



COURT MARTIAL

Citation: *R. v. Franzen*, 2022 CM 3007

Date: 20220607

Docket: 202132

Standing Court Martial

8 Wing Trenton
Trenton, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant D. Franzen, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, A.C.M.J.

REASONS FOR FINDING

(Orally)

Introduction

[1] Sergeant Franzen is charged with one service offence punishable under section 129 of the *National Defence Act (NDA)* for neglect to the prejudice of good order and discipline. This charge was preferred by the Director of Military Prosecutions on 22 May 2021.

[2] The prosecution alleged that, on or about 6 March 2021, while being deployed in Kuwait on Operation IMPACT, Sergeant Franzen failed to wear a mask on two different occasions on the same day, as required by the COVID-19 Threat Level Index.

[3] This decision is about the finding, guilty or not guilty, regarding this charge following a trial which took three days of hearing.

The evidence

[4] To prove the charge, the prosecution called two witnesses: Sergeant Craig, and Master Corporal Gervais. They also introduced on consent the COVID-19 Threat Level Index in force at the time of the alleged incident.

[5] Sergeant Franzen called three witnesses: Corporal Lesperance, Warrant Officer Gill, and Captain Bolduc. He also testified in his own defence. Through Corporal Lesperance, he introduced a sketch made by that witness of the seating in the bunker where he sat with some other people on the day of the alleged incident, and he provided a sketch he made on the same topic.

[6] Sergeant Franzen made some admissions, dispensing the prosecution from having to prove them beyond a reasonable doubt, which go as follows:

- a. The date of the alleged offence is on or about 6 March 2021, as indicated in the particulars of the charge sheet dated 21 May 2021;
- b. The place of the alleged offence is at or near Ali Al-Salem Air Base, Kuwait, as indicated in the particulars of the charge sheet dated 21 May 2021;
- c. On 5 March 2021 Sergeant Franzen arrived at Camp Canada, Ali Al-Salem Air Base, Kuwait, from Lebanon;
- d. Upon arrival, Sergeant Franzen received a briefing regarding the required preventive measures designed to contain the spread of COVID-19 that were then in place at Camp Canada, Ali Al-Salem Air Base;
- e. Upon arrival, Sergeant Franzen was provided with a document detailing these measures titled COVID-19 Threat Level Index. This document was provided to the Court as Annex A to the admissions made in writing (see Exhibit 3);
- f. At that briefing, it was explained to Sergeant Franzen that he had to follow the Force Health Protection High Threat preventive measures as detailed in the COVID-19 Threat Level Index;
- g. Sergeant Franzen understood the information provided during the briefing; and
- h. Sergeant Franzen tested positive for COVID-19 on 6 March 2021.

[7] Finally, the Court took judicial notice of the facts and matters contained and listed in article 15 of the *Military Rules of Evidence (MRE)*.

The Facts Related to the Alleged Incident

[8] Sergeant Franzen joined the Canadian Armed Forces (CAF) thirteen years ago as an infantryman in the regular force. Three years later, he changed trades and became a firefighter. As of today, he has experienced several deployments during his career, the last one being on Operation IMPACT in Kuwait from November 2020 to March 2021.

[9] Sergeant Franzen was the task force fire marshal for Operation IMPACT and his office was located at Camp Canada, Ali Al-Salem Air Base, Kuwait. At the beginning of March 2021, he went to Lebanon for a technical inspection.

[10] He came back from Lebanon on 5 March 2021. Upon his arrival at Camp Canada, Kuwait, he received a briefing regarding the required preventive measures designed to contain the spread of COVID-19 that were then in place, and he was provided with a document detailing these measures titled COVID-19 Threat Level Index (exhibit 3). At that briefing, it was explained to him that he had to follow the Force Health Protection High Threat preventive measures, which was the highest protection level, as detailed in the document.

[11] The protective measures common to all Force Health Protection Level were as follows:

- a. All food services were takeout only (Green Beans, dining facility (DFAC), restaurants, etc.). Post exchange (PX) visits were allowed;
- b. Visitor logs in communal areas and for meetings were to be used if duration was longer than fifteen minutes. Occupancy restrictions in communal areas and vehicles had to be respected; and
- c. No eating or socializing in common areas of accommodations buildings was permitted and they had to keep common area time to under fifteen minutes.

[12] For those who were on Camp Canada for some time and subject to the Force Health Protection Low Threat preventive measures, the mask had to be worn in some specific circumstances, and it was not required to be worn in others.

[13] As Sergeant Franzen visited a location outside Kuwait, he was considered an external visitor, making him subject to the Force Health Protection High Threat preventive measures. It meant that, on Camp Canada, he had to wear his mask as soon he was outside his room, except when outdoors with two-metre physical distancing from others, which included the gym/cardio room and in the common areas. There was no exception for eating.

[14] In addition, he could not participate to any Personnel Support Program-led group activities. Only activities within a defined work section were permitted. He could not do any sport.

[15] The day after his return to Camp Canada, which was on 6 March 2021, Sergeant Franzen went back to work. He experienced some difficulties with his Public Key Infrastructure (PKI) card in order to connect his computer workstation to the Defence Wide Area Network (DWAN). He then decided to request support to fix this problem and walked to the help desk located about thirty feet away from his office.

[16] When he arrived at the help desk, he met with Master Corporal Gervais. It was the first time they met. He told him that it was something that could be fixed on his computer remotely.

[17] Master Corporal Gervais confirmed to the Court that he met Sergeant Franzen for the first time in the morning, between 0800 and 0830 hours, on that day and that the request he made was in relation to an issue with his PKI card. He testified that he could identify Sergeant Franzen for two reasons: first he saw his last name on the name tag he wore, and second he had the very uncommon and very specific firefighter trade badge on his uniform. He mentioned that he was aware that this firefighter was coming back from outside, as many people knew on camp.

[18] Master Corporal Gervais told the Court that Sergeant Franzen was wearing his tan Canadian Disruptive Pattern (CADPAT) camouflage design uniform, but that he was not wearing a mask. He was surprised as he thought that because he went outside the camp, he would have to wear his mask, but he decided not to comment on the situation, as he did not know what medical authorities told Sergeant Franzen on this issue.

[19] Sergeant Franzen went back to his office and realized that his computer was not fully fixed. He then went to the orderly room (OR) located not too far away and spoke with some people there for some time. Once he finished the conversation, he went back to his office and observed that his computer was finally fully fixed.

[20] Sergeant Franzen told the Court that he wore his tan CADPAT uniform and his mask at all times on that day as required, including when he went to the help desk and the OR.

[21] Sergeant Franzen testified that during lunch time on that day, he went to the mess hall to grab his lunch as he was used to do, because only takeout was authorized for all, and he went back in his office for eating. He shared his office with another corporal. Once he sat down, he quickly realized that he could not eat in his office because of the preventive health measures he had to respect, which included not eating in the presence of anybody else. He then exited the building and ate his lunch alone in a different location.

[22] Later in the afternoon, a bunker drill exercise took place. Such exercises usually occurred unannounced and randomly, as the purpose was to test the readiness of people on the camp to safely and efficiently shelter if a bombardment of the camp occurs.

[23] When the alarm for a bombing sounded, Sergeant Franzen was in his office and he took cover under his desk. Once he heard the second alarm, he then went to the closest bunker.

[24] He entered through one of the two ends of the bunker. There were two long benches and he sat on one of them, closest to the entrance he had just used.

[25] Master Corporal Gervais sat on a bench as well and realized later that Sergeant Franzen was facing him at an angle. According to Master Corporal Gervais, he had a conversation with Sergeant Franzen concerning the PKI issue he dealt with earlier that morning.

[26] Master Corporal Gervais told the Court that Sergeant Franzen did not wear his mask during the entire time spent in the bunker.

[27] Captain Bolduc, the Construction Engineering (CE) troop commander, and his assistant, Warrant Officer Gill, were both in the office they shared when the alarm for the bunker drill exercise sounded. They took cover and when they both heard the second alarm, they walked to the closest bunker. Warrant Officer Gill, whose office was next to Sergeant Franzen's, told the Court that he saw Sergeant Franzen and they walked together to the bunker with Captain Bolduc. Captain Bolduc did not recall walking to the bunker with Sergeant Franzen but he remembered walking with Warrant Officer Gill to that location. Sergeant Franzen recalled making his way to the bunker while being close to Warrant Officer Gill and Captain Bolduc.

[28] Warrant Officer Gill confirmed that he knew Sergeant Franzen well, as he worked with him closely on a professional basis and he was his roommate on Operation IMPACT. However, they did not spend much time together as their respective schedules did not allow them to be often together at the same time in their room.

[29] Captain Bolduc told the Court that he worked frequently with Sergeant Franzen on Operation IMPACT and he knew who was.

[30] When the three of them arrived at the bunker, they all confirmed that Sergeant Franzen sat on a bench on one side, while Captain Bolduc and Warrant Officer Gill sat on a bench on the other side, directly in front of Sergeant Franzen.

[31] All witnesses heard by the Court confirmed that once people were in the bunker, a process began to take the attendance of the people. The person in charge of the bunker and being part of the auxiliary security force (ASF) would then report the number and the identity of the people in the bunker. Further to that process, all members would wait

for the “all clear”, meaning that they could exit the bunker because they would be told that the area was secured and safe.

[32] According to all witnesses heard by the Court, they stayed in the bunker for about thirty minutes to one hour. Sergeant Franzen, Captain Bolduc and Warrant Officer Gill told the Court that they spent most of that time talking together. Essentially, Sergeant Franzen showed pictures to them of his recent visit to Lebanon and they discussed it.

[33] Captain Bolduc and Warrant Officer Gill told the Court that Sergeant Franzen wore his mask at all times in the bunker.

[34] Sergeant Franzen affirmed to the Court that he did not recall any conversation about a PKI issue he had with Master Corporal Gervais while he was in the bunker.

[35] Corporal Lesperance, a plumbing and heating technician deployed on Operation IMPACT and with the CE section, told the Court that he sat directly beside Sergeant Franzen, having him directly on his left, and he saw him wearing his mask at all times while in the bunker. He added that he saw Sergeant Franzen earlier on that day at the hand wash station, and he was wearing his mask then as well. He recalled that Sergeant Franzen was under some restrictions at the time.

[36] Corporal Lesperance mentioned that he did not recall any conversation with Sergeant Franzen while he was in the bunker. He specified that he was part of the ASF and as such, he was called out through the speaker system on the camp and had to leave the bunker before the others, making his stay in the bunker shorter than most.

[37] Sergeant Franzen told the Court that while he was in the bunker, he wore his mask at all times and he never removed it.

[38] All witnesses mentioned that once the exercise ended, everybody had to attend a debriefing at a specific location on the camp outside the bunker. Once they exited the bunker, they all went to that place. When there, Warrant Officer Gill and Captain Bolduc saw Sergeant Franzen being called over by medical personnel.

[39] Sergeant Franzen confirmed that he was called out by somebody in front of everybody present. He took two COVID-19 tests. While the quick test result came back negative, it was confirmed that he tested positive to the second one. Accordingly, he was put in quarantine for a period of fourteen days.

[40] Then, the senior prevention medical technician on site, Sergeant Craig, initiated contact tracing. He is the one who looked for Sergeant Franzen, met him and informed him that he was considered as being an exposure. He asked him to be prepared to transfer to quarantine for fourteen days. He also interviewed him about the locations he had been and about the people he met since his return to camp.

[41] Sergeant Craig visited the locations identified by Sergeant Franzen and met with the people involved. He identified about eighteen persons as close contact to Sergeant Franzen. They were initially removed for forty-eight hours from camp and isolated from other people. They were finally sent to quarantine for a period of ten days with testing out, as they were identified as being close contacts to a person who tested positive to COVID-19.

[42] Obviously, the withdrawal of eighteen military personnel had an impact on the conduct of operations and required a certain reorganization of tasks for the sections which were affected by this situation.

[43] The witnesses described that the conditions in the quarters for quarantine were not optimal. They stayed in tents, were provided with meals but sometimes they would be forgotten. They were more exposed to a change to the weather conditions.

[44] While people were not necessarily upset at Sergeant Franzen, they were not very happy with the situation. As Warrant Officer Gill told the Court, he was supposed to be part of the ramp ceremony for a friend who recently died during an operation, and because he was quarantined, he could not participate. As he said, he was very sad but could not blame Sergeant Franzen for having COVID-19.

[45] Sergeant Franzen told the Court that it is while he was quarantined that he learned that a unit disciplinary investigation (UDI) was initiated regarding him. He said from that point on, he experienced a complete mental breakdown, especially when others left from quarantine, being left alone. As mentioned by some of the witnesses, he felt like a pariah.

Positions of the parties

The prosecution

[46] The prosecution affirmed that it proved beyond a reasonable doubt all essential elements of the offence of neglect to the prejudice of good order and discipline against Sergeant Franzen.

[47] For the prosecution, Master Corporal Gervais established without any doubt that Sergeant Franzen did not wear a mask as required at two different times: in the morning while inquiring at the help desk about an issue he had with his PKI card; and in the afternoon while in the bunker during the bunker drill exercise.

[48] The prosecution submitted that there was no animosity from Master Corporal Gervais toward Sergeant Franzen, and as such, this prosecution's witness should be believed.

[49] However, the prosecution raised the accuracy of the evidence provided by Sergeant Franzen, especially about the testimony he made before the Court. As other

witnesses he called said, they did not constantly keep their attention toward Sergeant Franzen, clearly leaving him the opportunity not to wear his mask while others were not paying attention to him.

Sergeant Franzen

[50] Sergeant Franzen pleaded not guilty to the charge before the Court and firmly denied having committed the offence as charged.

[51] Essentially, he claimed that on that day, he wore his mask at all times as requested, and more especially on the two different times referred by Master Corporal Gervais in his testimony on the day in question.

[52] Sergeant Franzen relied on the testimony of three other witnesses who were sitting very close to him and said that he wore his mask while in the bunker, contrary to what was said by Master Corporal Gervais. As the latter is the only witness called by the prosecution who said that such thing happened, Sergeant Franzen invited the Court to consider carefully the testimony provided by Master Corporal Gervais, as this situation may raise a doubt about what really happened. As such, Sergeant Franzen invited the Court to declare him not guilty of the offence as charged.

Some legal principles

Presumption of innocence, burden of proof and proof beyond a reasonable doubt

[53] Before this Court provides its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt; a standard that is inextricably intertwined with the principle fundamental to all Code of Service Discipline and criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[54] The first and most important principle of law applicable to every Code of Service Discipline and criminal case is the presumption of innocence. Sergeant Franzen entered these proceedings presumed to be innocent and the presumption of innocence remains throughout the case unless the prosecution, on the evidence put before the Court, satisfies it beyond a reasonable doubt that he is guilty.

[55] Two rules flow from the presumption of innocence: one is that the prosecution bears the burden of proving guilt, and the other is that guilt must be proven beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[56] The burden of proof rests with the prosecution and never shifts. There is no burden on Sergeant Franzen to prove that he is innocent. He does not have to prove anything.

[57] Now, 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.

[58] 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 Sergeant Franzen guilty unless it is sure he is guilty. Even if the Court believes that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, the Court must give the benefit of the doubt to Sergeant Franzen and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

[59] The important point for the Court is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. The Court must decide, looking at the evidence as a whole, whether the prosecution has proven Sergeant Franzen’s guilt beyond a reasonable doubt.

Testimonies’ credibility and reliability

[60] Reasonable doubt applies to the issue 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 this Court has a reasonable doubt about Sergeant Franzen’s guilt arising from the credibility of the witnesses, then it must find him not guilty.

[61] At this point, it may be useful to recall some basic principles regarding the determination of the credibility of a witness by the Court, as enunciated by Watt J. in the decision of *R. v. Clark*, 2012 CMAC 3, at paragraph 40 to 42 :

[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.

The evidence

[62] Regarding the evidence, it is important to say that the Court must consider only the one presented in the courtroom. Evidence is the testimony of witnesses and things entered as exhibits, including documents. It also comprises admissions. The evidence includes what each witness says in response to questions asked. Only the answers are evidence. The questions are not evidence unless the witness agrees that what is asked is correct.

The assessment of the accused's testimony

[63] The Court has heard Sergeant Franzen testify. When a person charged with an offence testifies, it must assess that evidence as it would assess the testimony of any other witness, keeping in mind what it said earlier about the credibility of witnesses. It may accept all, part, or none of Sergeant Franzen's evidence.

[64] Of course, if it believes the testimony of Sergeant Franzen that he did not commit the offences charged, it must find him not guilty.

[65] However, even if the Court does not believe the testimony of Sergeant Franzen, if it leaves it with a reasonable doubt about his guilt or about an essential element of an offence charged, it must find him not guilty of that offence.

[66] If it does not know whom to believe, it means it has a reasonable doubt and it must find Sergeant Franzen not guilty.

[67] Even if the testimony of Sergeant Franzen does not raise a reasonable doubt about his guilt or about an essential element of the offence charged, if after considering all the evidence the Court is not satisfied beyond a reasonable doubt of his guilt, it must acquit.

[68] If the Court has a reasonable doubt about Sergeant Franzen's guilt arising from the evidence, the absence of evidence, or the credibility or the reliability of one or more of the witnesses, then it must find him not guilty.

The essential elements of the offence of neglect to the prejudice of good order and discipline

[69] Section 129 of the *NDA* is a general provision that criminalizes any conduct deemed detrimental to good order and discipline within the Canadian Forces. It does not create two offences, one under subsection 129(1) of the *NDA* and another under subsection 129(2) of the *NDA*. On the contrary, it is a single offence.

[70] Subsection 129(1) of the *NDA* simply tells us that any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence. Generally speaking, proof of prejudice to good order and discipline beyond a reasonable doubt is required, although this proof of prejudice can sometimes be inferred from the circumstances if the evidence clearly points out to prejudice as a natural consequence of a proven act.

[71] Subsection 129(2) of the *NDA* tells us that under certain specific conditions, prejudice to good order and discipline is deemed to be prejudicial. It is, however, a rebuttable presumption, which means that it can be proven to be false.

[72] Concerning more specifically the essential elements of this offence, the prosecution must prove beyond a reasonable doubt that Sergeant Franzen is the person who allegedly committed the offence as described in the charge. In addition to the identity, the prosecution must prove specifically each of the following additional essential elements of the offence beyond a reasonable doubt:

- a. Sergeant Franzen failed to wear a mask as required by the COVID-19 Threat Level Index;
- b. Such omission is prejudicial to good order and discipline; and
- c. The blameworthy state of mind of Sergeant Franzen.

[73] Because the statement of the offence refers to neglect to the prejudice of good order and discipline, the Court raised with the prosecution the very nature of the offence. As mentioned from time to time by the court martial (see *R. v. Gardiner*, 2008 CM 3021 at paragraph 13, *R. v. Nauss*, 2013 CM 3008 at paragraph 34, *R. v. Brideau*, 2014 CM 1005 at paragraph 34, *R. v. Abao*, 2017 CM 1004 at paragraph 35, and *R. v. Carlyon*, 2017 CM 4013 at paragraph 30), when an offence under section 129 of the *NDA* refers to negligence, the *mens rea* must usually be addressed with the penal concept applying to criminal negligence.

[74] However, the prosecution mentioned to the Court that the term neglect used in the statement of the offence refers to the failure to do something, as reflected in the statement of particulars, and not to the failure to give proper care to something.

[75] Generally speaking, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. Fundamental principles of military law justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, but also with the offender's mental state. As established in *R. v. Beatty*, 2008 SCC 5, at paragraph 7, the modified objective test established in *R. v. Hundal*, [1993] 1 S.C.R. 867 remains the appropriate test to determine the requisite *mens rea* for negligence-based military service offences under the Code of Service Discipline. Concerning the *actus reus*, it

must be defined by the applicable standard and the fact that the conduct of the accused did not respect it.

[76] However, looking at the statement of particulars for this charge, I would agree with the prosecution that it does not refer to a negligence-based military service offence. Clearly, there is no reference to a lack of care from Sergeant Franzen, but only for not doing something he had to do.

[77] I then conclude that the essential elements I previously identified for this offence are the correct ones.

[78] Now, turning to the essential element regarding prejudice to good order and discipline, it is worth specifying that the expression “good order” used in section 129 of the *NDA* is wide enough to include good order in the sense in which the words are understood in civil life as applicable to civilians, and in the sense in which they would be understood in military life and applicable to members of a military force.

[79] Military discipline is the cornerstone to an effective and efficient standing armed force in a democracy. If the requirement for military discipline is not met, military authority can be undermined and this can only bring discredit to the service by diminishing the authority of those concerned. It may well be considered as being prejudicial to the concept of military discipline.

[80] It should be noted that conduct which is to the prejudice of good order is not necessarily to the prejudice of military discipline, depending on the circumstances. On the other hand, however, conduct which is prejudicial to military discipline is also held to be prejudicial to good order. It is not sufficient to prove that the conduct was prejudicial to good order but it must also be proven that the conduct was prejudicial to discipline.

[81] What is the meaning of the word “prejudice”? It is not defined in the Act or *Queen’s Regulations and Orders for the Canadian Forces (QR&O’s)*. In accordance with QR&O article 1.04, “words and phrases in English shall be construed according to the common approved meaning given in the *Concise Oxford Dictionary*”. The *Concise Oxford Dictionary* defines the word “prejudice” when used in the expression “to the prejudice of” as meaning “harm or injury that results or may result from some action or judgement.” In the way in which it is used in this charge, and as indicated by the CMAC decision in *R. v. Golzari*, 2017 CMAC 3, at paragraph 78, it means that the conduct tends to or is likely to adversely affect discipline. As clearly stated by the Court in the same paragraph, “military discipline requires that conduct be punished if it carries a real risk of adverse effects on good order within the unit; this is more than a mere possibility of harm”.

Analysis

[82] Considering the evidence as a whole, the Court has no difficulty to conclude that the prosecution proved beyond a reasonable doubt that Sergeant Franzen is the person who allegedly committed the offence of neglect to the prejudice of good order and discipline. Prosecution witnesses identified him in a straightforward manner and Sergeant Franzen's evidence is to the same effect, which includes his own admission during his testimony on this essential element.

[83] As there is no dispute about the date and the place of the alleged offence in the evidence adduced by both parties on these issues, then the Court considers them as being proven by the prosecution beyond a reasonable doubt as well. Consequently, it is the conclusion of the Court that the alleged offence took place on 6 March 2021, at Ali Al-Salem Air Base, Kuwait.

[84] Then, the next question for the Court to answer is the following one: Did the prosecution prove beyond a reasonable doubt that Sergeant Franzen failed to wear a mask as required by the COVID-19 High Threat Level Index?

[85] The prosecution evidence on this question rely on the testimony provided by Master Corporal Gervais. He said that at two different times on that day, he saw Sergeant Franzen not wearing a mask. The first time was in the morning at the help desk where he worked, and the second time was when he sat in the bunker during the bunker drill exercise in the afternoon of the same day.

[86] Master Corporal Gervais testified in a very straightforward manner. He seemed honest to the Court. He had no reason to give more favourable evidence to one side than to the other. He did not know much about Sergeant Franzen and did not appear as having any animosity toward him. The observations he made appear accurate and complete. He told the Court why things stood out in his mind concerning the identity of the accused when he met him for the first time that morning.

[87] Other witnesses confirmed his testimony on how things unfold during the bunker drill exercise. These witnesses confirmed where members of the help desk sat in the bunker, which would include Master Corporal Gervais.

[88] His testimony did not have any inconsistencies and he appears to the Court as being sincere and accurate. The Court has no reason to disbelieve him when he said that Sergeant Franzen did not wear a mask on two different occasions on that day.

[89] The testimony of Sergeant Craig was very helpful for understanding the context but his testimony did not provide any assistance on this question.

[90] Sergeant Franzen testified in his own defence. He was very straightforward and calm. He provided on how things unfolded on that day. The Court believes him when he said that he was aware of his obligation to respect the measures imposed on him on his return from Lebanon as required by the COVID-19 High Threat Level Index, which would include wearing a mask at all times.

[91] He explained that he had no reason to act differently and that he complied with the directive at all times on that day. He appeared honest and sincere to the Court. He seemed to have a good memory of that day. Once, he testified during cross-examination that he learned the name of the person at the help desk when he met him, and when confronted with an earlier statement he made in the course of the UDI where he stated that he learned such name some time after this event, he conceded right away that he was mistaken and that it is true that he learned the name of Master Corporal Gervais after the incident. He did not hesitate to correct himself in the circumstances. The Court has no reason to disbelieve him when he said that he wore a mask at all times on that day, denying at the same time the allegations made against him on this issue.

[92] The Court also has no reason to disbelieve other witnesses called by the accused: Corporal Lesperance, Warrant Officer Gill and Captain Bolduc.

[93] They all testified in an honest and straightforward manner. Corporal Lesperance had no reason to favour any side. As part of the ASF, he was in the bunker for less time than many other people there, and he clearly limited himself in reporting only what he saw and heard, including that for the whole time he was there, he saw Sergeant Franzen wearing a mask.

[94] Warrant Officer Gill was a bit closer to the accused as he had been his roommate for some time during the operation. Despite that, he appears as not trying to favour the accused at all. He had an excellent memory of that day. He is the one who provided the most detailed account of how things took place during the bunker drill exercise. He provided detailed observations of where some people were and how they acted. He is probably the one who, from an emotional perspective, would have strong negative feelings for the quarantine he was put in because of Sergeant Franzen, but as he said, can we blame someone who got COVID-19? He appears to the Court as very sincere. The Court has no reason to disbelieve him when he said that the accused wore a mask at all times while in the bunker on that day.

[95] Finally, Captain Bolduc testified in a calm and straightforward manner as well. He did remember less about any potential interaction he may have had with the accused prior to getting in the bunker. However, he had a clear memory of his interaction with Sergeant Franzen and Warrant Officer Gill in the bunker. He reported what he saw and heard, and nothing else. The Court has no reason to disbelieve him when he said that the accused wore a mask at all times while in the bunker on that day.

[96] This analysis leads the Court to only one conclusion: it does not know whom to believe. As such, when the Court finds itself in this situation, it means only one thing, which is that it has a reasonable doubt and it must find Sergeant Franzen not guilty.

FOR ALL THESE REASONS, THE COURT

[97] **FINDS** Sergeant Franzen not guilty of the charge of neglect to the prejudice of good order and discipline contrary to section 129 of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander J. Besner

Lieutenant-Commander F. Gonsalves, Directorate of Defence Counsel Services,
Counsel for Sergeant D. Franzen