



COURT MARTIAL

Citation: *R. v. Cruz*, 2010 CM 2022

Date: 20101207

Docket: 201045

Standing Court Martial

Asticou Centre
Gatineau, Québec, Canada

Between:

Her Majesty the Queen

- and -

Private D.J. Cruz, Accused

Before: Commander P.J. Lamont, M.J.

REASONS FOR FINDING

(Orally)

[1] Private Cruz, this court finds you not guilty of charges one through to five.

[2] Private Cruz is charged with five offences under the *National Defence Act*: Two charges of wilfully making a false entry in a document required for official purposes contrary to section 125(a); two offences of fraud contrary to section 380(1) of the *Criminal Code* and section 130 of the *National Defence Act*; and one charge of obstructing justice contrary to section 139(2) of the *Criminal Code* and section 130 of the *National Defence Act*.

[3] The charges concern his relationship with one Rhea Noblefranca, as well as claims he made upon public funds. The relevant time frame extends from some months prior to his enrolment in the Canadian Forces on 29 September 2006, to the summer of 2008, when the accused and Ms Noblefranca separated and later divorced.

[4] The charges read as follows:

- a) First charge - wilfully made a false entry in a document made by him that was required for official purposes. In that he, on or about 17 May 2007, at Canadian Forces Base Borden, Ontario, made a statutory declaration that he and Rhea Noblefranca had resided together as husband and wife for a continuous period of at least one year immediately prior to 17 May 2007, knowing it was false.
- b) Second charge - wilfully made a false entry in a document made by him that was required for official purposes. In that he, on or about 29 May 2007, at Canadian Forces Base Borden, Ontario, declared on a Common Law Partnership Application, that he met the conditions of Queen's Orders and Regulations 1.075 for recognition of his common-law partnership since 29 September 2006, knowing this was false.
- c) Third charge - an offence punishable under section 130 of the *National Defence Act*; that is to say, fraud contrary to section 380(1) of the *Criminal Code*. In that he, between 29 May 2007 and 30 June 2008, at or near the city of Ottawa, Ontario, did by deceit, falsehood or other fraudulent means, defraud Her Majesty in Right of Canada of the sum of about \$23,823.89, by claiming Separation Expense benefits for the said period for which he had no entitlement.
- d) Fourth charge - an offence punishable under section 130 of the *National Defence Act*; that is to say, fraud, contrary to section 380(1) of the *Criminal Code*. In that he, between 21 and 28 June 2007, at or near Canadian Forces Base Borden, Ontario, did by deceit, falsehood or other fraudulent means, defraud Her Majesty in Right of Canada of the sum of about \$2457.00, by claiming Separation Expense benefits for the period of about 10 October 2006 to 27 June 2007, for which he had no entitlement.
- e) Fifth charge - an offence punishable under section 130 of the *National Defence Act*; that is to say, obstructing justice, contrary to section 139(2) of the *Criminal Code*. In that he, between 10 and 21 July 2009, at or near the city of Ottawa, Ontario, did wilfully attempt to obstruct the course of justice by asking Mrs Rhea Noblefranca to change her statement to the military police.

[5] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed, the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[6] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt, and the accused must therefore, be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt.

[7] But reasonable doubt is not a frivolous or imaginary doubt. It is not something based upon sympathy or prejudice. It is a doubt based on reason and common sense that arises from the evidence, or the lack of evidence. The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty. The rule of reasonable doubt also applies to the issue of credibility. If there is a reasonable doubt as to the guilt of the accused arising from the credibility of witnesses, the accused is to be found not guilty.

[8] Rhea Noblefranca testified for the prosecution. She stated that she met Mr Cruz, as he then was, in December of 2005 and they dated for a year or so until they decided in December of 2006, to get married. They, in fact, married on March the 10th, 2007. Throughout this period she lived with her mother in a two-bedroom apartment on Côte Saint-Luc in Montreal, Quebec. Private Cruz lived with his family at an address on rue Alexandre in Laval. He slept over at the Côte Saint-Luc address from time to time when he visited. She estimated that this occurred maybe three nights on weekends in a month, and then she stated that he visited on perhaps less than ten occasions from the time they met until July of 2008. Her mother owned the furniture and appliances in the apartment and paid the rent and bills and Rhea helped with these expenses. Only she and her mother had a key to the apartment and nobody else received mail.

[9] In cross-examination, Ms Noblefranca agreed that Private Cruz enrolled in the Canadian Forces in late 2006 and she saw him off at the airport when he left for training in Gagetown. She also visited him when he was on course in Borden. Sometimes he gave her money, which she considered to be a gift between husband and wife. She asked the accused to open a joint bank account, which they did in February of 2006, in order to save for their wedding. She stated that she was the only one to make deposits on the joint account, and she eventually closed the account. The evidence of Rhea

Noblefranca as to whether and to what extent Private Cruz occupied the residence at Côte Saint-Luc was corroborated by her mother, Mila Noblefranca. She testified that he did not live at her apartment and did not contribute to the cost of running the household.

[10] Leonard Cruz testified for the defence. He is the older brother of the accused and lived at the rue Alexandre address with their mother. He testified that the accused and Rhea met in September of 2005, when Leonard introduced them to each other. They began dating and spent most of their time at the rue Alexandre address, but later would just spend weekends there. During the week they were together at Rhea's place because it was closer to Dawson College where the accused was attending school. In cross-examination, Leonard stated that most of his brother's personal effects remained at the rue Alexandre address and he always received mail there.

[11] Loretta Cruz is the mother of the accused and Leonard. She testified that as of October of 2005, Rhea and the accused slept in his room at the Alexandre address on weekends. It seems her relationship with Rhea was not happy, and at some stage she told the accused not to bring Rhea to the house anymore.

[12] Many documents were introduced into evidence by both parties. A number of those documents come from the personnel file of Private Cruz maintained by the clerks in the orderly room at the Canadian Forces Support Unit in Ottawa. Other documents come from the course file maintained at the orderly room of the Canadian Forces School of Administration and Logistics (CFSAL), at CFB Borden, where the accused was attending a course for ten weeks from 12 April to 28 June 2007. Still other documents were introduced by the accused in the course of his evidence.

[13] Private Cruz gave evidence in his defence. He testified that he met Rhea in September of 2005. At the time he was living with his family at the Laval address, but by the end of the month he was living at the Côte Saint-Luc address and contributing to the expenses. Residing at the Côte Saint-Luc address, he was closer to Dawson College and Concordia University which he attended until September of 2006 when he joined the Canadian Forces. He and Rhea looked for other accommodation, but he wanted to wait to move until after they were married. On enrolment in the Canadian Forces, he gave the address in Laval as being his ordinary residence because he understood from the people in the recruiting office that that was his address as that was where his furniture was located. He confirmed, after referring to a documentary exhibit, that he and Rhea opened a joint savings account in February of 2006 with a view to marriage. He and Rhea were married in a civil ceremony on 10 March 2007. They separated on 5 July 2008 and were divorced the following year. Private Cruz testified that he paid \$100 a month towards the rent at the Côte Saint-Luc address and contributed groceries and fuel for the car.

[14] It is evident that there are large and important discrepancies between these witnesses as to the circumstances of the relationship between Private Cruz and Rhea; specifically as to when they met, where each of them resided and whether they resided

with each other and whether Private Cruz contributed financially to the running of the household on Côte Saint-Luc.

[15] Several documents were introduced into evidence during the examination-in-chief of Private Cruz as well as in the course of his cross-examination. The documentary evidence, Exhibit 53, establishes that he and Rhea went on holiday to the Philippines for a period of two months from 18 May to 11 July 2006 and Private Cruz paid the expenses, including the cost of air travel. Exhibit 48, the correspondence and form from the Montreal fertility clinic, demonstrates that both Private Cruz and Rhea jointly sought medical help in March of 2008, to deal with infertility. The document discloses that Rhea advised the doctor that at that time they had been attempting conception for a period of two years and that they had sexual relations on average once per week.

[16] Rhea Noblefranca was not examined by either counsel as to her sexual relationship with Private Cruz; nor was she cross-examined as to whether she was attempting to have a child. The document, which later became Exhibit 48, was not put to her. Indeed, in the course of what might be described as a perfunctory cross-examination, Rhea was not questioned on many of the points which arose for the first time during the defence case in the course of the examination-in-chief of Private Cruz. Some points are of course much less significant to an understanding of the relationship between Private Cruz and Rhea, but the fact remains that on what must be accepted to be important points, such as the sexual nature of their relationship, there was virtually no cross-examination of Rhea by the defence.

[17] Relying on the rule laid down by the House of Lords speaking through Lord Herschell in *Browne v. Dunn*, (1893), 6 R. 67, quoted with approval in *R. v. Lyttle*, 2004 SCC 5 at paragraph 64, the prosecution says I should accept the evidence of Rhea Noblefranca as to the nature of her relationship with Private Cruz and attach little or no weight to the evidence with which she was not confronted. I agree with counsel for the prosecution that the rule in *Browne v. Dunn* was not adhered to by defence counsel in the cross-examination of Ms Noblefranca.

[18] As the Supreme Court of Canada observed in *R. v. Lyttle*, the remedy for the breach of the rule in *Browne v. Dunn* is a matter for the informed discretion of the trial judge after taking into account all the circumstances. In the present case, I note that some of the evidence with which Ms Noblefranca was not confronted is documentary in nature, for example, the report of the fertility clinic. This particular document was apparently recorded by a health professional who spoke directly to Rhea in circumstances where both the accuracy of the information provided and the accuracy of its recording were particularly important. I note also that the prosecution did not seek to have her recalled to give evidence on the matters raised for the first time in the examination of Private Cruz. In all the circumstances I am not prepared to discount all of the evidence that should have been put to Ms Noblefranca. In particular, as will appear shortly, I have relied upon the fertility clinic document to make some findings of fact in this case.

[19] I have strong reservations about accepting the evidence of the accused, Private Cruz. I found that many of his answers to questions were not responsive, and indeed, he appeared to me on several occasions to be simply trying to avoid answering a question. Unless his evidence was confirmed on important points by the evidence of another witness, or by documentary evidence that I have found to be reliable, I do not accept his evidence.

[20] The first and second charges in the charge sheet allege offences contrary to section 125(a) of the *National Defence Act*; that is, wilfully making a false entry in a document made by him that was required for official purposes. I discussed the elements of the offence created by section 125(a) in the case of *Corporal J. Wells*, decided 14 January 2004. In addition to identifying the accused as the offender and establishing the date and place of the offence, the prosecution must establish:

1. a false entry in a document;
2. that the document is made by the accused;
3. that the document is required for official purposes;
4. an intention on the part of the accused to author the document; and
5. a blameworthy state of mind, either wilfulness or negligence with respect to the falsity of the document.

[21] In this case, the prosecution argues that the accused made two wilfully false documents in connection with his application for the recognition of his common-law status with Rhea Noblefranca. The first charge concerns a statutory declaration made by Private Cruz on 17 May 2007, Exhibit 10 before me, in which Private Cruz jointly swears with Rhea Noblefranca that "we have resided together for at least one year preceding the application for recognition". The second charge concerns a form, a Common-Law Partnership Application, Exhibit 11, dated 29 May 2007 and signed by Private Cruz, in which he states that he met the conditions for the recognition of his common-law partnership effective 29 September 2006.

[22] There is no doubt that the statutory declaration referred to in the first charge, and the Common-Law Partnership Application referred to in the second charge, were both made and signed by Private Cruz for official purposes. The Canadian Forces recognizes the common-law status of members of the Canadian Forces, who are party to a common-law relationship. A policy document issued by the Chief of Military Personnel entitled, "Common-Law Partnerships" and dated 23 August 2006 is before me as Exhibit 34. It states in paragraph 2.1 "The Canadian Forces (CF) acknowledges the rights of its members to form committed relationships such as marriages and common-law partnerships. Members in common-law partnerships have the right to enjoy the same recognition and benefits as person in marriages."

[23] Queen's Regulations and Orders Article 1.075 entitled, "Common-Law Partner and Common-Law Partnership" applies by its terms to all regulations, orders, and instructions issued under the *National Defence Act*, and defines the terms in paragraph 2 as follows:

"....[C]ommon-law partner", in relation to an officer or non-commissioned member, means a person who has been cohabiting with the member in a conjugal relationship

- (a) for a period of at least one year; or
- (b) for a period of less than one year, if the member and the person have jointly assumed the support of a child.

"common-law partnership" means the relationship between an officer or non-commissioned member and the common-law partner of that member.

[24] What is meant by the term "conjugal relationship"? The Oxford Concise Dictionary defines conjugal as "of or relating to marriage or the relationship between husband and wife" and notes that the word is derived from the Latin for being yoked together. In *Molodowich v. Penttinen* (1980), 17 R.F.L. (2D) 376 at page 381, cited with approval by the Supreme Court of Canada in *M. v. H.* [1999] 2 S.C.R. 3 at paragraph 59, the Ontario District Court set out a number of factors to consider in deciding whether a conjugal relationship exists, and to help distinguish a conjugal relationship from a mere economic arrangement. In general the *Molodowich* factors seem to point to the following issues to determine whether a relationship is of a conjugal nature: is the relationship one that is intended by the parties to continue indefinitely and that involves sexual intimacy between the parties, to the exclusion of any other parties?

[25] Despite the wording of the first charge, I am satisfied that the period of one year referred to in the statutory declaration should be considered to be the period of one year beginning 29 May 2006; that is, one year prior to the date of the application, Exhibit 11. The two documents should be read together. As to the alleged falsity of the statutory declaration, the issue then is whether Private Cruz and Ms Noblefranca indeed resided together as of 29 May 2006, until 29 May 2007. Separation for military purposes does not toll the relevant period. Queen's Regulations and Orders, Article 1.075(4) provides:

For greater certainty, a common-law partnership does not end solely because the officer or non-commissioned member and the common-law partner are living separately for military reasons.

[26] I find as a fact that as of late May of 2006 Private Cruz and Rhea Noblefranca were on an extended holiday together in the Philippines, and that during the holiday Private Cruz contributed substantially to the expenses incurred by both of them. At that time they had a sexual relationship and were attempting to have a child together. After they returned to Canada, Private Cruz began his application to join the Canadian Forces, and was enrolled on 29 September 2006. After a short period of leave without pay he went to CFB Gagetown for his basic military training. In December of 2006, after the completion of his basic training, he and Ms Noblefranca made marriage plans, and they were, in fact, married in early March of 2007. The following month Private Cruz went to CFB Borden for his QL3 course in the clerking trade where he was on 17 May, when he signed the statutory declaration, and 29 May 2007, when he signed the Common-Law Partnership application.

[27] The prosecution has assumed the burden to prove a negative; that is, that Private Cruz was not residing together with Rhea Noblefranca during this period, and to prove that negative beyond a reasonable doubt. While I do not accept the evidence of Private Cruz as to where he was residing, I am not persuaded on all the evidence I have heard that he was not residing with Ms Noblefranca during this period. The prosecution relies on the evidence of Ms Noblefranca and her mother to prove this fact. But both Ms Noblefranca and her mother signed admittedly false documents, at the request of Private Cruz it is true, but nonetheless of their own volition, to mislead military authorities as to the relationship between Ms Noblefranca and Private Cruz, and his involvement in the household on Côte Saint-Luc.

[28] I consider that Ms Noblefranca was not fully candid and forthcoming in her evidence before me as to the nature of her relationship with Private Cruz before they married. For these reasons on all the evidence, including the testimony of Leonard and Loretta Cruz that Private Cruz was not residing at the Laval address for substantial periods, I have some doubt as to whether Private Cruz did not reside with Ms Noblefranca at the address on Côte Saint-Luc, and that doubt has to be resolved in favour of Private Cruz. He is not guilty on the first charge.

[29] The second charge concerns the falsity of the Common-Law Partnership Application document signed by Private Cruz. The prosecution submits that this is a false document when it states that the conditions prescribed by QR&O Article 1.075 for the recognition of common-law status were met as of 29 September 2006, because in fact, in the submission of the prosecution, the parties had not resided together in a conjugal relationship for a period of one year prior to 29 September 2006, as required by Queen's Regulations and Orders Article 1.075.

[30] On all the evidence I am satisfied that Private Cruz and Ms Noblefranca were not residing together in a conjugal relationship as early as 29 September 2005, and therefore, the application document, Exhibit 11, is a false document. But I am not satisfied that Private Cruz knew that the document was a false document at the time he signed it. I therefore find I have a reasonable doubt as to whether Private Cruz wilfully made this false document.

[31] There was little evidence as to how the common law application documents came to be prepared. I take from the evidence of Lieutenant Heffernan, who gave evidence by way of a statutory declaration, Exhibit 45, that as with other kinds of military documentation relating to the students on the QL3 course at CFB Borden, the Common-Law Partnership Application would be processed by the student's instructor. Exhibit 38 discloses that the course instructors for Private Cruz's QL3 course were Master Corporal T. Blair and Master Corporal D. Lundrigan, neither of whom gave evidence. Master Corporal Skinner gave evidence by video link for the defence. She was employed as a clerk in the orderly room for the School of Administration and Logistics at CFB Borden. On 17 May, she received a fax from Rhea Noblefranca with the statutory declaration signed by her, but lacking the signatures of Private Cruz and Lieutenant Heffernan, Exhibit 46.

This document appears to be an earlier version of what became Exhibit 10. Master Corporal Skinner had a vague recollection of being involved in the processing of Private Cruz's application, but did not give any information to the court as to the preparation of the application form, Exhibit 11, on 29 May. There is no evidence from anyone else who may have been involved in the preparation of Exhibit 11 before it was signed by Private Cruz.

[32] Exhibit 11 is not a false document except for the entry of the date "29 September 2006" entered on the line above the word "date". There is no evidence before me as to how that particular date was chosen to be inserted on that line, or by whom. It happens to be the same date as Private Cruz enrolled in the CF. As well, there is no evidence that Private Cruz was aware that for the statement to be true, he had to have been in a common-law relationship with Ms Noblefranca for the one-year period prior to his enrolment date. I am not satisfied that Private Cruz knew the significance of the date entry of 29 September on Exhibit 11 at the time he signed it. If there were evidence that Private Cruz had been instructed by the person who prepared this document as to the significance of the date entered on the form as the "effective date" of his common-law relationship, and had then answered the question falsely as to when his common-law relationship began, I might well have come to a different conclusion. He is not guilty on the second charge.

[33] The conditions of military service for the Canadian Forces often require that members live separately from their dependants for periods of time for valid military reasons. It is recognized that this enforced separation results in additional expenses to members to cover the costs of shelter, meals, and incidental expenses incurred at the new place of duty. Regulations contained in the Compensation and Benefit Instructions for the Canadian Forces (CBI) and other instruments provide for the payment of public money to compensate for these additional expenses.

[34] Charges No. 3 and 4 in the charge sheet allege offences of fraud by Private Cruz by the claiming of separation expense benefits to which he was not entitled over two different time periods. In law, fraud is deliberately dishonest deprivation.

[35] The fourth charge relates to a series of claims made by Private Cruz near the end of his course in Borden in late June of 2007 for separation expense benefits. The claims were initiated by Private Cruz signing a form called "Application for Temporary Relocation (TR) Benefits and Separation Allowance (SA), Exhibit 43. The date of signature is 12 April 2007, the first day of his QL3 course in Borden. In the box for principal residence, he gave the address of his dependants as the Côte Saint-Luc address, and sought TR benefits and SA effective 10 March 2007, the date of his marriage to Rhea Noblefranca.

[36] Exhibit 12 is a series of eight General Allowance Claim forms in which Private Cruz claimed, and was apparently paid \$13.00 per day, less adjustments, for each month from 10 October 2006 until 27 June 2007, for a total of \$2457.00. Over his signature in paragraph 2 on each claim, Private Cruz certifies, "I have a dependant as defined in CBI 209.997; that there is no separation with intent, judicial or otherwise, in existence."

[37] Again, there is virtually no evidence before me as to how the General Allowance Claim forms came to be prepared. On the face of them, seven of the documents were signed by Private Cruz on 21 June 2007, a week before the QL3 course concluded. The eighth claim form was signed by him on 28 June, the day the course finished. All eight forms were signed by one Tracy MacLean, an orderly room clerk at CFSAL, either the same day or the day after Private Cruz signed. Tracy MacLean certifies on each document that, "entitlement to SE has been established for that period under the provisions of CBI 209.997." Tracy MacLean was not called to testify. Sergeant Vezina also signed each of these claims in the position of Budget Coordinator, and testified that the entitlement to this benefit is verified by the orderly room staff. But there was no evidence as to how entitlement was verified in this case, either by the examination of other documentation or by questioning of the claimant, or perhaps by other means. In particular, there was no evidence as to how, or even whether, steps were taken to verify the status of dependants.

[38] "Dependant" is defined in the CBI 209.80(3). As applicable to this case:

"dependant" means, in respect of an officer or non-commissioned member

(a) the member's spouse or common-law partner, who is normally resident with the member at the member's place of duty or who, if living separately, is doing so for military reasons....

The prosecution argues that Ms Noblefranca was not a dependant as defined because for much of the time period in respect of which separation benefits were paid, back as far as mid-October of 2006, she was neither a spouse nor a common-law partner, but even if she were, she was not normally resident with Private Cruz, but was living with her mother alone at the Côte Saint-Luc address.

[39] For the reasons I have already given I have some doubt as to whether Private Cruz was residing with Ms Noblefranca at the Côte Saint-Luc address for some time prior to his joining the CF in September of 2006. I cannot say beyond a reasonable doubt that Ms Noblefranca was not a dependant as defined throughout the period referred to in the fourth charge, and therefore, I cannot say that Private Cruz was not entitled to separation expenses for this period. The element of deprivation of Her Majesty is not proven beyond a reasonable doubt. Even if he were not entitled to separation expenses for some part of the period under consideration, I am also not satisfied that Private Cruz dishonestly claimed this benefit. He is not guilty of the fourth charge.

[40] The third charge also concerns separation expenses claimed and apparently paid to Private Cruz over a period of 12 months while he was posted to Ottawa. These claims originated with a second Application for Temporary Relocation (TR) Benefits and Separation Allowance (SA) form, dated and signed by Private Cruz, 3 July 2007, with effect from the same date, Exhibit 16. Exhibit 14 is a series of General Allowance Claim forms

for the period 5 July 2007 to 30 June 2008 in which the costs of rental accommodation, furniture, and meals are claimed under the purported authority of Canadian Forces General Order 124/06. This instrument is before me as Exhibit 33. It states, "TR temporary relocation is only available to those members with dependants who are posted and do not move with their dependants, household goods, and effects". Again, Private Cruz signed each claim and certified, "that I have a dependant as defined in QR&O 209.80(3), that there is no separation with intent during the timeframe on this claim." Again, there is no evidence as to how the forms, Exhibit 14, came to be prepared before they were signed by Private Cruz, but each form was also signed by someone who certified, "that entitlement to SE has been established for that period under the provisions of QR&O 209.95(3), (4), or (5) as applicable."

[41] Again, the prosecution argues that Private Cruz was not entitled to these benefits because although he was separated from his wife Rhea, while performing his duties in Ottawa, he was not normally residing with her when he was in Montreal. For the reasons I have already given, I am not satisfied that Private Cruz was not residing with his wife when he was not in Ottawa performing his duties, and I therefore cannot conclude beyond a reasonable doubt that he was not entitled to the separation expenses paid to him. Even if I were so satisfied, again, I cannot say beyond a reasonable doubt that Private Cruz dishonestly claimed these amounts. He is not guilty on the third charge.

[42] The prosecution argues that Private Cruz was trained as a RMS clerk and familiar with the claims documentation and the claims process as a result of his training. Counsel points to memoranda signed by Private Cruz in evidence before me that appear to be prepared, in accordance with military custom, to a high degree of professionalism. It is submitted by the prosecution that Private Cruz became aware of separation expense benefits while posted to Borden, and made a false claim for common-law status to support his claim to benefits that would not be available to him as a single person. Counsel points to the syllabus of the QL3 course in evidence, Exhibit 38, to argue that Private Cruz was instructed generally as to personnel movement support and specifically as to imposed restriction and separation expenses as early as 31 May and 7 June 2007, during the eighth and ninth weeks of the QL3 course. I am invited then to find that Private Cruz knew he was not entitled to these benefits at the time they were claimed.

[43] In my view, the sequence of events as disclosed by the documentary evidence gives no support to the prosecutor's contentions. Private Cruz first applied for separation benefits as noted above on the first day of his QL3 course. His application for recognition of common-law status was begun some days before he was instructed as to separation expenses. On all the evidence I have heard, I conclude that Private Cruz was a very junior member of the Canadian Forces at the time he signed the claims, with little understanding of the regulations and instruments that would govern his entitlements.

[44] Finally, the fifth charge alleges an offence of wilfully attempting to obstruct the course of justice by asking Ms Noblefranca to change her statement to the military police. She testified that in 2009 the military police came to her house and a few days later she received a telephone call from Private Cruz asking her to lie and say that he lives with

her. He was upset and said if she didn't say so, he would have to go to court and pay money. He asked her to agree with what he said if the military police came to the house. Then she testified that she didn't know if lying would be the right word.

[45] On all the evidence, I cannot say that I am satisfied beyond a reasonable doubt that in speaking to Ms Noblefranca, Private Cruz intended to obstruct the course of justice. I do not know what information it was that Ms Noblefranca gave to the police, nor do I know what Private Cruz's understanding was of the information that she gave to the police. If Private Cruz was told by the police what it was that Ms Noblefranca had previously told them, that conversation was not put into evidence in this case. Nor do I know the time period she was referring to when she stated that it would be a lie to say that Private Cruz lived with her. Indeed, it appeared to me that her qualification of what Private Cruz said to her as a lie, was more of a conclusion she drew on facts that may have been apparent to her. I am not prepared to say that such a conclusion was unreasonable on her part, but there is an insufficient basis in the evidence before me to draw that same conclusion beyond a reasonable doubt. Private Cruz is not guilty on the fifth charge.

Counsel:

Captain E. Carrier, Canadian Military Prosecution Service
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Major J.A.E. Charland, Directorate Defence Counsel Services
Counsel for Private D.J. Cruz