COURT MARTIAL

Citation: *R v Wilcox*, 2011 CM 3011

Date: 20111116
Docket: 201061

Standing Court Martial

Halifax Court Room
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Ex-Corporal M.A. Wilcox, Accused

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

REASONS FOR FINDING

(Orally)

[1] On 6 March 2007, more than four years ago, at Kandahar Airfield in Afghanistan, a tragic accident occurred between two Canadian Forces brothers-in-arms involving the discharge of a 9-millimetre pistol in a tent which resulted in the death of Corporal Megeney.

[2] The Canadian soldier presumably held criminally and disciplinarily responsible by the prosecution for his actions that resulted in this consequence, which is Corporal Wilcox, is now charged with a service offence under section 130 of the *National Defence Act* for criminal negligence causing death by using a firearm contrary to subsection 220(*a*) of the *Criminal Code*, and with a service offence for negligently performing a military duty contrary to section 124 of the *National Defence Act*.

[3] All incidents of this nature are tragic, but not all of them attract criminal and or disciplinary liability. There is nothing a court can do or say that will adequately address the loss suffered by the victims' families in such circumstances. However, in assessing culpability, it is not the consequences of a negligent act of using a weapon that determines whether an accused's manner of using such a weapon is objectively dangerous. It is the manipulation itself that must be examined.

[4] Considering the nature of the charges before this court martial, its main duty is now to determine if the prosecution discharged its burden of proof in order to demonstrate beyond a reasonable doubt that Corporal Wilcox failed to exercise care that would result in such kind of liability.

THE PROCEEDINGS

[5] The proceedings for this trial started with an application made by Corporal Wilcox for a plea in bar concerning the first charge on the charge sheet. I granted the application because I came to the conclusion that this Standing Court Martial has no jurisdiction to try the accused on the first charge on the charge sheet. Consequently, I ordered that the accused be tried on the second and third charge on the charge sheet as ordered by the Court Martial Appeal Court on 18 October 2010 concerning this matter.

[6] The proceedings have lasted, so far, 32 days over nine non-consecutive weeks spread out on a period of seven months. During the prosecution's case, 19 witnesses were heard, three *voir dires* were held concerning the admissibility of three witnesses' opinions as expert opinion, one *voir dire* was held concerning the necessity of such a procedure, and five *voir dires* were held by the court to determine admissibility issues in relation to evidence. Corporal Wilcox presented a defence and he testified on his own behalf.

THE EVIDENCE

[7] The evidence is composed of the following elements:

(a) the testimony of 20 witnesses in the following order: Corporal Bowden, Commander (retired) Filips, Captain (retired) Harvey, Master Warrant Officer Miles, Mr Barr, Sergeant McKay, Master Corporal Ryles, Staff-Sergeant Ray, Master Corporal Keighan, Master Corporal Morse, Master Corporal O'Doherty, Corporal Andrews, Master Corporal Noseworthy, Captain Young, Sergeant Crosby, Sergeant Joyce, Captain Campbell, Sergeant Aston, Warrant Officer Saunders, and Corporal Wilcox, the accused in this trial;

(b) sixty-five exhibits which include documents such as Canadian Forces publications, reports, sketches made by witnesses, written admissions, photographs, videos on DVD, clothes, and weapons;

(c) admissions made by the accused, many in relation to the work done, the pictures taken, and the items seized by the investigator, Corporal Foster, on the day of the incident. Also Corporal Wilcox made some other admissions in writing and in relation to some essential elements of both offences as charged, including the main following one:

(i) that on or about 6 March 2007, at or near Kandahar, Afghanistan, he did, with the said 9-millimetre Browning pistol, shoot Corporal Megeney, R.K., causing his death; and

(d) the judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

THE FACTS

Corporal Wilcox's career

[8] Corporal Wilcox joined the Primary Reserve Force component of the Canadian Forces on 23 October 2003. He chose to be an infantryman with the 2nd Battalion, Nova Scotia Highlanders in Sydney, Nova Scotia. He went through different training in order to be properly qualified as a soldier.

[9] First he went on his basic military qualification (BMQ) training that he followed on weekends at his unit. He got qualified on that course at the end of the month of March 2004. Further to that, he went to his first specific trade course, the Primary Reserve soldier qualification (P Res SQ) on which he succeeded on July 2004.

[10] His first developmental period (DP1) in his trade, which includes all necessary courses, was completed on 20 August 2004, and his second developmental period (DP2), as a soldier in the Reserve Force, was completed on 13 May 2005.

[11] In order to move on with his career progression, Corporal Wilcox was selected as a candidate in order to attend the next required course, the primary leadership qualification (PLQ) course that would allow him, with the proper time, experience, and another occupational course to be appointed as a master corporal.

[12] He did the proper modules on that course and he successfully completed his PLQ course in the month of March 2006. It is during that course that he first met one of his brothers-in-arms and his friend Corporal Kevin Megeney.

[13] At that point of his training as a soldier, Corporal Wilcox has received training, including on different weapons, the rifle (C7), the light machine gun (C9), the machine gun (C6), the hand grenade, grenade launcher (M203), the 60-millimetre mortar (M72), the 84-millimetre (Carl Gustav), and the 9-millimetre Browning pistol. He was also qualified as a wheeled driver and a radio operator.

[14] He was taught how to handle those different weapons with safety principles that are common to all weapons, such as never aim a weapon to anybody unless you want to fire at that person and consider always a weapon as to be loaded.

[15] He was first introduced to the 9-millimetre Browning pistol as a soldier during his DP2. He saw again this weapon during his PLQ course. At the end of his PLQ

course he was qualified as an instructor able to assist the range safety officer (RSO) and the assisting range safety officer (ARSO) on the range by providing coaching to an individual firing and also as a person able to instruct on some firearms such as the 9-millimetre Browning pistol.

Pre-deployment training on Task Force 1-07

[16] Corporal Wilcox volunteered in 2006 to be part of the Task Force (TF) 1-07 that would be deployed in Afghanistan at the beginning of the year 2007. The purpose of that task force was to qualify soldiers in order to conduct combat operations in Afghanistan.

[17] For being deployed with TF 1-07, soldiers had to complete all training and to go successfully through proper personal weapons tests from April to December 2006. It means that soldiers reviewed, fired, and were tested on the weapons they knew, which includes the 9-millimetre Browning pistol. They were also taught and tested on the shotgun because it was a weapon that they would have to carry and use in Afghanistan. Corporal Wilcox properly qualified on weapons in order to be deployed in Afghanistan.

[18] Corporal Wilcox trained with the National Security Element that would be deployed as a part of the task force. His platoon, which is 1 Platoon, trained mainly on convoy escort and a bit on manning an access gate. Concerning weapons, soldiers were trained on a conventional range during day and night conditions, and on non-conventional ranges such as jungle range-type. The latter is a range where the soldier shall move through a trail where targets will pop-up obliging the soldier to identify each target and make the decision to fire at it or not. Basically the soldier must instinctively shoot at the target. This way, to compose with the situation, was previously practiced on a conventional range including with the 9-millimetre Browning pistol.

[19] As a group, the platoon was also involved in laser training. Soldiers had to wear a vest with sensors on it that will react only to a laser placed on their weapon when they are shot by another soldier. Also, it collects data that it is used to assess how soldiers perform their task when confronted to an enemy and if in the heat of the battle they respect basic rules in order to avoid a friendly-fire incident. The reality is that such incidents occurred once during the training and soldiers were briefed on that issue.

[20] The platoon exercised also by having sections moving under live fire in order to get familiarized with real battle conditions. Finally, the platoon received urban operations training, which consisted in part to clear buildings of enemies. It is very demanding to soldiers because they must assess quickly if they must shoot or not to a target, especially knowing that friendly forces are performing the same task in the same building.

[21] Corporal Wilcox received all this training with his fellow comrades of his section including Corporal Megeney, and he ended up in the month of December 2006 to be declared ready to be deployed. The training took place in three different locations

throughout those eight months: the camp Aldershot in the province of Nova Scotia, the base of Gagetown in the province of New Brunswick, and the base of Wainwright in the province of Alberta. Soldiers stayed on those locations at least twice and three times for the base of Gagetown which was the departure location for deployment overseas. It is important to mention that Corporal Wilcox did not train with his platoon the second time it went to Wainwright because he had a wheeled driver course in Gagetown. It is the only time he did not train with his platoon.

[22] While on training some incidents occurred in relation to weapons. According to one of the platoon members Corporal Andrews, during the time the platoon was training for the first time in Wainwright, Corporal Wilcox, Corporal Megeney, and he played quick draw on one night with two unloaded 9-millimetre Browning pistols. Playing quick draw would mean that two individuals are facing each other at some distance, and on a signal such as a word said or by being the first to draw the pistol from the holster, both individuals would try to be the fastest to draw his pistol, to aim and shoot at the other person.

[23] Also while on training for the second time in Wainwright, on which Corporal Wilcox couldn't attend because he was on a driving course in Gagetown, some platoon members were involved in some unusual incidents. Master Corporal Crosby, as then he was, was filmed pointing at very close range an unloaded 9-millimetre Browning pistol on the head of Sergeant Joyce. Right after this incident, Sergeant Campbell reminded Master Corporal Crosby that such things must never happen, and it was decided that superiors would remind all platoon members about safety concerns when handling such weapons, which they did.

[24] During the same period of time, three photographs were taken depicting on each a member of the platoon, which were Sergeants Aston, Joyce, and Campbell handling in a tent a 9-millimetre Browning pistol. They were referred to by some witnesses as some trophy pictures taken as a souvenir.

[25] Also during that same period, Master Corporal Crosby was filmed while reassembling a 9-millimetre Browning pistol and pointing directly to the camera.

[26] Before deployment, Corporal Wilcox was personally assigned the following weapons: a C7A2 rifle, an M203 grenade launcher, and a 9-millimetre Browning pistol. Corporal Megeney was personally assigned also the following weapons: a C7A2 rifle and a 9-millimetre Browning pistol.

The deployment of Task Force 1-07

[27] Corporal Wilcox deployed with his comrades at the beginning of the month of December 2006 and he landed with his equipment, weapons, and ammunition on Kandahar Airfield (KAF) in Afghanistan on 12 December 2006.

[28] 1 Platoon was led by Lieutenant Pentney and his second in command was Warrant Officer Saunders. The section commanders were Sergeant Campbell for one section, Sergeant Aston for two section, Sergeant Joyce for three section, and Master Corporal Pouchelu for four section.

[29] Corporal Wilcox was a member of three section under the responsibility of Sergeant Joyce. The other section members were, in order of command within the section, Master Corporal Crosby as the second in command, Corporal Megeney, Corporal Morse, Corporal Andrews, Corporal Bowden, Corporal Noseworthy, and Private MacMullin. Corporal Wilcox was fourth in command within the section.

[30] On their arrival in KAF, platoon members were brought to a hangar to be briefed about do's and don'ts on the camp. It is important to remember that the camp was handled by the Americans; some specific rules about various items had to be passed to Canadian troops on their arrival by Canadian Forces personnel on subjects such as dress, fraternization, alarms, meals, and other miscellaneous points. Those rules were adapted for the Canadian contingent and could restrict those issued by the Americans.

[31] Another topic presented to the troops was about the status of weapons on camp. Soldiers were told that while on KAF, personal weapons would be carried at all times, except while doing physical training (PT) and conducting personal hygiene, situations for which weapons will be secured. Weapons shall not be loaded; however, a magazine must be available at all times.

[32] The term "unload" means that no magazine is placed in the weapon. The term "load" means that the magazine, with rounds in it, is inserted in the weapon. The term "ready" means that once a magazine is in the weapon, a round has been placed in the chamber of the weapon and the latter is locked on safe. In that position, the weapon is ready to fire immediately once the safety feature is removed.

[33] 1 Platoon was part of the NSE Force Protection component. Its main task was to operate entry control point three (ECP 3). It was one of the entry and exit points on KAF where soldiers of the contingent, foreign people, and Afghanis would access the camp. The platoon had to perform personnel and vehicle search while protecting this entry point of any attack by Talibans.

[34] Further to their briefing, soldiers were brought to their tents in order to install themselves and to rest. After one night's rest, platoon members went to the firing range to conduct personal weapons zeroing.

[35] After that 1 Platoon members proceeded to a turnover with the platoon they were replacing. On the first day they observed how the various tasks were performed, and on the second day they did the tasks under the supervision of those they were taking over from.

[36] After some days, an individual picture was taken for each member of the platoon in order to create for each of the soldiers an identification card (ID). Some days after they all received an ID card, and for those working at ECP 3 the mention "Force Exemption" was placed on it.

[37] This mention was put on ID cards of those who were involved in the protection of the camp such as the military police members and soldiers working at access gates of the camp. The meaning of the mention "Force Exemption" is that those who were wearing it were authorized to carry weapons loaded and ready to fire everywhere on KAF.

[38] However, the Canadian contingent clearly limited the scope of such directive by ordering to the soldiers working at an entry control point to have their weapon loaded and ready when on duty at that location, and to carry their weapons unloaded once outside that location and anywhere else on KAF. This limitation was passed to soldiers of 1 Platoon. It was an individual and a group responsibility to make sure that everybody would conduct themselves in accordance with this directive.

[39] For authorities on the camp, it was a constant struggle with soldiers to have the weapons unloaded directive on the camp respected. If a soldier was caught having his weapon loaded, then the approach developed was to have him put his weapon in the proper condition, reminding him about the directive on KAF, and contact his superior to reinforce the need to reiterate and reinforce to soldiers the camp directive's requirement concerning weapons. It is only when a soldier would deliberately infringe the directive that a disciplinary action would be taken by the chain of command against him.

[40] At least twice, Sergeant Joyce, three section commander, had to remind to three section members the weapons policy on camp during the month of January and February 2007. Three section members were not very problematic on that respect, from a chain of command point of view, and did not have to be reminded more than others on that perspective.

[41] The only notable incident concerning the weapons involving three section members happened at the range. On one evening, after a day shift at ECP 3 and further to an authorization obtained by Sergeant Joyce, three section members went on the range to fire non-lethal ammunition with their grenade launcher (M203) and their shotgun. Sergeant Joyce was the range safety officer and Master Corporal Crosby was the assisting range safety officer. Members shot at a car as a target with the ammunition. Corporal Noseworthy, as then he was at the time, was authorized to pass the firing line and approach the target in order to film the impact and effect of the ammunition on it. However, it was contrary to the usual safety rules on the range. Also, for demonstrating the effect of the ammunition on a person, Sergeant Joyce fired once at Master Corporal Crosby who wore additional personal protective equipment. Fortunately, he was not injured, but this practice was totally unsafe, executed without the knowledge of any higher authority, and against the usual safety rules applicable on the range.

The environment

[42] Three section was living in a rectangular modular tent with one door at each end of the tent. Sergeant Crosby, Corporal Megeney, and Corporal Wilcox were living in a space located at the back of tent and separated by a temporary wall made of plywood. Other members of the section, Corporal Morse, Corporal Andrews, Corporal Bowden, Corporal Noseworthy, and Private MacMullin were living in the larger space located at the front of the tent. Sergeant Joyce, as a section commander, was living in a different modular tent with the other section commanders.

[43] This place was considered by soldiers pretty much as their home and a safe area. They clearly expressed that KAF camp was secure inside considering the context. They clearly recognized that the place was considered as a war zone, was warm, dusty, somewhat dirty, and noisy because of the airfield activities and the vehicles constantly moving night and day, with many people carrying weapons, and authorized Afghanis moving inside the camp. They have been exposed to some rocket attacks while on camp, but none of them felt personally threatened once in their quarters.

The work at ECP 3

[44] At ECP 3, members of three section had to perform a shift of 12 hours. Then, there was a day shift from 6:30 a.m. to 6:30 p.m. and a night shift from 6:30 p.m. to 6:30 a.m. There were four tasks at that entry point for soldiers to perform: the gate, the area for personnel search, the area for initial personnel and vehicle search (OP2) followed by a thorough vehicle search, and a group of soldiers ready to provide help at any of these points when there was an additional workload called "flex."

[45] There was a duty list where soldiers of three section would find out where they would be tasked. There was a rotation for night and day shift and also for the tasks performed. They would usually use a vehicle to transport themselves from their tent to ECP 3 with their personal protection equipment and their weapons. On arrival, they would go to the clearing bay to load and ready their weapons. At that place they will put their weapons in a small hole in a barrel filled with sand and they will load their weapons.

[46] Once on location, while performing their duties, they will have a rest period that they would spend in the rest area which was equipped with air conditioning, some beds, drinks, and some video games.

[47] There will be rush hours mainly in the morning when most of the people would come in the camp and at the end of the day when most of the people will exit the camp.

[48] The purpose of the task is to protect the entry point, but also to prevent the introduction of any explosive devices or weapons in the camp. Also soldiers would search for preventing theft by searching for any valuables.

[49] Once their shift would be terminated, they will go to the clearing bay to unload their weapons, get in a vehicle, and go back to their tent. This practice was usually respected, but it has happened once in a while that a three section member would forget to unload his weapons at the clearing bay. He would do so once at his tent by going to a clearing bay close to the tent or by clearing his weapons around or in his tent. In summary, leaving ECP 3 with a loaded weapon was not a big deal and forgetting to unload his weapon was not a huge deal or violation for which you could assume that you would not be charged for this.

[50] Usually soldiers would clean their weapons in their tent at least twice a week. For that purpose they would apply the usual safety measures learned in order to do it.

The incident

[51] On 6 March 2007 six members of three section were on duty on the day shift. One group was constituted of Corporal Megeney, Corporal Morse, and Corporal Andrews. The other group involved Master Corporal Crosby, Corporal Wilcox, and Private Pitchuk. The latter was added to the section for the task on that day because of a shortage of people.

[52] On that day, Sergeant Joyce was involved in another task concerning convoy escort, meaning that Master Corporal Crosby was in charge of the section. Private MacMullin was also on leave, and Corporals Noseworthy and Bowden were off duty.

[53] The group of six soldiers left in the morning in a vehicle with their personnel gear and weapons. On that day they were performing gate shift. On their arrival at ECP 3 they loaded their weapons at the clearing bay.

[54] Basically, one group of three soldiers would be on duty while the other group would rest for two hours and take over from the first one. It went like this during the entire shift. The day was fairly routine and nothing out of the ordinary happened. The last group to perform the duty was Corporal Wilcox's group, the other group already grabbed their things and packed up.

[55] At the end of the day, Corporal Wilcox went to the clearing bay to unload his rifle and pistol. He unloaded both weapons starting with the rifle; however, after he unloaded his 9-millimetre Browning pistol he heard the horn of the vehicle, he put back in his holster the pistol while keeping in his other hand the magazine full of rounds, took his computer bag, his rifle, and other gear. He realized that he couldn't put back the magazine in the pocket on his holster because he couldn't reach it, then he decided to put it back directly in his pistol and to unload it again later.

[56] He went back to the vehicle, got in it, and the group left. Master Corporal Crosby was driving; he went back to the tent and parked at the rear of the tent close to the door giving access to Corporal Wilcox's side of the tent. The group got out of the car, except for Private Pitchuk and Master Corporal Crosby. Private Pitchuk being temporar-

ily tasked to three section and living in a different area, Master Corporal Crosby had to drive him back to a different place. The latter asked Corporal Megeney if he could bring back his personal equipment to the tent to which he agreed.

[57] Corporal Bowden and Corporal Noseworthy were in the tent on their side when the group came back. They heard the vehicle arrive, the group going out of the vehicle, noticed that Corporal Megeney and Corporal Wilcox entered their side of the tent by hearing their voices, and saw others, Corporals Morse and Andrews, arrive by coming in their side of the tent.

[58] Master Corporal Crosby left the location to drive Corporal Pitchuk back to his tent.

[59] People around and in the tent heard a shot characterized by many people as coming from a 9-millimetre Browning pistol. They also heard a sound from somebody in distress and Corporal Wilcox calling for help. Many people ran to the location where the shot's sound came from.

[60] When he arrived, Sergeant Campbell saw Corporal Wilcox beside Corporal Megeney. The latter was lying down on the floor beside his bed. Sergeant Campbell approached Corporal Megeney and found out that he was shot in the chest. He started first aid, he asked Corporal McKay to escort Corporal Wilcox out of the tent. He realized that Corporal Megeney's condition was deteriorating quickly, and instead of calling an ambulance, he asked for a stretcher for transporting Corporal Megeney to the hospital located close to the tent.

[61] Meanwhile, Sergeant Joyce had run to the tent where the gunshot came from and he saw Corporal Wilcox outside the tent with Corporal Morse. He learned from Corporal Wilcox that he shot Corporal Megeney. He then decided to go immediately to the hospital to ask for an ambulance. On his way, he ran into two American soldiers in a vehicle and asked them to call for an ambulance which they did. He also found out that one of these soldiers was trained as a combat lifesaver and asked him to go to the tent in order to help.

[62] Sergeant Joyce decided to go back to the tent and on his way he passed Canadian soldiers carrying a stretcher to the hospital with Corporal Megeney on it. At the hospital it was confirmed that Corporal Megeney suffered a gunshot wound to the right chest. After 30 minutes of resuscitative efforts that produced no results, the death of Corporal Megeney was pronounced at 1902 hours on 6 March 2007 by the physician Commander Filips. An autopsy performed five days later by the chief forensic pathologist for Ontario confirmed that the cause of the death of Corporal Megeney was a perforating gunshot wound of the chest.

[63] When he went back to the tent, Master Corporal Crosby saw some people gathered around the tent. He learned from Corporal Andrews that Corporal Megeney was shot and brought to the hospital.

[64] Sergeant Joyce came back to the tent once he had talked to the American soldiers, and when he saw Corporal Wilcox he asked him the "no bullshit version" of what happened.

[65] Corporal Wilcox told him that he saw Corporal Megeney moving and that the latter pointed his pistol at him, then he went to draw his own pistol, pointed it at Corporal Megeney, pulled the trigger, and shot him.

[66] Further to that, Sergeant Joyce left Corporal Wilcox with Corporal Morse, he went into the tent and saw somebody moving things. He ordered, basically, to freeze the scene, asked Corporals Andrews and Noseworthy to help him secure the weapons left in the tent which were two rifles, C7A2, and two 9-millimetre Browning pistols, and put Master Corporal Pouchelu in the doorway at the entrance to prevent any access.

[67] Accompanied by Sergeant Aston he went to the MPs office to report what happened and he found out that Corporal Megeney was declared dead.

[68] On his return to the tent area, Sergeant Joyce brought together the members of three section and told them the bad news about Corporal Megeney.

After the incident

[69] Corporal Wilcox was arrested for 2nd degree murder on the night of 6 to 7 March 2007. On 7 March 2007 he met a nurse specialized as a mental health counsellor to find out how he was making out and if he needs any treatment. Some days later, Corporal Wilcox was released with conditions. On the day Corporal Wilcox was released, Master Corporal Crosby went to see him on his way back from duty at ECP 3 to find out how he was making out.

[70] Master Corporal Crosby met Corporal Wilcox outside of four section's tent area because Corporal Wilcox was moved at that location. They both moved inside the tent, and started to play video games. At some point Master Corporal Crosby told to Corporal Wilcox how he personally felt about the incident, to wit Corporal Wilcox responded that he didn't know how his pistol got loaded because he remembered unloading his rifle and all he remembered from this whole instance is the smoke in the air and the smell of the gun powder.

[71] Sometime later, while at the Tim Hortons on the base, Master Corporal Ryles met Corporal Wilcox at that location. Both were waiting in line. Master Corporal Ryles told Corporal Wilcox that it was hard stuff and too bad in reference to the incident. Corporal Wilcox replied to him that it was an accident, that they were only playing, and that they wanted to see who was faster.

[72] Finally, Corporal Wilcox was repatriated to Canada during the month of March 2007.

THE LAW

[73] On the charge laid under section 130 of the *National Defence Act*, Corporal Wilcox is charged with criminal negligence causing the death of Corporal Megeney by using, possessing, carrying, or handling a firearm contrary to paragraph 220(*a*) of the *Criminal Code*.

[74] Section 220 of the *Criminal Code* reads as follows:

> 220. Every person who by criminal negligence causes death to another person is guilty of an indictable offence and liable
>
> (*a*) where a firearm is used in the commission of the offence, to imprisonment for life and to a minimum punishment of imprisonment for a term of four years; and
>
> (*b*) in any other, case to imprisonment for life....

[75] Despite the fact that it does not create an offence, section 219 of the *Criminal Code* defines criminal negligence. This section provides:

> 219. (1) Every one is criminally negligent who
>
> (*a*) in doing anything, or
>
> (*b*) in omitting to do anything that it is his duty to do,
>
> shows wanton or reckless disregard for the lives or safety of other persons.
>
> (2) For the purposes of this section; "duty" means a duty imposed by law....

[76] As stated by the honourable Madam Justice Rowles from the court of appeal for British Columbia in the decision of *R v Hughes*, 2011 BCCA 220, at paragraph 29:

> Under s. 219(1), criminal negligence is established where an accused, in doing anything, or in omitting to do anything that it is his or her legal duty to do, shows wanton or reckless disregard for the lives or safety of other persons. The *mens rea* or mental element in criminal negligence is the same for both acts of commission and omissions: *R. v. Tutton*, ... [1989] 1 S.C.R. 1392.

[77] For the court to find Corporal Wilcox guilty of criminal negligence causing the death, in addition to the identity, the place, and the date, the prosecution must prove each of these following essential elements beyond a reasonable doubt:

(a) that Corporal Wilcox, while handling a firearm, caused the discharge of it in proximity to others persons or failed to take adequate safety precautions to prevent the discharge of it which it was his duty to do;

(b) that in handling a firearm causing the discharge of it in proximity to other persons, or failing to take adequate safety precautions to prevent the discharge of it, Corporal Wilcox showed a wanton or reckless disregard for the lives or safety of others; and

(c) that Corporal Wilcox's conduct caused Corporal Megeney's death.

[78] In order to prove that Corporal Wilcox caused the discharge of his 9-millimetre Browning pistol, or while handling his pistol he failed to take adequate safety precautions to prevent the discharge of it, as it was his duty to do, this essential element required the prosecution to prove either of the following:

(a) that Corporal Wilcox caused the discharge of his pistol; or

(b) that Corporal Wilcox failed to take adequate safety precautions to prevent the discharge of his pistol that Corporal Wilcox has a legal duty to do.

[79] The prosecution does not have to prove that Corporal Wilcox meant to kill or seriously harm Corporal Megeney or anybody else. What the prosecution has to prove beyond a reasonable doubt, however, is that what Corporal Wilcox did or failed to do, showed a wanton or reckless disregard for the lives or safety of others.

[80] Criminal negligence requires more than just carelessness on Corporal Wilcox's part. What he did or failed to do must be a marked and substantial departure from what a reasonably prudent person would do in the same circumstances, as stated in *R v J.F.*, 2008 SCC 60, at paragraph 11 and 68.

[81] The prosecution may prove this marked and substantial departure from what a reasonably prudent person would do in the same circumstances in either of two ways:

(a) by proving that Corporal Wilcox was aware of a danger or risk to the lives or safety of others, but went ahead anyway;

(b) by proving that Corporal Wilcox simply gave no thought to the possibility that any such risk existed.

[82] The prosecution does not have to prove both, it is enough for the prosecution to prove one or the other.

[83] For an act or omission to cause someone's death it must be at least a contributing cause, one that is beyond something that is trifling or minor in nature. There must not be anything that somebody else does later that results in Corporal Wilcox's act or omission no longer being a significant contributing cause of Corporal Megeney's death.

[84] It is of no concern too, that proper medical treatment might have saved Corporal Megeney's life.

[85] To answer this question the court must consider all the evidence. The court does not limit its consideration only to the opinion of the expert about what caused Corporal Megeney's death. The court takes into account, as well, the testimony of any witness who described the events that took place around the time that Corporal Megeney was injured and died.

[86] On the charge laid under section 124 of the *National Defence Act*, Corporal Wilcox is charged with having negligently performed a military duty imposed on him by failing to take proper precautions against the unsafe discharge of a firearm he used or handled.

[87] Section 124 of the *National Defence Act* reads as follows:

> Every person who negligently performs a military duty imposed on that person is guilty of an offense and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

[88] The essential elements of the offence under section 124 of the *National Defence Act* are:

(a) the identity of the accused as the offender;

(b) the date and place of the offence;

(c) the accused failed to perform a military duty imposed on him, which includes to prove that:

  (i) a military duty was imposed on the accused;

  (ii) the accused was aware of the military duty imposed on him;

(d) the accused performed negligently the military duty imposed on him, which includes:

  (i) to prove that there was a standard of care to be exercised by the accused;

  (ii) the acts or omissions of the accused were in relation to the military duty imposed on him;

  (iii) the conduct of the accused breached the required standard of care; and

(iv) the conduct of the accused amounted to a negligence, which means that the acts or omissions of the accused constituted a marked departure from the expected standard of care.

[89] As a matter of fact, in 1995 the Court Martial Appeal Court clearly established in the case of *R v Mathieu*, CMAC 379 at page 13, that for penal negligence offences such as the negligent performance of duties under section 124 of the *National Defence Act*, "the applicable standard of liability is an objective standard based on the court's assessment of what a reasonable person would have done in the circumstances" which would apply to establish both the *actus reus* and the *mens rea*.

[90] This position was reiterated by the Court Martial Appeal Court in its recent decision of *R v Day*, 2011 CMAC 3, where Judge Weiler, writing for the court, clearly expressed the view at paragraphs 11 and 12 that the Supreme Court decision in *R v Creighton*, [1993] 3 SCR 3, must receive application.

> [11] The prosecution submits that the military judge recognized that the standard of care was an objective one, namely, that of a reasonable person in all the circumstances of the case, but that the approach adopted by the military judge personalized the test. He erred in requiring the prosecution to lead evidence of Captain Day's knowledge, training and experience. This, the prosecution submits, was rejected by the Supreme Court of Canada in *R .v. Creighton*, [1993] 3 S.C.R. 3.
>
> [12] I agree with this submission. In *Creighton* at pages 41, 58, 60, and 73, the Supreme Court held that for an offence based on negligence the standard is a "marked departure" from the conduct of a reasonable person in all the circumstances of the case. The Supreme Court recognized that some activities may impose a higher *de facto* standard than others. This flows from the circumstances of the activity, not from the expertise of the actor. It is a uniform standard regardless of the background, education, or psychological disposition of the actor. The Supreme Court expressly rejected the argument that the standard of care in crimes of negligence would vary with the degree of experience, education, and other personal characteristics of the accused. *Creighton* was applied by this court in the military context in *R. v. Mathieu*, (1995) 5 C.M.A.R. 363 at pp. 373-374.

[91] Then, in order to assess properly if the conduct of the accused amounted to negligence, the court comes to the conclusion that the offence of negligent performance of duties is of a nature of penal negligence, but calls for being less serious than the offence of criminal negligence in the *Criminal Code*. The maximum punishment established for an offence under section 124 of the *National Defence Act*, which is dismissal with disgrace from Her Majesty's service, is an objective indication for explaining why the relative seriousness of those two offences make the offence of negligent performance of duties as been held by military courts to require only a marked departure from the norm. Also the court relies on the approach taken on a very similar issue by Judge Fish in *R v J.F.*, 2008 SCC 60, at paragraphs 11 to 13.

[92] Before this court provides its legal analysis, it's 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 principles fundamental to all criminal trials.

And these principles, of course, are well-known to counsel, but other people in this courtroom may well be less familiar with them.

[93] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent; it is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[94] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. Their burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[95] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R v Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court's subsequent decision. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court, but also on what the evidence does not tell the court. The fact that a person has been charged is in no way indicative of his or her guilt. And I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[96] In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, the Supreme Court held that:

> ... [A]n effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities....

[97] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Corporal Wilcox, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[98] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed, what they did. It could be documents, photographs, maps, or other items introduced by witnesses. The testimony of expert witnesses, formal admissions of facts by either the prosecution or defence, and matters of which the court takes judicial notice.

[99] It is not unusual that some evidence presented before the court may be contradictory. Often witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[100] Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness' opportunity to observe, a witness' reasons to remember, like, were the events noteworthy, unusual and striking, or relatively unimportant and therefore understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial that is a reason to favour the prosecution or the defence or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[101] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative. Finally, was the witness' testimony consistent with itself and with the uncontradicted facts?

[102] Minor discrepancies which can and do innocently occur do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter, it is always serious and it may well taint a witness' entire testimony.

[103] The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. However, the court will accept evidence as trustworthy unless there is a reason rather to disbelieve it.

[104] As the rule of reasonable doubt applies to the issue of credibility, the court is required to definitely decide in this case, first, on the credibility of the accused and to believe or disbelieve him. It is true that this case raises some important credibility issues and it is one of those cases where the approach on the assessments of credibility expressed by the Supreme Court of Canada in *R v W.(D.)*, [1991] 1 SCR 742, must be applied because the accused, Corporal Wilcox, testified. As established in that decision at page 758, the test goes as follows:

> First, if you believe the evidence of the accused, obviously, you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in a reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[105] This test was enunciated mainly to avoid for the trier of facts to proceed with establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word by word as some sort of incantation, (See *R v S (W.D.)*, [1994] 3 SCR 521 at page 533).

[106] As underlined by Justice Avalar, writing for the majority in *R v C.L.Y.*, 2008 SCC 2, at paragraph 10, I want to confirm that I am aware of the test in *W.*(*D.)*, aforementioned, and of the decisions of the Supreme Court of Canada delivered in *C.L.Y.* quoted just above and *R v J.H.S.*, 2008 SCC 30, on the application of that test while assessing credibility. The pitfall that this court must avoid is to be in a situation appearing or in reality as it chose between two versions in its analysis.

[107] Having instructed myself as to the presumption of innocence, a reasonable doubt, the honest and the required standard of proof, and the essential elements of both offences, I will now proceed with the analysis of the case.

THE POSITION OF THE PARTIES

[108] The prosecution takes the position that if the court believes the evidence adduced by the accused, then it would prove beyond a reasonable doubt all essential elements of both offences. Essentially the prosecution is of the opinion that Corporal Wilcox clearly stated that he showed a wanton or reckless disregard for the life or safety of Corporal Megeney by not taking the time to identify the person before shooting. Concerning the self-defence means claimed by the accused, the prosecution says that it cannot be considered by the court because the accused has not established an air of reality to that defence, and if so, then the prosecution has established beyond a reasonable doubt that there was not a reasonable apprehension of a risk of death or grievous bodily harm for the accused and that there was not also reasonable belief for the accused that it was not possible to preserve himself from harm except by killing the adversary. On the other hand, if the court does not believe the accused, then the prosecution affirms that it has proven beyond a reasonable doubt all essential elements for both offences. Finally, the prosecution takes the position that the offence of manslaughter is a lesser and included offence to the offence of criminal negligence causing death and that the court can find the accused guilty of that offence. If the court concludes that it is not the case, then the prosecution strongly suggests that the court can find the accused guilty of the lesser and included offence of careless use of a weapon.

[109] Corporal Wilcox claims that he must be believed and that he met the necessary evidential burden on the three constitutive elements of self-defence in order for the court to consider it. He clearly states that he was not negligent when he shot Corporal Megeney and that the way he reacted in the circumstances were clearly self-defence because the perception of the accused being assaulted was reasonable; that it was reasonable for him to think that the person will shoot at him and there was no other way for him to get out of the situation. If the court does not believe Corporal Wilcox, then the court is left with the evidence that does not establish beyond a reasonable doubt that the accused was negligent. In fact, according to him, there is not much evidence on the circumstances of the shooting other than a possible quick draw game between the victim and the accused, which is very tiny for the court to make a conclusion beyond a reasonable doubt of negligence with a marked and substantial departure from the norm. Concerning the other charge, Corporal Wilcox suggests that the military duty imposed on him concerning the status of the weapon on KAF camp was vague because the directive was clear, but its application varied a lot within the section, especially in the light of the behaviour of people of his section towards security of weapons. Then, his conclusion is that he must be acquitted on both charges because the prosecution failed to prove beyond a reasonable doubt some essential elements on both counts.

THE ISSUES

[110] Many admissions have been made by the accused leaving the court with only one issue to deal with on the first charge and also with a couple of issues to deal with on the second charge.

[111] Concerning the first charge, the only question the court shall answer can be formulated as the following: Did Corporal Wilcox show a wanton and reckless disregard for the life or safety of Corporal Megeney?

[112] Concerning the second charge, the two questions the court must answer are:

(a) Did Corporal Wilcox fail to perform a military duty imposed on him; and

(b) Did Corporal Wilcox perform negligently the military duty imposed on him?

THE ANALYSIS

Criminal negligence causing death

[113] First, the court would like to deal with the issue of lesser and included offence to the charge of criminal negligence causing death. It is clear for the court that this issue has been dealt with by Judge Arbour in the Supreme Court decision of *R v Morrisey*, [2000] 2 SCR 90. Obviously, she stated that the offences of manslaughter and criminal negligence causing death are equivalent and interchangeable, having the same maxi-

mum and minimum punishment. Clearly, one is not lesser and included to the other. At paragraph 62 of the decision she said:

> The circumstances of this case palpably demonstrate the overlap: the accused was initially charged with manslaughter and there is nothing in the record that explains why he was committed for trial on the charge of criminal negligence causing death rather than on the original charge of manslaughter. Nothing turns on this since the two are totally interchangeable. This is further demonstrated by cases, such as *R. v. Collins*, [1999] O.J. No. 2437 (QL) (S.C.J.), which indicate that the s. 86(2) offence of careless handling or use of a firearm is a lesser, included offence to criminal negligence causing death, the distinction turning on the degree to which the conduct departs from the required standard. The equivalency between the two offences is further demonstrated by the sentencing provisions of s. 220(*a*) and s. 236(*a*), both of which provide a four-year, mandatory minimum sentence where a firearm is used in the commission of criminal negligence causing death and manslaughter, respectively.

[114] For the court, only the offence of careless handling or use of a firearm is a lesser and included offence to the offence of criminal negligence causing death.

[115] Now, in the context where Corporal Wilcox made admissions, including that on or about 6 March 2007 at or near Kandahar, Afghanistan, he did with his 9-millimetre Browning pistol shoot Corporal Megeney, R.K., causing his death, the court is left with deciding on only one essential element of the offence of criminal negligence causing death, did Corporal Wilcox show a wanton or reckless disregard for the life or safety of Corporal Megeney?

[116] In order to answer this question, the court is turning now the test enunciated by the Supreme Court in *W.(D.)* aforementioned. I will first proceed with the analysis of the evidence introduced by the accused. The nature of this evidence in this case requires this court to make certain findings as to the credibility of some witnesses in order to assess properly the credibility and reliability of the accused in light of all of the evidence.

[117] Corporal Wilcox testified in a straightforward and relatively calm manner. He provided a logical explanation how his pistol ended as loaded once he left the entry control point at the end of the day in order to return to his tent. He admitted that he had opportunities to comply with the directive for having an unloaded weapon on camp once off duty from ECP 3, and that he has usually conformed himself to it except for one time. He recognized that this directive was reinforced by his section commander twice before and that he understood it well.

[118] He told the court that once he brought back in his tent some equipment belonging to Master Corporal Crosby, he heard a weapon being cocked and he saw a weapon pointed at him on his right side at his five o'clock, that he drew immediately his 9-millimetre Browning pistol armed it, pointed at the person aiming at him, and fired one round. He then realized that he shot Corporal Megeney. He dropped his pistol, went to Corporal Megeney, and called for help. Some people came immediately; Sergeant Campbell started first aid and asked him to leave the tent.

[119] Corporal Wilcox confirmed the he talked to Sergeant Joyce outside the tent after the incident. He confirmed that he told him that he saw a weapon at him and that he fired with his pistol.

[120] Despite the fact that Corporal Wilcox may appear sincere while telling his own version of the story, the court cannot believe him concerning the very circumstances of the shooting. Corporal Wilcox told the court that he reacted instinctively without paying attention to the circumstances and to the person he was shooting at. It is very hard to believe that he did so when no evidence was adduced to support such a reaction. Basically, Corporal Wilcox was in his tent, a place well-known to him and where he was used to live, for which he never feared to see or find a Taliban as he said to the court. He never provided an explanation why he would have any reason to be afraid for his life in his tent at that moment and he confirmed that he felt secure in the compound. Reality is that he confirmed in his testimony that there was nothing at the time of the incident to make him feel threatened. Nothing unusual happened on that day on his shift at ECP 3, no special directive was issued about possible intrusion in the camp, no previous circumstances occurred recently calling for soldiers such as Corporal Wilcox to fear any kind of threat in the area of the section's tent. He confirmed also in his testimony that it was not unusual for him to hear a weapon cocked in his tent considering that soldiers would clean their weapons in their tent.

[121] In the light of the training and experience Corporal Wilcox had on weapons, including using a 9-millimetre Browning pistol, the court finds hard to believe that without the existence of any circumstances that would justify him to react as he claimed, it makes it very difficult to believe that he instinctively reacted without paying any attention to what kind of target he was shooting at.

[122] Also, he did not provide any kind of explanation concerning the fact that a rounds case was found close to his own bunk, that he was seen immediately after the shooting close to his bunk instead of being close to Master Corporal Crosby's bunk as he affirmed to the court.

[123] Looking at the evidence as a whole, his testimony raised some other issues. Corporal Andrews testified that he played quick draw with Corporals Wilcox and Megeney with a 9-millimetre Browning pistol. Corporal Andrews testified in a calm manner. He had some difficulty to remind some things, but he was not reluctant to answer. Basically, it looks like that his memory has faded with the passage of time, which would be normal after four years. However, the fact that he played quick draw was a notorious fact that came back sometime prior to his testimony in court. On that issue the court finds his testimony reliable and credible. He has no interest against or for the accused and this event seems sincerely and clearly a noteworthy and striking event for him.

[124] Master Corporal Ryles testified that after the incident he met Corporal Wilcox at the Tim Hortons on the camp. He was told by Corporal Wilcox that him and Megeney

were playing when the incident occurred. Basically Master Corporal Ryles testified in a straightforward and calm manner. Despite some difficult questions put to him, especially on his disciplinary record, he clearly and honestly answered to these questions. It appears clearly to the court that he had nothing to hide and that he has no interest in the outcome of this trial. The conversation he reported was an unexpected event and it was reported by the witness as this. The court finds Master Corporal Ryles' testimony reliable and credible.

[125] So, considering the evidence as a whole, the court has some difficulty to believe Corporal Wilcox when he said that he never played quick draw with anybody during pre-deployment or during the mission in Afghanistan. While it was established by Sergeant Joyce that at some point of the pre-deployment training it was an issue within the platoon to the extent that section commanders had to remind platoon members not to do it, it's still difficult for the court to believe that Corporal Wilcox never did or at least being familiar with such a thing over a period of 11 months which is from the time he started to train up to the time of the incident. Basically by playing some kind of game within the tent it would explain clearly why Corporal Wilcox did not pay attention to who he was aiming his pistol because he knew clearly who the person was. Knowing who the target was, Corporal Wilcox did not have to look at Corporal Megeney further to the invitation made by the latter to react fast and quickly to the weapon pointed at him. And as he described it to Master Corporal Crosby, he was shocked by the fact that his pistol was loaded as he thought that it was unloaded like it was for his rifle.

[126] Then, it is the court's conclusion that the evidence provided by the accused is not credible and reliable concerning the very circumstances when Corporal Wilcox fired at Corporal Megeney.

[127] In the circumstances, where the court would have found the evidence adduced by the accused as credible and reliable, the court would have then been in the obligation to consider if Corporal Wilcox has established an air of reality in order for the court to consider self-defence.

[128] By believing the accused, the court would have concluded then that he shot Corporal Megeney without paying attention at all to the target as he reported it. Then, to avoid any conclusion by the court that he did not show wanton or reckless disregard for the life or safety of Corporal Megeney, self-defence would have constituted, in regard of that charge, an explanation to avoid any criminal liability in the circumstances.

[129] In order for the court to consider self-defence under paragraph 34(2) of the *Criminal Code*, first, the accused would have to establish an air of reality to its three constitutive elements which are:

(a) the existence of an unlawful assault;

(b) a reasonable apprehension of a risk of death or grievous bodily harm; and

(c) a reasonable belief that it is not possible to preserve oneself from harm except by killing the adversary.

[130] The concept of an air of reality has been defined by Judge Curry in the Supreme Court decision in *R v Osolin*, [1993] 4 SCR 595, at page 682:

> ... The term "air of reality" simply means that a trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. If the evidence meets that test then the defence must be put to the jury. This is no more than an example of the basic division of tasks between judge and jury.... [Emphasis added]

[131] It is not sufficient that the accused assert from some belief that he was mistaken, it has to be corroborated by some other evidence as established at paragraph 17 and 18 of the Supreme Court decision in *R v Park*, [1995] 2 SCR 836.

[132] Concerning a more specific application of the test to this specific defence, it has been discussed and applied in the Supreme Court decision of *R v Cinous*, 2002 SCC 29, at paragraph 92 to 97. Essentially, the accused has an evidentiary burden in order for the court to consider this defence.

[133] Concerning the first component of this defence, the court would have concluded subjectively and objectively that there was some evidence supporting it. However, concerning the second and third components, despite that the evidence would have been established, then subjectively the court would have concluded that there was no evidence reasonably capable of supporting the conclusion that the perception of the accused was objectively reasonable. The reality is that there is no evidence that would allow the court to make inference that would have led it to such a conclusion. How it would have been possible for the court to appreciate objectively a reasonable apprehension of a risk of death if the accused never put evidence that would allow the court to infer such a conclusion? The accused clearly stated that he had no fear, but that he reacted instinctively without paying attention to anything including the kind of threat he was facing. Also he did not adduce evidence that would have allowed the court to appreciate that shooting for killing was the only option to preserve himself from any harm in the circumstances, especially knowing that he had not to fear from anything or anybody in his tent which has been described as a safe and secure place.

[134] Then the court would have concluded that it could not consider that defence as a reason to acquit the accused on that charge because the accused would have failed to prove that there was an air of reality to it.

[135] Now the court is turning itself to the second step of the test enunciated in the Supreme Court decision of *R v W.(D.)*, aforementioned. After having considered the evidence as a whole, this court is still not left in a reasonable doubt by the testimony of Corporal Wilcox on all the essential elements of criminal negligence causing death. As mentioned earlier, the testimony of the accused, even not considered credible and relia-

ble by the court, would contain some element that would corroborate evidence leading the court to believe beyond a reasonable doubt that Corporal Wilcox showed a wanton or reckless disregard for the life or safety of Corporal Megeney while using his 9-millimetre Browning pistol in his tent on 6 March 2007.

[136] Clearly, Corporal Wilcox, with the training and experience he had at the moment of the incident, knew that he shall not have a loaded pistol in his tent or any other place on the camp and that it was a legal duty for him to comply with the directive. In fact, he did respect this directive on all times except for once before the incident. By avoiding unloading his weapon, he clearly acted significantly different from what a reasonable person would have done in the circumstances.

[137] Accepting his version of the evidence, a reasonable person, which is a soldier trained and having experience on handling various weapons such as 9-millimetre Browning pistol, would have taken as soon as possible the opportunity to unload his weapon. Also, this reasonable person, in the circumstances of the case, while knowing that his weapon was loaded and after having armed it, would have taken the time to look at the threat in order to assess to what extent it was necessary to fire at it in order to preserve his own life and security. Essentially, if the court would have accepted that Corporal Wilcox shot instinctively, it would have determined that he acted in a marked and substantial departure from what a reasonable person would have done.

[138] Finally, turning to the last step of the same test. On the basis of the evidence that this court accepts, the court is convinced beyond a reasonable doubt of the guilt of the accused regarding the offence of criminal negligence causing death, and more specifically that Corporal Wilcox showed a wanton or reckless disregard for the life or safety of Corporal Megeney while using his 9-millimetre Browning pistol in his tent on 6 March 2007.

[139] By aiming and shooting at somebody he knows in the context of some game played, a reasonable person would have made sure that the weapon was unloaded before using it, which he did not, and would have not pointed and fired at a person, which he did. This analysis leads the court to conclude that Corporal Wilcox's actions were a clear marked and substantial departure from what a reasonable person would have done in the circumstances. Pointing and firing at somebody with a weapon is always dangerous, especially in a context when live ammunition is loaded and unloaded at some point in time during a day on an operational theatre.

[140] Consequently, having regard to the evidence as a whole, the prosecution has proved beyond a reasonable doubt all of the essential elements of the offence of criminal negligence causing death.

Negligent performance of duties

[141] Now, in the context where Corporal Wilcox made admissions including that on or about 6 March 2007, at or near Kandahar, Afghanistan, he did with his 9-millimetre

Browning pistol shoot Corporal Megeney, R.K., causing his death, the court is left with deciding on only two essential elements of the offence of negligent performance of a military duty.

(a) Did Corporal Wilcox fail to perform a military duty imposed on him?

(b) Did Corporal Wilcox perform negligently the military duty imposed on him?

[142] Without going through it again, the court is using again the test enunciated by the Supreme Court in *W.(D.)*, aforementioned, in order to proceed with the analysis of the testimony provided by Corporal Wilcox in the light of this specific offence. The analysis and the conclusion of the court is the same for the reasons aforementioned, and the court disbelieves the accused on what he said about the way the incident occurred for the reasons expressed previously.

[143] Turning to the second step of the test the court comes to the same conclusion which is that the court is left with no reasonable doubt by any element of the disbelieved testimony of Corporal Wilcox. Essentially, the accused confirmed that he unloaded his pistol at ECP 3 and that he loaded it again immediately and that he never took any opportunity he had to unload it again before or while in his tent. He clearly stated, as it comes from the evidence as a whole, that he had a military duty to have his pistol unloaded on the camp including in his tent which he did not have. It is true that at one occasion, as some other members of his section, that he forgot to unload his weapons, but as they all did, once he realized that he forgot, he unloaded it in order to follow the directive as it was his duty to do. The court understands from the evidence adduced, including the one from the accused, that there was a clear duty for Canadian soldiers to have unloaded weapons on camp, and if someone would forget to comply with it, it would then make what is necessary to comply with this directive.

[144] The court having rejected his testimony in part and having concluded that the accused was playing some kind of game with his pistol and involving Corporal Megeney, Corporal Wilcox had clearly the duty to take the proper precautions in the circumstances to prevent the unsafe discharge of his pistol which would have been to unload and not pointing it toward a comrade in his tent. A reasonable person, which is a soldier trained and having experience on handling various weapons such as a 9-millimetre Browning pistol, would have taken as soon as possible the opportunity to unload his weapon and would have avoided to point his weapon at a colleague in his tent on an invitation to play some kind of game with it. The way Corporal Wilcox handled his weapon is significantly different from what a reasonable person would have done in the situation and constitutes clearly for the court a marked departure. Then, it is the conclusions of the court that Corporal Wilcox performed negligently his duty to have his pistol unloaded on the camp, including in his tent, which he did not have in order to prevent any unsafe discharge of it.

[145] Consequently, having regard to the evidence as a whole, the prosecution has proved beyond a reasonable doubt all the essential elements of the offence of negligently performed a military duty imposed on him.

DISPOSITION

FOR THESE REASONS, THE COURT:

[146] **FINDS** Corporal Wilcox guilty of the second and third charge on the charge sheet.

Counsel:

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