never told by Master Corporal VanGenne that there was a “bystander failure happening”. If he had been given such information, he said he would have acted on it. None of the defence witnesses were cross-examined.

Assessment of the evidence

The proper frame of analysis

[9] This case is about an unfortunate situation where someone strongly felt they had been the object of unacceptable behaviour at a unit event which was meant to be fun. The operation of the military justice system is such that I can safely infer that what initiated the process that brought us here is that a number of persons in the chain of command believed that something wrong may have occurred and is worthy of careful independent assessment and sanction if warranted. The immediate cause of this trial, however, is the preferral of the two charges before the court by a representative of the Director of Military Prosecutions. To be clear, my job is not to assess if the conduct alleged or even proven is wrong. It is to assess whether the essential elements of those two charges have been proven at the required standard, no less and no more.

Presumption of innocence and proof beyond a reasonable doubt

[10] In this frame of mind as it relates to the charges, it is important to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, two notions fundamental to findings for Code of Service Discipline and criminal trials.

[11] In this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent.

[12] What does the expression “beyond a reasonable doubt” mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[13] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The Court must not find Master Corporal Lewis guilty unless it is sure he is guilty. Even if I believe that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, I must give the benefit of the doubt to

Master Corporal Lewis and find him not guilty because the prosecution has failed to satisfy me of his guilt beyond a reasonable doubt.

The assessment of credibility

[14] In coming to conclusions on this case, the Court must assess the credibility of witnesses, especially of the initial complainant, Master Corporal VanGenne, and of the accused, Master Corporal Lewis, who testified in his own defence. The findings I have to make will depend in part on the manner in which I assess their evidence.

[15] The assessment of credibility turns on a myriad of considerations, some personal to the trial judge's impressions born from experience, logic and an intuitive sense of the matter. The Supreme Court of Canada (SCC) said in *R. v. R.E.M.*, 2008 SCC 51 that "it may be difficult for a trial judge 'to articulate with precision the complex intermingling of impressions that emerge after watching and listening to witnesses and attempting to reconcile the various versions of events.'" Indeed, "assessing credibility is a difficult and delicate matter that does not always lend itself to precise and complete verbalization."

[16] It may be useful to discuss the guidance provided by the Court Martial Appeal Court (CMAC) in the case of *Clark v. The Queen*, 2012 CMAC 3, where the court has given clear guidance as to the assessment of the evidence. Justice Watt explained a number of principles starting at paragraph 40, including as follows:

[40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v. Thain*, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.

[41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at para 39; *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 9-11.

[42] Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

[17] In arriving at credibility findings, I must be careful not to reverse the burden of proof. If this Court has a reasonable doubt about Master Corporal Lewis' guilt arising from the credibility of the witnesses, then it must find him not guilty. Furthermore, in evaluating the impact of the accused's testimony on the required findings, I am required to assess credibility using the following method, as prescribed by Cory J. of the SCC in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, at page 758:

(a) if I believe the testimony of the accused, I must find him not guilty;

- (b) if I do not believe the testimony of the accused but it leaves me with reasonable doubt, I must also find him not guilty; and
- (c) even if the testimony of the accused does not leave me with any reasonable doubt, I must ask myself whether, based on the evidence which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Analysis

The credibility and reliability of witnesses

[18] The prosecution witnesses testified in a straightforward manner, did not exaggerate the facts and did not show animosity towards the accused. Captain Peralta-Huertas and Master Corporal Mohr experienced memory issues or provided inconsistent evidence that raise concerns as to reliability. I have to be aware of risks as it pertains to the credibility of Master Corporal VanGenne, given his threats during the events to the effect that he admits having said to Master Corporal Lewis “When we are back at the unit, you are fucked,” a threat also voiced to Sergeant Macaulay who, I understand, was initially targeted in Master Corporal VanGenne’s complaint but eventually somehow exonerated. Given the nature of the verbal confrontation which appeared to have occurred at the axe-throwing event, there is a possibility that the complaint may have been a way to get back at Master Corporal Lewis in response to his actions that day. I will endeavour to look for corroboration of Master Corporal VanGenne’s version.

[19] Also, I must be aware of the relationship between Master Corporal VanGenne and Master Corporal Mohr and the possibility of collusion between them. They travelled by car back from Bad Axe Throwing and discussed what had just occurred. They were friends. Master Corporal Mohr, during his testimony, appeared to be protective of Master Corporal VanGenne, displaying selective memory of what he would have said as opposed to what Master Corporal Lewis would have. He could not recall banter by Master Corporal Lewis but was adamant that Master Corporal VanGenne had not said certain words, both in examination-in-chief and in cross-examination. There was some internal discrepancies when Master Corporal Mohr said he could not remember any banter and use of foul language by Master Corporal VanGenne. In cross-examination, when pressed whether Master Corporal VanGenne was quite vocal during the axe-throwing competition, his answer was that Master Corporal VanGenne was not the instigator but had engaged in it.

[20] To be clear, I am not preoccupied with vengeance and collusion simply because it is within the realm of possibilities, as it often is in many complaints. I am preoccupied because in this case there are facts such as threats and opportunity as well as the absence of other facts which require that I be alive to those possibilities which in this context go beyond mere conjecture. By the absence of other facts I mean the absence of facts pointing to the possibility that Master Corporal VanGenne had been a bit of an

outcast or somewhat singled out of the group so that people who may have witnessed something improper done to him may have refrained from coming forward.

[21] I have no significant concerns in relation to the credibility of the defence witnesses, especially since none of them were subjected to cross-examination. The accused, Master Corporal Lewis, testified in a relatively straightforward manner, although he exercised significant restraint in relating words spoken by him to Master Corporal VanGenne and words he had heard spoken by others, yet no clarifications were sought in cross-examination. His version of events was internally consistent and appears to have been externally consistent as well given the absence of cross-examination. Despite his apparent reluctance in describing some of the words said to or by him, he did admit a physical contact with Master Corporal VanGenne, stating that he “shouldered” him, meaning gently leaning into Master Corporal VanGenne, touching the other man’s chest with his shoulder briefly, while asking him to tone his banter “down a notch”.

The elements to be proven

[22] The two charges are laid under section 86 of the *NDA*, albeit under two different paragraphs of that provision. The essential elements of these offences are similar and they are as follows:

- (a) the identity of the accused;
- (b) the date and place of the offence;
- (c) the prohibited act (*actus reus*) in that the accused: quarrelled with a person (charge 1) and/or used provoking gestures toward a person tending to cause a quarrel (charge 2);
- (d) the person involved in a quarrel or towards whom the gestures were directed is subject to the Code of Service Discipline; and
- (e) the fault element (*mens rea*) meaning that the accused intended what he did in quarrelling or using provoking gestures.

Issues

[23] There is no reasonable contention on the elements of identity, time and place of the offence and on the fact that Master Corporal VanGenne, the person involved in a quarrel or towards whom the gestures were directed, was at the time subject to the Code of Service Discipline. What is at issue in this trial is whether the prosecution has been able to prove beyond a reasonable doubt the alleged prohibited acts for each charge, namely whether Master Corporal Lewis quarrelled with Master Corporal VanGenne and whether he used provoking gestures towards him.

[24] This requires proof beyond reasonable doubt of what Master Corporal Lewis has done in relation to both charges and whether that or these proven act(s) constitutes quarrelling (charge 1) and constitute provoking gestures tending to cause a quarrel (charge 2). If Master Corporal Lewis has done these things, I do not see any issue in the evidence that could lead me to form a reasonable doubt as to whether he acted with the requisite intent.

Position of the parties

[25] The prosecution submits that it has proven at the required standard that a series of confrontational encounters occurred in a short time span between Master Corporal Lewis and Master Corporal VanGenne on 27 October 2017. I should conclude that either alone or in combination these encounters initiated by Master Corporal Lewis constitute quarrelling under charge 1. The Court is also asked by the prosecution to conclude that Master Corporal Lewis did touch the groin of Master Corporal VanGenne without consent, proving charge 2. To arrive at these findings I am asked to dismiss the version of Master Corporal Lewis and prefer the version of the prosecution witnesses. Alternatively, if I accept the version of Master Corporal Lewis, the prosecution submits that his admission to the effect that he “shouldered” or gave a shoulder nudge to Master Corporal VanGenne while telling him to “tone it down a notch” does constitute quarrelling in all of the circumstances of this case.

[26] The defence submits that the prosecution has failed to prove the confrontational encounters it alleges beyond a reasonable doubt, especially the two physical contacts, including the alleged touching of the groin. On the alternative argument of the prosecution, it is alleged that the shoulder nudge admitted by Master Corporal Lewis does not constitute quarrelling under charge 1.

The confrontational encounters between Master Corporal Lewis and Master Corporal VanGenne

First contact and reaction

[27] The analysis of the two issues this trial raises can be more efficiently done by making findings on whether the encounters alleged by the prosecution have been proven at the required standard, commencing with what has been described as a preliminary contact between the legs of Master Corporal VanGenne as he was getting set to throw an axe.

[28] Captain Peralta-Huertas testified that he saw Master Corporal Lewis approach Master Corporal VanGenne from behind and touch his crotch with his boot, using a force he qualified as minimal – a touch. Master Corporal VanGenne for his part testified that he had been touched twice as he prepared to throw the axe, but felt this had been done with an axe handle. The prosecution’s theory is that there has been one touch and that it does not constitute quarrelling in the circumstances given the atmosphere of banter and friendly competition at the time. However, the prosecution argues that what

immediately followed this touching, namely the look of disapprobation on Master Corporal VanGenne's face, should have placed Master Corporal Lewis on notice that the joking was over. It is submitted that every other gesture Master Corporal Lewis may have decided to do after that moment should have been clearly understood by him to be provoking, hence tending to cause a quarrel or quarrelling. By virtue of the status this event has been given, I must make a finding as to whether I have been convinced it has occurred.

[29] I have not been convinced beyond reasonable doubt that Master Corporal VanGenne had been touched with the boot of Master Corporal Lewis in the fashion described by Captain Peralta-Huertas. I am having difficulties aligning the testimony about a gentle touch by a boot and what Master Corporal VanGenne said he felt between his legs. An axe handle would feel very different than a boot in my view. It is also surprising to me that no one else would have seen a gesture that would have been so much more obvious than the discreet nudging of an axe handle between the legs. It seems also unlikely that someone would risk approaching so close from behind a person preparing to throw an axe overhead. It would be a lot less risky to approach with an object like an axe handle. I am also having difficulties understanding how Captain Peralta-Huertas could say that Master Corporal VanGenne appeared uncomfortable immediately afterwards and yet feel that it was a game not worthy of his intervention in any way. I do not doubt the sincerity of Captain Peralta-Huertas, but he did not appear to me to have a good memory of the events of that day as it pertains to details. His version, given quite late to investigators after he had been prompted to collaborate by a superior, raises a risk that he may have been trying to reconstruct events in his mind to accord with the mood of the day following the Wing Commander's briefing to unit personnel to the effect that something improper must have occurred. He said he felt at that time and for quite a while afterwards that all that were games played in good fun. His late conversion to a theory implicating the accused in improprieties raises a doubt in my mind. I do not feel I can rely on his testimony to determine any facts incriminating for the accused.

[30] Given the reservations I expressed as it pertains to the testimony of Master Corporal VanGenne and my reluctance to rely on the testimony of Captain Peralta-Huertas, I am left in doubt as to the occurrence of this first contact and of what has been portrayed as a clear look of disapproval on the part of Master Corporal VanGenne which should have led Master Corporal Lewis to understand the joking was over.

Second contact

[31] The second alleged encounter took place a very short time after the first. I understand Master Corporal Van Genne would have thrown his axe or axes and retreated to the back area away from the throwing line. Master Corporal Lewis was throwing immediately after on another target. When he was done throwing, he would have retreated to the waiting area. Heading straight to Master Corporal VanGenne, he would have asked him, "How is your dick" and then touched his groin area with his

hand. That was followed by a bit of shoving and an exchange of angry words which I will turn to shortly.

[32] Focusing strictly on the alleged touching of the groin and the accompanying words, I want to be clear that if this behaviour was to be established beyond a reasonable doubt it would constitute a provoking gesture, even the touching alone, in the context of this case. The issue becomes whether either one of the words or touching or both of these were proven beyond a reasonable doubt in this trial.

[33] As it pertains to the words “how is your dick” the evidence of the prosecution is contradictory. Master Corporal VanGenne testified he heard these words said by Master Corporal Lewis. Master Corporal Mohr, who was next to VanGenne, shoulder to shoulder and close enough to hear, by his own testimony said he did not remember words spoken by Master Corporal Lewis. In cross-examination he said he did not see Lewis’ lips moving. His memory as to words spoken was better in relation to his friend, Master Corporal VanGenne, who, according to Mohr, said nothing until he was in the car with him. That does not accord with the evidence of Master Corporal VanGenne who testified that after having been touched on the groin he was angry, shoved Master Corporal Lewis and was shouting. The evidence of Corporal Mohr leaves me in doubt as to whether Master Corporal Lewis said the words attributed to him. This doubt is reinforced by the testimony of Warrant Officer Patterson, who was right next to Master Corporals VanGenne and Mohr at the time. He testified to not having seen or heard anything inappropriate. He was not cross-examined on words he may have heard. No one else in that packed room was called to testify as to what they may have heard. In the face of this evidence I am left with a doubt as to whether the words “How is your dick” were spoken while Master Corporal Lewis allegedly touched Master Corporal VanGenne’s groin.

[34] Turning now to that alleged gesture by Master Corporal Lewis, the doubts I expressed about the reliability of the recollection of events by Master Corporal Mohr, especially as it pertains to his testimony to the effect that he can’t recall words said, influence my views as to how much weight I must give to Mohr’s testimony as to the corroboration of the version outlined by Master Corporal VanGenne to the effect that he was touched on the groin, a gesture expressly denied by the accused. The prosecutor argued that courts find guilt in reliance on the version of complainants over denials of accused persons all the time. It is true, especially in relation to events where there are only two people involved. However, the evidentiary considerations pertaining to proof of an assault in a hotel room would vary if the act was committed in a room full of people who would be expected to notice as opposed to the situation where only a victim and alleged perpetrator are present.

[35] Here the gesture alleged is an extension of the hand to the groin area of another person during an official activity of a CAF unit in a room filled with over twenty CAF personnel of various ranks. The alleged gesture is noticeable and so is the ensuing argument. The only evidence of it is from two sources. First, the alleged victim who admitted threatening the alleged perpetrator with retaliation of some sort at the time, to

the effect that he would be “fucked when we are back at the unit” and who, indeed, transmitted a complaint to authorities at the unit the following work day. Second, the alleged victim’s friend who discussed the events immediately thereafter in the car and whose reliability is doubtful, not only because of his absence of memory on words spoken but also by the way he described the touching and its duration raising doubts as to what he had seen. As for the other evidence, I note one prosecution witness did not notice the gesture and four defence witnesses did not notice or mention noticing anything inappropriate, their testimony remaining unchallenged on cross-examination. The accused’s denials during examination-in-chief were not challenged as he was not cross-examined. His version is in my view free of obvious contradictions or inaccuracies that may ground a finding of non-credibility.

[36] I may think that it is possible the events happened as described by the prosecution, I may even think it is probable. However, the standard I have to apply as judge requires more, as explained earlier. It requires more because our justice system mandates conviction only of those found guilty beyond reasonable doubt on the evidence presented at trial, with the understanding that many “probably guilty” accused persons will leave the courtroom with non-guilty verdicts. It is hoped that in this way, society encounters fewer judicial errors and unjust convictions. In the case at bar, the whole of the evidence presented in this trial leaves me with a reasonable doubt as to whether Master Corporal Lewis touched the groin of Master Corporal VanGenne without his consent as particularized at charge 2.

Other interaction

[37] Turning now to the rest of the interactions between Master Corporal Lewis and Master Corporal VanGenne, I must assess whether Master Corporal Lewis could be found to have quarrelled with Master Corporal VanGenne and therefore be found guilty of charge 1.

[38] Counsel have referred to quarrelling having been defined in the law at paragraph 38 of *R. v. Sketcher*, 2016 CM 4014, as an angry argument or disagreement. The prosecution argues that words that Master Corporal Lewis admits having said and that Master Corporal VanGenne testified having heard may constitute quarrelling and lead to a conviction on the first charge. One of these statements is “Don’t let logic get in the way of your emotions” uttered by Master Corporal Lewis. In his testimony, Master Corporal VanGenne interpreted what he described as condescending words inviting a confrontation, such as, “Come at me bro, let’s do this”. Master Corporal Lewis did not repeat these words in his testimony. It is one of the instances that he avoided getting into the details of what had been said, and on which he was not cross-examined. However, he admitted these words during an interview with police on 27 November 2017, the audiovisual recording of which was admitted in evidence. Having viewed this recording numerous times, and seeing this specific statement in its context during the interview, I prefer Master Corporal Lewis’ version in that it was voiced in an ironic way, in reaction to what he perceived to be an over-the-top, emotional verbal reaction by Master Corporal VanGenne in the course of their argument, specifically Master

Corporal VanGenne's words to the effect "Once we get back to the unit, you're fucked."

[39] In all of the circumstances, I am not convinced these words were the expression of an angry argument in themselves. From Master Corporal Lewis' version, they were meant to de-escalate the situation, showing how exaggerated things had become. I realize this is not the version of Master Corporal VanGenne, but nevertheless I am left in reasonable doubt as to whether those words constitute quarrelling by Master Corporal Lewis given the possibility of dual interpretation of these words in the context.

[40] I mention in passing that I do realize the possible irony of exculpating Master Corporal Lewis on the basis of a statement to police that was entered in evidence at the initiative of the prosecution over the strong objections of defence both on procedural and substantive grounds. It remains that statements must be admitted in their entirety for a reason: they sometimes provide context and exculpatory evidence that can be just as relevant as any inculpatory statement.

[41] The same reasoning applies to another set of words that Master Corporal Lewis admitted saying to Master Corporal VanGenne at the same time that he was shouldering him, namely, "Tone it down a notch" or words to that effect. These words are relevant only to the testimony of Master Corporal Lewis himself, no other witnesses having testified about that occurrence. Nevertheless, I am not convinced these words were the expression of an angry argument in themselves. From Master Corporal Lewis' version, they were meant to de-escalate the situation, showing how exaggerated things had become in relation to the banter going on in the context of the competition between teams. He described these words to the investigator as a way to remind Master Corporal VanGenne that "we are between friends here at a unit event." In the circumstances, I am left with a reasonable doubt as to whether those words constitute quarrelling by Master Corporal Lewis.

[42] In any event, I believe that at most the words attributed to Master Corporal Lewis could have constituted the use of provoking speeches tending to cause a quarrel or disturbance under subsection 86(b) of the *NDA*. However, Master Corporal Lewis was not charged with that offence and the law applicable to offences under section 86 do not allow the transfer between one of the offences within the section to another as is allowed for section 85, as provided for at *Queen's Regulations and Orders for the Canadian Forces* 103.62.

[43] What remains to be analyzed is the alternative argument of the prosecution to the effect that the "shoulder nudge" admitted by Master Corporal Lewis, which I described previously, constitutes quarrelling. Indeed, offering physical contact to a person without consent is an assault. In a military setting, during what should have been a convivial event, it was imprudent to approach someone who appeared frustrated and enter into physical contact with him, even slightly. In effect, nothing good resulted from the physical contact. That being said, the charge here is not bad judgement or assault. The assessment of whether a given conduct constitutes quarrelling must be made

independent of the actual consequences or events that followed. It must be made objectively, from the perspective of the reasonable observer. I have described the context when the words “tone it down a notch” were spoken and the version of the accused as to what he meant to accomplish when saying this to Master Corporal VanGenne. Master Corporal Lewis’ version is the only one I have. That physical contact could have been seen as intimidating but I have no evidence as to how it was perceived. The prosecution in its thesis concedes that a minor physical contact without consent, such as the initial boot or axe handle between the legs of Master Corporal VanGenne from behind, would not constitute quarrelling in the circumstances of the activity being undertaken at the time. This leads me to conclude that a reasonable observer could conclude the same in relation to the “shoulder nudge” admitted to by Master Corporal Lewis. Although this is a close call, I believe in the circumstances that I need to give the benefit of the doubt to Master Corporal Lewis.

[44] I have not found conduct on the part of Master Corporal Lewis in the circumstances of this case to conclude that Master Corporal Lewis is guilty of the first charge of quarrelling with a person subject to the Code of Service Discipline.

Concluding remarks

[45] In conclusion, it turns out that I could not find guilt in this case on the charges as laid in application of the very stringent standard of proof beyond reasonable doubt. There is no blame to be extended to anyone by virtue of that result. This result may not be welcome by those who complained and believed a sanction was warranted in this case. To them I say you have done your job as long as you truly and honestly believe a situation needed to be reported and an investigation undertaken. The rest is the job of professional investigators, prosecutors and ultimately my job in applying the law requiring me to make a finding of guilt only when I am sure of the guilt of an accused on the basis of evidence that convinces me beyond a reasonable doubt.

[46] The prosecution did not have an easy job here given the extraordinary circumstances brought upon military prosecutors by a recent decision of the CMAC in *R. v. Beaudry*, 2018 CMAC 4 which at this time prevents the import of offences such as assault committed in Canada in the Code of Service Discipline for trial by military tribunals. Before that decision was rendered, Master Corporal Lewis was scheduled to be tried under charges of assault. He had chosen to be tried by a General Court Martial, a jury of his peers under my guidance as military judge. In light of the *Beaudry* decision, the prosecution, I am sure considered a number of factors and decided to provide Master Corporal Lewis with the opportunity to have his day in court martial exactly in the period already scheduled for his trial, however without a jury of his peers as charges were transformed into section 86 charges which are mandatorily tried by Standing Court Martial. As it turns out, those were not the best charges to obtain a conviction, but such is not the role of prosecutors. They are servants of justice and they have performed that role admirably in the difficult circumstances surrounding this case.

[47] It is ironic that the *Beaudry* decision, meant to preserve the right to trial by jury, had the practical effect of preventing another accused, Master Corporal Lewis, to be tried by a jury of his peers as he had initially chosen. It is even more ironic considering that Corporal Beaudry, to the contrary, did not appear to want to be tried by a jury of his peers, as he instead requested to be tried by judge alone. To do so, he had to obtain the concurrence of the Director of Military Prosecutions to be tried by Standing Court Martial as one of the offences he was charged with would otherwise have had to be tried by General Court Martial in accordance with the applicable statutory scheme.

[48] In any event, I am confident the efforts of the prosecution in choosing to bring this trial before a court martial in a timely manner promoted the interests of justice favourably in comparison with the possible alternative of asking that this matter be brought before a civilian court where Master Corporal Lewis would have had to retain and pay for his own lawyer and would have had the matter heard later. Most importantly, a civilian trial would not have allowed as easily the attendance by military personnel from this base and his unit, the persons most interested in the administration of justice in this case.

[49] Master Corporal Lewis, I assume the last year you spent as a person suspected and charged with an offence has been difficult for you, and, as well probably for your family and friends. You can breathe a sigh of relief now that you are about to be found not guilty. However, I invite you to reflect on what caused your difficulties with the law. I hope you are determined to avoid poor choices in your personal interaction in the future. Your good judgement will benefit you, those you love and the CAF, which hopefully can then count on you as a fully contributing member for years to come.

FOR THESE REASONS, THE COURT

[50] **FINDS** Master Corporal Lewis not guilty of charge number 1.

[51] **FINDS** Master Corporal Lewis not guilty of charge number 2.

Counsel

The Director of Military Prosecutions as represented by Lieutenant(N) J.M. Besner and Major J.G.S. Germain

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Corporal N.J. Lewis