



COURT MARTIAL

Citation: *R. v. Pett*, 2019 CM 4018

Date: 20191206

Docket: 201925

Standing Court Martial

Moss Park Armoury
Toronto, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal K.G. Pett, Accused

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

REASONS FOR FINDING

(Orally)

Introduction

[1] Master Corporal Pett is facing two charges in the course of this Standing Court Martial, resulting from an altercation which occurred on 16 November 2018, here at Moss Park Armoury, during a training evening when pipers and drummers from the 48th Highlanders Band were rehearsing with dancers in preparation for the St. Andrew's Ball. During a break after the band had just played a set of jigs, Master Corporal Pett took exception to a remark made to him by Corporal Turner to the effect that the band had not been playing roundly enough and should play the piece differently. An altercation ensued during which Master Corporal Pett is alleged to have threatened Corporal Turner with bodily harm, saying "I will fucking beat you up" or words to that effect. The intervention of Master Warrant Officer Lang, the band's Pipe Major, had the effect of calming things down for a while. Master Corporal Pett stepped away from the formation to drink some water, Master Warrant Officer Lang went over

to him and tried to engage him in a conversation as to what had occurred. It is alleged that Master Corporal Pett refused to engage in the conversation, walked away and said, “fuck this” or words to that effect. Master Corporal Pett is charged under section 85 of the *National Defence Act (NDA)* for behaving with contempt towards Master Warrant Officer Lang and under section 95 of the *NDA* for ill-treatment of a subordinate in relation to the threats made against Corporal Turner.

The evidence

[2] The evidence consists in the oral testimony of the six witnesses called by the prosecution and the testimony of two witnesses for the defence: Master Corporal Pett in his own defence, as well as Dr King, his treating psychologist. Drawings of the location of various persons present done by all of the prosecution’s witnesses were entered as exhibits. The prosecution witnesses testified as to what they recall having seen and heard in relation to the interaction between Master Corporal Pett and Corporal Turner as well as between Master Corporal Pett and Master Warrant Officer Lang on 16 November 2018. They also provided elements of context on the circumstances in which the words attributed to Master Corporal Pett were uttered.

[3] As for the evidence heard, I do accept that the confrontation of 16 November 2018 was unusual for the members of the 48th Highlanders Band present, therefore memorable to a point. It was also a high-intensity event for some, which may affect their recollection of details of the events. There were also strong links between some prosecution witnesses: husband and wife and twin brothers. That reality may have influenced perceptions about the intensity or gravity of what had occurred and the frequent contact and normal discussions between these witnesses since the events may have impacted on their memory. That being said, prosecution witnesses did provide written statements a short period of time after the events the same evening and any discrepancy or lapse in memory could be addressed by counsel on the basis of those statements as necessary during the trial. I find that the testimony of all of those present, including the accused, was quite consistent as to what had occurred. I do not see the need to summarize in detail what each witness has told the Court in their respective testimony, but will briefly summarize what I find to be the important elements for each witness.

[4] The first witness for the prosecution was Corporal Paul Turner, who is identified in the second charge as the person ill-treated by the actions of Master Corporal Pett. Corporal Turner mentioned that he had been entrusted by the Pipe Major, Master Warrant Officer Lang, to provide feedback and direction on occasion as to how the band sounded given that he had been playing at a high level for years and had recently

completed the Primary Leadership Qualification course and needed occasions to exercise some leadership. He described what the band was doing on the evening of 16 November 2018 and how he took the decision to move around the formation during a break to tell the pipers assembled to play the jigs more round. When he got to Master Corporal Pett, the reaction was less than positive. An argument ensued, at first not so much about the appropriateness of making the observation, but rather on whether it was a fair observation to make. The discussion quickly degenerated and Corporal Turner said it involved swearing and threats from Master Corporal Pett. When asked by the prosecutor as to the exact words he remembers having been said to him, Corporal Turner answered that he heard Master Corporal Pett tell him either "I'll punch you in the face right now" or "I'll fucking beat you up." Corporal Turner said that the tone was very different than what he was used to in previous exchanges with Master Corporal Pett and other members of the band. He observed that Master Corporal Pett made it sound like it was not at all a joke and Corporal Turner said he was not sure at the time if Master Corporal Pett could follow through with his words.

[5] Corporal Turner testified that he tried to defuse the confrontation, but at one point walked away towards his brother, Master Corporal Turner, to convey the situation to him. His brother went to obtain the assistance of the Pipe Major, Master Warrant Officer Lang. Corporal Turner went back towards Master Corporal Pett to once again try to defuse the confrontation. Corporal Turner admitted that when Master Warrant Officer Lang came to break up the discussion between the two, he did take accountability for what had happened, mentioning that it was his fault, that he had started it. He explained that he said that in order once again to try to defuse the situation and make it end.

[6] The second prosecution witness was Mrs. Linda Lang. She is a volunteer civilian piper with the 48th Highlanders Band and the wife of Master Warrant Officer Lang. She confirmed that at one point in the rehearsal on 16 November 2018, Corporal Turner went around the circular formation to tell pipers that the set of jigs should be played more round. With the noise level on the parade square at the time with 150 to 200 dancers being instructed by loudspeakers next to the band, it was appropriate for instructions to be passed that way. She saw Corporal Turner move to the other side of the circle and engage Master Corporal Pett on what she assumed to be the same recommendation. However, she noticed that Master Corporal Pett became agitated and told Corporal Turner that he could not speak to him that way. She then decided to walk across the circle to try to defuse the situation by telling Master Corporal Pett that she "got the same advice and it was not personal". However, after heading back to her position, she noticed Master Corporal Pett and Corporal Turner continue to argue. At one point she heard Master Corporal Pett tell Corporal Turner, "I'm going to fucking

punch you in the face.” Afterwards, she noticed that her husband, Master Warrant Officer Lang, was engaged in a discussion with Master Corporal Pett in the presence of Warrant Officer Hanson near the water fountain. She could not hear what was being discussed, but noticed Master Corporal Pett turning around to leave the group to go upstairs towards the band room. A few minutes later, he came downstairs and left the building by the side door.

[7] The third prosecution witness was Master Corporal Alexander Brown, a piper with the 48th Highlanders Band at the time of the events. He described what occurred when the band had stopped playing a jig set and he noticed Corporal Turner approaching to mention that the jig could have been played more round. He described the tone of voice used by Corporal Turner as fairly calm. He considered that the comment was fair given the way the jig had been played. As Corporal Turner moved around the circle to voice similar remarks to other pipers, he heard shouting coming from Master Corporal Pett who was visibly agitated. He heard Master Corporal Pett say to Corporal Turner that he was “going to kick the shit out of [him].” He added that many other threats and insults were transmitted by Master Corporal Pett to Corporal Turner, including threats to beat him up. He believes Master Corporal Turner went to Master Warrant Officer Lang to inform him of the situation. Master Corporal Brown mentioned that there is some swearing occasionally within the band, but that in this case it was no teasing, there was no laughing and the words of Master Corporal Pett were so out of proportion that it was clear to anyone hearing them that it was not a joke. From his point of view, the comments were inappropriate from a person in authority in the Canadian Armed Forces (CAF). In cross-examination, Master Corporal Brown admitted that he is friends with Corporal Turner and that Master Corporal Pett was not someone that he would look up to as a private or corporal going up in ranks. He added that the incident of 16 November 2018 confirmed, in his view, the lack of professionalism of Master Corporal Pett.

[8] Master Corporal Brian Turner, twin brother of Corporal Turner, testified next. He joined the 48th Highlander Band ten years ago as a civilian drummer then joined the reserve force in 2012. He has since grown in the rank to become in effect the lead drummer. He described the events he witnessed on the evening of 16 November 2018 in a manner consistent with the testimony of other witnesses, mentioning that at one point between sets, as he was speaking to his drummers, he overheard a commotion coming from his left side. He saw his brother, Corporal Turner, and Master Corporal Pett engaged in a verbal altercation with each other. He could hear swearing and heard Master Corporal Pett say to his brother, “I will kick your fucking ass.” He noticed Master Corporal Pett was red in the face and apparently very angry. His brother came to him and discussed what had occurred while Master Corporal Pett was still yelling

obscenities and threats at Corporal Turner. He was “half-paying attention” at that point as he was also focussing on Master Corporal Pett’s behaviour and verbal abuse. He decided that he had heard enough to engage the Pipe Major, Master Warrant Officer Lang.

[9] On cross-examination, Master Corporal Turner was adamant that multiple obscenities and threats were said by Master Corporal Pett but the only one he remembers and noted down in his written statement on the evening of the event was “I will kick your fucking ass,” adding that he was sure of what he had heard. He said it was the first time he saw someone acting like that in the military and was adamant that what he saw was not simply someone yelling at someone else in the band, but rather a superior threatening a subordinate.

[10] Corporal George Boast was the fifth witness for the prosecution. He has been a piper with the 48th Highlanders for 33 years and has known Master Corporal Pett for at least 35 years. He described the event of 16 November 2018 in a manner similar to the other witnesses, mentioning that he agreed with the suggestion of Corporal Turner to play the jig more round. He described his position in the formation and said that he heard a commotion from the opposite side of the circle and saw Corporal Turner talking back and forth with Master Corporal Pett. He could not hear the words that were being said exactly, but could see the hands moving and the anger in the face of Master Corporal Pett given his actions and facial expression. After this had gone on for a while, he saw Master Corporal Turner talking to the Pipe Major to the effect that something wrong was happening and deserved intervention. He subsequently saw Master Warrant Officer Lang in discussion with Master Corporal Pett and Corporal Turner.

[11] On cross-examination, Corporal Boast said that the initial commotion did not necessarily attract the attention of the Drum Major and Pipe Major as they were located at the top of the circle and looking at the dancers. Having known Master Corporal Pett for so long, he has become aware that Master Corporal Pett had been involved in two significant incidents in his capacity as a driver with the Toronto Transit Commission, a streetcar accident five years ago causing serious injuries to a pedestrian and a suicide ten years ago when a man lay down in front of the subway train Master Corporal Pett was driving. He noticed that in the last couple of years Master Corporal Pett was more agitated than normal most of the time as his mind seemed to be always going. He mentioned that Master Corporal Pett told him he had been diagnosed with post-traumatic stress disorder (PTSD). In his opinion, Master Corporal Pett’s condition was known around the unit.

[12] Master Warrant Officer Ian Lang was the last witness called by the prosecution. He has been the Pipe Major for the 48th Highlander Band since February 2007 and in

that capacity he reports both to the unit Regimental Sergeant Major and the Deputy Commanding Officer depending on issues. He described his general approach to leadership in a musical band, distinguishing between military issues such as discipline, dress and deportment and musical issues where the leadership approach is typically more relaxed and where each member regardless of rank is encouraged to contribute comments and initiatives in attempting to sound as good as possible. He confirmed that he had tasked Corporal Turner to correct the band should he hear that the jigs were not being played as round as they should. However, he had not informed other members of the band of the fact that he had entrusted Corporal Turner with these responsibilities. Such a tasking was not unusual for him as his expectation is that junior members may exercise leadership as it pertains to music, commensurate with their musical abilities and levels which may not correspond to their military rank they wear in the band.

[13] Master Warrant Officer Lang described his involvement in the incident of 16 November 2018, mentioning that during the rehearsal he was positioned at the top of the semicircle where musicians were disposed, looking away from the band at the dancers. When he was made aware by Master Corporal Turner of an altercation between Corporal Turner and Master Corporal Pett, he turned around and headed for the direction of the two men who by then were discussing. Although he believed something had happened, both were adamant that things were okay and so it was clear to him that he was not going to get more information on the spot and, essentially, he decided to carry on with the rest of the rehearsal. He decided to turn around to head back to his original position in between the band and the dancers. Shortly thereafter, Master Corporal Turner came back to him again, saying that things were not all right, that he had heard Master Corporal Pett threaten Corporal Turner and that the situation required his intervention.

[14] Master Warrant Officer Lang looked for Master Corporal Pett, noticing that he had moved away from the other members of the band and was by that time near the water fountain, in discussion with Warrant Officer Hanson. Master Warrant Officer Lang decided then to go over and inquire as to what had occurred. However, the conversation was a short one as Master Corporal Pett replied that he did not want to talk to him. He looked angry and upset. Master Warrant Officer Lang, being of the view that he needed to get an answer as to what had occurred, challenged Master Corporal Pett once again. He said that Master Corporal Pett at that point walked away from him and told him to "fuck this." At that point, Master Warrant Officer Lang needed to get back to the rehearsal so he tasked Master Warrant Officer Reesor, the Band's Drum Major who was not involved specifically in playing or supporting the rehearsal with the dancers, to go after Master Corporal Pett and find out what was going on. Master Warrant Officer Reesor came back a short time later saying that Master Corporal Pett

had left the building. The ensuing investigation was the result of Master Warrant Officer Reesor's consultations with the unit Regimental Sergeant Major who ordered that a Unit Disciplinary Investigation be conducted right away.

[15] When asked in cross-examination if Master Corporal Pett could have said, "I don't fucking need this," as opposed to "fuck this," Master Warrant Officer Lang was adamant that he had heard Master Corporal Pett say, "fuck this" as he was turning his back to him to leave. Master Warrant Officer Lang confirmed that there has been raised voices from the leadership in the band at times but not from him. He also confirmed that he was aware of a harassment complaint which had been made following the incident by Master Corporal Pett in relation to him but not related to the incident itself.

[16] Dr Matthew King testified as the first witness for the defence. He has been treating Master Corporal Pett since May 2019 after Master Corporal Pett had experienced a third PTSD-related incident in his civilian job as a driver for the Toronto Transit Commission. He confirmed the diagnosis of PTSD made after the first incident in 2010 when a person jumped on the rails just in front of the subway train driven by Master Corporal Pett, who could do nothing to spare the desperate person from death. The clinical notes consulted by Dr King revealed that the prognostic for recovery was good at the time and after six or seven months away from work Master Corporal Pett did return to full duty with the Toronto Transit Commission. However, in 2014 as a streetcar driver, he had another accident which involved a pedestrian crossing right in front of his streetcar between two parked cars. Once again, Master Corporal Pett could do nothing to avoid the accident. The situation led to a resurgence of his symptoms of PTSD including anxiety and depression. He was treated with prolonged exposure and a number of coping strategies were discussed, including the need to disengage himself from a situation if he feels overwhelmed. To Dr King, this technique, amongst other ones employed in Master Corporal Pett's personal life, was effective. Dr King also commented on Master Corporal Pett's lack of ability or loss of some level of ability to express himself when in crisis.

[17] Master Corporal Kevin Pett testified in his defence. He explained his background as a piper with the 48th Highlander Band which he joined about 30 years ago before joining the reserve force in 1993. He described the events of the evening of 16 November 2018, making numerous references to testimony already heard, to the effect of confirming what other witnesses had mentioned about the purpose of the rehearsal, who was present and what had essentially occurred. He mentioned that they were playing a set of jigs he had been playing for decades with the band, mentioning that he knows how to play them. He said that once they had taken a break, Corporal Turner went around the formation and approached him with a cocky attitude saying, "Pett, you need to play these jigs round." Master Corporal Pett admitted taking offence

both with the way he had been addressed and with the suggestion about the way the jigs should be played, especially considering Corporal Turner's erratic playing during the previous set. He told Corporal Turner that he should not be advising other pipers on how to play the jigs after having been making so many mistakes himself in playing them. He said that, in response to this remark, Corporal Turner became agitated and kept insisting that he be listened to. Master Corporal Pett told him to stop with his requests many times and at one point, despite not being one to pull rank, he had to tell Corporal Turner that he was a master corporal and that as a corporal he had to stop as it had been enough. It is at that point that he observed Corporal Turner leave and head over to the drum section, where Master Corporal Turner, his brother, was positioned.

[18] He then witnessed Corporal Turner coming back towards him and restating his request, demanding to be obeyed. It is at that point that he admits having said to Corporal Turner that he "deserved" or "needed" a punch in the face. The argument then continued further until Master Warrant Officer Lang arrived to address them. At that point, he told the Pipe Major that the argument was over and heard Corporal Turner admit that it was his fault and that he had started the argument. He mentioned having tried to protect Corporal Turner by saying the matter was over. Master Warrant Officer Lang then asked that they stop arguing and do their job before leaving them.

[19] Master Corporal Pett, after the departure of Master Warrant Officer Lang, was still agitated and felt that he needed to get away, as he was told by his psychologist in relation to his coping strategies for PTSD. He went to the water fountain nearby and chatted with Warrant Officer Hanson who was there. It is at that point that Master Warrant Officer Lang came to him, asking what had occurred in the course of the argument and insisting to discuss the matter. Master Corporal Pett said that he then felt like he needed to get away from a conflictual situation once again. He remembered saying, "I don't need this" and walked away, heading for the band's room. He said he was overwhelmed, had difficulties coping, but was still being able to handle himself.

[20] Master Corporal Pett testified that he did not intend to be disrespectful. He said he has never spoken to other members of the band in the fashion alleged in the charge and is usually a relaxed and pleasant guy. He mentioned making a complaint about the way people were being spoken to in the band. Following that complaint and the ensuing resolution, things got better for everyone. He qualified the volume of voice he used on the occasion of the argument with Corporal Turner to be at first a 1 out of 5 and, at most, a 3 to 3.5 during the most heated part of the altercation.

[21] On cross-examination, Master Corporal Pett said that he had forgotten to confirm that indeed Mrs. Lang had come to him after he had been initially addressed by Corporal Turner to the effect that the remarks were not personal. However, it did not

change his perception of what had occurred, simply because Mrs. Lang had not heard the way Corporal Turner had addressed him. He clarified what he told Corporal Turner about not addressing master corporals as he did and confirmed the conversation was not a joke. Concerning the allusion to deserving or needing a punch in the face, Master Corporal Pett admitted it may not have been the best way to address a subordinate. He admitted having calmed down by the time he was at the water fountain and that maybe he should not have said what he said to Master Warrant Officer Lang and should not have walked away from him as he did. However, he insisted that he had to get away at that time and confirmed that he headed directly home after getting his things in the band room upstairs without informing anyone.

The law applied to the evidence

What needs to be proven for each charge?

[22] The elements of identity as well as time and place of the offences on both charges are not in contention, as well as the rank or appointment and status of Master Warrant Officer Lang and Corporal Turner respectively as superior and subordinate of Master Corporal Pett, a fact known to the accused. What remains to be decided is whether the prosecution has met its burden of proving beyond a reasonable doubt the conduct alleged as well as the intent of Master Corporal Pett in speaking and acting as he did.

[23] I will discuss the second charge first, at this point of these reasons, to respect the sequence of events, both as they occurred and as they were related to the Court by the witnesses.

Proof of the charge of ill-treatment of subordinate

[24] The particulars of the charge of ill-treatment of subordinates read as follows:

“In that he, on or about 16 November 2018, at Moss Park Armoury, Toronto, Ontario, said to Cpl Turner: ‘I will fucking beat you up’ or words to that effect.”

[25] The prohibited conduct is the first thing that needs to be established beyond a reasonable doubt in relation to this charge. The prosecution submits that the ill-treatment alleged are words spoken by Master Corporal Pett to the effect of conveying a threat of bodily harm to Corporal Turner. The evidence of prosecution witnesses who conveyed the words they heard being spoken by Master Corporal Pett towards Corporal Turner differs as to what was said exactly. However, the

particularization of the offence as it is, by the use of the expression “or words to that effect” dispenses the prosecution from proving the exact words, as long as the evidence points to words to the effect of expressing an intention to inflict violence to Corporal Turner.

[26] The test to establish whether a given conduct particularized in the charge constitutes ill-treatment is an objective one, meaning that the nature of these actions must be looked at as it would be by the ordinary reasonable person in the circumstances in which the acts were committed. That reasonable person is one who is objective, fully informed of the circumstances of the case, right-minded, dispassionate, practical and realist. Witness opinions are relevant to the application of the reasonable person standard; however, they are not determinative, given that one’s personal opinion does not necessarily satisfy the requirement of the legal test, which is whether the actions would be considered contemptuous or disrespectful by the ordinary reasonable person, in all the circumstances. On that basis, I must determine if the acts proven as being attributable to the accused constitute ill-treatment as the term has been understood in Canadian military law. Both parties submitted that the law on ill-treatment is as explained in the case of *R. v. Duhart*, 2015 CM 4022 at paragraphs 46 to 55. I agree. Ill-treating someone means acting cruelly towards him or her, meaning disregarding or taking pleasure in the pain or suffering of that person. It can, of course, include physical violence as alluded to in Note B to *Queen’s Regulations and Orders for the Canadian Forces* (QR&O) 103.28, but it can also include psychological violence or a combination of psychological pressure and a physical act. This simple definition of the term “ill-treat” provides sufficiently objective criteria to provide those subject to the Code of Service Discipline a clear idea of what acts are prohibited.

[27] As for the fault element, all that is required is that the prosecution establish that the accused had the intent to engage in the conduct particularized in the charge, in this case, say the words attributed to him or her, or words to that effect. In short, the accused must have intended the prohibited act which constitutes the ill-treatment of a subordinate. This is established by resorting to inferences drawn from all of the circumstances so that the judge can be convinced beyond a reasonable doubt that the accused must have intended to engage in the prohibited conduct.

Proof of the charge of behaving with contempt

[28] As for the first charge of behaving with contempt towards a superior officer, it is not contested that the behaviour described in the charge was towards, namely within the sight or hearing of Master Warrant Officer Lang, a superior officer. That behaviour has been particularized as follows in the first charge:

“In that he, on or about 16 November 2018, at Moss Park Armoury, Toronto, Ontario, walked away from MWO Lang, while being spoken to and said ‘fuck this’ or words to that effect.”

[29] Once again, the first thing to be established is the prohibited conduct. How to assess whether someone’s actions are contemptuous? Once again the parties agree as to the law applicable to such an issue: The court martial case of *R. v. Lévesque*, 2016 CM 4017 deals, at paragraph 16, with the notion of contemptuous or contempt in relation to an offence. Whether the actions attributed to Master Corporal Pett are contemptuous is to be decided on an objective standard, meaning that the nature of these actions must be looked at as it would be by the ordinary reasonable person in the circumstances in which the acts were committed. It is the same test as for the offence of ill-treatment.

[30] In this case, it is half-admitted in the sense that Master Corporal Pett confirmed that he indeed walked away from Master Warrant Officer Lang while he was being spoken to. He did offer an explanation however: he was trying to escape a confrontational situation of a type to exacerbate his symptoms of PTSD. He also denied saying, “fuck this,” mentioning instead that he said, “I don’t need this” before walking away.

[31] As it pertains to the fault element to be proven in relation to the first charge, the applicable law is once again found in *Lévesque* at paragraphs 12 to 15. Contrary to a charge of ill-treatment, the fault element for an offence of behaving with contempt requires not only proof of the voluntary nature of the conduct but also demands proof of an insubordinate intent on the part of the accused at the moment of acting. Once again this can be established by resorting to inferences drawn from all of the circumstances. The fault element is subjective: what matters is what the accused actually intended which can be inferred from his actions or lack thereof in relation to the offence.

Position of the parties

[32] The prosecution submits that the entire behaviour of Master Corporal Pett in relation to the discussions on 16 November 2018 with Corporal Turner and Master Warrant Officer Lang showed a loss of control which resulted in the commission of both offences, as established beyond a reasonable doubt by the evidence.

[33] As it pertains to the initial confrontation with Corporal Turner, the defence submits that the prosecution has failed to prove beyond a reasonable doubt the prohibited act as particularized in the second charge given that its witnesses did not agree on what had been said exactly. It is submitted that I should believe Master Corporal Pett’s testimony to the effect that he said to Corporal Turner that he either

“deserved” or “needed” a punch in the face or at least be left with a reasonable doubt by it. Furthermore, the defence argues that I should believe the accused or be left with a reasonable doubt as to the intent of Master Corporal Pett to ill-treat Corporal Turner, given that his words were intended to express his displeasure at a subordinate who was refusing to back down from his insistence that the set of jigs that Master Corporal Pett had been playing for decades needed to be played a different way and was essentially disobeying orders to back off and disengage from that line of conversation. It is submitted that the conduct was not cruel and, therefore, did not amount to ill-treatment.

[34] As it pertains to the first charge, the defence concedes that Master Corporal Pett left the conversation with Master Warrant Officer Lang, but submits this was done so that he could disengage himself from a stressful situation as he was instructed to do by medical professionals assisting him in dealing with his PTSD. It is submitted that I should believe Master Corporal Pett or at least be left with a reasonable doubt as to the words he said at the time which were “I don’t need this” and not “fuck this” as alleged. It is not contested that Master Warrant Officer Lang did not order Master Corporal Pett to come back to him when he turned around to leave. Once again, in light of Master Corporal Pett’s coping strategies for his PTSD, it is submitted that in acting as he did to get away from a stressful conflictual situation, Master Corporal Pett had no insubordinate intent.

Analysis

The proof beyond reasonable doubt

[35] Underlying the analysis of those issues and indeed any charge by a court is the constitutional requirement for the prosecution to prove its case beyond a reasonable doubt. 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 a reasonable doubt of the existence of all of the essential elements of the offence.

[36] 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.

Reasonable doubt and credibility

[37] Reasonable doubt applies to issues of credibility. On any given point, the court may believe a witness, disbelieve a witness, or not be able to decide. The Court need not fully believe or disbelieve one witness or a group of witnesses. If I have a reasonable doubt about Master Corporal Pett's guilt arising from the credibility of the witnesses, then I must find him not guilty.

[38] This is especially relevant in this case where the credibility of conflicting accounts is at issue. Indeed, Master Corporal Pett has testified. His evidence impacts both the prohibited conduct and the fault element for both charges. In effect, the impact of his testimony is that the prosecution's evidence may be inaccurate as it pertains to words attributed to him by some prosecution witnesses and his intent given his testimony that he did not intend to offend anyone in relation to both charges. In order to respect the fundamental principle obliging the prosecution to prove the guilt of the accused beyond a reasonable doubt I must assess the credibility of the accused as follows:

First, if [I] believe the evidence of the accused, [I] must acquit.

Second, if [I] do not believe the testimony of the accused but [am] left in reasonable doubt by it, [I] must acquit.

Third, even if [I am] not left in doubt by the evidence of the accused, [I] must ask [my]self whether, on the basis of the evidence which [I] accept, [I am] convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[39] In this case, however, as it pertains to the first charge of behaving with contempt, I am of the view that I could find Master Corporal Pett guilty even if I believe him as it pertains to the words he is alleged to have uttered as he walked away from the conversation with Master Warrant Officer Lang. Whether the words "fuck this" were said as reported by Master Warrant Officer Lang or whether it is rather the words "I don't need this" that were said as testified by Master Corporal Pett may be words to the same effect considering the circumstances, especially that the words were accompanying the action of walking away from a conversation of a serious nature initiated by a superior. In that sense, the conduct alleged may be proven even if I believe the evidence of the accused.

Credibility of witnesses

[40] I did find that the accused Master Corporal Pett testified in a straightforward fashion and I noted his capacity to admit the accuracy of accounts by some prosecution witnesses as well as his introspection as to his behaviour on the night of 16 November 2018. It is clear from his testimony that he was angry about the cocky approach he felt Corporal Turner adopted towards him as he engaged him about the band's, hence his, playing of a set of jigs he had been playing since a time Corporal Turner was not even born. As Master Corporal Pett related the incident, I could still feel his anger. That made the testimony of prosecution's witnesses more credible in my mind as to how Master Corporal Pett appeared to them on 16 November 2018. I believe Dr King's testimony as it pertains to the diagnosis of PTSD and the difficulties experienced by Master Corporal Pett in dealing with stressful situations. If these difficulties are sufficient for Master Corporal Pett to experience challenges in expressing himself coherently and to control himself, it is logical to me that it may affect his capacity to remember details of events when he is in such a state of mind.

[41] As noted by Watt J.A. writing for the Court Martial Appeal Court in *R. v. Clark*, 2012 CMAC 3 at paragraph 48, testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as the witness believes it to be. In a word, credibility. Accuracy concerns have to do with the actual accuracy of the witness' account. This is reliability. The testimony of a credible, in other words, an honest witness, may nonetheless be unreliable. I am having concerns with the reliability of the testimony of Master Corporal Pett as to the exact words he uttered during his altercations with Corporal Turner and Master Warrant Officer Lang. It seems plausible to me that the stress he was under at the time altered his perception of events and made his recollection unreliable.

[42] As it pertains to the altercation subject of the second charge of ill-treatment, the testimony of Master Corporal Pett as to the words he said, namely "you deserve" or "you need a punch in the face," does not accord with the other evidence heard. Four prosecution witnesses heard Master Corporal Pett utter profanities and threats of all sorts to Corporal Turner. Their recollection of what was said each points to a statement beginning by the words "I will" or "I am going to" followed each by a different phrase conveying a threat or intent to cause bodily harm. All of these witnesses were unanimous in stating that multiple threats had been uttered as the abuse lasted for a period of time.

[43] My assessment of the credibility of the prosecution witnesses who testified in this case is very positive. I found that their recollection of events was entirely satisfactory and sufficient to ground findings of facts beyond reasonable doubt, despite some minor discrepancies as it pertains to the precise sequence of events, the number of

peripheral interactions and the exact words said. Frankly, it would be suspicious if all witnesses were *ad idem* on these issues. I believe all witnesses testified in a dispassionate fashion, trying for the most part to stick to the facts. There were some exceptions, highlighted in cross-examination by defence but they dealt with matters not central to the issues that I need to determine. For instance, Master Corporal Brown provided opinions as to the professionalism of Master Corporal Pett but such evidence is not at all determinative of the issues and the witness acknowledge that his negative opinion may have affected the tone of his statement written on the night of the event but did not affect what he observed and testified about to the Court. Also, I find that Master Warrant Officer Lang testified in a neutral and dispassionate fashion despite the fact, revealed towards the end of his testimony, that he had been the object of a harassment complaint initiated by Master Corporal Pett. I find his testimony to be highly credible.

Conclusions of facts resulting from credibility assessment

[44] In the circumstances therefore for the reasons expressed, especially the strength of the prosecution's evidence as to the words that have been attributed to Master Corporal Pett, I do not believe the evidence of the accused as to the words attributed to him and his evidence does not leave me with a reasonable doubt as to what was said.

[45] I am convinced beyond a reasonable doubt that the words attributed to Master Corporal Pett by prosecution witnesses were said. I find that Master Corporal Pett uttered various threats to Corporal Turner including saying the words particularized at charge 2 and subsequently said "fuck this" upon walking away from Master Warrant Officer Lang, while he was trying to have a conversation with him.

Application of these facts to the first charge of behaving with contempt towards a superior officer

First issue: has the prohibited act been proven to the required standard?

[46] The behaviour complained of occurred in the course of an attempted conversation dealing with what Master Warrant Officer Lang perceived as a requirement for him, as Pipe Major, to determine what had occurred during a previous verbal confrontation between Master Corporal Pett and Corporal Turner, especially whether threats had been uttered as related to him by Master Corporal Turner.

[47] It has been admitted by Master Corporal Pett that he indeed walked away from Master Warrant Officer Lang while he was being spoken to. He denied saying "fuck this" in the process, instead insisting that he said "I don't need this" before walking away. I do not believe the evidence of Master Corporal Pett on what was said, but even

if I did, the prohibited act would, in my opinion, have been proven nevertheless. The actions of Master Corporal Pett need to be looked at as they would be by the ordinary reasonable person in the circumstances prevailing at the time. In my view, the prosecution has discharged its burden to present evidence that would lead an ordinary reasonable person to conclude that the actions of Master Corporal Pett constituted contemptuous behaviour in the circumstances. The conduct proven here, namely a Master Corporal being specifically addressed to by the most senior non-commissioned officer of his subunit in relation to an incident of questionable conduct, turning his back to his superior and walking away saying words to the effect of “fuck this” or even “I don’t need this”, is in my view objectively contemptuous. It constitutes a prohibited act targeted by section 85 of the *NDA*, which is behaving with contempt towards a superior officer.

Second issue: has the fault element (mens rea) been proven to the required standard?

[48] There is no debate as to whether Master Corporal Pett would have acted knowingly in walking away from Master Warrant Officer Lang and uttering the words attributed to him. Yet, he testified that he did not intend to be disrespectful to anyone. This raises the issue of whether the fault element of the offence has been made out on the evidence. As mentioned earlier, the fault element or *mens rea* of the offence requires the application of a subjective test relating to whether the accused intended to behave with contempt by his conduct. In trying to ascertain what was going on in the accused’s mind, as the subjective approach demands, I may draw reasonable inferences from the accused’s actions or words at the time of his act or in the witness box. I may choose to believe or not believe the accused.

[49] Here I do not believe the testimony of the accused to the effect that he did not intend to offend anyone. If it had been the case, he would have at least tried to explain that he could not engage in a conversation of the nature solicited due to his stress level. I am not convinced that his stress level at the time he was approached by Master Warrant Officer Lang near the water fountain was so high as to prevent him from doing so. At that time, he had disengaged from the confrontational exchange with Corporal Turner and had been chatting with Warrant Officer Hanson. Furthermore, I do not believe his stress level prevented him from re-engaging with Master Warrant Officer Lang once he had a chance to cool off. Instead, Master Corporal Pett decided to leave the building without having been dismissed.

[50] In light of the actions of Master Corporal Pett at the time of his interaction with Master Warrant Officer Lang and taking into account the circumstances of events preceding and following this interaction, I have no difficulties to conclude that Master

Corporal Pett intended to behave with contempt by his conduct as he was oblivious as to the consequences of his action or inaction at the time.

[51] To be clear, I am not expecting behavioural perfection from a person who may be in crisis due to a mental condition. I believe I am simply recognizing that the Code of Service Discipline imposes a minimum standard of conduct on anyone engaged in an interaction with a superior in the circumstances established in this case. The Code of Service Discipline must be able to enforce breaches of that standard of conduct. This may seem harsh in some circumstances but it is what the Code of Service Discipline must be able to accomplish if it is to meet its purpose of assuring the maintenance of discipline, efficiency and morale of the military. The imposition of an adequate sentence following any finding of guilty adequately allows taking into consideration mitigating circumstances of any given offence.

Conclusion

[52] As a result, I conclude that on the facts of this case, the first charge of behaving with contempt towards a superior officer has been proven beyond a reasonable doubt.

Application of the facts to the second charge of ill-treatment of a subordinate

First issue: has the prohibited act been proven to the required standard?

[53] As mentioned earlier, the finding the court needs to make on the second charge is related to the issue of whether the acts particularized in the charge meet the definition of ill-treatment from the perspective of an ordinary reasonable person in the circumstances in which the acts were committed. Would such a person conclude that Master Corporal Pett ill-treated Corporal Turner by acting cruelly towards him, meaning disregarding or taking pleasure in his pain and suffering?

[54] I do believe that the behaviour displayed by Master Corporal Pett at the time of the offence, as established by prosecution witnesses, indeed constitutes ill-treatment given the obvious threat of physical harm directed at a subordinate by Master Corporal Pett. His words were clear. I agree with defence that the evidence of Corporal Turner may not have been convincing as to whether he indeed felt threatened given his decision to re-engage with Master Corporal Pett after having gone over to his brother, Master Corporal Turner. However, the question in relation to the prohibited act is not whether anyone felt threatened. The objective test requires that I ask myself whether a reasonable person witnessing a master corporal utter threats to a corporal, as was proven here, is ill-treating that subordinate. I have no hesitation to answer affirmatively. Threats of physical harm are an entirely unacceptable way of exercising authority and

leadership in the CAF, especially in the circumstances of this case. Every member of the CAF is entitled to expect that his or her physical integrity will not be threatened. Acting otherwise is indeed acting cruelly and with utter disregard to the distress and suffering that such behaviour may cause for the subordinate recipient. This type of conduct is not acceptable and I believe from Master Corporal Pett's testimony that he acknowledges that in acting as he did, he crossed the line of what is acceptable for a leader.

[55] The circumstances of the threats particularized in the charge are such that I am left with no doubt that Master Corporal Pett showed blatant disregard for the suffering he could cause to Corporal Turner. The conduct of Master Corporal Pett in the circumstances amounts to threats of violence and, therefore, ill-treatment as that term is understood in QR&O article 103.28.

Second issue: has the fault element (mens rea) been proven to the required standard?

[56] As for the fault element, all that is required is that the prosecution establish that the accused had the intent to engage in the conduct particularized in the charge. Having found that the prohibited act, namely the words attributed to him or words to that effect has been proven beyond a reasonable doubt, and that this conduct constitutes the ill-treatment of a subordinate, I have no difficulty to conclude that, in light of all of the circumstances, the accused must have intended to engage in the prohibited conduct.

[57] That being said, the defence brought to my attention the remarks of d'Auteuil M.J. in *R. v. Murphy*, 2014 CM 3021, at paragraph 48, to the effect that "the prosecution must prove beyond a reasonable doubt the intent of Corporal Murphy to abuse his authority or to use violence towards a subordinate because of the existence of [a] hierarchical relationship." I am not certain that this statement is entirely accurate in law. Yet, even if this was the test for the *mens rea* of the offence under section 95 of the *NDA*, the test would be met in the circumstances of this case. Indeed, the circumstances of the threats towards Corporal Turner find their source in the subordinate-superior relationship which operated at the time, as evidenced from the testimony of Master Corporal Pett himself.

Conclusion

[58] As a result, I conclude that, on the facts of this case, the second charge of ill-treatment of a subordinate has been proven beyond a reasonable doubt.

Addendum: the wrong statement of the offence

[59] The defence, in its final submissions, raised an issue as to what should have been the proper statement of the offence for the second charge of ill-treatment under section 95 of the *NDA*. Indeed, the charge is labelled as “Ill-treated a person who by reason of rank was subordinate to him.” Yet, we are dealing in this case about the actions of a master corporal in relation to a corporal. As is well known, master corporal is not a rank but rather an appointment as specified in QR&O article 3.08. Consequently, it is submitted that the statement of the offence should have been “Ill-treated a person who by reason of appointment was subordinate to him.” I agree.

[60] The defence invites me to find Master Corporal Pett not guilty of that charge on the basis that the prosecution has failed to prove the offence it stated. Given the exceptional nature of the issue and the timing of it having been raised, I have exceptionally allowed the prosecutor to respond on how his error could be fixed. The prosecution submits that I should make a special finding, referring to section 138 of the *NDA*.

[61] That is the wrong answer. Special findings of guilty are available when there are differences between the facts proven and the facts alleged in the statement of particulars. The issue here is an error in the statement of the offence.

[62] I have commented this summer in *R. v. Renaud*, 2019 CM 4021, which is not yet published, that prosecutors’ errors in drafting charge sheets appear to multiply. In that case, the prosecution applied to obtain significant amendments to the charges at the close of its case. As stated then, the annoyance of continuously having to do extra work due to this recurring lack of attention to detail should not be interpreted as an invitation to punish careless prosecutors in the hope that they pay attention in the future. That should be the job of their supervisors. After all, contrary to most occupations in the CAF, the lack of attention to details by legal officers does not risk getting people killed. What I need to do is assess whether a solution is available in the existing legal framework to be able to follow a course of action best calculated to do justice. These words, inspired by QR&O article 101.04, come to mind as I do not believe in the circumstances of the charge before me that arriving at a finding of not-guilty on a technicality as requested by the defence, without resolving the issues raised by the particulars of the charge on the basis of the evidence, would be seen as a proper exercise in delivering justice.

[63] Fortunately, there is a solution: the amendment of the charge sheet under the authority of section 188 of the *NDA*. As discussed by the CMAC in the case of *R. v. Winters*, 2011 CMAC 1, at paragraph 33, section 188 creates the obligation to amend the charge when the few conditions for its application are met. These conditions are:

- (a) first, there is a technical defect in a charge that does not affect the substance of the charge; in French “*l’existence d’un vice de forme qui ne touche pas au fond de l’accusation.*”
- (b) second, the court is of the opinion that the conduct of the accused person’s defence will not be prejudiced by an amendment of the charge. In French “[*le jugement de la cour à l’effet*] *que la défense de l’accusé ne sera pas compromise par cette décision.*”

[64] As it pertains to the first condition, the notion of technical defect is not limited to clerical errors mentioned at QR&O article 112.59(2). Looking at the words of section 188 of the *NDA*, the term “technical defect” cannot be interpreted in isolation of the words that follow; namely, “that does not affect the substance of the charge.” It can be defined by opposition to defects that do affect the substance of the charge. I believe that what we have here in terms of defect in the statement of the charge, where everyone agrees as to the subordination of Corporal Turner to the accused, is a defect that does not affect the substance of the charge. The first condition is met.

[65] As it pertains to the requirement that the conduct of the accused person’s defence will not be prejudiced by an amendment of the charge, there is no doubt in my mind that the defence was conducted in the full understanding that there was a superior-subordinate relationship between Corporal Turner and Master Corporal Pett. It is indeed a significant element in the version of the accused. Counsel for the accused were able to present evidence and arguments to defend the accused on the second charge without difficulty. Therefore, the conduct of the accused person’s defence has not been prejudiced by the error in the statement of the offence and will not be prejudiced by an amendment to that statement of offence. The second condition is met.

[66] Section 188 of the *NDA* does not require that an application be made by a party to allow the court to amend the charge. The court can act as soon as it becomes aware that there is a defect. I am consequently able to order that the statement of the offence in the second charge be amended to read, “Ill-treated a person who by reason of appointment was subordinate to him.” I am therefore endorsing a minute of the amendment on the charge sheet, as required at subsection 188(3) of the *NDA*.

Conclusion

[67] In all of these circumstances therefore, I am convinced beyond a reasonable doubt that all of the essential elements on both charges have been made out and, therefore, Master Corporal Pett must be found guilty of both charges.

FOR THESE REASONS, THE COURT:

[68] **FINDS** the accused guilty of both charges on the charge sheet, for behaving with contempt towards a superior officer, contrary to section 85 of the *NDA* and for ill-treatment of a subordinate, contrary to section 95 of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major P. Germain and Captain S.Z. Zeewari

Major A. Bolik and Captain D. Sommers, Defence Counsel Services, Counsel for Master Corporal K.G. Pett