



COURT MARTIAL

Citation: *R v Perras*, 2011 CM 4009

Date: 20110415

Docket: 201068

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sapper M.J. Perras, Accused

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] The accused, Sapper Perras, is charged with having unlawfully caused bodily harm and of negligently performing a military duty imposed on him.

[2] The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt that Sapper Perras used his weapon without the reasonable precautions for the safety of other persons when he shot the no-shoot target in compound No. 1 and that his actions caused bodily harm to Sapper McCulloch. The prosecution also argues that Sapper Perras' military duty was to ensure that he respected the safety of other persons when handling his C7 rifle. Defence counsel argues the evidence before this court does not prove beyond a reasonable doubt that Sapper Perras is guilty of these offences.

THE APPLICABLE LAW

[3] Before this court provides its analysis of the evidence and of the charges, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[4] It is fair to say that the presumption of innocence is most likely 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 the cases dealt with under Canadian criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[5] 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. The 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.

[6] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt 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.

[7] In *R v Lifchus*, [1997] 3 SCR. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. 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 arrives at the end of the case, based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

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

... an 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.

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 prov-

ing the guilt of an accused person, in this case Sapper Perras, 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 be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[9] Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed and 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 the defence, and matters of which the court takes judicial notice.

[10] 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.

[11] 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, the court will assess a witness's opportunity to observe; a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? 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 the accused chooses to testify.

[12] 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's testimony consistent with itself and with the uncontradicted facts?

[13] 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's entire testimony.

[14] 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, a court will accept evidence as trustworthy unless there is a reason, rather to disbelieve it.

[15] The court must focus its attention on the test found in the Supreme Court of Canada decision in *R v W. (D)*, [1991] 1 SCR. 742. This 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 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.

[16] In *R v J.H.S.*, [2008] SCC 30 at paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R v H. (C.W.)* (1991), 68 CCC (3d) 146 British Columbia Court of Appeal, where Wood J.A. suggested the additional instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[17] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court. The evidence before this court is composed essentially of the following: judicial notice, exhibits, admissions and the testimony of witnesses. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. Four exhibits were produced by the prosecution: Exhibit 3 is the admissions made by the accused; Exhibit 5 is pictures of Sapper McCulloch's personal equipment he was wearing on 12 January 2010 and of Sapper Perras' C7 rifle; Exhibit 6 is the Level 3.5 Range Safety Briefing prepared by Captain Rattray; and Exhibit 7 is the orders given by Captain Haskell. Defence counsel presented one exhibit, Exhibit 4, which is a diagram of the 3.5 range. The witnesses heard in the order of their appearance before the court are: Sergeant Singer, Master Corporal Allen, Master Corporal Chant, Captain Rattray, Captain Haskell, Lieutenant Berry, Corporal McCulloch and Sapper Perras.

[18] The credibility of the witnesses has not been challenged by either the prosecutor or by defence counsel. While there were some minor inconsistencies between the evidence of certain witnesses, there are no contradictions in the evidence presented by the prosecution and by the defence. The court accepts the evidence as presented by the witnesses.

[19] On 12 January 2010, Sapper Perras was a member of 2 Combat Engineer Regiment and he was training with his unit in Fort Irwin, California in preparation for his deployment to Afghanistan. He was a member of the section commanded by Sergeant Singer. His section was participating in a live fire exercise with an infantry platoon commanded by Captain Haskell. Sapper Perras was present at the range safety briefing given the previous evening by the Range Safety Officer, Captain Rattray.

[20] The platoon and the section had to clear numerous compounds. The platoon approached the compound complex from the east and was moving in a westerly direc-

tion. The first compound to be cleared was compound No. 4. Compound No. 1 was located to the north of compound No. 4. Compound No. 1 was approximately 40 feet wide by 20 feet deep. The building in the compound was approximately 15 feet by 10 feet.

[21] The infantry cleared compound No. 1. Sergeant Singer divided his section into two detachments. His detachment was composed of himself, Sapper McCulloch and Sapper Perras. Sergeant Singer directed Sappers McCulloch and Perras to search the interior side of the compound wall. He then told Sapper Perras to join him to conduct a search of the building. After having searched the underneath and the perimeter of the building, Sergeant Singer directed Sapper Perras to search the interior of the building.

[22] A blanket was covering the entrance to the building; Sergeant Singer held the blanket to let Sapper Perras enter the building. Sapper Perras was at the low ready position; that is to say, he was holding his C7 with both hands, the butt of the weapon was against his shoulder, the muzzle was pointing towards the ground and it was on safe. Sapper Perras was alone in the building. He moved to the left room of the building and he fired two shots in quick succession. Sapper McCulloch heard the two shots, felt a sharp pain in his right arm and fell to the ground. Sergeant Singer and Sapper Perras immediately went to provide first aid to Sapper McCulloch.

[23] The exercise was stopped. Sapper Perras' C7 rifle was taken from him by the range safety officers and it was examined by a weapon technician. His C7 and the magazine were found to be serviceable.

[24] Sergeant Singer described the conduct of the live fire range on 12 January 2010. His section was following an infantry platoon into the complex of compounds. The infantry were first to enter the compound to clear it of possible human threats and the engineers were to follow to clear the compound of explosive threats such as IEDs and booby traps. He cleared compound No. 4 with the complete section and then he divided his section into two detachments. He took his detachment composed of Sappers Perras and McCulloch to clear compound No. 1. Although the infantry was supposed to leave a linkman to inform the engineers of the situation at the compound, he could not remember seeing a linkman at compound No. 1.

[25] He instructed Sappers McCulloch and Perras to clear the inside perimeter of the compound wall, Sapper McCulloch starting on the left side and Sapper Perras on the right side. Sergeant Singer told Sapper Perras to come assist him in clearing the house when Sapper Perras had reached the midway point of the northern wall of the compound; Sapper McCulloch was still conducting his sweep of the compound wall. Sapper Perras had completed his sweep before Sapper McCulloch because the distance he had to cover was shorter than the distance for Sapper McCulloch. It had taken Sapper Perras approximately 10 to 15 minutes to complete his sweep of the wall. When told in cross-examination the searching drill for the compound wall was for each sapper to continue and cover the ground already covered by the other sapper, Sergeant Singer replied that the tactical situation dictates and that in the present case, each sapper hav-

ing a metal detector, he had decided to call Sapper Perras to do the search of the building.

[26] Sergeant Singer and Sapper Perras searched the exterior of the house and this took approximately five minutes. Sergeant Singer and Sapper Perras moved to the door of the house located on the south side of the house. Sergeant Singer ordered Sapper Perras to clear the house, while Sapper McCulloch was finishing his sweep of the wall of the compound and as Sergeant Singer testified, "he was probably behind the building at that time."

[27] Lieutenant Berry, the Engineer Safety Officer, told Sergeant Singer the compound had been cleared as they entered the compound. Sergeant Singer testified that they "train to fight." He did not expect any targets in that building because the infantry had already cleared it, but he did not change how his troops conducted their drills because he did not want to instill bad lessons in his soldiers, he did not want "sloppy drills." Sergeant Singer testified that no one ever assumes a building is clear since the infantry might have missed something. One must enter a house ready to fight; that is how they were trained.

[28] Targets were positioned in a manner to ensure that no one was in the arcs of fire when the target was engaged. He testified the target in compound No. 1 should not have been standing when they arrived at the house. He did not believe there were any arcs of fire in compound No. 1 because there were not supposed to be any targets in the compound. Also, safety staff would be present when targets were to be engaged. He could not remember hearing about a no-shoot target being present in the house when he arrived at compound No. 1. Targets that had been engaged by the infantry in compound No. 4 had been put on the ground and that meant the target was no longer a threat. He was not asked nor did he testify that he had told his sappers that there should not be any targets in the house. His sappers had done their drills correctly until Sapper McCulloch was shot. He was unsure if they had been on that specific range before the incident.

[29] He entered the house after he had given first aid to Sapper McCulloch and he did see the target standing at a 45 degree angle in the north-west corner of the house. The impact zone for this target would be the north-west portion of the range. The target was positioned in a manner that required it to be manually lowered to the ground. The room was very dark because the window was covered by a blanket. The target was a no-shoot target. The shoot and the no-shoot targets were the same 3D picture of a human figure dressed as an Afghan. The shoot target showed the man holding a gun and the no-shoot picture showed him holding something other than a gun.

[30] Sergeant Singer confirmed that his sappers were instructed to conduct their drills when faced with a target and that it can become second nature to react in the way one is drilled. They had done rehearsals for an explosive breach, but had not rehearsed the clearing of houses. He did not order his sappers not to engage targets. Sappers had

to positively identify their target as a threat before they were allowed to shoot the target and they had to control their fire.

[31] Captain Rattray was the Range Safety Officer for the exercise on 12 January 2010. He confirmed that soldiers had to shoot in a north-west direction. Lieutenant Berry was the Engineer Assistant Range Safety Officer and he was responsible for all engineer activity on the range. He thought Lieutenant Berry was present at this range safety briefing on the evening of 11 January, but he was not positive. He testified during his cross-examination that it was his intention that the troops would be under the constant supervision of the assistant range safety officers.

[32] Captain Haskell was the commander of the infantry platoon on 12 January 2010. He had specified in his orders that a threat had to be positively identified before it was engaged. He confirmed that targets were placed so individuals would fire in a north-west direction. He agreed that engineers had not been given an order not to fire at targets because there was no reason to give that order and that such an order "does not make sense" since they were training to go to Afghanistan.

[33] The infantry section commander responsible to clear compound No. 1 told him the compound was clear. Members of that section had fired rounds in that house. Captain Haskell knew there was a target in that house. He did not check to see if the target had been put on the ground. He did not see Sergeant Singer after compound No. 4.

[34] He explained how a compound should be marked to indicate it had been cleared by the infantry, but he did not state whether compound No. 1 had been so marked. He also stated the whole exercise was "very choreographed" and there was no doubt the infantry had been through the building. He found out after the incident that the target was a no-shoot target.

[35] While he ordered the engineers to clear compound No. 4 he did not order them to clear compound No. 1. That decision was made by Sergeant Singer, and Captain Haskell did not find that decision to be unreasonable. He confirmed that his plan was not to have the engineers search every compound, but to be prepared to search the compound. He thought the search of compound No. 4 might have made the engineers think they had to clear every compound. His assumption was that the engineers would move into a compound only if the compound had been cleared of all physical threats by the infantry. The engineer commander could not move into a compound if he believed there might be threats other than explosives. He agreed soldiers should always be at the ready, ready to react and to fire.

[36] Lieutenant Berry, the Engineer Assistant Range Safety Officer, testified the 3.5 range was one of the first live fire ranges during the training in Fort Irwin. He was not present during the range safety briefing given by Captain Rattray. Lieutenant Berry stated he followed Sergeant Singer to building No. 1 and told him the infantry was in compound No. 2. He was monitoring the skills and drills of the engineers. He kept on watching Sapper McCulloch when Sergeant Singer and Sapper Perras entered the

house. He did not know the no-shoot target was still in the house when Sapper Perras entered the house. He testified the cloth covering the window on the left side of the house kept a lot of light out of the house. He confirmed there was no linkman at compound No. 1. He stated the majority of engineer sections did fire their weapons to engage threats.

[37] Sapper McCulloch, now Corporal McCulloch, remembers being told by Sergeant Singer to search the left portion of the inside of the compound wall. He did a visual search of that area. He believed that Sergeant Singer searched the right side of the wall and that Sapper Perras entered the house. He does not remember in which compound they were or the layout of the compound at the time he was hit by the bullets. He testified the tactical situation would dictate how they would do their job in a specific compound. They "had to make a snap decision of where to go and how to do our job." He had received orders from his chain of command to do a visual sweep of the compound. He was in the left upper corner of the compound when he was hit.

[38] He was following the drills he had been taught. He could not state anything concerning the arcs of fire because he could either not remember or he hadn't heard much of the range safety briefing. He knew the infantry were going in first and that the engineers might not have to shoot, but they had not received any order stating they were not to shoot. They did not rehearse clearing houses.

[39] Sapper Perras joined the Canadian Forces in 2007. He joined 2 CER in 2008 after having completed his basic sapper training. He had shot the C7 rifle on conventional ranges during his basic training and at 2 CER. He had not participated in the range portion of the OSONS HAMMER exercise because he had been sent on a TLAV driver course. He had always fired at normal paper targets on a conventional range.

[40] He attended a course given by the US Army Corps of Engineers on the search of buildings and compounds. He was taught the sappers had to start at the entrance of the compound, they would clear the interior of the compound wall by having two sappers search in opposite directions, meet at the halfway point of the perimeter of the wall, keep searching the area already searched by the other sapper until both sappers met at the starting point. They would then search buildings.

[41] While at Fort Irwin, he had not practiced searching a house before 12 January 2010. They had done dry runs using a "glass house" meaning that the outline of the house was indicated by mine tape on the ground. They had mostly practised their infantry skills. Fort Irwin was the final test of the years' training before the deployment to Afghanistan. They were there to practice how to live and move on the battlefield so they would be ready for the real war. He had been told he always had to be at the ready when outside the wire.

[42] He knew the safety rules were that he had to control his personal weapon and that he not lase people meaning not point his laser designator at someone. He understood the

role of the safety personnel was to follow the group as it moves through the village and to have eyes on the exercise participants at all times.

[43] He stated they had cleared compound No. 4 using the drills they had been taught. Sergeant Singer, Sapper McCulloch and he then went to compound No. 1. No linkman was present at the compound. It was unclear to him who was the safety person at that location at that time. Sergeant Singer told them to search the inside perimeter of the compound wall. After he and Sapper McCulloch had "sort of connected at the back center of the compound," Sergeant Singer told Sapper Perras to come to him at the back of the house to clear the house. Sapper McCulloch stayed in the back of the compound. Sergeant Singer then told Sapper Perras to go in the house. He felt he was being tested, that he had to do a good job in this scenario that was similar to what they could expect in Afghanistan. He did not know where Sapper McCulloch was situated at that time. His main concern was doing his job properly. He explained that he relied on the chain of command to direct people on the range. He had been told that it was the place to make mistakes and that safety staff would be everywhere.

[44] He entered the house and saw it was divided in two rooms. He went into the room to the left and saw a target in the corner. The window was small and was covered. It was dark and the target appeared to be a threat. It was a man in Afghan clothes. He took the safe off his weapon, aimed and fired two shots.

[45] The particulars of charge No. 1 reads as follows: "In that he, on or about 12 January 2010, at or near Fort Irwin, California, did unlawfully cause bodily harm to Sapper McCulloch by using a firearm, to wit a C-7 rifle, without reasonable precautions for the safety of other persons." The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- a. the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- b. that an unlawful act was committed by Sapper Perras;
- c. that the act was objectively dangerous; and
- d. the unlawful act caused bodily harm to Sapper McCulloch.

[46] It is clear from the undisputed evidence that Sapper Perras is the accused. Sapper Perras was at Fort Irwin, California on 12 January 2010. Sapper Perras shot Sapper McCulloch in the right arm and his humerus was broken. A titanium rod had to be inserted in his arm. A bullet is still lodged in his ribcage and he will have to undergo further surgery to remove this bullet. There is no doubt that the injuries he suffered from being shot interfere with the health or comfort of Sapper McCulloch and are more than merely transient or trifling.

[47] Did Sapper Perras commit an unlawful act? An unlawful act is an offence under either federal or provincial law. The unlawful act alleged in this case is the use of a firearm without reasonable precautions for the safety of other persons. This offence is found at section 86 of the *Criminal Code of Canada*. The prosecution must prove the following essential elements of this offence beyond a reasonable doubt:

- a. that Sapper Perras used a firearm;
- b. that Sapper Perras used the firearm without reasonable precautions for the safety of other persons; and
- c. that Sapper Perras had no lawful excuse for his use of the firearm.

[48] The *Criminal Code of Canada* defines a firearm as "a barrelled weapon from which any shot, bullet or other projectile can be discharged and that is capable of causing serious bodily injury or death to a person." Sapper Perras has admitted that the C7 rifle is a firearm as defined by the *Criminal code of Canada*. He testified that he shot two bullets from his C7 rifle on 12 January 2010 when he was clearing the building. There is no dispute that Sapper Perras used a firearm on 12 January 2010.

[49] Has the prosecutor proven beyond a reasonable doubt that Sapper Perras failed to take reasonable precautions to live up to the standard of care that a reasonably prudent person would exercise in the same circumstances? Firstly, what is that standard of care? The prosecutor asserts that the standard of care is to ensure that no one is in the arcs of fire before firing one's personal weapon.

[50] Exhibit 6, the Level 3.5 Range Safety Briefing, states that the purpose of the range is to "exercise your complete platoon, along with attachments, and to practice fire and movement, urban operations and operations in a complex environment by both day and night." It also tells the participants that they will be able "to practice your movement, urban operations, gunfighter and medical skills." Paragraph 7 provides that "safety is everyone's responsibility. Proper weapons handling and drill will be used at all times and any unsafe act must be stopped immediately." It is then repeated that "Proper drills will be used at all times - safety is your responsibility." It then states that weapons will only fire within the arcs and to be aware of the direction of the barrel at all times. The safety angle for 5.56 millimetre calibre small arms is 688 mils. Weapons are to be carried at "ready" with the safety on while moving. It also provides that "under no circumstances will you point your weapons at a role player." This document also indicates that the "chain of command will control all movement during the exercise."

[51] The Level 3.5 Range Safety Briefing does not state that a soldier may not fire his weapon if another soldier is within his arcs of fire. The court has not been provided any evidence to the effect that soldiers were specifically instructed not to fire their weapons if a soldier was within their arcs of fire. While common sense might dictate that, when one is involved in a live fire range, one should not fire his or her personal weapon when another soldier is in the vicinity of the target or is within the safety angle of that weapon,

the court has not been asked to take judicial notice of that fact nor has the court been presented any evidence on that issue.

[52] What were the arcs of fire of Sapper Perras? The prosecutor was asked by the court what evidence was presented to explain the arcs of fire of Sapper Perras when he engaged the target and what evidence explains the meaning of the term "688 mils"? The prosecutor replied there was no evidence pertaining to the definition of that term, that the prosecution did not have to define every word for the court and that the prosecution did not have to prove how many degrees represent 688 mils. He replied it was an angle and that a military court should know what it means and that the word "mils" is defined in the dictionary.

[53] Exhibit 6 does not define the term "mils." Witnesses were not asked to define or explain that term. Article 1.04 of the Queen's Orders and Regulations provides that English words and phrases shall be construed according to the common approved meaning given in the Concise Oxford Dictionary except that:

(a) technical words and phrases, and words that have acquired a special meaning within the Canadian Forces, shall be construed according to their special meaning; and

(b) words and phrases that are defined within *QR&O* or within the *Interpretation Act* or the *National Defence Act* shall be construed according to that definition.

The term "mils" is not defined in the *Interpretation Act*, the *National Defence Act* or in the *QR&O*. The *Concise Oxford Dictionary 10th Edition*, defines "angle" as "the space (usually measured in degrees) between two intersecting lines or surfaces at or close to the point where they meet." One of the definitions of the word "degree" in this dictionary is "a unit of measurement of angles, equivalent to one ninetieth of a right angle". The Concise Oxford Dictionary defines "mil" as an abbreviation for millilitres, millimetres or millions or as a noun meaning one thousandth of an inch. Does this mean that the safety angle for the arcs of fire of the 5.56 millimetres small arms weapons is 688 millimetres or 688 thousandths of an inch? The court would have to guess the answer is 688 millimetres since this is the only measure of distance that seems to make any sense in the context.

[54] A court may infer a fact. An inference is a deduction of fact that may be logically or reasonably be drawn from another fact or group of facts established in the trial. It is a conclusion that may, not must, be drawn in the circumstances. If there are no proven facts from which an inference can be logically drawn, it is impossible to draw an inference; at best the court would be speculating or guessing and that is not the standard found in Canadian law.

[55] The meaning of the term "mils" is probably well known to individuals conducting ranges and to individuals training on these ranges. It is probably explained in a Canadian Forces publication, but it has not been explained to the court. While the term "mils" surely has a specific meaning when used in the context of a safety angle, this

court finds it has not been presented with evidence that clearly informs the court of its meaning. These definitions from the Concise Oxford Dictionary do not permit the court to infer the meaning of 688 mils and what they represent as a safety angle for the arcs of fire of 5.56 millimetres small arms weapons. The court was not asked to take judicial notice of the definition of that term during the trial.

[56] While the prosecutor is correct in stating that not every word needs to be defined, the prosecutor knows he has the burden of proving beyond a reasonable doubt every element of the offence charged. Basically, the prosecutor has to prove what he alleges. He may do that in different ways. Providing evidence on the significance of the arcs of fire of Sapper Perras at the time of the alleged offence is an essential portion of the case against Sapper Perras. The court finds the prosecutor has not provided the court with the necessary evidence to permit the court to infer the meaning of the term "688 mils" and to understand the significance of a safety angle of 688 mils when using a 5.56 calibre weapon. The court also finds that the prosecutor has not proven beyond a reasonable doubt that a soldier on range 3.5 on 12 January 2010 was prohibited from firing his personal weapon when someone was within his arcs of fire. Therefore, the court finds the prosecutor has not proven beyond a reasonable doubt that ensuring that no one is in the arc of fire before firing one's personal weapon is the standard of care in the present case.

[57] Notwithstanding this finding and assuming the standard of care has been proven by the prosecution, the court will now examine whether Sapper Perras did use his C7 rifle without reasonable precautions for the safety of other persons. The prosecutor asserts that Sapper Perras should have asked his sergeant if it was safe to engage the target or he should have waited until everyone was in a safe position. The prosecutor asserts these are examples of reasonable precautions in this case because Sapper Perras knew his bullets could pass through the plywood walls of the house and he knew Sapper McCulloch was behind the house. Is it reasonable that Sapper Perras would not be concerned with the whereabouts of Sapper McCulloch when he was ordered to enter the house?

[58] Sapper Perras was one of the most junior soldiers involved in the exercise that day. He had been a sapper since 2008, approximately two years before the alleged offence. He had received some training on the use of his personal weapon, the C7 rifle, but always on a conventional range. He explained how they were supposed to clear the inside perimeter of a compound wall. They had cleared the compound wall in compound No. 4 in that manner. He was in the process of clearing the inside perimeter of compound No. 1 when Sergeant Singer ordered him to stop his drill and to join him at the house. Sergeant Singer cleared the exterior of the house with Sapper Perras and then he ordered Sapper Perras to enter the house to search it.

[59] Sapper Perras was not told not to engage any targets when he entered the house. There is no evidence before this court that demonstrates Sapper Perras knew he could not or should not engage a target in that house. To the contrary, he was told to always be on his guard. Sergeant Singer confirmed he wanted his sappers to always do their drills correctly. Sergeant Singer expected his sappers to react appropriately to a threat.

[60] Sapper Perras erroneously assessed a no-shoot target as a shoot target. The room was dark. Members of the infantry section clearing the house had made the same mistake. For some reason unknown to this court, the target had been left standing in the corner of the room. No linkman was present to warn Sergeant Singer of this situation. Sergeant Singer ordered Sapper Perras to search the house not knowing there was a target in that house and assuming the house was free of any possible threat because the infantry had already cleared the house.

[61] Sapper Perras did not know the exact location of Sapper McCulloch when he shot the no-shoot target. He stated he had last seen Sapper McCulloch at approximately the mid-point of the back wall of the compound. Sergeant Singer told Sapper Perras to join him when Sapper Perras was at the mid-way point of the back wall of the compound. It would appear that Sergeant Singer had lost sight of Sapper McCulloch when he was focussing his attention on the house.

[62] The evidence before this court is far from clear on what was expected of Sapper McCulloch at the time the shots were fired. Was he supposed to continue searching the wall using the drills they had been taught and thus continue searching the right side of the wall? This would have put him in the north-eastern portion of the compound instead of the north-western portion of the compound. Was he supposed to return to the entrance of the compound by retracing his steps? Was he supposed to wait in the north-west corner of the compound? What was he supposed to do and where was he supposed to be? What were Sergeant Singer's intentions concerning Sapper McCulloch when he called Sapper Perras to him? The court does not know the answers to these questions since these questions were not asked during the trial. Some of these answers would surely be helpful in understanding why Sapper McCulloch was in the north-west corner of the compound, the arc of fire of targets, and why he was there when Sergeant Singer ordered Sapper Perras to search the house.

[63] Sergeant Singer did not think that Sapper Perras would have to engage a target because the house had already been cleared by the infantry although he had not received any definitive information to that effect. He assumed there was no need to have any concerns about possible arcs of fire since he did not expect Sapper Perras to encounter any targets. Yet, he expected his sappers to enter every building under the assumption they could be faced with a threat. He expected them to react accordingly.

[64] Sapper Perras was obviously involved in a situation where the use of his weapon could have dangerous consequences for other soldiers on the range. A live fire range by its very nature represents an environment where soldiers are more at risk than on a conventional range. The proper planning and conduct of such ranges minimize the risk of injury or death. Although each soldier must control his or her weapon and ensure that she or he uses it in a safe manner at all times, it is the responsibility of the range safety staff and of the chain of command to ensure that ranges are planned and conducted safely and that soldiers are not put in dangerous positions. Sapper Perras was an inexperienced and junior sapper at the time of the alleged offence. He carried out his tactical and weap-

on drills in the manner he was taught. He obeyed the orders of Sergeant Singer when he entered the house to search it. He had been taught how to react to threats and he was expected to react according to the nature of the threat.

[65] The court has not been presented with evidence that demonstrates that Sapper Perras knew or should have known that Sapper McCulloch would have been in the north-west corner of the compound when Sapper Perras was entering the building or that Sapper McCulloch might have been in his arcs of fire when he engaged the target. Sapper Perras could not know what Sapper McCulloch was doing and where he was since he had been ordered to clear the outside of the house and then to search the house. This is not a situation of a soldier firing his weapon after having seen another soldier in his arcs of fire. This is not a situation where the soldier has some clues that something might be wrong and thus has a duty to alert his superior. It is not the responsibility of the most junior members to second guess the lawful orders of their superiors unless the situation on the ground clearly points to that option.

[66] It is the legal obligation of every member of the Canadian Forces to obey lawful orders of a superior officer.¹ While one can safely assume the Canadian Forces wants soldiers that do think and contribute to the success of the mission, we also expect soldiers to obey lawful commands of superiors without the need for discussions and explanations in every circumstance. Combat requires the swift and correct obedience to orders. The soldiers involved in that live fire range on 12 January 2010 were training to go to combat; they were training to fight.

[67] While safety when using weapons is always a priority and an individual responsibility, the court finds the circumstances of this case clearly point to a junior and inexperienced soldier obeying a lawful command from a superior to the best of his abilities based on the information he had at that time. His responsibility at that time was to execute his tactical and weapon drills correctly. Unfortunately, Sapper Perras committed the same mistake the infantry had made a few minutes before; he entered a dark room and shot a no-shoot target. In his case, his bullets hit Sapper McCulloch.

[68] Based on the evidence before this court, the court believes that it was reasonable for Sapper Perras to focus his attention on the task he had been given in that live training scenario and not wonder whether Sapper McCulloch might be in his arcs of fire. The court finds the prosecutor has not proven beyond a reasonable doubt that Sapper Perras failed to take reasonable precautions to live up to the standard of care that a reasonably prudent person would exercise in the same circumstances.

[69] The particulars of charge No. 2 read as follows: "In that he, on or about 12 January 2010, at or near Fort Irwin, California, when handling a C-7 rifle, failed to respect the safety of other persons as it was his duty to do so." The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

¹ *QR&O* 19.015

- a. the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- b. that a particular military duty was imposed on Sapper Perras;
- c. that Sapper Perras was aware of the duty imposed upon him;
- d. that a standard of care was to be exercised by Sapper Perras;
- e. the conduct of Sapper Perras in relation to this military duty;
- f. that this conduct breached the required standard of care; and
- g. that Sapper Perras' failure to respect the safety of other persons when handling his C7 rifle amounted to negligence.

[70] The military duty alleged to have been breached is the respect for the safety of other persons when handling a C7 rifle. Exhibit 6 provides that safety is everyone's responsibility and that proper weapons handling and drill will be used at all times. It also provides that weapons will only fire within the arcs and that soldiers must be aware of the direction of their weapon's barrel at all times.

[71] Was Sapper Perras aware of this military duty? Sapper Perras was present during the range safety briefing. He knew he had to control his weapon and not lase anyone. He was aware of that duty.

[72] What was the standard of care to be exercised by Sapper Perras? The prosecution argues that the standard of care to be exercised by Sapper Perras was to ensure there was no one in his arcs of fire when firing the weapon and to positively identify targets before engaging them. At the onset, the court does not see how the need for positive identification forms part of this specific military duty. The need for positive identification is not found in the range safety orders at Exhibit 6, but is found in the Rules of Engagement section of the tactical orders given by Captain Haskell at Exhibit 7. The need for positive identification is an order that ensures that only threats are engaged and not innocent or non-belligerent individuals. In a live fire range context, a person could engage a target without having correctly positively identified the target as a threat and still have fired his or her weapon in a safe manner such as engaging the target when there is no one present in his or her arcs of fire. A range safety rule is not necessarily breached in that situation although it might mean the person has not followed the ROE correctly.

[73] The court has already stated at charge No. 1 that the prosecutor has not proven beyond a reasonable doubt that a soldier on range 3.5 on 12 January 2010 was prohibited from firing his personal weapon when someone was within his arcs of fire. For the same reasons found at charge No. 1, the court finds the prosecutor has not proven beyond a reasonable doubt that ensuring that no one is in the arcs of fire before firing one's personal weapon is the standard of care in the present case. Notwithstanding this finding and

assuming the standard of care has been proven by the prosecution, the court will now determine whether the conduct of Sapper Perras amounts to a marked departure of the conduct expected of a reasonable person in the circumstances of Sapper Perras.

[74] What was the conduct of Sapper Perras in relation to this military duty? Sapper Perras fired his C7 rifle and his bullets hit Sapper McCulloch. Sapper Perras fired his weapon when Sapper McCulloch was within his arcs of fire. Did this conduct breach the required standard of care? In the military context, the standard of care will vary considerably in relation to the degree of responsibility exercised by an accused, the nature and purpose of the operation and the exigencies of the particular situation. To answer that question, the court must consider all the evidence, including Sapper Perras' rank, status and training at the time of the alleged offence; the nature of the activity and the circumstances surrounding Sapper Perras' alleged failure to take the requisite care.

[75] Sapper Perras shot a target in a house when he did not know the exact location of Sapper McCulloch. Based on the evidence before this court and for the reasons given in charge No. 1, the court believes that it was reasonable for Sapper Perras to focus his attention on the task he had been given in that training scenario and not wonder whether Sapper McCulloch might be in his arcs of fire when he shot the target. The court thus concludes the prosecution has not proven beyond a reasonable doubt that his conduct did breach the required standard of care.

[76] The court will still pursue its analysis of this offence. Assuming his conduct did breach the required standard of care; did this conduct amount to negligence? The word "negligently" in section 124 of the *National Defence Act* signifies that Sapper Perras either did something or omitted to do something in a manner that would not have been adopted by a reasonably capable and careful person in his position in the Service under similar circumstances. When a person takes all reasonable steps commensurate with his knowledge, his training and his experience and those steps fall short of the acceptable standard of care, such lack alone is not negligence for the purposes of the offence of negligent performance of a military duty.

[77] The offence of negligently performing a military duty requires more than just carelessness on Sapper Perras' part. What he failed to do must be a marked departure from the expected standard of conduct in the performance of a military duty, as distinguished from a general duty of care. A mere departure from the standard expected of a reasonable person of the rank, training, status, degree of responsibility and experience of Sapper Perras, in similar circumstances, will not suffice to ground liability for penal negligence, which is required of an offence of negligently performing a military duty under section 124 of the *National Defence Act*. The distinction between a mere departure and a marked departure from the norm is a question of degree. It is only when the conduct meets the higher threshold that a court may find, on the basis of that conduct alone, a blameworthy state of mind.

[78] The court has already stated that safety when using weapons is always a priority and an individual responsibility. The court has already found that the circumstances of

this case clearly depict a junior and inexperienced soldier obeying a lawful command from a superior to the best of his abilities based on the information he had at that time. His responsibility at that time was to execute his tactical and weapon drills correctly. The evidence does not demonstrate that he knew or should have known that Sapper McCulloch was in his arcs of fire when he entered the house and shot the target. The court finds the evidence does not prove beyond a reasonable doubt that Sapper Perras' actions were a marked departure from the standard expected of a reasonable person of the rank, training, status, degree of responsibility and experience of Sapper Perras, in similar circumstances. Sapper Perras, stand up.

FOR THESE REASONS, THE COURT

[79] **FINDS** you not guilty of charges No. 1 and No. 2.

Counsel:

Captain Eric Carrier, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major C.E. Thomas, Directorate Defence Counsel Services
Counsel for Sapper M.J. Perras