COURT MARTIAL

Citation: *R. v. Meeks* 2022 CM 2015

Date: 20221024
Docket: 201960

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Sergeant K. Meeks, Applicant

-and-

His Majesty the King, Respondent

Before: Commander S.M. Sukstorf, M.J.

DECISION ON A MOTION BY DEFENCE THAT NO PRIMA FACIE CASE HAS BEEN MADE OUT

(Orally)

The case

[1] The allegations before the Court relate to an alleged altercation that occurred during the early morning hours of 18 June 2019 in Kaiserslautern, Germany.

[2] Sergeant Meeks is charged with two offences under section 130 of the *National Defence Act (NDA)*; that is to say, aggravated assault contrary to section 268 of the *Criminal Code* and assault contrary to section 266 of the *Criminal Code*. In addition, he is charged with one offence under section 86 of the *NDA* for using provoking speeches toward a person subject to the Code of Service Discipline, tending to cause a quarrel. The charges arise from an early morning altercation that unfolded on the morning of 18 June 2019 in Kaiserslautern, Germany where Sergeant Meeks was serving with his unit which was participating in Exercise SWIFT RESPONSE.

[3] At the close of the prosecution's case, pursuant to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.05(13), defence presented a motion seeking a directed verdict. Defence argued that the prosecution did not present a prima facie case on the third charge. More specifically, he argued that the prosecution did not introduce evidence of identity and there is no evidence that Sergeant Meeks did make the provoking speeches as set out in the particulars. His position is that there is only speculation that Sergeant Meeks made one statement.

[4] The third charge reads as follows:

"THIRD CHARGE *NDA* Section 86	USED PROVOKING SPEECHES TOWARD A PERSON SUBJECT TO THE CODE OF SERVICE DISCIPLINE, TENDING TO CAUSE A QUARREL *Particulars*: In that he, on or about 18 June 2019, at or near Kaiserslautern, Germany said to Cpl Melvin "you think you are a tough guy" and "you want to fight", or words to that effect."

The applicable law

[5] The applicable test to be applied in courts martial in assessing whether a prima facie case has been established in evidence is captured in Note (B) to QR&O article 112.05:

> (B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused person could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

[6] The above test is consistent with the test set out for directed verdicts by Fish J. of the Supreme Court of Canada (SCC) in *R. v. Fontaine*, 2004 SCC 27. At paragraph 53, Fish J. set out the test which was later enunciated in *R. v. Barros*, 2011 SCC 51, at paragraph 48 by Binnie J.

> A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction . . .. Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge.
> [Citations removed.]

[7] As stated in the Note, the test is the same whether the evidence is direct or circumstantial, but the nature of the judge's task varies according to the type of evidence that the prosecution has advanced. Where the prosecution's case is based entirely on direct evidence, the judge's task is straightforward. In simple terms, direct evidence relates to “the precise fact which is the subject of the issue on trial” (see Sopinka, John, Sidney N. Lederman and Alan W. Bryant. *The Law of Evidence in Canada,* 2nd ed. Toronto: Butterworths, 1999, at section 2.74).

[8] Thus, if the judge determines that the prosecution has presented direct evidence as to every element of the offence charged, the judge's task is complete. As McLachlin C.J.C. explained in *R. v. Arcuri*, 2001 SCC 54:

> [B]y definition the only conclusion that needs to be reached in such a case is whether the evidence is true . . . It is for the jury to say whether and how far the evidence is to be believed . . . Thus if the judge determines that the Crown has presented direct evidence as to every element of the offence charged, the judge's task is complete. If there is direct evidence as to every element of the offence, the accused must be committed to trial.
> [Citations removed.]

[9] At the close of the prosecution’s case, it was clear that there was no direct evidence of Sergeant Meeks having uttered to then-Corporal Melvin the words “you think you are a tough guy” nor was there any evidence that he uttered “you want to fight,” or words to that effect. The prosecution led eight witnesses, seven who were witnesses to or involved in the altercation that unfolded outside a bar in Kaiserslautern, Germany. In response to the defence’s application, the prosecution submitted that there is sufficient factual evidence upon which a trial judge could draw such an inference.

[10] When it comes to applying the above legal test to circumstantial evidence, which is what is present in the case at bar, the test is more complicated. With circumstantial evidence, there is, “by definition, an inferential gap between the evidence and the matter to be established that is, an inferential gap beyond the question of whether the evidence should be believed: see Watt, David. Watt’s Manual of Criminal Evidence. Scarborough, Ont.: Carswell, 1998, at § 9.01 (circumstantial evidence is ‘any item of evidence, testimonial or real, other than the testimony of an eyewitness to a material fact. It is any fact from the existence of which the trier of fact may infer the existence of a fact in issue’).” As the SCC set out in *Arcuri,* at page 840:

> 23 The judge's task is somewhat more complicated where the Crown has not presented direct evidence as to every element of the offence. The question then becomes whether the remaining elements of the offence — that is, those elements as to which the Crown has not advanced direct evidence — may reasonably be inferred from the circumstantial evidence. Answering this question inevitably requires the judge to engage in a limited weighing of the evidence . . .. [T]he judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw. This weighing, however, is limited. The judge does not ask whether she herself would conclude that the accused is guilty. Nor does the judge draw factual inferences or assess credibility. The judge asks only whether the evidence, <u>if believed</u>, could reasonably support an inference of guilt.
> [Emphasis in original.]

[11] The weighing of the evidence for a directed verdict is a very limited exercise. “The judge does not ask him- or herself whether he or she is personally satisfied by the evidence. Rather, the judge asks whether a jury, acting reasonably, could be satisfied by the evidence.” (see *R. v. Charemski,* 1998 1 S.C.R. 679 at paragraph 23; emphasis removed.)

[12] A good starting point for any discussion of inference drawing is the definition offered by Watt J. in David Watt’s Manual of Criminal Evidence (Toronto: Carswell, 2005) at page. 108:

> An *inference* is a deduction of fact which may logically and reasonably be drawn from another fact or group of facts found or otherwise established in the proceedings. It is a conclusion that *may*, not must, be drawn in the circumstances.

[13] With respect to the defence’s argument that all that is before the Court is speculation, I was particularly mindful of Justice Watt's caution in the above-mentioned manual that, "The boundary which separates permissible inference from impermissible speculation in relation to circumstantial evidence is often a very difficult one to locate."

[14] In *R. v. Morrissey*, [1995] O.J. No. 639.at page 209, Doherty J.A. described the process of inference drawing as follows:

> A trier of fact may draw factual inferences from the evidence. The inferences must, however, be ones which can be reasonably and logically drawn from a fact or group of facts established by the evidence. An inference which does not flow logically and reasonably from established facts cannot be made and is condemned as conjecture and speculation.

[15] The courts have repeatedly cautioned against confusing a reasonable inference with mere speculation and case law suggests that there is a distinction between conjecture and speculation, on the one hand, and rational conclusions drawn from the whole of the evidence on the other. Consequently, in conducting an analysis, it is important to be aware that there are two ways in which inference drawing can become impermissible speculation.

[16] The first step in inference drawing is ensuring that the primary facts, which are said to provide the basis for the inference, are established by the evidence. If the primary facts are not established, then any inferences drawn from them will result in impermissible speculation.

[17] The second way in which inference drawing can become impermissible speculation occurs where the proposed inference cannot be reasonably and logically drawn from the established primary facts. This possibility stems precisely from the fact that an inductive conclusion is not necessarily valid. As McLachlin C.J.C. put it in *Arcuri*, at page 839 S.C.R., and pages. 31 to 32 C.C.C:

> [W]ith circumstantial evidence, there is, by definition, an inferential gap between the evidence and the matter to be established – that is, an inferential gap beyond the question of whether the evidence should be believed . . .. The judge must therefore weigh the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the Crown asks the jury to draw.
> [Emphasis removed.]

[18] Further, if the judge determines that there are two competing inferences that can reasonably be drawn and it is not speculation, it is a legal error to favour the inference of the accused over that of the prosecution as to do so usurps the function of the trier of fact (see *Arcuri*, at pages 839 to 842, *R. v. Charemski*, at paragraphs 27 to 31 and *R. v. Masterson*, 2008 ONCA 481, at paragraphs 6 to 16). As Major J. put it in *R. v. Sazant*, 2004 SCC 77, at paragraph 18, "where more than one inference can be drawn from the evidence, only the inferences that favour the Crown are to be considered". Thus, if a reasonable inference in favour of the prosecution is available to be drawn, then, regardless of its strength, a judge conducting a preliminary inquiry is required to draw it.

[19] The offence set out in the third charge is that Sergeant Meeks used provoking speeches and provoking gestures toward a person subject to the Code of Service Discipline. This offence provides those in authority with a suitable means of suppressing quarrels in circumstances where they might have serious consequences. This specific offence is enunciated at paragraph 86(b) of the *NDA* and reads as follows:

> 86 Every person who
>
> . . .
>
> **(b)** uses provoking speeches or gestures toward a person so subject that tend to cause a quarrel or disturbance, is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[20] The prosecution must also prove each of the following additional essential elements beyond a reasonable doubt:

(a) that Sergeant Meeks used provoking speeches toward a person as it is alleged in the charge;

(b) that such provoking speeches tend to cause a quarrel or disturbance;

(c) that the person toward whom the speeches are directed is subject to the Code of Service Discipline; and

(d) finally, the blameworthy state of mind of Sergeant Meeks.

[21] Based on the evidence, the date and place of the alleged offence is not contested. Similarly, then-Corporal Melvin was and remains a person subject to the Code of Service Discipline.

[22] There must be a determination as to whether Sergeant Meeks used provoking speech and whether that speech tended to cause a quarrel or disturbance. This determination as to whether the words used tend to cause a quarrel must be determined objectively, that is, on the basis of a reasonable person standard, in light of all circumstances.

[23] Firstly, it goes without saying that the prohibited acts or *actus reus* as set out in the particulars must be proven. The following two essential elements must be determined objectively, that is, on the basis of a reasonable person standard, in light of all of the circumstances:

(a) whether Sergeant Meeks used provoking speech; and

(b) whether those words spoken tend to cause a quarrel.

[24] To understand the requirements of the offence as set out above, it is useful to look at the ordinary meaning of the key words in each of these elements:

(a) "provoking speeches" are those which provoke; that is, stimulate a reaction or emotion, typically a strong or unwelcome one, in someone; and

(b) a "quarrel" has been defined as an angry argument or disagreement. The provoking speeches must be of the kind to cause an objectively reasonable person to either engage in an angry exchange or disagreement or to cause a disturbance.

[25] What tends to provoke or cause a quarrel needs to be assessed in the context of all the circumstances of the case.

Analysis

[26] A prima facie case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential element of the charge such that Sergeant Meeks could reasonably be found guilty at this point in the trial, if no further evidence was adduced.

[27] The facts or evidence that unfolded at trial with respect to this third charge are particularly complex given that the only evidence of provoking words being spoken can be attributed to either Sergeant Meeks or then-Corporal Melvin. However, this same evidence also suggests that the words spoken were in fact exchanged during the heated dispute to which both Sergeant Meeks and then-Corporal Melvin were engaged, so the Court needed to assess the words in that context.

[28] The danger for a trial judge in assessing this sort of application which relies upon circumstantial evidence is that the trial judge can overreach and draw an inference that should not be properly drawn from the primary facts. In order to infer a fact from established facts, all that is required is that the inference be reasonable and logical. I approached the evidence methodically, dealing with each required inference separately.

[29] In assessing the evidence, the judge is to assume that all of the evidence she hears is true. It is not her function to decide whether witnesses should be believed. The judge is not to weigh the evidence, in the sense of evaluating whether it is reliable. The judge is not, for example, to discount testimony because of concerns about the opportunity of the witness to observe or recall the events accurately. Similarly, the judge is not to assess the witnesses' credibility. The judge is therefore to assume that the witness is not only trying to be truthful but is also being accurate.

Relevant testimony to the third charge

[30] Here is a summary of all the relevant evidence and primary facts with respect to the third charge that I considered in weighing the evidence, in the sense of assessing whether it is reasonably capable of supporting the inferences that the prosecution will asks the trier of fact to draw:

Captain Korajlija

[31] Captain Korajlija testified that:

(a) while he was outside trying to arrange cabs to take the soldiers back to the base, there was a commotion, and he went to investigate. He described the commotion as yelling and agitated voices. More specifically, he stated that everyone was yelling but he could not say who exactly; and

(b) he returned to the group, and it was shortly after he got back that he saw Sergeant Meeks hit then-Private Meadows in the face.

Mr Berthe (then-Private)

[32] Mr Berthe testified that:

(a) the first two people who started fighting were Sergeant Meeks and then-Corporal Melvin;

(b) he recalls the arguing and the fighting between the two;

(c) their voices were raised but he could not hear what was being said;

(d) their tone as raised, vocal and affirmative;

(e) he was a couple of feet away from them;

(f) in response to Sergeant Meeks and then-Corporal Melvin arguing, he got in-between them so that they did not start fighting;

(g) then-Corporal Melvin did not react to him getting in-between them, but he said that Sergeant Meeks pushed him out of the way with his hands;

(h) Sergeant Meeks moved him using his hands, but he said that he did not feel assaulted at all; and

(i) that he felt more like an obstacle, and he did not feel like he was in danger.

[33] Under cross-examination he confirmed:

(a) then-Corporal Melvin had forgotten his cigarettes and was going back into the bar for them;

(b) he believed that Sergeant Meeks was upset about then-Corporal Melvin going back into the bar; and

(c) during the argument between Sergeant Meeks and then-Corporal Melvin there were a lot of people (meaning fellow soldiers) around.

Mr Prupas (then-Private)

[34] Mr Prupas testified that:

(a) he believed it was Sergeant Meeks who told him that they were to leave and return to base;

(b) Sergeant Meeks' demeanour was serious and he displayed a sense of urgency when he told them they had to return to base;

(c) although they were told to leave, they did not leave right away because they were drunk and were not taking it seriously. They just did not get the sense of urgency;

(d) in response to them not leaving, Captain Simmons and Sergeant Meeks went back into the nightclub and ordered them out;

(e) although he cannot remember who gave the order, he recalls Sergeant Meeks being present;

(f) after being told a second time to leave, they shuffled outside to the front of the bar;

(g) they were told that there was a communication lockdown and they had to go back to the base;

(h) then-Corporal Melvin went back up to the bar as he forgot his cell phone;

(i) when then-Corporal Melvin came back from the bar, there was an altercation between him and Sergeant Meeks;

(j) Sergeant Meeks was upset with then-Corporal Melvin because Sergeant Meeks had told everyone to leave the bar, but then-Corporal Melvin went back in to get his phone and that started an argument;

(k) he cannot recall exactly what Sergeant Meeks said at that time, but he confirmed that he was angry;

(l) a shouting match ensued between Sergeant Meeks and then-Corporal Melvin with some pushing;

(m) he does not recall who all did the pushing, possibly both or maybe just one of them;

(n) then-Privates Prupas and Berthe tried to split up the argument between Sergeant Meeks and then-Corporal Melvin, but then-Private Berthe became part of the altercation; and

(o) they all tried to get then-Corporal Melvin and Sergeant Meeks away from each other.

[35] Under cross-examination he confirmed:

(a) that it was very likely that then-Corporal Melvin had returned for his cigarettes and not his cell phone;

(b) it was after then-Corporal Melvin came back that he and Sergeant Meeks had their argument; and

(c) he remembers both then-Corporal Melvin and Sergeant Meeks being held back from trying to fight each other.

Master Corporal Melvin (then-Corporal)

[36] Master Corporal Melvin testified that:

(a) while still inside the nightclub, Sergeant Meeks approached him, grabbed him by his t-shirt and pushed him up against the wall telling him that "it was time to get the fuck out";

(b) in response, then-Corporal Melvin responded to him to back the fuck up as they were all getting out of the nightclub;

(c) Sergeant Meeks did back off and continued to gather the remainder of the group;

(d) while they were all outside on the sidewalk, waiting for their rides to bring them back to the base, he witnessed Sergeant Meeks pushing then-Private Berthe and then he saw then-Private Berthe fall on his buttocks;

(e) when he saw Sergeant Meeks push then-Private Berthe to the ground, he said he had enough of that and reacted immediately by pushing Sergeant Meeks, telling him to pick on someone worth picking on;

(f) he was afraid that Sergeant Meeks might hit him, so he pushed Sergeant Meeks off to the side and told him to pick on someone else;

(g) after the push, Sergeant Meeks wanted to fight him;

(h) what followed was a yelling match between them, but he cannot recall what Sergeant Meeks said;

(i) although he could not recall the words Sergeant Meeks used, he understood that Sergeant Meeks intended to get combative with him; and

(j) they were only able to exchange words because people held the two of them back.

Captain Simmons

[37] Captain Simmons testified that:

(a) he got a call from the Company 2I/C saying to return to base and that there was a communication lockdown;

(b) he immediately started to round up everyone telling them that they had to go back to the base;

(c) he told Sergeant Meeks directly that there was a communication lockdown and they had to return to base;

(d) he was trying to organize taxis to get the group of them home when an altercation started to brew outside the bar;

(e) Sergeant Meeks talked to the junior ranks impressing upon them the seriousness of the situation and that they could have a soldier on the drop zone with a broken back;

(f) it did not start out to be violent, as he recalls Sergeant Meeks explaining to the junior ranks what a communication lockdown was and the implications of that being enacted. He was not sure what transpired but the situation turned into raising voices and pushing and shoving;

(g) with respect to raised voices, he said that then-Corporal Melvin, then-Privates Meadows and Berthe were all yelling at Sergeant Meeks;

(h) he did not hear Sergeant Meeks say anything specific at that time;

(i) he did not observe anything specific exchanged between Sergeant Meeks and then-Corporal Melvin; and

(j) Sergeant Meeks' demeanour at that time was agitated and aggressive and not the same demeanour he had when he was leaving the bar.

Mr Meadows (then-Private)

[38] Mr Meadows testified that:

(a) Captain Korajlija advised them that something had happened during the jump in Bulgaria;

(b) they were advised that something went wrong on the jump and possibly someone had died;

(c) he was told to exit the bar and he almost instantly went out onto the street to secure taxis for the group in order to take them back to the base;

(d) he was on the street or on the curb trying to get a taxi while most of the soldiers were standing to the right about twenty-five feet away on the sidewalk;

(e) he did not notice who all was there until something happened and he noticed commotion to his right and he saw Captains Korajilja and Simmons on the back of Sergeant Meeks and then-Private Berthe in a chokehold;

(f) Sergeant Meeks was angry at that time, but he could not hear what was being said;

(g) that he ran over to free then-Private Berthe, who was freed, but that he was thrown to the ground by Sergeant Meeks;

(h) he does not really know how this happened, but just remembers being thrown to the ground, perhaps by his shirt or his arm;

(i) he got up and noticed that Sergeant Meeks and then-Corporal Melvin were advancing toward each other, so he got in between the two of them; and

(j) he noticed that when then-Corporal Melvin spoke to Sergeant Meeks, he reacted. He asked Sergeant Meeks what he was doing, and he told then-Corporal Melvin to get back and that is the end of his memory.

Corporal Gebeshuber

[39] Corporal Gebeshuber's testified that:

(a) when he was leaving the bar, he heard raised voices on the street;

(b) although he did not recognize the voices, he knew that they were coming from the group of people he was with, being then-Privates Meadows, Berthe, Sergeant Meeks or then-Corporal Melvin;

(c) at first, he ignored the raised voices as he was more worried about one of his friends possibly being dead;

(d) then, a fight broke out and, in the beginning, it was between then-Private Berthe and Sergeant Meeks, and it all happened so quickly starting with shoving;

(e) he is not sure how then-Private Meadows got mixed in, but he thinks then-Corporal Melvin was trying to break something up and then-Private Meadows was on the ground; and

(f) he immediately reacted to make sure that then Private Meadows was okay and Sergeant Meeks had already been separated from the group.

[40] Although it was uncontested that some form of altercation unfolded in the early morning hours of 18 June 2019 involving Sergeant Meeks, the only evidence before the Court of any specificity regarding provoking speech similar to that outlined in the particulars came from Corporal Gebeshuber who described an argument outside of the bar as follows:

> "Q. And so you said that you seen Melvin get involved there and what did you see next? A. Pretty much like—the scuffle—everyone pretty much converges, obviously, because that's what happened. And I believe Melvin said something or Sergeant Meeks said something, I not sure who said the exact phrase, but I heard the phrase "so you think you are tough" something like that, and then I believe—because we are all pretty much main focus at that point is to separate Private Berthe and Sergeant Meeks because obviously don't—it's gonna be administrative nightmare obviously if that happens, and then for some reason, I turned around and the next thing I know pretty much, Meadows is on the ground and I believe Melvin is either holding Sergeant Meeks or trying to pull him back. Not 100 per cent sure on the details, but I know, very quickly Private Meadows is on the ground, the fight was pulled apart, and then almost if I remember correctly, instantaneously the police arrived, ambulance arrived."

[41] A fulsome review of the evidence suggests a wide variance in witness testimony in describing how the yelling, shoving, argument and altercations unfolded during the early morning hours of 18 June 2019. The evidence is that there was a quarrel between then-Corporal Melvin and Sergeant Meeks, but Sergeant Meeks is not charged with quarrelling. Sergeant Meeks is charged with making provoking words being "you think you are a tough guy" or "you want to fight" in which it is suggested were words causing or tending to cause a quarrel. In other words, Sergeant Meeks is charged with using these words to instigate a quarrel with then-Master Corporal Melvin.

[42] There is no evidence before the Court that the words "you want to fight", were said or heard by anyone. This leaves the Court only one expression of "you think you are tough" which on its face is similar to those words set out in the particulars of the charge.

[43] At this point, in determining whether I can draw an inference that Sergeant Meeks made the above statement, I must not engage in any assessment of the reliability or the strength of the evidence, or of the witnesses, but rather, I must simply look to see if there is any evidence, if believed, to support the prosecution's position.

[44] In order for a properly instructed panel to find that the words "you think you are tough", were actually spoken by Sergeant Meeks, a properly instructed panel would have to be able to draw an inference that it could have been said by him. Considering the evidence from the testimony of Corporal Gebeshuber that he heard similar words from either Sergeant Meeks or then-Corporal Melvin, this leaves open the possibility of either Sergeant Meeks or then-Corporal Melvin made this statement.

[45] Further, there is evidence from multiple witnesses, most particularly Master Corporal Melvin to the effect that Sergeant Meeks was combative.

[46] As the prosecution argued and the case law suggests, where it is possible that two inferences can be drawn from the facts, then at this preliminary stage, the Court must adopt the inference in favour of the prosecution. Together, these facts permit an inference that the words were spoken to be drawn by a properly instructed panel.

[47] However, the test for a no prima facie case on this third charge does not end here. Next, in the context of the alleged conduct which occurred, the Court must determine whether prosecution has provided some evidence that the words used by Sergeant Meeks were provoking and whether they caused or were intended to cause a quarrel?

Did Sergeant Meeks utter words which would be perceived by a reasonable person to be of the type to stimulate a strong or unwelcome reaction or emotion?

[48] What tends to provoke or cause a quarrel needs to be assessed in the context of all the circumstances of the case. As an example, depending on the context where the speech was used, the words "you want to fight" would likely appear to the reasonable person to be a clear invitation for the parties to engage in a quarrel, whereas the words "you think you are tough" on their own, lack the necessary context that they will result in or provoke a quarrel. However, depending on what is unfolding, the words could be suggestive of a challenge and uttered with the intent to cause a quarrel or they may simply be a statement regarding something that has transpired.

[49] The ultimate question for me to answer at this stage is whether the panel can draw an inference that the words uttered "you think you are tough" would be perceived by a reasonable person to be of the type of words that would stimulate a strong or unwelcome reaction or emotion? To answer this question, as the trial judge, I must engage in limited weighing of the relevant facts in evidence first to determine whether the uttering of these words occurred and did cause the quarrel, and if not, whether the reasonable person would conclude that these words were intended to cause a quarrel. On their face, the words are not necessarily provoking so the context is important.

[50] In performing the task of limited weighing, the judge must determine whether it would be reasonable for a properly instructed panel to infer the guilt of the accused if the prosecution's evidence was believed. Once again, this task of "limited weighing" never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

[51] There is evidence of a significant amount of yelling from many different individuals and by Master Corporal Melvin's own admission, when they were outside, he pushed Sergeant Meeks. As explained above, the Court, or a panel will first want to determine whether the provoking speech set out in the particulars caused the "quarrel" or argument between Sergeant Meeks and then-Corporal Melvin or would have at least tended to cause it.

[52] If not, then even if the words can be attributed to Sergeant Meeks, the panel will have to ask itself whether the spoken words rise to a penal or criminal level. In other words, the panel must be able to objectively determine that the words incited, provoked when used or were specifically intended to cause a quarrel. I have to ask myself whether the uttered words would be perceived by a reasonable person to be of the type to stimulate a strong or unwelcome reaction or emotion.

[53] There will be some words used that will automatically instill a strong emotional reaction where their mere use is detrimental to discipline and worthy of penal sanctions, however, courts must be particularly attentive not to broaden the scope and ensure that terms of mere disagreement are not raised to the level of criminality. Importantly, I am also mindful of the rank differences and the fact that Sergeant Meeks was at that very time responsible for corralling the privates and getting them to leave the bar. The evidence is that the privates ignored the earlier pleas to leave the bar and had to be ordered to leave. In this situation, a Sergeant would use more direct language to gain compliance.

[54] It is a common law principle that offences or crimes must be sufficiently defined to ensure that members have a clear understanding of what acts are prohibited and why. From a policy perspective, it cannot be automatically assumed that direct orders and language used by a senior non-commissioned member in providing operational direction to young privates rises to the level of criminality.

[55] Consequently, the Court had to focus very carefully on its assessment of the reasonableness of the inference to be drawn from the use of these words from the actual context upon which they were used.

[56] With respect to how the argument between Sergeant Meeks and then-Corporal Melvin unfolded, the testimony is all over the place as to who or what began the quarrelling first. This is understandable as witnesses described paying attention at different times and they could understandably only describe what they witnessed. However, as I explained earlier, it is not for the Court to assess the credibility or reliability of the evidence, but I mention this only as I was specifically looking for any evidence that the provoking speech used by Sergeant Meeks caused the quarrel or disturbance. I also tried to understand the context in which the words were spoken.

[57] Master Corporal Melvin and Mr Meadows both testified that the first altercation arose between Sergeant Meeks and then-Private Berthe. Corporal Gebeshuber also testified that he believed that then-Corporal Melvin intervened when there was something going on between then-Private Berthe and Sergeant Meeks.

[58] However, the Court noted that aside from then-Corporal Melvin and Sergeant Meeks, the evidence suggests that both then-Privates Berthe and Prupas were the two individuals physically present and engaged during the entire spectrum of conflict, including the disagreement that unfolded between then-Corporal Melvin and Sergeant Meeks.

[59] In his testimony, Mr Berthe was clear that the first argument that arose was between Sergeant Meeks and then-Corporal Melvin. Mr Berthe suggested that the argument between Sergeant Meeks and then-Corporal Melvin erupted because then-Corporal Melvin wanted to go back or did go back to retrieve his cigarettes. This was also confirmed by Mr.Prupas.

[60] Master Corporal Melvin confirmed that when he went back for his cigarettes, Sergeant Meeks grabbed him by his shirt, pushed him up against the wall, and told him it was "time to get the fuck out". There were no other witnesses to this interaction, and it is conduct for which Sergeant Meeks is not charged.

[61] Mr Prupas testified that from what he recalls, it was when then-Corporal Melvin came back from the bar, that there was an altercation between him and Sergeant Meeks. He said that Sergeant Meeks was upset with then-Corporal Melvin because Sergeant Meeks had told everyone to leave the bar, but then-Corporal Melvin went back into the nightclub to get his cigarettes and in his view, that started their argument. Mr Prupas confirmed that Sergeant Meeks was angry and that a shouting match ensued between Sergeant Meeks and then-Corporal Melvin. He could not recall who did the pushing; however, Master Corporal Melvin told the court that he pushed Sergeant Meeks first.

[62] Captain Simmons said he is not sure what transpired, but the situation turned into raised voices and pushing and shoving. With respect to raised voices, he said that he witnessed then-Privates Meadows, Berthe and then-Corporal Melvin all yelling at Sergeant Meeks.

[63] The Court noted that by Master Corporal Melvin's own admission, after he said he saw Sergeant Meeks push then-Private Berthe to the ground, he reacted by pushing Sergeant Meeks and telling him to pick on someone worth picking on. He went on to tell the Court that it was after he pushed Sergeant Meeks that Sergeant Meeks wanted to fight him. Corporal Gebeshuber confirmed that when the scuffle broke out it was originally pushing and shoving.

[64] In law, there can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. After reviewing all the evidence before the Court, I find that the evidence only suggests that a disagreement between Sergeant Meeks and then-Corporal Melvin erupted, either in response to then-Corporal Melvin returning to the nightclub to retrieve his cigarettes, or alternatively, based on Master Corporal Melvin's own admission that he pushed Sergeant Meeks after he allegedly saw him push Private Berthe.

[65] Only one witness, Corporal Gebeshuber, testified to hearing words akin to "you think you are tough". Although he could not determine who said them, his evidence places the words spoken during the heated argument or shoving, outside on the road after all the members had exited the nightclub. Considering this timing, even if a panel can infer that Sergeant Meeks did say these words to then-Corporal Melvin, the

evidence suggests that they were spoken during the pushing and shoving and therefore they could not have been the catalyst in provoking the quarrel.

[66] Importantly, when Master Corporal Melvin testified, although he did say that Sergeant Meeks became combative, none of his evidence suggests that it was the specific words of Sergeant Meeks that triggered the disagreement or that the words themselves provoked him to push Sergeant Meeks or that started the conflict that evening. This is an important fact that is missing upon which an inference might be drawn.

Would the words "you think you are tough" cause an ordinary person to engage in an angry argument or disagreement?

[67] I must then ask myself whether the reasonable person would consider that the words spoken were intended to cause a quarrel or in general would "tend" to cause a quarrel. I reviewed court martial case law and found that in every case where an accused was found guilty, the words spoken were germane to the conflict and in most cases precipitated it. Further, the specific words were keenly remembered by the parties involved as the cause of the argument. I note that in this case, with respect to the allegations before the court, Master Corporal Melvin does not remember anything specific that Sergeant Meeks said while they were outside of the bar.

[68] Given the unique facts of this case, and the timing of the words spoken, the evidence only suggests that if the words were spoken by one of them, they were spoken during the argument as trash talk and they were not the cause of the argument itself.

[69] Consequently, I find that there is no factual evidence before the Court upon which a panel properly instructed could find that these specific words spoken were used by Sergeant Meeks to provoke a quarrel nor is there sufficient evidence upon which they can draw such an inference. As referred to earlier, absent primary facts upon which a panel can reasonably and logically draw an inference, a determination that the words provoked a quarrel, were intended to, or by their nature would "tend to", results simply in impermissible speculation.

[70] During my review of this application, as indicated in this decision, there is clearly "some" evidence of an argument between Sergeant Meeks and then-Corporal Melvin. The court asked itself whether the facts in evidence would permit a panel to make a special finding of guilty based on this other evidence or facts. Although the prosecution did file an application to amend the particulars of the first charge, they did not file an application with respect to the particulars of the third charge and all the court is left with is a charge that Sergeant Meeks used provoking speech towards then-Corporal Melvin tending to cause a quarrel.

[71] Under section 138 of the *NDA*, the Court may make a special finding of guilty should it choose to in specific cases. However, in this case, the Court finds it would be inappropriate because it would place Sergeant Meeks in the unfair position of not

knowing the legal case he had to meet before this court martial. More particularly, I note that there is only "some" evidence, and this Court did not weigh or assess its credibility or reliability. It would undermine the purpose of providing particulars to reasonably inform Sergeant Meeks of the allegations against him and to give him the opportunity of a full defence and a fair trial.

[72] As the then-Chief Military Judge wrote in *R. v. Wylie*, 2017 CM 1005, at paragraph 27:

> [27] Particulars serve to enable an accused person to fully assess the case against him, define the issues and prepare his or her defence, including whether or not to call evidence and testify at trial. It also assists the Court in managing the trial as it relates to issues concerning the admissibility of evidence. It is trite law that the prosecution is bound by the essential particulars of the charge, subject to the rule of surplusage. For example, the date and the location, the identity of the victim or the amount of money stolen in a charge of stealing are all particulars that would fall in that category. All particulars that are not surplusage shall be proven by the prosecution; if not, the Court will simply find the accused not guilty subject to the rule of special findings. However, the Court cannot make a special finding when the facts differ materially from the facts alleged in the particulars if it would prejudice the accused.

[73] In this case, substituting new particulars based on the evidence that has come out at trial significantly affects the defence of Sergeant Meeks. As an example, the line of questioning defence pursued during the cross-examination of the prosecution witnesses reflected the defence strategy to defend the case based on the exact words set out in the third charge as described above.

[74] Consequently, based on the facts and circumstances of this case, I find that amending the particulars to reflect facts that unfolded in evidence would prejudice Sergeant Meeks in the conduct of his defence and I have no choice but to find him not guilty of the third charge.

[75] In summary, although there is some evidence whereby a properly instructed panel can draw the inference that Sergeant Meeks used the words "you think you are tough", I found no evidence before the Court, upon which a properly instructed panel could rely upon to support the inference that Sergeant Meeks use of these words either caused or were intended to cause, or would tend to cause a quarrel with then-Corporal Melvin.

Conclusion

FOR THESE REASONS, THE COURT:

[76] **GRANTS** the defence application and finds Sergeant Meeks not guilty of the third charge.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Sergeant J.K. Meeks, Applicant

The Director of Military Prosecutions as represented by Major G.D. Moffat and Major G.J. Moorehead, Counsel for Respondent