



COURT MARTIAL

Citation: *R. v. Hykawy*, 2024 CM 3018

Date: 20241008
Docket: 202349

Standing Court Martial

2nd Canadian Division Support Base Valcartier
Courcelette, Quebec, Canada

Between:

His Majesty the King

- and -

Corporal L. R. Hykawy, Accused

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

REASONS FOR FINDING

(Orally)

Introduction

[1] Corporal (Cpl) Hykawy is charged with one offence punishable under section 130 of the *National Defence Act (NDA)*, for assault with a weapon, contrary to section 267 of the *Criminal Code*.

[2] More specifically, the prosecution alleged that on 22 May 2023, at Canadian Forces Base (CFB) Wainwright, Alberta, Cpl Hykawy threatened to use a knife in committing an assault upon Sergeant (Sgt) J.S. Ouellet.

[3] This decision is about the finding, guilty or not guilty, regarding this charge following a trial that lasted a total of four days.

The evidence

[4] The prosecution called three witnesses: Cpl Patrie, Sgt Ouellet, and Sgt Gionet. In addition, it introduced a knife.

[5] Sgt Ouellet opted to testify in the language of his choice, which was French, while the language of trial chosen by Cpl Hykawy, the accused in these proceedings, was English. Accordingly, the Court made available to Sgt Ouellet consecutive interpretation services for the interpretation of the proceedings, allowing him to give evidence in the official language he chose for testifying.

[6] Cpl Hykawy made the decision to testify on his own behalf. He also introduced three images from Google Maps of a part of CFB Wainwright, a picture of the hatch and driver seat of a Light Armoured Vehicle (LAV) 6.0, and an electronic copy of Sgt Ouellet's audio recorded statement made to the police on 22 May 2023.

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

The facts

[8] At this stage, it would be appropriate for the Court to provide a summary of the circumstances relevant to this matter.

[9] During the month of May 2023, the 5th Combat Engineer Regiment (5 CER) participated in the exercise MAPLE RESOLVE 23 as a component of the 5th Canadian Mechanized Brigade Group (5 CMBG). As a member of 5 CER, Cpl Hykawy was the driver of a LAV for the entire exercise, which was for five weeks, and there was an officer designated as crew commander for this vehicle for the duration of the exercise.

[10] At the end of MAPLE RESOLVE 23, it was necessary to prepare the vehicles for their return by train to their place of origin, namely CFB Valcartier, province of Quebec which is also the location of the unit where the members of 5 CER usually belong and work.

[11] On 22 May 2023, Sgt Ouellet and Sgt Gionet were tasked as crew commanders on two LAVs with the mission to prepare the vehicles to be returned to their place of origin. They were taking over from the usual crew commanders for these LAVs, considering that the latter were officers who had to participate in a meeting that day.

[12] The mission consisted of three stages: first, to drive the LAV to the wash track to clean them up; second, to bring them to the Weapons Effect Simulator (WES) kit building to have the WES system removed from the vehicles; and finally park them at that location so that they could eventually be loaded onto a train.

[13] On 22 May 2023, between 1200 hours and 1300 hours, during his lunch time, Cpl Hykawy was told to be at his LAV for 1300 hours to drive it to the wash track. He

was not informed about the entire mission and knew only that he had to drive the vehicle to that location.

[14] Sgts Gionet and Ouellet reported at 1300 hours and took their respective places as crew commanders on a LAV. Sgt Ouellet was in the vehicle driven by Cpl Hykawy. They did not know each other and had never worked with each other before.

[15] The radio that allowed the vehicles to communicate with each other had been previously removed from the LAV. However, the vehicle's internal communications system was still operational to allow crew members to communicate with each other using a headset.

[16] The crew commander of the vehicle usually provides direction to the driver and helps him in the safe driving of the vehicle, considering its size and heaviness, which includes the existence of certain blind spots.

[17] Sgt Gionet took the lead with his vehicle in the direction of the wash track. Sgt Ouellet directed Cpl Hykawy to follow Sgt Gionet's vehicle, which he did.

[18] The drive to the wash track took about half an hour. During that drive, Cpl Hykawy felt that he did not have much interaction with Sgt Ouellet to help him drive the vehicle properly. In addition, he was told by Sgt Ouellet to stay at a distance of two LAV vehicles from the other vehicle on a dusty road, and to have the vehicle positioned closer to the middle than the side of the road.

[19] Cpl Hykawy said that by driving in dusty conditions in such a way while following another vehicle made his drive harder and more exhausting. Because he had difficulty to see clearly what was going on, he had to constantly worry about the vehicle in front of his own slowing down suddenly or any other vehicle arriving in the opposite way.

[20] Cpl Hykawy mentioned that he did not have much assistance from Sgt Ouellet when he made a mandatory stop on the road. Normally, the crew commander indicates to the vehicle's driver whether the crossroad is safe due to the existence of certain blind spots. According to Cpl Hykawy, Sgt Ouellet did not help him in this aspect of the vehicle's operation. In addition, Sgt Ouellet was constantly on his back to drive as fast as he could by telling him to, "Speed the fuck up" and to not really stop at stop signs.

[21] According to Sgt Ouellet, he had no particular concerns about his driver while they went to the wash track. He confirmed that he had not much interaction with Cpl Hykawy. He said that he provided the minimal necessary directions to the driver, like going right, left or to follow the vehicle in front, to get to that location, assuming that Cpl Hykawy knew where he had to go and how to get there.

[22] Once they arrived at the wash track, Cpl Hykawy washed the vehicle, helped by Sgt Ouellet. Then, they sat back in the LAV.

[23] Sgt Gionet's vehicle left the wash track first for the WES kit building located not very far away. Sgt Ouellet's vehicle left some time after Sgt Gionet's vehicle.

[24] Sgt Ouellet said that he did not know where the WES kit building was located for the next stage of the mission. When he arrived at a crossroad with a stop, Cpl Hykawy stopped the vehicle. According to Sgt Ouellet, having seen the vehicle in front of him going straight forward, he directed his driver to go straight. However, Cpl Hykawy instead turned right.

[25] Still according to Sgt Ouellet, Cpl Hykawy told him that because the LAV did not have a WES system, he assumed that they were going back to the camp. From Cpl Hykawy's perspective, he told the Court that he did not know what the next step was, and not being told where to go by his crew commander, he assumed that they were going back to the camp. He mentioned that he would have gone straight at the stop if he had been directed to do so, which had not been done by the crew commander.

[26] Sgt Ouellet told Cpl Hykawy that he had to follow his commands. Cpl Hykawy would have responded that he did not want to work with him again. Sgt Ouellet found this comment strange, but it did not bother him at all. Cpl Hykawy made his way back with the vehicle to the WES kit building and once he arrived, he parked the vehicle beside Sgt Gionet's vehicle.

[27] Sgt Gionet confirmed that once his LAV left the wash track, he was not followed by Sgt Ouellet's vehicle immediately. He said that once he arrived at the WES kit building, he waited for Sgt Ouellet for about ten minutes. The latter finally arrived and parked the LAV beside his own.

[28] After the vehicle was parked, Sgt Ouellet then got out of his seat and went to Cpl Hykawy's seat while remaining on the vehicle. He wanted to talk to him. Sgt Ouellet would have said something like, "When I told you to go straight, you go straight. I am the Sgt, I am in charge, you should listen to what I say." From Sgt Ouellet's perspective, Cpl Hykawy was disobeying an order provided by a superior, and he wanted to remind him how things shall work.

[29] Sgt Ouellet spoke in a disciplinary manner, in a confidant but not upset tone. As a reply to Sgt Ouellet's affirmation, Cpl Hykawy said that he recently put his release from the Canadian Armed Forces (CAF).

[30] Sgt Ouellet said that Cpl Hykawy mentioned that he intended to go and fight in Ukraine as a soldier. While Cpl Hykawy confirmed that he had put his released from the CAF, he told the Court that he never mentioned anything at all in relation to go as a soldier in Ukraine.

[31] According to Sgt Ouellet, after Cpl Hykawy replied to him, the latter got out of the vehicle and started to walk in the opposite direction he was supposed to go.

Sgt Ouellet got down from the LAV and asked Cpl Hykawy where he was going. Cpl Hykawy responded that he was walking back to the camp.

[32] Sgt Ouellet decided to join him with a quick walk as he could not let him go. Once he caught up with him, he positioned himself directly in front of him. Sgt Ouellet said that Cpl Hykawy seemed to be distressed. He was looking at the ground, he was shaking, and he seemed to have a bizarre behaviour in the circumstances. He seemed to be beside himself.

[33] Sgt Ouellet told him that it was not a big deal. He wanted to comfort him more than making him an example from a disciplinary perspective. Cpl Hykawy did not say anything. Sgt Ouellet tapped him lightly on the left shoulder in order to get him out of his bubble, to get a reaction from him, and to confront him because of the way he had acted.

[34] Cpl Hykawy finally responded by taking out a knife, pointing the blade in Sgt Ouellet's direction, while telling him to back away from him. At that moment, they were at a distance of thirty centimetres from each other.

[35] The knife was a Bowie knife, which measures a total of ten inches, with a fixed blade six inches long and one inch wide that ends in a point, and a four-inch brown handle.

[36] Sgt Ouellet checked for the next movements of Cpl Hykawy and stood back from him at a distance of six to seven metres.

[37] Cpl Hykawy turned around and sat down on a concrete block. Sgt Ouellet went inside the WES kit building and asked some people to call the military police. He went outside and saw Cpl Hykawy still sitting on the concrete block, and he seemed to be calm.

[38] The police arrived. Sgt Ouellet told an investigator his version of the incident. He was there for about an hour. Later on the same day, he was interviewed by the police at the police detachment. This interview was audio recorded.

[39] Cpl Hykawy said that after he left the wash track, he made a right turn at the stop, not knowing that he was supposed to go next to the WES kit building. It is at this time that Sgt Ouellet started yelling at him, being pretty angry, and made comments to make him feel bad.

[40] Once he parked beside Sgt Gonet's vehicle at the WES kit building, he confirmed that Sgt Ouellet got out from his seat, and walked on the vehicle to his seat. Sgt Ouellet seemed to be "pissed", and he appeared to him as having lost his cool because he shook the hatch to get him out of his seat. Sgt Ouellet denied having done such thing and Sgt Gonet, who witnessed this part of the incident, never mentioned such a thing.

[41] From that moment on, and for the rest of the events, Cpl Hykawy had the impression that Sgt Ouellet wanted to physically fight with him, that he wanted to attack him.

[42] Cpl Hykawy said that because Sgt Ouellet was unable to open the hatch, he stood back, which allowed Cpl Hykawy to fully open the hatch and get out of the vehicle. He went down to get away from Sgt Ouellet.

[43] Cpl Hykawy affirmed that Sgt Ouellet jumped out of the LAV and came after him. Cpl Hykawy took a second to figure what he could do. Sgt Ouellet made some comments, he replied and again, got away from him.

[44] Cpl Hykawy walked in the direction of the building. Sgt Ouellet caught up with him and positioned himself in front of him a second time. Sgt Ouellet started to poke him with the right hand on his left shoulder, while yelling at him. Sgt Ouellet would have said to him, "Let's fucking go." Cpl Hykawy interpreted these words as an invitation to fight.

[45] He walked away again from Sgt Ouellet. The latter caught up with him again, came up around him and positioned himself in front of him, yelling at him and poking him hard on his left shoulder. Sgt Ouellet shoved him once, asking him what he will do.

[46] On these three different occasions, Cpl Hykawy said that Sgt Ouellet was shaking his fists with his arms pumping down, while yelling at him.

[47] In essence, Cpl Hykawy told the Court that while he was trying to get away from Sgt Ouellet, he feared to be hit by the latter at any moment. He felt pretty scared and unsafe.

[48] Cpl Hykawy said that he panicked and pulled out his knife and stepped back from Sgt Ouellet, while telling him to, "Get the fuck away" from him. Essentially, he was trying to prevent from being physically attacked by Sgt Ouellet. He affirmed that he never intentionally pointed his knife towards anybody specifically. However, he did not recall where the blade of his knife was pointing. He recognized that it was not acceptable to pull out his knife from the sheath the way he did.

[49] Cpl Hykawy said that Sgt Ouellet put his hands in the air and mentioned that it was time to call the military police. Sgt Ouellet left. Cpl Hykawy put his knife back in the sheath, threw it away on the ground and removed his combat shirt. He sat down on a concrete block and a civilian came to check on him.

[50] Sgt Ouellet came back. Cpl Hykawy told him that he would call his captain, but he did not. Sgt Ouellet left. The police arrived, seized his knife and arrested him.

Some legal principles

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

[51] 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 (CSD) and criminal trials. These principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[52] The first and most important principle of law applicable to every CSD and criminal case is the presumption of innocence. Cpl Hykawy 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.

[53] 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.

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

[55] 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.

[56] 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 Cpl Hykawy 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 Cpl Hykawy and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

[57] 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 Cpl Hykawy’s guilt beyond a reasonable doubt.

Testimonies' credibility and reliability

[58] 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 Cpl Hykawy's guilt arising from the credibility of the witnesses, then it must find him not guilty.

The evidence

[59] 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 and pictures. It also comprises admissions, if any. 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

[60] The Court has heard Cpl Hykawy testify. When a person charged with an offence testifies, the Court 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 Cpl Hykawy's evidence.

[61] Of course, if it believes the testimony of Cpl Hykawy that he did not commit the offence charged, it must find him not guilty.

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

[63] If it does not know whom to believe, it means it has a reasonable doubt and it must find Cpl Hykawy not guilty.

[64] Even if the testimony of Cpl Hykawy 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.

[65] If the Court has a reasonable doubt about Cpl Hykawy'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 assault with a weapon

[66] Cpl Hykawy is charged with one count for assaulting a person with a weapon contrary to section 267 of the *Criminal Code*. This provision reads as follows:

Every person is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years or is guilty of an offence punishable on summary conviction who, in committing an assault,

(a) carries, uses or threatens to use a weapon or an imitation thereof [.]

[67] The Court must find Cpl Hykawy not guilty of assault with a weapon unless the prosecution proves beyond a reasonable doubt that Cpl Hykawy is the person who allegedly committed the offence at the time and the place alleged in the particulars of the charge.

[68] In addition to these essential elements of the offence, the prosecution must prove specifically each of the following additional ones beyond a reasonable doubt:

- (a) that Cpl Hykawy applied force to Sgt Ouellet;
- (b) that Cpl Hykawy intentionally applied the force;
- (c) that Sgt Ouellet did not consent to the force that Cpl Hykawy applied;
- (d) that Cpl Hykawy knew that Sgt Ouellet did not consent to the force that Cpl Hykawy applied; and
- (e) that Cpl Hykawy threatened to apply force with a weapon.

Position of the parties

The prosecution

[69] The prosecution affirmed that it has proven beyond a reasonable doubt that on 22 May 2023, at CFB Wainwright, Alberta, Cpl Hykawy committed a service offence punishable under section 130 of the *NDA* by assaulting with a weapon Sgt Ouellet, contrary to section 267 of the *Criminal Code*.

[70] The prosecution did not take issue with Cpl Hykawy having established an air of reality to the defence of self-defence. However, it stated that the prosecution has demonstrated beyond a reasonable doubt that Cpl Hykawy did not have reasonable grounds to believe that force was threatened to be used against him, and that he did not act reasonably in the circumstances.

[71] Consequently, the prosecution invited the Court to reject Cpl Hykawy's defence of self-defence and to find him guilty as charged.

Cpl Hykawy

[72] Cpl Hykawy submitted to the Court that he pulled out the knife, but that this knife could not be considered as a weapon in the circumstances because he did not have any intent to use it for such purpose. In other words, the circumstances did demonstrate that he used this object to pass a message but that he had no intent, whatsoever, to really use it, but he did this for the sole purpose of defending himself and to discourage Sgt Ouellet from taking the action of attacking him physically.

[73] In addition, he argued that if the Court found him guilty of such an offence, then he wants it to consider that he acted purely in self-defence because his action of pulling out the knife was reasonable in the circumstances, and he had reasonable grounds to believe that Sgt Ouellet wanted to physically attack him.

[74] He affirmed that his action was proportionate in the circumstances because it was made for creating sufficient distance between himself and Sgt Ouellet to deter the latter from using any physical force against him.

[75] Accordingly, Cpl Hykawy asked the Court to acquit him of the charge.

Analysis

[76] Before addressing the defence of self-defence raised by Cpl Hykawy, the Court must first determine what verdict it should render on the charge before it.

The commission of the offence of assault with a weapon

[77] It must therefore determine whether the prosecution has proven beyond reasonable doubt all the essential elements of the charge of assault with a weapon.

[78] Considering the evidence as a whole, especially the testimony of Cpl Hykawy, the Court has no difficulty to conclude that the prosecution proved beyond a reasonable doubt some essential elements of the offence:

- (a) that Cpl Hykawy is the person who allegedly committed the offence of assault with a weapon on Sgt Ouellet; and
- (b) that the alleged assault with a weapon took place at CFB Wainwright, province of Alberta, as mentioned in the particulars of the charge.

[79] Concerning the date as alleged in the particulars of the charge, there is no indication that it is material to the offence to be proven by the prosecution. Sgt Ouellet and Cpl Hykawy confirmed that the alleged assault with a weapon took place on the afternoon of 22 May 2023.

[80] Then, the Court concludes that the date does not constitute an element of the offence to be proven by the prosecution, as it is not critical in the circumstances of this case and does not cause any prejudice to the accused's defence.

[81] The Court is left with deciding if the prosecution has proven beyond a reasonable doubt that Cpl Hykawy intentionally applied force to Sgt Ouellet, without the consent of Sgt Ouellet, knowing that Sgt Ouellet did not consent to the force that Cpl Hykawy applied, and that Cpl Hykawy threatened to apply such force with a weapon.

[82] Whether the Court retains the context described by Sgt Ouellet or the one reported by Cpl Hykawy is not really important at this stage of the analysis, considering that Cpl Hykawy confirmed in his testimony that his action of taking his knife out of its sheath and showing it to Sgt Ouellet was intended first and foremost to make the latter understand that he intended to use force against him if he did not stop, without his consent, and that he knew that Sgt Ouellet did not consent to this force that he intended to apply to him.

[83] Cpl Hykawy said that it was because of the ever-increasing insistence of Sgt Ouellet, whether because Cpl Hykawy was simply tired of him, or because he feared that he would attack him physically, that he acted as he did and that he took out the knife in a panic so that Sgt Ouellet understood that he was ready to go so far as to physically attack him if he did not stop doing what he was doing.

[84] Considering this evidence, the Court concludes that the prosecution proved beyond a reasonable doubt that Cpl Hykawy intentionally applied force to Sgt Ouellet, without the consent of Sgt Ouellet, knowing that Sgt Ouellet did not consent to the force that Cpl Hykawy applied.

[85] Then the Court is left with a last question: did Cpl Hykawy threaten Sgt Ouellet to apply force with a weapon?

[86] Cpl Hykawy, through his counsel, suggested to the Court that the knife shown to Sgt Ouellet was not intended to threaten him to apply force with a weapon, but rather to make him understand that he had to stop doing what he was doing and that the object was used only to get his attention to make him understand how serious he was about this. He claims that he made no gesture or uttered any words indicating to Sgt Ouellet any intention of using such an object against him.

[87] A “weapon” is anything used, designed to be used, or intended by a person to be used to injure, kill, threaten or intimidate another person.

[88] A Bowie knife, which measures a total of ten inches, with a fixed blade six inches long and one inch wide that ends in a point, and a four-inch brown handle which is suddenly and deliberately shown to someone by directing it towards this person, while telling him to step back from you, and while taking a few steps backwards oneself, can only lead to the reasonable inference and conclusion that it is a threat to apply force with a weapon.

[89] The Bowie knife is a knife that can be used to inflict bodily harm or physical damage, and it was shown by Cpl Hykaw to indicate to Sgt Ouellet that it can be used towards him to do such things if he did not stop what he was doing.

[90] It was not just an object to pass a message; it was shown as the object to be used to pass the message.

[91] Consequently, considering the evidence as a whole, the Court concludes that the prosecution proved beyond a reasonable doubt all the essential elements of the offence of assault with a weapon contrary to section 267 of the *Criminal Code*.

The defence of self-defence

[92] Considering the Court's conclusion on the first count, it must now consider the defence of self-defence which was presented by Cpl Hykaw.

[93] Section 72.1 of the *NDA* allows the defence of self-defence to be considered:

72.1 All rules and principles that are followed from time to time in the civil courts and that would render any circumstance a justification or excuse for any act or omission or a defence to any charge are applicable in any proceedings under the Code of Service Discipline.

[94] Section 34 of the *Criminal Code* sets out how this defence is to be considered:

(1) A person is not guilty of an offence if

(a) they believe on reasonable grounds that force is being used against them or another person or that a threat of force is being made against them or another person;

(b) the act that constitutes the offence is committed for the purpose of defending or protecting themselves or the other person from that use or threat of force; and

(c) the act committed is reasonable in the circumstances.

(2) In determining whether the act committed is reasonable in the circumstances, the court shall consider the relevant circumstances of the person, the other parties and the act, including, but not limited to, the following factors:

(a) the nature of the force or threat;

(b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

(c) the person's role in the incident;

(d) whether any party to the incident used or threatened to use a weapon;

(e) the size, age, gender and physical capabilities of the parties to the incident;

(f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;

(f.1) any history of interaction or communication between the parties to the incident;

(g) the nature and proportionality of the person's response to the use or threat of force; and

(h) whether the act committed was in response to a use or threat of force that the person knew was lawful.

(3) Subsection (1) does not apply if the force is used or threatened by another person for the purpose of doing something that they are required or authorized by law to do in the administration or enforcement of the law, unless the person who commits the act that constitutes the offence believes on reasonable grounds that the other person is acting unlawfully.

[95] It is up to Cpl Hykawy to first establish an air of reality for this defence. Thus, he must discharge his burden of presentation to the effect that "there is some evidence upon which a properly instructed jury could reasonably decide the issue" (*R. v. Fontaine*, 2004 SCC 27 at paragraph 14).

[96] The Court, in applying the air of reality test, must presume that the evidence is truthful and that the witnesses are providing reliable information.

[97] As the Court previously mentioned, Cpl Hykawy told the Court that while he was trying to get away from Sgt Ouellet at the WES kit building, he feared being hit by the latter at any moment, considering the way Sgt Ouellet was talking to him and because he poked him on the shoulder a few times. He felt pretty scared and unsafe.

[98] He said that he panicked and pulled out his knife and stepped back from Sgt Ouellet, while telling him to, "Get the fuck away" from him. Essentially, he was trying to prevent from being physically attacked by Sgt Ouellet. He affirmed that he never intentionally pointed his knife towards anybody specifically. However, he did not recall where the blade of his knife was pointing. He recognized that it was not acceptable to pull out his knife from the sheath the way he did.

[99] Cpl Hykawy said that Sgt Ouellet put his hands in the air and mentioned that it was time to call the military police. Sgt Ouellet left. Cpl Hykawy put his knife back in the sheath, threw it away on the ground and removed his combat shirt. He sat down on a concrete block and a civilian came to check on him.

[100] Sgt Ouellet confirmed in his testimony that Cpl Hykawy suddenly and without any warning, took out a knife, putting the blade in Sgt Ouellet's direction, while telling him to back away from him. It occurred after Cpl Hykawy got out of the LAV and when Sgt Ouellet caught up with him after a short walk.

[101] Sgt Ouellet checked for the next movements of Cpl Hykawy and stood back from him at a distance of six to seven metres.

[102] Cpl Hykawy turned around and sat down on a concrete block. Sgt Ouellet went inside the WES kit building and asked some people to call the military police. He went outside and saw Cpl Hykawy still sitting on the concrete block, and he seemed to be calm.

[103] In the circumstances, the Court considers that the testimony of Cpl Hykawy to explain why he pulled out his knife and showed it to Sgt Ouellet satisfies the air of reality test required to allow this Court to consider the defence of self-defence that he presented. His evidence is sufficient to allow a jury having received proper instructions to reasonably decide the issue.

[104] Then, the Court must conclude that Cpl Hykawy is not guilty of assault with a weapon if the following three conditions are met:

- (a) that Cpl Hykawy believed that force was being used against him and his belief was based on reasonable grounds;
- (b) that Cpl Hykawy committed the act for the purpose of defending or protecting himself against the use of force; and
- (c) that Cpl Hykawy acted reasonably in the circumstances.

[105] Cpl Hykawy does not have to prove that he acted in self-defence. Rather, it is up to the prosecution to prove beyond a reasonable doubt that he did not act in self-defence. If the prosecution proves beyond a reasonable doubt that at least one of the three conditions of self-defence is not met, that defence must be dismissed.

[106] To decide whether the prosecution has proven beyond a reasonable doubt that Cpl Hykawy did not act in self-defence, the Court must examine the following three questions:

- (a) did the prosecution prove beyond a reasonable doubt that Cpl Hykawy did not believe that force was being used against him or that his belief was not based on reasonable grounds?
- (b) did the prosecution prove beyond a reasonable doubt that Cpl Hykawy did not commit the act in order to defend himself or protect himself against the use of force?
- (c) did the prosecution prove beyond a reasonable doubt that Cpl Hykawy did not act reasonably in the circumstances?

Did the prosecution prove beyond a reasonable doubt that Cpl Hykawy did not believe that force was being used against him or that his belief was not based on reasonable grounds?

[107] This element concerns Cpl Hykawy's belief, based on his perception of the circumstances, that force was being used against him, and whether that perception was reasonable.

[108] In order to decide whether Cpl Hykawy's belief was reasonable, the Court must ask whether an ordinary person, sharing the attributes, experiences and circumstances of the accused, would have held that belief.

[109] Cpl Hykawy indicated that he left the vehicle because he could no longer stand Sgt Ouellet's attitude and recriminations towards him. Following this, Sgt Ouellet became angry, insulted him and physically attacked him by pushing him with his fingers on his shoulder, more than once. Sgt Ouellet would have told him, "Let's fucking go!", which he took as an invitation to fight.

[110] The prosecution adduced the evidence of Sgt Ouellet and Sgt Gonet. They both confirmed that while being parked at the WES kit building, Sgt Ouellet reminded Cpl Hykawy the importance of following orders from a superior, and that it was done in a firm manner, without any excess.

[111] Sgt Ouellet testified that he was concerned by Cpl Hykawy's attitude and behaviour, which would explain why he went after him once he got out of the vehicle.

[112] On this question, I conclude that Cpl Hykawy's testimony was provided in a coherent, detailed and straightforward manner. He had some legitimate fears about the reactions coming from Sgt Ouellet for what he had done.

[113] However, Sgt Ouellet's testimony was also coherent and straightforward. He was calm, and candidly admitted that he did not recall some of his own reactions and words, as well as those from Cpl Hykawy. I do not have any reason to disbelieve his testimony either.

[114] It is possible, considering the circumstances as a whole, that Cpl Hykawy believed that force could be used against him. The circumstances related by both witnesses indicate that Sgt Ouellet was upset with Cpl Hykawy's attitude, and being so exasperated, Cpl Hykawy might ultimately fear that force could be used to a certain degree against him, particularly after having, to some extent, been physically touched by his superior. In other words, it is possible that Cpl Hykawy may have feared that things could escalate physically because of his attitude with his superior.

[115] It is also possible that such belief was not based on reasonable grounds, considering that I do not know whom to believe on this issue. Both persons testified to what extent Sgt Ouellet was angry and upset with Cpl Hykawy during their walk at the

WES kit building, but I have no reason to disbelieve either of these witnesses on this matter. Then, it is my conclusion that the prosecution did not prove beyond a reasonable doubt that Cpl Hykawy did not believe that force was being used against him or that his belief was not based on reasonable grounds.

Did the prosecution prove beyond a reasonable doubt that Cpl Hykawy did not commit the act in order to defend himself or protect himself against the use of force?

[116] This element concerns Cpl Hykawy's purpose, that is, the Court seeks to determine whether he committed the act to defend or protect himself against the use of force. Cpl Hykawy was to act for the purpose of defending himself, not for the purpose of revenge. He was not to act to give himself a role as a vigilante, to seek revenge or for any other personal consideration.

[117] On this issue, there is no reason for the Court to believe that Cpl Hykawy did commit the act of pulling out his knife for something else than to defend himself. As he said, he panicked, and because of the fear he had, he defended himself in this way. Even Sgt Ouellet indirectly admitted that such reaction seemed to come from a sudden feeling of fear or protection from Cpl Hykawy. Sgt Ouellet's reaction was to step back and immediately make a reference to the police to sort out the issue, recognizing that Cpl Hykawy was ready at that point to do specific things to protect himself.

[118] Accordingly, the Court concludes that the prosecution did not prove beyond a reasonable doubt that Cpl Hykawy did not commit the act in order to defend or protect himself against the use of force.

Did the prosecution prove beyond a reasonable doubt that Cpl Hykawy did not act reasonably in the circumstances?

[119] This element concerns the reasonableness of Cpl Hykawy's conduct and consists of determining what an ordinary person who shares Cpl Hykawy's attributes, experiences and situation would have done, which is that of a non-commissioned member of the rank of corporal who has good experience driving a heavy vehicle with the characteristics of a LAV, who is accustomed to and trained in carrying out such a task with a supervisor in operational conditions, and who is trained in the respect and importance of decisions made by the chain of command.

[120] In order to decide whether Cpl Hykawy's action was reasonable in the circumstances, the Court must take into account the particular situation of Cpl Hykawy, the other parties involved and the action, including the following factors:

- (a) the nature of the force or threat;
- (b) the extent to which the use of force was imminent and whether there were other means available to respond to the potential use of force;

- (c) the person's role in the incident;
- (d) whether any party to the incident used or threatened to use a weapon;
- (e) the size, age, gender and physical capabilities of the parties to the incident;
- (f) the nature, duration and history of any relationship between the parties to the incident, including any prior use or threat of force and the nature of that force or threat;
- (g) any history of interaction or communication between the parties to the incident; and
- (h) the nature and proportionality of the person's response to the use or threat of force.

[121] The Court considers that the question of whether Cpl Hykawy acted in response to the use or threat of use of force that he knew to be legitimate is not a relevant factor in the assessment it must make, given the circumstances described.

[122] As noted by the Supreme Court of Canada in its decision in *R. v. Khill*, 2021 SCC 37, at paragraphs 74, 123 and 124, the words “role played in the incident” refer to the conduct of the accused, namely the acts, omissions and exercises of judgment, from the beginning to the end of the incident, which are relevant in analyzing the reasonableness of Cpl Hykawy’s act in the circumstances. The Court must ask whether Cpl Hykawy did anything to create, cause or contribute to the conflict, and consider the extent of his responsibility in this regard.

[123] Sgt Ouellet allegedly used physical force by pushing Cpl Hykawy with his hand on the shoulder on several occasions, to the point of causing him to back away. Sgt Ouellet also allegedly moved his arms up and down in a straight position along his body in a repetitive manner with his fists closed when speaking to Cpl Hykawy. The nature of the force used by Sgt Ouellet, according to Cpl Hykawy, was only physical and moderate, and at no time Sgt Ouellet would have made a comment or a gesture to indicate that he wanted to get into a physical fight with Cpl Hykawy. Sgt Ouellet may have said, “Let’s fucking go” but it is unclear what these words would have meant in the circumstances. It sounded more as an invitation to go back to the vehicle than one to fight, according to the Court.

[124] As told by Cpl Hykawy, it was much more because of the intensity linked to the gestures and words of Sgt Ouellet, than because the latter attacked him more seriously in a physical manner which provoked the reaction of fear and panic on the part of Cpl Hykawy, to the point of clearly showing his knife.

[125] There was no indication in Cpl Hykawy's testimony that Sgt Ouellet was about to punch him or attack him. In these circumstances, it would have been possible for him to express that he understood Sgt Ouellet's concerns but that he needed to be left alone for a few minutes before coming back to the vehicle.

[126] Exasperated by the reproachful comments and attitude from his superior, Cpl Hykawy left the vehicle for no apparent and valid reason. He tried to get away from, and avoid, a situation that seemed to make him uncomfortable, while his superior made the decision to follow him, and to enter his bubble. Clearly, Sgt Ouellet was trying to bring him back to reason. Even if by touching him or physically shaking him, the circumstances of this case demonstrate that Sgt Ouellet was mainly trying to reason with Cpl Hykawy because he had left his position as driver for no apparent reason and that he did not seem to care more than necessary about the consequences of such an action.

[127] Cpl Hykawy was the only person who threatened to use a weapon, namely a Bowie knife that he had on him, while Sgt Ouellet did not use or even threaten to use any weapon in the circumstances.

[128] Cpl Hykawy appeared to be a slightly thinner and less stocky individual than Sgt Ouellet, but the Court did not notice any notable difference that would suggest that one is more physically imposing than the other.

[129] Cpl Hykawy and Sgt Ouellet did not know each other really well and it was the very first time that they were working together.

[130] As stated by Cpl Hykawy, communication with Sgt Ouellet did not go well, as he felt that they were minimal about any driving direction, and much too repetitive about the nature of his relationship with his superior.

[131] The nature of Cpl Hykawy's response to Sgt Ouellet's actions and words was much more serious in terms of gravity than what he was facing. The knife he showed Sgt Ouellet was clearly a weapon that could quickly inflict a serious, even fatal, injury, which is quite different from being punched.

[132] It is clear to the Court that Cpl Hykawy's response was totally disproportionate to what he was facing.

[133] Cpl Hykawy did contribute to the tension between him and Sgt Ouellet by getting out of the vehicle and walking away from it. It is not unusual to see a superior trying to educate a subordinate about the importance of respecting the hierarchy and obeying orders. Sometimes, it can be made with too much insistence and intensity, but it cannot justify the gesture of showing a knife while asking to step back, which was disproportionate and unreasonable in the circumstances.

[134] A non-commissioned member with the experience of Cpl Hykawy knew that leaving his vehicle while performing a task may constitute a manifestation of some form of insubordination, which may expose him to being questioned about his behaviour, either informally or more formally depending on the case. Obviously, if he believed that he was the victim of inappropriate or even abusive behaviour on the part of a superior, there are different ways to report it. Obviously, showing a knife and giving the impression of wanting to use it is not one of these ways.

[135] The Court concludes that the prosecution has proven beyond a reasonable doubt that Cpl Hykawy did not act reasonably in the circumstances, and accordingly dismisses the defence of self-defence presented by Cpl Hykawy.

FOR ALL THESE REASONS, THE COURT:

[136] **FINDS** Cpl Hykawy guilty of the charge of assault with a weapon contrary to section 267 of the *Criminal Code*.

Counsel:

The Director of Military Prosecutions as represented by Majors R. Gallant and É. Baby-Cormier

Major C. Da Cruz, Directorate of Defence Counsel Services, Counsel for Corporal L.R. Hykawy