



## COURT MARTIAL

**Citation:** *R. v. Preece*, 2003 CM 210

**Date:** 20030730

**Docket:** F200321

Standing Court Martial

Canadian Forces Base Petawawa  
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private S. Preece, Accused**

**Before:** Colonel K.S. Carter, C.M.J.

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### **FINDING**

(Orally)

[1] Private Preece, you have been charged with two charges of disobeying a lawful command, contrary to section 83 of the *National Defence Act*, arising out of an incident which occurred on the 19th of November 2002, in which you failed to participate in gas hut training when ordered to do so by Captain Wallace and Captain Jonasson. The court finds you guilty of these two charges.

[2] The evidence presented to the court in this case consisted of the testimony of four witnesses: Captain Wallace, Captain Jonasson, Private Graham and Private Preece, as well as various documentary exhibits and judicial notice of several matters pursuant to Military Rules of Evidence 15 and 16.

[3] The prosecution has made a summary of its facts and arguments and so has the defence. But before proceeding to that, the court would like to go over generally the process that it must follow and the rules that it must follow in coming to its decision. The burden on the prosecution at a court martial, in this and every case, is to prove all the essential elements of each charge beyond a reasonable doubt. If the prosecution fails to do so and to meet the standard in relation to a charge, then the court must find the accused not guilty of that charge.

[4] What is a reasonable doubt? It is a real and justifiable doubt, not one based on illusion, speculation, or guessing, nor is it a doubt that is based on sympathy or prejudice. It is one that is logically connected to the evidence, or to the absence of evidence, and one that is held after a fair, thorough, and impartial consideration of all the evidence before the court. It is not enough for the prosecution to prove that the accused is probably guilty.

[5] The standard of proof in a court martial is the same as in any criminal trial in Canada. It is an exacting standard of proof, not a probability standard that is used in making everyday decisions. It is a much higher standard of proof than that which applies to administrative decisions and findings. This standard of proof beyond a reasonable doubt applies to the total body of evidence upon which the prosecution relies, not the individual parts.

[6] The prosecution must prove each and every essential element of an offence beyond a reasonable doubt. Simply put, the accused person does not have to establish anything at trial. The accused is always presumed innocent until the prosecution has convinced the court it has met its burden of proof beyond a reasonable doubt on all the essential elements of the offence; that is, until the conclusion of the evidence.

[7] There are many different types of evidence. These include documents, photographs, physical objects, and perhaps most commonly, the oral testimony of individual witnesses testifying under oath before the court as to their recollection of what happened, and sometimes the testimony of these witnesses differs or is contradictory. The court must, in determining what has been proven in evidence, determine the credibility of the testimony of the witnesses.

[8] The court will mention how it has assessed the credibility of various witnesses. The court is not compelled to accept the account of any witness except to the extent it is determined credible. The court will usually accept evidence as trustworthy unless there is some reason for disbelieving it. There are a number of factors which influence the assessment of a witness's credibility; they include a witness's ability to recall and a witness's ability to observe, which may be influenced by physical restrictions such as

limitations on vision or hearing. Emotional restrictions also affect a witness's credibility; that is, a witness may be so scared, angry, or elated that this affects their ability to observe, or a witness may be under the influence of alcohol or prescription or non-prescription drugs.

[9] Credibility is also influenced by a witness's motivation to recall; that is, whether something was unimportant and trivial or significant, whether it was something in which they had no personal interest or significant personal interest. The witness's ability to communicate is important: is the witness's testimony clear, responsive, and forthright; or confusing, evasive, and argumentative? Finally, is the testimony of a witness reasonably consistent within itself and consistent with uncontradicted facts?

[10] All that makes it clear that a finding that certain testimony is not credible does not mean a witness is consciously or even unconsciously lying. There are many factors which may lead the court to conclude certain witnesses are more credible than others. The court may also believe all, part, or none of a witness's testimony. If, however, it rejects part of the testimony of a witness, it will only accept the remainder of that testimony with caution after testing it carefully.

[11] Now, this a case where the accused person, that is Private Preece, chose to testify, and the Supreme Court of Canada has established, in those circumstances, what this court must do. In a case called *R. v. W.(D.)* found at (1991), 63 C.C.C. (3d) 397, the Supreme Court of Canada has set out a process for this court to follow. First, the court must analyse whether or not the accused is believed, and there is a certain assumption that the accused's testimony would exculpate the accused if believed. If the accused is believed, then the court must acquit the accused. If, however, the accused is not believed, but nevertheless, the testimony of the accused raises a reasonable doubt, then, again, the court must find the accused not guilty.

[12] Finally, if the testimony of the accused is not believed and does not raise a reasonable doubt, but still a reasonable doubt exists on the basis of the evidence that the court accepts, then again, the court must find the accused person not guilty. It is only if the court does not have a reasonable doubt about any of the essential elements of a charge that the court will find the accused guilty.

[13] So let me turn briefly to summarize the prosecution's submissions. The prosecution summarized the facts before the court as he saw them. The prosecution submitted that it has met every burden upon it of proving every essential element of both offences. The prosecutor identified those elements as the jurisdiction of the court, the identity of the accused person, the date and place of the offence, that the orders were

given by officers superior to Private Preece, that Private Preece was aware of the orders given, that the orders were lawful commands, that Private Preece disobeyed those orders and she did so with the necessary blameworthy state of mind.

[14] The prosecution in particular stressed the commands were lawful as they clearly related to a military duty. The prosecutor also argued that any medical limitations imposed upon Private Preece were neither the reason for her refusal to comply with the orders given, nor alternatively, a reason not to comply with the orders.

[15] The defence, in his submissions, argued that certain of the submissions of the prosecution relating to the physical requirements of gas hut training and an ability to accommodate someone with medical limitations such as Private Preece's was not based on evidence before the court. The court agrees that those matters are neither by evidence nor inference before the court.

[16] The defence has submitted that the court, regardless of its finding on the first charge should stay proceedings on the second charge through the application of Note G to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 103.16. The defence has also argued that the commands given by Captain Wallace and Captain Jonasson were not lawful commands because Private Preece was not deployable and was not, therefore, required by the applicable Canadian Forces publication (CFP), Training For War, Volume 2, Supplement 4, Individual Battle Task Standards, Chapter 3, para 3, and Annex G, Note 2, to participate in deployment level of capability (DLOC) training, of which gas hut training is a part. Separately and independently, the defence argued that because Private Preece was not in possession on the 19th of November of all of her individual protective equipment (IPE) kit, which she was required to wear for gas hut training by the provisions of paragraph 4(e) of Exhibit 4, that again, this was not a lawful command.

[17] The defence also submitted that the court should find that Private Preece raised the issue of a permanent medical category and by so doing, Captain Wallace was under an obligation to verify any medical limitations this might impose with the appropriate medical authorities before issuing any command to Private Preece to participate in gas hut training.

[18] Finally, the defence submits that the court should have a reasonable doubt about Private Preece's blameworthy state of mind, given the testimony of her prior good performance; the testimony by Captain Wallace and Captain Jonasson that this was out of character for her; her temporary medical category which precluded her being deployed; her treatment by 2 Field Ambulance; the lack of advance notice she had received about her requirement to participate; her non-participation in the training the previous year; and

the devastating impact on her of the news she had received one or two days earlier from her doctor that she would be put on a permanent medical category, and ultimately, released from the Canadian Forces. This, cumulatively, the defence submits, made it reasonable for Private Preece to believe that she was precluded from undertaking any such training.

[19] As explained earlier, the court must determine if the evidence of the accused is believed, and if so—and the evidence presumed as I have indicated to be exculpatory—find the accused not guilty. The court is in the somewhat unusual position here of finding the testimony of Private Preece generally credible but not necessarily relevant to the fundamental issues before the court.

[20] Private Preece has a generally reliable recollection about all matters except the immediate time frame surrounding the commission of the offences. During that time, by her own testimony, she was highly emotional, angry, upset, and frustrated. She described herself as losing control. She recalls very little of the interactions between herself and Captain Wallace and Captain Jonasson. In short, because of her inability to recall, the most that she could tell the court was that she believed the order from Captain Jonasson was a suggestion.

[21] The court finds that Private Preece's own testimony about the actual circumstances surrounding the interactions with Captain Wallace and Captain Jonasson to be so little and so vague as to not be credible except as confirmed by other witnesses. This is somewhat troubling given Private Preece's detailed recollection of other contemporaneous matters, but ultimately, in relation to these particular incidents, why Private Preece does not remember is less critical than the fact that she does not remember what she said or why she said it.

[22] The question the court must now deal with is whether having found the remainder of Private Preece's testimony credible, does the court find Private Preece not guilty? The court finds that the remaining testimony is either not relevant, or where relevant, not exculpatory, and this will become evident when the court reviews its findings of fact in this matter.

[23] For the same reasons, the court, having considered the parts of the testimony of Private Preece it does not believe, does not find that it raises a reasonable doubt. The court therefore moves to the question of whether the prosecution has proven the guilt of Private Preece beyond a reasonable doubt.

[24] The court has found the witnesses who have testified before it to be credible. It has already dealt with the issue of Private Preece's testimony. There are some not unexpected divergences on minor details given the nearly seven months since this incident took place and the relative importance of the matter to the different witnesses. There is, however, in the court's view, no contradiction of substance.

[25] The facts found by the court are as follows. Private Preece, who joined the Canadian Forces in 1999, suffered a foot injury during basic training which did not heal in a timely fashion and which resulted, from September 1999 onwards, in a series of temporary medical categories which restricted her participation in various normal aspects of military training such as drill and group physical education. Having successfully completed basic training and her first level trade's training, QL3 Medical Technician, she was posted to 2 Field Ambulance in Petawawa in mid-2000. She has served with 2 Field Ambulance since then.

[26] Private Preece's medical treatment for her foot injury and temporary medical categories continued until at least November 2002. Private Preece found the medical employment limitations she worked within constricting, particularly as it related to her ability to participate in career enhancing activities, such as formal courses. She saw her career as stalled. She was also bothered by her perception that her supervisors looked at her differently because of her medical employment restrictions. She found that, on occasion, she would have to remind them of what duties she was precluded from performing, but that when she did this, they would usually indicate they had forgotten about her medical employment restrictions and would tell her to carry on with her normal, that is, her medically restricted duties.

[27] In 2000/2001, she participated in various aspects of unit training, such as mine awareness, gas hut, ranges, and qualified for her military driver's licence. Subsequently, however, that is, in 2001/2002, she did not participate in range training, at least because of the fact that she slowed down the qualification process because she walked more slowly than the other participants. Private Preece also indicated that when she was on narcotics, there were also safety concerns with regard to her participation in live firing exercises.

[28] In July 2001, Private Preece began working as a pharmacy stores person in the 2 Field Ambulance pharmacy. Captain Jonasson became the pharmacist and her direct supervisor and platoon commander in December 2001. Captain Wallace became Combat Support Company OC and her company commander in June 2002. Between June and November 2002, Captain Wallace, who was aware of Private Preece's temporary medical category and medical employment limitations and her concerns about her career, tried to

increase her participation in unit training activities within her medical limits and to, as he put it, turn her career in the opposite direction; that is, a more rewarding and positive direction.

[29] In September 2002, Private Preece participated in two weeks of unit field training, working in the brigade medical station during the first week and on pharmacy duties during the second week.

[30] The commanding officer of 2 Field Ambulance sent out Exhibit 3, dated 19 September 2002. This an operations order directing that all 2 Field Ambulance personnel be trained to minimum level of capability standards, MLOC standards, in order to maximize unit readiness. Annex A of that operations order indicated that this would include gas hut training. The specific gas hut instruction, Annex G to that document, was not introduced into evidence before the court.

[31] A further operations order dated 10 October 2002, Exhibit 4 before the court, states at paragraph 2 that all 2 Field Ambulance personnel will conduct training in order to complete individual battle training standards in accordance with the earlier operations order. Paragraph 4(e) of that order states that complete IPE is to be carried during all refresher training and to be worn by all during gas hut training. This was to include chemical warfare boots, gloves, suit, mask and carrier.

[32] Annex A to that operations order states that gas hut training will take place on 19 November 2002 between 0900 and 1600 hours at Gas Hut No. 1 on the gas hut range. That part of Annex B which relates to Combat Support Company, Private Preece's company, states that Combat Support Company will ensure all personnel complete mine awareness and gas hut training in accordance with Annex A.

[33] Those operations orders were received by Captain Wallace though there is no indication of how or to whom they were passed down in Combat Support Company. Within the pharmacy where, in November 2002, Captain Jonasson, Private Preece, and Private Graham worked, Captain Jonasson at least was aware of the gas hut training since he participated in it during the morning of 19 November 2002. Private Graham, who was pregnant at the time, and therefore, according to Exhibit 3, para 4(a), "strictly forbidden from attending the gas hut," indicated she was aware of the ongoing training because it happened regularly every fall and spring in the unit and she had seen people going in and out dressed for training.

[34] Private Preece indicated she was not told she was participating in gas hut training but that she was aware Captain Jonasson was doing gas hut training the morning of 19 November 2002.

[35] At approximately 1300, on 19 November 2002, Captain Jonasson, Private Graham, and Private Preece were all in the pharmacy area in 2 Field Ambulance building at CFB Petawawa. Captain Wallace was at the loading dock in the building with those company personnel who had not yet completed gas hut training on 19 November 2002. Being advised that one person was missing from the group, Private Preece, he told Sergeant Weeks to get her.

[36] At about 1305, a Private Googoo arrived at the pharmacy. Private Preece advised Private Googoo she would not be participating in the training as she had a responsibility to a Captain Leach who apparently was coming in to pick up medical supplies prior to a deployment to Sierra Leone, and also that she did not have all her protective kit with her, only half of it.

[37] Captain Wallace was advised Private Preece would not be participating in gas hut training. He came to the pharmacy area himself and asked whether there was any medical or work-related reason that she could not participate. He recalls Private Preece saying there was no such reason.

[38] Private Graham recalls also that Private Preece mentioned at this time that she really did not want to participate due to the fact she would be released. Captain Wallace did not give Private Preece an order to participate at that time; rather, he went to her direct supervisor and platoon commander, Captain Jonasson, and told him to issue a direction.

[39] Captain Jonasson went into the pharmacy and spoke directly to Private Preece. He told her she needed to go and do the gas hut training and to gather her equipment. Private Preece's response was that she felt that she had to make a stand, that she had been badly treated, that she felt it was not necessary for her to do the training, and that she would not do it. He recalls no mention at that time of Private Preece's medical condition.

[40] Private Graham's recollection is that Private Preece mentioned at this time that she did not feel she should have to participate as she was being released.

[41] Captain Jonasson, in light of Private Preece's refusal, went and advised Captain Wallace who returned to the pharmacy a second time. There, he again spoke to Private Preece. He confirmed with her there was no medical or work-related reason for her not to participate in gas hut training.



[42] He asked her if she understood that she had disobeyed the lawful command of her platoon commander, and Private Preece said she did. He then proceeded to give her an order himself to gather her equipment and come to the gas hut. She refused to participate and Captain Wallace confirmed with Private Preece that she realized she was now disobeying an order by her company commander.

[43] During the second conversation, Private Preece explained she did not have all her kit for the gas hut, and Captain Wallace indicated that a protective suit might be available but that it would be sufficient if she brought her rain gear. Private Preece also advised Captain Wallace, at this time, that her doctor had told her she would be getting a permanent medical category and would be released sometime in the future. Captain Wallace explained that he was unaware of this, but in his view, it was irrelevant to her participating in the training.

[44] After Private Preece's refusal of the order to gather her kit and come to the gas hut, Captain Wallace instructed Captain Jonasson to take her to the regimental sergeant major's office and departed himself with the now delayed van and the rest of the personnel to the gas hut for training. Private Preece remained working in the pharmacy for the rest of the afternoon and did not participate in the gas hut training.

[45] Later that afternoon, Private Preece told Private Graham that she felt what she did was wrong, but that she also felt she did not have to participate as she was being medically released. Private Preece also explained that she had told Private Graham that it was not right as the pharmacy was very busy, that she had not been advised of the requirement to the last minute, and that she would have had no time to tell people that she had been ordered to take care of, such as Captain Leach, that she was not available.

[46] It is clear from the testimony that within a few days, Private Preece apologized for her actions that day to both Captain Jonasson and Captain Wallace, and that Captain Wallace and Private Preece, at least, appeared to regret that the incident on 19 November 2002 had proceeded to disciplinary charges and ultimately to this court martial. Those then are the facts as found by the court based on the evidence presented to it.

[47] The prosecution has proven beyond a reasonable doubt the identity of the accused, the time and place of the offence, that Captain Wallace and Captain Jonasson were superior officers and this was known to Private Preece, and that they both gave commands to Private Preece. The prosecution has also established that Private Preece received and understood the orders and that she failed to comply with those orders.

[48] The defence has correctly identified the two areas which need to be addressed in more detail as whether the order was lawful and whether Private Preece had the requisite blameworthy state of mind when she did not obey the orders.

[49] Let me first, however, deal with an issue raised by the defence, that because Captain Jonasson's order was given at the direction of Captain Wallace, that Note G to QR&O 103.16 precludes a conviction on both charges. Notes to QR&Os are, of course, guidance and not binding, but that is not the issue here. The purpose of the Note is to make it clear that if the order of a superior officer is passed on by a person who is not that superior, indeed may not be a superior at all, but someone who the accused might reasonably supposed to be duly authorized to pass it on, then the order is given by the superior officer even though she or he has not spoken personally to the accused.

[50] For example, if Corporal Smith is given an order by Sergeant Roy to go to Captain Jones's office because Captain Jones wants to see him, and he does not comply; and then Master Warrant Officer Peters gives the same order to the corporal; and then Captain Jones gives it himself; and then finally, Major Tremblay orders the corporal to go to Captain Jones's office because Captain Jones wants to see him, each order is a separate order and each refusal is a separate refusal. Whether all of these need or should be the subject of a charge is a different question.

[51] If, however, two or more persons who are not superiors, but simply individuals who are duly notifying an accused of the same order by the same superior, then there would be only one lawful command and one charge. Not, I hasten to add, because of the operation of the Note, but because of the law in Canada which precludes multiple convictions for the same improper act and I would refer counsel here to two Supreme Court of Canada cases: *R. v. Kineapple* (1974), 15 C.C.C. (2d) 524 and *R. v. P.(D.W.)* (1989), 49 C.C.C. (3d) 417.

[52] Additionally, the court would point out, on the evidence before it, Captain Jonasson gave an order to Private Preece that came from him personally and as a result of his authority as her direct supervisor and platoon commander. He did not simply transmit an order from Captain Wallace. This approach would appear to indicate respect for the normal chain of command applicable to Private Preece. So for the reasons outlined, the court does not accept the argument of the defence on this issue.

[53] Let me now turn to the issue of the lawfulness of the commands given to Private Preece to participate in gas hut training. The prosecution has established that it related to a military duty and was given to Private Preece by her military superiors in her chain of command.

[54] The defence has raised three reasons why the court should have a reasonable doubt that the commands were lawful. Firstly, that Private Preece, given her temporary medical category, was in the category of non-deployable and therefore, did not have to participate in gas hut training. Secondly, that Private Preece did not have to participate in gas hut training unless she had all her protective kit with her. And finally, that Private Preece did not have to participate in gas hut training once she had raised the issue of her permanent medical category with Captain Wallace until he had checked with medical authorities about what medical restrictions she was subject to.

[55] *Canadian Forces Administrative Order* 34-30, Medical Standards for the Canadian Forces; Chapter 3 of CFP 154 Medical Standards; Exhibit 5; and the testimony of the witnesses make it clear that with a G4 O4 temporary medical category, Private Preece was not deployable. The CF manual on Training for War, Volume 2, Supplement 4, in Annex G to chapter 3 indicates that personnel will go through the gas chamber during deployment level of training, DLOC, only. Exhibits 3 and 4 refer to minimum level of training, MLOC, but make it clear, in the context of that training within 2 Field Ambulance, that it includes gas hut training.

[56] Two issues must be addressed. If an individual does not meet minimum medical category for deployment, can that individual be required to undergo training which appears to be a prerequisite for deployment, and secondly, are unit authorities empowered to decide what training must be taken to meet individual and unit requirements? Specifically, can a unit decide that although certain training, in this case, gas hut training, is not required to meet a certain standard of readiness, it nevertheless wishes its members to undergo that training? The answer to both questions is yes.

[57] Even if a person is on a temporary or, indeed, a permanent medical category, provided that the training required is not something which the individual is medically precluded from doing, they can be required to complete that training. The fact that an individual member does not appear at the time of the training to fall into the category of those persons requiring it does not make an order to participate in it anything other than lawful.

[58] There is no evidence before the court that Private Preece, because of her temporary or any potential permanent category, was medically precluded from participating in the gas hut training. The court has taken note that in the previous month, she had participated in unit field training again even though she was not able to deploy at that time. A unit may also quite lawfully require that members undergo training which,

while not required for a specific listed purpose, may be usefully combined with it in order to meet other unit goals.

[59] The testimony of Captain Wallace and Private Graham establish that 2 Field Ambulance, for at least two years, had been combining DLOC and MLOC training, and Captain Wallace made it clear this was to ensure a target number of unit members were DLOC qualified. Consequently, these factors result in no reasonable doubt as to the lawfulness of the orders given to Private Preece.

[60] Private Preece did not have all her protective kit with her to participate in gas hut training. Annex G to chapter 3 of Training for war, Volume 2, Supplement 4 states at Note 1 that the decision to train without complete IPE is a Land Force Area command function and at Note 2 that personnel must be fully dressed going through the gas chamber.

[61] In the evidence before the court, although Private Preece did not have her full kit with her, Captain Wallace indicated that either the missing kit could be acquired en route or an impermeable rain suit would be sufficient. The order to Private Preece was not one where she was at the door of the gas hut and being required to enter without the appropriate protective kit. She was being ordered to collect her kit and participate in the training. There was nothing in the command she received, even if she did not have at the time of the order full protective kit, which was unlawful. The court does not need to nor will it comment on what might have happened at the gas hut if appropriate protective gear was not available.

[62] Finally, the defence submits that there is a reasonable doubt that the order was lawful given that Private Preece, who was on a temporary medical category, informed Captain Wallace that she was being put on a permanent medical category. Captain Wallace was familiar with the temporary medical category restrictions, and as Exhibit 5 indicates, they do not preclude participation in gas hut training.

[63] Although Private Preece indicated she was being put on a permanent medical category, she responded twice to inquiries that there was no medical reason she could not participate in the gas hut training. CANFORGEN 076/98 states that if there are concerns with employment limitations, then the chain of command is to raise any concerns with appropriate medical authorities, not the member. In this case, there were no employment limitations about which the chain of command had concerns; consequently, the CANFORGEN is not applicable.

[64] I now move to the final issue: whether there is a reasonable doubt about Private Preece's blameworthy state of mind. Private Preece's prior good conduct and the fact that this type of conduct is out of character for her is not indicative of her state of mind at the time. The lack of prior notice and her non-participation the previous year, while perhaps making the order a surprise and occasioning some resentment on the part of Private Preece, again does not impact on her blameworthy state of mind. In a military context, many orders may be unexpected and undesired by the recipient. Surprised or unplanned disobedience is still disobedience.

[65] The heart of the issue, the court has considered, is whether Private Preece had an honest but mistaken belief in a set of facts that, if true, would mean that there was a reasonable doubt as to her blameworthy state of mind. In simplistic terms, did she think that she was not doing anything wrong because of her belief in certain facts; that is, did she honestly but mistakenly believe the order was unlawful even if that was not the case?

[66] The evidence as to why Private Preece did not comply with the order does not raise this issue. The explanation provided revolves around Private Preece's view that it was not necessary for her to participate given that she was going to be released. It was a personal assessment by her of the lack of necessity for her to participate, perhaps compounded by the unexpected nature of the order, her lack of complete kit, and a commitment to a pre-existing and what she considered important obligation to Captain Leach.

[67] In regard to this latter matter, this was not raised at the time with either Captain Jonasson or Captain Wallace. Consequently, there was no attempt, as set out in QR&O 19.02 to point out conflicting orders and have the conflict resolved by the superior officer who gave the latter order.

[68] The prosecution has succeeded in proving, beyond a reasonable doubt, that the orders given by Captain Jonasson and Captain Wallace were lawful, and that Private Preece had the requisite blameworthy state of mind.

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