



COURT MARTIAL

Citation: *R v Lambert*, 2011 CM 4012

Date: 20110507

Docket: 201043

Standing Court Martial

Canadian Forces Base Greenwood
Greenwood, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Sergeant P.M. Lambert, Accused

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

REASONS FOR FINDING

(Orally)

[1] The accused, Sergeant Lambert, is charged with having committed an assault upon Master Corporal Greenslade, of striking a person who by reason of his rank was subordinate to him, of having disobeyed a lawful command of a superior officer, and of conduct to the prejudice to the good order and discipline.

[2] 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.

[3] 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 pros-

ecution 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.

[4] 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.

[5] 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.

[6] In *R. v. Lifchus*, [1997] 3 S.C.R. 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 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.

[7] In *R. v. Starr*, [2000] 2 S.C.R. 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 proving the guilt of an accused person, in this case Sergeant Lambert, 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.

[8] Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or 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.

[9] 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.

[10] 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'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 that accused chooses to testify.

[11] 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?

[12] 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.

[13] 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.

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

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 C.C.C.(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."

[15] 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 the court martial is composed essentially of the following: judicial notice, exhibits, 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. Nine exhibits were produced by the prosecution; defence counsel presented two exhibits. The prosecution witnesses were Captain Welsh, Ms Coderre, Corporal Harbers, Sergeant Paquette, Warrant Officer Reid, Sergeant Maher, Master Corporal Wolfe, Major Boisvert, and Sergeant Greenslade. Master Warrant Officer Hughes was called by defence counsel. Sergeant Lambert's statement to the military police was entered as evidence at Exhibit 8. The credibility and reliability of the witnesses is a major issue in this case.

[16] The court will firstly address charges 1 and 2. On 24 November 2008, Sergeant Lambert was a member of the Canadian Heron UAV Detachment, CHUD, and he was training with other members of the CHUD in Suffield, Alberta in preparation for his deployment to Afghanistan. Sergeant Lambert along with other members of the CHUD went to a bar in Medicine Hat to have dinner and to relax after having completed a segment of their training. Morale amongst the group was good and all seemed to enjoy themselves drinking, sharing food, and playing billiards. There is no dispute between counsel as to these facts.

[17] The particulars of the first charge read as follows: "In that he, on or about 24 November 2008, at or near Medicine Hat, Alberta, did commit an assault upon Master Corporal S.C. Greenslade." 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 Sergeant Lambert applied force directly or indirectly to Master Corporal Greenslade;
- c. that Sergeant Lambert intended to apply force to Master Corporal Greenslade;
- d. that Master Corporal Greenslade did not consent to the application of force by Sergeant Lambert; and
- e. that Sergeant Lambert knew that Master Corporal Greenslade did not consent.

[18] It is clear from the evidence that Sergeant Lambert and Master Corporal Greenslade were involved in a fight in the washroom of a bar in Medicine Hat, Alberta on 24 November 2008. There is no dispute as to the identity of Sergeant Lambert as the alleged offender and on the date and location of the alleged assault. There is also no dispute Sergeant Lambert did apply force to Master Corporal Greenslade and that Master Corporal Greenslade did not consent to this application of force. Sergeant Lambert also knew Master Corporal Greenslade did not consent. These conclusions apply for charges 1 and 2.

[19] Defence counsel relies on subsection 34(1) and subsection 37(1) of the *Criminal Code of Canada* to justify the use of force by Sergeant Lambert. Defence counsel asserts this is a case of self-defence and that the evidence demonstrates Sergeant Lambert was unlawfully assaulted by Master Corporal Greenslade, or that, in the alternative, Sergeant Lambert had a mistaken belief he was being assaulted by Master Corporal Greenslade. He further argues the prosecution has not proved beyond a reasonable doubt that Sergeant Lambert was not acting in self-defence. The prosecutor, while not addressing the issue of self-defence in his final submissions, argued there was no evidence Master Corporal Greenslade provoked Sergeant Lambert or consented to the application of force by Sergeant Lambert. He argued the evidence demonstrated Sergeant Lambert had punched Master Corporal Greenslade in the head and that Master Corporal Greenslade had then defended himself. The court will use the present rank of the witnesses when referring to those witnesses.

[20] Defence counsel has put forth this justification or defence and the court must now consider if there is an air of reality to this defence. The term "air of reality" means that "a properly instructed jury could reasonably, on account of the evidence, conclude in favour of the accused," see *R. v. Fontaine*, [2004] 1 S.C.R. 702, at paragraph 74. This test must be performed by a trier of fact, be it a judge sitting alone or a jury, or in the case of a General Court Martial, a panel.

[21] The evidence at the heart of this defence comes from the testimony of Sergeant Greenslade and statements attributed to Sergeant Lambert. It is the assessment of credibility and reliability of Sergeant Greenslade and of the statements attributed to Sergeant Lambert that will determine whether this defence succeeds. The court concludes there is an air of reality to this defence.

[22] Subsection 34(1) of the *Criminal Code of Canada* reads as follows:

Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

Subsection 34(1) contains four essential ingredients. If, after considering all of the evidence, the court is convinced beyond a reasonable doubt that one or more of these ingredients was not present, then self-defence under section 34(1) was not present and Sergeant Lambert cannot rely upon it. The four ingredients of section 34(1) are:

- a. Sergeant Lambert was unlawfully assaulted;
- b. Sergeant Lambert did not provoke the assault;
- c. the force used by Sergeant Lambert was not intended to cause death or grievous bodily harm; and
- d. the force used by Sergeant Lambert was no more than necessary to enable him to defend himself.

[23] Was Sergeant Lambert unlawfully assaulted? Sergeant Paquette testified he saw Sergeant Greenslade enter the bathroom after Sergeant Lambert. He is the only witness that saw them enter the washroom. After the fight Sergeant Lambert told Sergeant Paquette that Sergeant Greenslade had punched him. Warrant Officer Reid testified Sergeant Lambert and Sergeant Greenslade were impaired that evening and that he "would not have let them drive." Sergeant Maher saw Sergeant Lambert come out of the washroom; there was blood on him and he was excited. Sergeant Lambert said he was in a fight with Sergeant Greenslade. Sergeant Maher did not see Sergeant Greenslade come out of the washroom. Sergeant Lambert had said Sergeant Greenslade had sucker punched him and that he "beat the crap out of him." Sergeant Maher was not cross-examined on that part of his testimony.

[24] Sergeant Maher went back to the hotel with Sergeant Lambert. He took Sergeant Lambert to Sergeant Lambert's room and stayed with him. Sergeant Lambert was still excited from being in a fight. Sergeant Lambert again stated Sergeant Greenslade had sucker punched him. Sergeant Maher testified that he thought Sergeant Lambert was bragging about the fight because he had said that he had "beat up" Sergeant Greenslade. Sergeant Maher described this as normal post-fight talk. He stated that bragging was not uncommon after a fight. He could not repeat the exact words. He remembered some talk of eye gouging, but could not recall who would have done that. There was also some talk of someone hitting his head on a toilet. He understood the following message: Sergeant Lambert did not start the fight, but he finished it and then he got out of the washroom.

[25] Sergeant Maher had gone to Sergeant Lambert's room to let Sergeant Lambert speak about the fight and to prevent him from getting into more trouble. He stayed in the room for a certain period of time, but he could not recall exactly how long, possibly approximately two hours.

[26] During his cross-examination, he stated he had a "short fuse" at that stage of the training, but he could not say if other members of the CHUD also did have a short fuse. He stated that Sergeant Greenslade could be aggressive as anyone could be, but he had not seen him act on it.

[27] Master Warrant Officer Hughes was not present at the bar, but was in his hotel room at the time of the fight. He was awoken and informed of the incident. He went to Sergeant Lambert's room. Sergeant Lambert was speaking on the telephone; he was calm. He had a conversation with Sergeant Lambert. Sergeant Lambert told him he had gone to the washroom and that Sergeant Greenslade had followed him. There was a discussion about the PER; Sergeant Greenslade attacked him, and Sergeant Lambert defended himself. Sergeant Lambert did not seem intoxicated, he was not slurring his words and he was not stumbling. He did not notice any injury on Sergeant Lambert.

[28] He then went to Sergeant Greenslade's room; it was approximately an hour to an hour and a half after the fight. Sergeant Greenslade was also speaking on the phone; he was quite agitated and he was yelling. Sergeant Greenslade stated he had gone to the washroom, there was a discussion, and that Sergeant Lambert had struck him. During his examination-in-chief, he stated that Sergeant Greenslade was more intoxicated, that his words were slurred, and that he was not stumbling. During his cross-examination, he stated he meant to say Sergeant Greenslade was more agitated when he said "a little more intoxicated" in his examination-in-chief. He noticed a slight bruise under Sergeant Greenslade's eye, but nothing significant.

[29] Defence counsel also relies on the evidence provided by Sergeant Greenslade to argue that Sergeant Lambert was unlawfully assaulted by Sergeant Greenslade. Sergeant Greenslade described his relationship with Sergeant Lambert during the period of time he first met Sergeant Lambert until the time of the fight.

[30] He met Sergeant Lambert in the fall of 2005. He often visited Sergeant Lambert at his house and Sergeant Lambert assisted him when he had a break up of a personal relationship. He described a very close relationship. He could recall he was feeling the effects of alcohol when he was at the bar, but he could still observe what was happening. He did not recall how much he had drunk or how much Sergeant Lambert had drunk. He could not recall who was the first person to enter the bathroom. They were both at the urinals and he described a pleasant conversation with Sergeant Lambert since they were reminiscing. Sergeant Greenslade went to wash his hands and Sergeant Lambert asked him why he was complaining about his Personnel Evaluation Report, (PER). He described Sergeant Lambert as being upset and he assumed Sergeant Lambert was upset because he thought Sergeant Greenslade was calling him a liar. He had his back to Sergeant Lambert and was facing the paper towel dispensing machine.

[31] Sergeant Greenslade became upset and he hit the paper towel dispenser. He then added "it wasn't working right anyway." He remembered being struck behind the right ear and he turned around and he hit Sergeant Lambert in the face. Sergeant Lambert hit him on the right side of the face near his eye and it sent his glasses flying. They grabbed each and were wrestling. Sergeant Greenslade grabbed Sergeant Lambert's face. He remembers falling and hitting his head on the wall or on the floor. Sergeant Greenslade said it was enough. Sergeant Lambert asked him if he had enough and Sergeant Greenslade replied "it was enough." As he was getting up, Sergeant Greenslade

was hit by Sergeant Lambert in the same head and neck area as he had been hit the first time. Sergeant Lambert ran out of the washroom.

[32] Sergeant Paquette entered the washroom and said that Sergeant Lambert had said Sergeant Greenslade had jumped him. Sergeant Greenslade told Sergeant Paquette he had not done that. Sergeant Paquette accompanied Sergeant Greenslade to the hotel and told him to get medical attention for his eye. Sergeant Greenslade telephoned his common law spouse. He was in shock and upset and could not remember much because the adrenaline was flowing. Sergeant Lambert telephoned him and Sergeant Greenslade told him that he had sucker punched him.

[33] Sergeant Greenslade stated he was happy with his PER because it had placed him on the merit board. He described his injuries as a bloody bruise on the corner of his eye and a bruise behind his ear in the shape of the ear piece of his glasses. The nose piece of his glasses had been damaged. Three or four days later he spoke with Sergeant Lambert at the hotel and Sergeant Lambert told him he was sure Sergeant Greenslade was about to "take a swing at him" when he hit the paper towel dispenser. Sergeant Greenslade was not cross-examined on that portion of his testimony. Sergeant Greenslade stated that he accepted it and that the matter had been resolved at the lowest level. He described a disagreement he had with Sergeant Lambert when they were deployed when Sergeant Lambert would have said "remember Medicine Hat" or words to that effect to which Sergeant Greenslade would have replied "What, you'll sucker punch me again?" Sergeant Greenslade stated Sergeant Lambert remained silent.

[34] During his cross-examination, Sergeant Greenslade was evasive in answering certain questions. He ultimately agreed that his relationship with Sergeant Lambert had lessened when he was assigned to the CHUD. He agreed that Sergeant Lambert had become closer friends with one or two other members of the CHUD, but he stated that it "doesn't really bother him." He tried to explain why the relationship changed by stating the crew had increased and that Sergeant Lambert had more responsibilities.

[35] He confirmed that he hit Sergeant Lambert after he was hit. He disagreed with defence counsel that he hit the paper towel dispenser, knocked off the cover, and then hit Sergeant Lambert. He agreed the fight started after he hit the paper towel dispenser. When asked if he hit the paper towel dispenser because he was angry, he replied he was upset because of his conversation with Sergeant Lambert and because he cared. He confirmed he could feel the effects of the alcohol, but he was not impaired. He stated he does not normally hit paper towel dispensers, but that sometimes he might hit them to make them work.

[36] Sergeant Greenslade could feel the effect of alcohol. He followed Sergeant Lambert into the washroom. There was a discussion pertaining to his PER. He became upset and he hit the paper towel dispenser. He explained he became upset at the conversation because he cared, but he never explained why he cared or what he specifically cared about. A fight ensued only after Sergeant Greenslade became aggressive. While there might have been contradiction in his testimony whether or not Sergeant

Greenslade was more intoxicated than Sergeant Lambert, Master Warrant Officer Hughes did state Sergeant Greenslade slurred his words when he spoke to him and was very agitated while Sergeant Lambert did not slur his words and was calmer. Warrant Officer Reid thought that Sergeant Greenslade and Sergeant Lambert were impaired while they were at the bar. This evidence leads the court to conclude that Sergeant Greenslade is not a reliable and credible witness concerning the events of 24 November 2008.

[37] Notwithstanding this assessment of Sergeant Greenslade's reliability and credibility, Sergeant Greenslade testified that Sergeant Lambert told him a few days later he was sure Sergeant Greenslade was about to hit him when he hit the paper towel dispenser. This statement, which was not challenged or contradicted by defence counsel during cross-examination, corroborates Sergeant Greenslade's version of events as to how the fight started. This statement also contradicts Sergeant Lambert's statement to Sergeant Maher that Sergeant Greenslade had sucker punched Sergeant Lambert. The court is left with two contradictory statements by Sergeant Lambert as to how the fight started. But the analysis on this element does not end there.

[38] Defence counsel also argues that Sergeant Lambert mistakenly believed he was being attacked by Sergeant Greenslade when he hit him in self-defence. The court may find that belief was mistaken. But, even though it was mistaken, if the court finds or is left with a reasonable doubt that it was a reasonable belief, then Sergeant Lambert is entitled to be found not guilty so long as the force he used met the other conditions described in section 34(1). When considering whether Sergeant Lambert's mistaken belief that he was being assaulted was a reasonable belief, the test the court must apply is an objective one. In other words, the mistake must have been one which an ordinary person using ordinary care could have made in the same circumstances.

[39] The court cannot rely on Sergeant Lambert's statements since they contradict each other. The court has already declared Sergeant Greenslade was not a reliable and credible witness. Therefore, when the court is unable to decide whom to believe, the benefit of the doubt goes to the accused. Therefore, the court finds that the prosecution has not proven beyond a reasonable doubt that Sergeant Lambert was not unlawfully assaulted.

[40] Did Sergeant Lambert provoke the assault? A person provokes an assault when he or she intentionally incites or urges another person to assault him or her. Section 36 of the *Criminal Code of Canada*¹ defines provocation as "provocation by blows, words or gestures" for the purposes of sections 34 and 35. Although they were arguing about Sergeant Greenslade's PER, there is no evidence that Sergeant Lambert challenged Sergeant Greenslade to a fight or insulted him in a manner that would provoke Sergeant Greenslade to use force. There is no evidence that proves Sergeant Lambert used any words, gestures, or blows to provoke the assault.

¹ RSC 1985, c C-46

[41] Was the force used by Sergeant Lambert intended to cause death or grievous bodily harm? It is clear from the evidence of Sergeant Greenslade that the force used by Sergeant Lambert was not intended to cause death or grievous bodily harm.

[42] Was the force used by Sergeant Lambert no more than necessary to enable him to defend himself? Sergeant Greenslade testified Sergeant Lambert hit him in the neck and head area after they had both ceased struggling and that he then left the washroom. This statement was never challenged by defence counsel during his cross-examination of Sergeant Greenslade. The court has found that Sergeant Greenslade's evidence pertaining to the events of 24 November is not reliable. Therefore, the court is left with a reasonable doubt that Sergeant Lambert hit Sergeant Greenslade as described by Sergeant Greenslade. The court finds the evidence does not prove beyond a reasonable doubt that Sergeant Lambert used more force than necessary to defend himself.

[43] Thus, the court has not been convinced beyond a reasonable doubt that one or more of the ingredients of self-defence under section 34(1) of the *Criminal Code* was not present at the time of the alleged offence. The court finds that Sergeant Lambert was acting in self-defence when he assaulted Sergeant Greenslade.

[44] The particulars of the second charge read as follows: "In that he, on or about 24 November 2008, at or near Medicine Hat, Alberta, struck with his fist Master Corporal S.C. Greenslade, in the head." The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- a. the identify of the accused as the offender and the date and place as alleged in the charge sheet;
- b. that Sergeant Lambert struck Master Corporal Greenslade with his fist;
- c. that Sergeant Lambert struck Master Corporal Greenslade in the head;
- d. that Sergeant Lambert intentionally struck Master Corporal Greenslade; and
- e. that Sergeant Lambert knew Master Corporal Greenslade was subordinate to him by reason of his rank.

[45] Having determined that Sergeant Lambert was acting in self-defence when he hit Sergeant Greenslade, there is no need to determine whether the evidence proves beyond a reasonable doubt that Sergeant Lambert struck Sergeant Greenslade in the head with his fist.

[46] The particulars of the third charge read as follows: "In that he, between 6 May 2009 and 16 May 2009, while receiving Third Location Home Leave Travel Assistance, did travel to Canadian Forces Base Greenwood, Nova Scotia, contrary to an or-

der given to him by Major J.M.D. Boisvert." 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 order was given to Sergeant Lambert;
- c. that it was a lawful order;
- d. that Sergeant Lambert received or knew the order;
- e. that the order was given by a superior officer;
- f. that Sergeant Lambert was aware of that officer's status;
- g. that Sergeant Lambert did not comply with the order; and
- h. the blameworthy state of mind of Sergeant Lambert.

[47] There is no dispute that Sergeant Lambert did travel to CFB Greenwood between 6 May and 16 May 2009. Sergeant Lambert clearly stated during his interview with the military police that he had travelled to CFB Greenwood during his leave from theatre. This leave is often referred to as HLTA, Home Leave Travel Assistance. Exhibit 3, his HLTA Travel Request form, indicates that he has 18 days of leave in Block number 99 and that his leave starts on 28 April and ends on 15 May. This form also indicates his tour start date is 20 December 2008 and tour end date is August 2009. It is a request for third destination HLTA with Jamaica as the destination. His travel companion is his next of kin, Melissa Lambert, and her location is Kingston, Nova Scotia. His place of duty is 14 Wing Greenwood. His leave pass, Exhibit 12, covers the period of 24 April '09 to 18 May '09 and indicates Jamaica as the address while on leave. It was signed by Sergeant Lambert on 7 January 2009 and by Major Boisvert on 6 January 2009.

[48] The identity of the accused as the offender and the date and place as alleged in the charge sheet have been proven beyond a reasonable doubt for charges 3 and 4. It is also not challenged by defence counsel that Sergeant Lambert did, in fact, receive Third Location Home Leave Travel Assistance. Sergeant Lambert stated he had received Third Location HLTA during his interview with the military police. Exhibits 3 and 5 indicate he applied for Third Location HLTA and Exhibits 10 and 11 indicate he did receive \$3,000 for leave transportation allowance.

[49] Was an order given to Sergeant Lambert? Captain Welsh witnessed the conversation between Major Boisvert and Sergeant Lambert on 23 April '09. He could clearly hear the conversation. He remembered Major Boisvert asking Sergeant Lambert about his plans for his HLTA. Sergeant Lambert replied that he would go to Toronto to meet

his wife and then go to Jamaica. He would then spend some time with his family in Toronto and then return to Dubai. Captain Welsh was not contradicted or challenged on those portions of his testimony during his cross-examination.

[50] Captain Welsh testified Sergeant Lambert confirmed he would not be in a situation where there was an issue with the 800 kilometre rule. Major Boisvert wanted to confirm that Sergeant Lambert would not go within 800 kilometres of his house. Major Boisvert was making his rounds and ensuring that other members of the unit would not commit the same mistake as Master Corporal Maher. Major Boisvert was asking these questions because he wanted to ensure members of the unit knew the rules. He did not remember hearing the name of Cathy Michaud or Major Boisvert telling Sergeant Lambert to double-check with the HLTA staff.

[51] Warrant Officer Reid testified that Major Boisvert had sent an email on 22 April '09, Exhibit 9, to every member of the CHUD concerning HLTA. Warrant Officer Reid spoke with Sergeant Lambert after he had received the email. Sergeant Lambert told him he had seen the email. He told Sergeant Lambert he could not go home on his points. Sergeant Lambert told him he understood and that he would reverse his points and have his family meet him in Toronto. During his cross-examination, he agreed that Sergeant Lambert said he would fly his family to Toronto if he could not follow his plan.

[52] Sergeant Maher witnessed the conversation between Major Boisvert and Sergeant Lambert; Captain Welsh was also in the room. Major Boisvert asked Sergeant Lambert if he was going home during HLTA, Sergeant Lambert replied he was going to Jamaica and to another destination. Major Boisvert asked him again if he was going home, Sergeant Lambert answered he was not; Major Boisvert then left the room. He could hear Major Boisvert and Sergeant Lambert clearly.

[53] Master Corporal Wolfe was the chief clerk of the CHUD. She was on the same HLTA block as Sergeant Lambert. She departed KAF on the same flight as Sergeant Lambert. She told Sergeant Lambert not to go home if he was going on a Third Location HLTA. She did not want anyone to be in trouble during her tour. He looked at her and replied "Don't worry, I won't." She was not contradicted or challenged on those portions of her testimony during her cross-examination.

[54] Major Boisvert was the CO of the CHUD. He was the approval authority to grant permission to reunite with a next of kin on date and location as found on the leave pass, Exhibit 12, and on the Request for Approval Third Location HLTA form, Exhibit 5. He sent an email on 22 April '09 to all members of the CHUD who had not yet gone on HLTA. A member of his unit was under investigation and he wanted to ensure that all members of his unit knew the rules. He had spoken to the HLTA coordinator before sending his email. His main concern was that the rules be followed. Warrant Officer Reid was Sergeant Lambert's direct supervisor. Major Boisvert told Warrant Officer Reid to speak to Sergeant Lambert to ensure Sergeant Lambert would see the email and to explain the email to Sergeant Lambert.

[55] On 23 April '09, he spoke with Sergeant Lambert in the flight planning room. Captain Welsh and Sergeant Maher were in the room. He explained the HLTA rules to Sergeant Lambert. He told him he had to remain 800 kilometres from his home if he was taking a Third Location HLTA. Major Boisvert had learned the rule from Cathy Michaud, "the senior HLTA lady," and the rules had not changed since their arrival in theatre. He could not say a hundred per cent sure that he did say the 800 kilometre limit, but he was almost positive he did. He was sure Sergeant Lambert understood his directives and that he would not go to Greenwood or within 800 kilometres of Greenwood because Sergeant Lambert had told him his mother, sister, and children would meet him in Toronto to go to Canada's Wonderland. Major Boisvert stated everyone would attend briefings when they arrived in KAF and one of these briefings dealt with HLTA.

[56] During his cross-examination, he agreed that he did not show Chapter 10 of the CBI to Sergeant Lambert. He had contacted Mrs Michaud to ensure he fully understood the rules so he could ensure his subordinates understood these rules. He relied on the information from Mrs Michaud to write his email. He did not read Chapter 10 of the CBI. Exhibit 13, personal notes taken by Major Boisvert to assist him in the completion of the official war diary, was introduced by defence counsel through Major Boisvert. Exhibit 13 indicates that on 23 April he spoke with Sergeant Lambert about his HLTA. The inscription reads as follows: "He mentioned that he is cleared by HLTA folks to go ahead in his plan. He told him that the senior HLTA lady said that you are not allowed within 800 km of home. I told him to double-check with HLTA senior advisor."

[57] Exhibit 8 is the 10 September 2009 videotaped interview of Sergeant Lambert with the military police. Sergeant Lambert states that he went to Jamaica with his wife and then went to his home in Kingston, Nova Scotia and to CFB Greenwood before returning to KAF. He states that Ms Coderre, an HLTA coordinator at KAF, would have told him on numerous occasions that he could go home when travelling on Third Location HLTA, but that he could not claim that part of his travel.

[58] When asked if he had been briefed on HLTA rules for a third location, he replied "I know where this comes from." He then stated the only thing they got was Major Boisvert sending an email stating they could not go home if going on Third Location HLTA. He said he told Major Boisvert he had spoken to Ms Coderre and that she was telling him he could do it. Major Boisvert told him to check his plans. When asked if anyone had told him he could not go home on HLTA, he replied only Major Boisvert told him not to go home. He stated Warrant Officer Reid only asked him if he had checked about his HLTA. The only email he received on HLTA was from Major Boisvert. He did not recall signing a document that referred to the MFSI.

[59] Captain Welsh, Warrant Officer Reid, and Master Corporal Wolfe are deemed credible and reliable witnesses. They testified in a straightforward manner throughout their testimony. Major Boisvert is also deemed a credible and reliable witness. He tes-

tified in a straightforward manner and the court does not conclude he was evasive during his cross-examination. Sergeant Maher's evidence concerning the conversation between Major Boisvert and Sergeant Lambert is consistent with the evidence provided by Captain Welsh and Major Boisvert. He is deemed reliable and credible on that portion of his testimony.

[60] Exhibit 9, the email from Major Boisvert, was received and seen by Sergeant Lambert. The email states:

"Folks,

Please read carefully as you are about to go on your HLTA.

I just had a conversation with the chief HLTA lady.

If you are going (or declaring that you are going) to a third location, you are NOT allowed to go home in any way, shape or form. That includes going home on your own accord, using your own money or reward points, etc. You are not entitled to go home as DND might consider it fraud and you will have a good chance that the MPs might have to investigate your case. I would suggest that you do not even think about it. For a third location, you must stay outside of your home unit (or could be family depending of your marital status, etc.) by 800 kilometres or more. Before booking anything on your own, contact HLTA staff and discuss with them your plans. Do not assume that it is okay. HLTA staff brief everyone when you go and see them about these rules. If you have special circumstances, talk to them.

If you are going home, HLTA staff must book your flight through a MOU they have with DND.

Any questions can be directed by the HLTA staff.

Thanks"

Major Boisvert spoke to Sergeant Lambert on 23 April '09 and explained the HLTA third location rule to him. Sergeant Lambert stated in his interview with the MP that Major Boisvert told him not to go home while on Third Location HLTA. The evidence accepted by this court proves beyond a reasonable doubt that Major Boisvert gave an order to Sergeant Lambert that he was not to go home if he was taking Third Location HLTA.

[61] Was it a lawful order? As stated in *R. v. Liwyj*, 2010 CMAC 6, the offence created by section 83 of the *National Defence Act* "reflects the fact that obedience to orders is the fundamental rule of military life." It is the legal obligation of every member of the Canadian Forces to obey the lawful orders of a superior officer, see article 19.015

of the QR&O. An order is not to be obeyed if it is manifestly unlawful. The prosecution has to prove beyond a reasonable doubt that the order was not manifestly unlawful. As stated at paragraph 24 of *Liwyj*:

An order that is not related to military duty would obviously not meet the necessary threshold of lawfulness. In other words, a command that has no clear military purpose will be considered manifestly unlawful.

[62] Defence counsel asserts the order was not lawful because Major Boisvert did not have the authority to give that type of order. He bases his argument on Chapter 16 of the QR&O and Chapter 10 of the Compensation and Benefits Instructions, CBIs. He argues Sergeant Lambert was not on duty while he was on leave and, thus, Major Boisvert could not order him not to go to CFB Greenwood during his leave. He further states Chapter 10 of the CBIs only provide for the financial benefits one may claim while on Third Location HLTA and does not prohibit a person from going to his home.

[63] Paragraph 10.2.01 of Chapter 10 of the CBIs, Chapter 10 being the Military Foreign Service Instructions, MFSI, provides the intent of the MFSI as follows:

"The intent of the allowances and benefits under the Military Foreign Service Instructions is to recognize and to facilitate a member's service outside Canada and to ensure that, as much as possible, members should be neither better nor worse off than their counterparts serving in Canada."

Section 21 of the MFSI pertains to Home Leave Travel Assistance, HLTA. The intent of HLTA is found at paragraph 10.21.02(1) and it is to "assist a member who is deployed or assigned to a place of duty outside Canada to reunite with their next of kin." Article 10.21.04 pertains to entitlement for HLTA and contains numerous provisions that dictate the amount of the allowance one may receive, the frequency of HLTA, the qualifying time for HLTA, the consequence of the early termination of a deployment, and when HLTA is not authorized. Paragraph (1)(b) of article 10.21.04 provides that a member to whom this section applies, is entitled to an allowance in the amount for the applicable post for travel to a third location in accordance with CBI 10.21.06, HLTA for Travel to a Third Location, if the member is deployed or assigned for an expect period of 120 consecutive days or more. Entitlement to claim HLTA is dependent upon the member being granted leave and authorized to travel on leave, see paragraph 10.21.04(4). Leave travel for a member travelling to the home or to the previous place of duty or to a third location must start and finish at the post, see paragraph (5) of article 10.21.04. Article 10.21.05 deals specifically with HLTA for travel to home or previous place of duty.

[64] Article 10.21.06 pertains to HLTA for travel to a third location. Paragraph (1) sets out the method to be used to calculate the amount of HLTA for a post. Paragraph (2) reads as follows:

"The allowance for transportation expenses for a direct return journey between the member's post and a third location is provided only for the travel of a member or a member and one next of kin."

Paragraph (3) reads as follows:

"All travel is to be direct to a third location and a member is not entitled to travel:

- (a) to or from the member's home or previous place of duty via a third location; or
- (b) to or from a third location via a member's home or previous place of duty."

[65] The intent of the MFSI is to provide certain allowances and benefits to CF members deployed outside of Canada. Section 21 of the MFSI provides the necessary guidelines for the administration of the HLTA. It sets out the intent of HLTA and every parameter that must be observed when applying for and when administering this financial benefit and when receiving this financial benefit. A simple reading of these provisions tells us that a member deployed for an expected period of 120 consecutive days or more is entitled to an allowance in the amount for the applicable post for travel to a third location in accordance with CBI 10.21.06. The member must be granted leave and must be authorized to travel to be entitled to claim HLTA. Leave travel for a member travelling to a third location must start and finish at the post. Third location is defined at article 10.21.01 as:

"Any location outside a radius of 800 kilometres from the member's post, home or previous place of duty, or if a member is deployed on an operation, any location outside the theatre of operations."

[66] Paragraph (1) of article 10.21.06 pertains to the amount of HLTA for a particular post and paragraph (2) sets a limit to the allowance for transportation expenses for a direct return journey between the member's post and a third location. Paragraph (3) clearly sets out that a member is not entitled to travel to or from the member's home or previous place of duty via a third location or to or from a third location via a member's home or previous place of duty. Article 10.21.06 does not state the member is not entitled to claim for this travel; it states that all travel is to be direct and then expands on that notion of direct travel.

[67] While there could be some discussion on the interpretation of the definition of third location, it is clear from the evidence of all of the witnesses and from Exhibit 9 that a third location had to be any location outside a radius of 800 kilometres from the member's post, home, or previous place of duty when one was applying for Third Location HLTA at the time Sergeant Lambert was deployed with the CHUD.

[68] The court concludes that Major Boisvert had the authority to order Sergeant Lambert not to go home during his Third Location HLTA because one of the conditions for receiving this allowance is that the member will not go to his home. The order had a clear military purpose.

[69] Did Sergeant Lambert receive or know the order? Sergeant Lambert stated during his interview with the military police that Major Boisvert told him not to go home during the Third Location HLTA. Sergeant Lambert confirmed he received the email from Major Boisvert. Major Boisvert, Captain Welsh, and Sergeant Maher testified that Major Boisvert explained the 800 kilometre rule to Sergeant Lambert on 23 April. The evidence accepted by the court proves beyond a reasonable doubt that Sergeant Lambert did receive the order from Major Boisvert.

[70] Was the order given by a superior officer? Superior officer is defined at article 1.02 of the QR&O as:

... any officer or non-commissioned member who, in relation to any other officer or non-commissioned member, is by the *National Defence Act*, or by regulations or custom of the service, authorized to give a lawful command to that other officer or non-commissioned member.

Major Boisvert was the CO of the CHUD and Sergeant Lambert was a member of the CHUD. Major Boisvert was clearly by rank and by position a superior officer in relation to Sergeant Lambert.

[71] Was Sergeant Lambert aware of that officer's status? Every witness testified that Major Boisvert was the CO of the CHUD. There is no doubt that Sergeant Lambert knew Major Boisvert's status.

[72] Did Sergeant Lambert comply with the order? Sergeant Lambert stated in his interview with the military police that he did travel to CFB Greenwood and to his home. He stated he did so because he had told Major Boisvert he had spoken with Ms Coderre and she was telling him he could do it. Major Boisvert would have then told him to confirm these plans with the HLTA staff. He went to Greenwood during his Third Location HLTA because he had been told by Ms Coderre that he could if he did not claim that portion of his transportation costs. If one follows his logic, he travelled to Greenwood because he followed the directives he said he received from Major Boisvert and because Ms Coderre told him he could. This logic and explanation is based on accepting Sergeant Lambert's version of events.

[73] Ms Coderre was a travel coordinator working for the CFPSA at KAF from November 2008 to 18 May 2009. She described the training she received on the HLTA rule and her training in Kingston. She assisted members with their HLTA. She stated she explained the Third Location HLTA rules to members going on Third Location HLTA. She confirmed one could not combine a trip to one's home and Third Location HLTA.

[74] She testified she never provided Sergeant Lambert any information that was contrary to the Third Location HLTA rule that prohibited travel to within 800 kilometres of one's next of kin or place of duty. She stated the CFPSA staff booked all travel when a member went home on HLTA. She testified Sergeant Lambert made his own arrangements to go to Jamaica during his Third Location HLTA. She did not know he was going to another location.

[75] During her cross-examination, she testified Sergeant Lambert could have travelled via Halifax if it was only a transit point; he could meet his next of kin in Halifax en route to Jamaica, but he could not leave the airport. While she could recall that Sergeant Lambert had asked her if he could go to Greenwood, she could not recall her answer, but she stated she would not have told him he could since one could not combine a trip home with Third Location HLTA. She could not recall Sergeant Lambert bringing her two different travel itineraries, but could recall receiving one where Sergeant Lambert was travelling to Jamaica through Toronto. She could not recall telling Sergeant Lambert on 26 January he could not fly via Halifax. She stated she might have been at the Canada House HLTA briefing on 23 April. She does not remember Sergeant Lambert asking her if he could go to Greenwood after Jamaica; he would have asked her that on 23 April.

[76] Ms Coderre stated she was not Sergeant Lambert's direct travel coordinator. She could not remember what she had told the military police on that topic since the interview had occurred approximately two years ago. Ms Coderre was interviewed via telephone by the military police. She reviewed the investigator's notes on that interview. The notes indicate she remembered Sergeant Lambert, but that she was not his direct travel coordinator. Ms Coderre stated that she had told the truth to the military police and that she just happened to deal with him every time he came into the office. She explained that travel coordinators were assigned to HLTA blocks and that any travel coordinator could assist a member.

[77] Ms Coderre testified in a straightforward manner throughout her testimony. She answered questions in the same manner throughout her testimony. She was not evasive; she did not contradict herself. Her recollection of events appears to have been affected by the passage of time. At the time of the alleged offences, there does not appear to be any reason why she should have paid more attention to her dealings with Sergeant Lambert than she would have for any other member travelling on HLTA. While she is deemed a credible witness, the reliability of her evidence concerning her conversations with Sergeant Lambert is not as strong.

[78] The court must also assess the credibility and reliability of Sergeant Lambert's statements to the military police. In *R. v. Dinardo*, [2008] 1 S.C.R. 788, 2008 SCC 24, Charron J stated at paragraph 23 that:

... the assessment of credibility will not always lend itself to the adoption of the three distinct steps suggested in *W. (D.)*; it will depend on the context. What matters is that the

substance of the *W. (D.)* instruction be respected. In a case that turns on credibility, such as this one, the trial judge must direct his or her mind to the decisive question of whether the accused's evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt. Put differently, the trial judge must consider whether the evidence as a whole establishes the accused's guilt beyond a reasonable doubt.

[79] Sergeant Lambert stated during his interview with the military police that he verified on at least three occasions with Ms Coderre to ensure his plans were in accordance with the HLTA rules. He states she told him he could do what he wanted as long as he did not claim his transportation costs to go to his home. When asked what briefings he had received on HLTA rules, he answered he had only received the email from Major Boisvert.

[80] Major Boisvert and Captain Welsh testified that Sergeant Lambert told Major Boisvert he was going to Jamaica with his wife and then he would meet the rest of his family in Toronto before returning to KAF. They also testified Major Boisvert was having this conversation to ensure Sergeant Lambert would not go within 800 kilometres of his home during his Third Location HLTA. Sergeant Maher testified Sergeant Lambert told Major Boisvert he was going to Jamaica and to other location when he was asked if he was going home during his HLTA. Master Corporal Wolfe told Sergeant Lambert not to go home if he was going on Third Location HLTA and Sergeant Lambert replied that he wasn't.

[81] The picture that Sergeant Lambert paints is quite different from the picture painted by the evidence of Captain Welsh, Major Boisvert, Sergeant Maher, and Master Corporal Wolfe. Why tell Major Boisvert one story, Jamaica and then Toronto, when he has already supposedly received the confirmation from Ms Coderre that he can go home? He states in his MP interview that he did not hide his intentions to go home, but he told Master Corporal Wolfe he was not going home when she spoke to him as they were both leaving for their HLTA. Sergeant Lambert lied to Major Boisvert and he lied to Master Corporal Wolfe. The court does not believe Sergeant Lambert's version of events. The court does not find his evidence to be credible and reliable.

[82] The court finds the evidence proves beyond a reasonable doubt that Sergeant Lambert did not comply with Major Boisvert's order not to travel to CFB Greenwood when going on Third Location HLTA.

[83] Did Sergeant Lambert have a blameworthy state of mind or, in other words, did he intentionally disobey the order? The court finds the evidence it accepts proves beyond a reasonable doubt that Sergeant Lambert intentionally disobeyed Major Boisvert's order.

[84] The particulars of the fourth charge read as follows: "In that he, between 6 May 2009 and 16 May 2009, while receiving Third Location Home Leave Travel Assistance, did travel to Canadian Forces Base Greenwood, Nova Scotia, contrary to chapter 10.21.06 of the Military Foreign Service Instructions." The essential elements of this offence are:

- a. the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- b. that Sergeant Lambert received Third Location Home Leave Travel Assistance;
- c. that Sergeant Lambert travelled to CFB Greenwood;
- d. the standard of conduct required, specifically Chapter 10.21.06 of the Military Foreign Service Instructions;
- e. that Sergeant Lambert knew or ought to have known the standard of conduct required;
- f. that Sergeant Lambert's conduct constitutes a breach of the standard of conduct required;
- g. that the conduct was intentional; and
- h. the prejudice to good order and discipline resulting from the conduct.

[85] There is no dispute that Sergeant Lambert did travel to CFB Greenwood between 6 May and 16 May 2009. Sergeant Lambert clearly stated during his interview with the MP that he had travelled to CFB Greenwood during his leave from theatre. The identity of the offender and the date and place as alleged in the charge sheet were not in dispute and have been proven as indicated at charge 3. It is also not in dispute that Sergeant Lambert did in fact receive Third Location HLTA and it has been proven as indicated at charge 3.

[86] Chapter 10.21.06 of the MFSI is alleged to have been breached by Sergeant Lambert. The court has already given its detailed analysis of section 21 of the MFSI and of article 10.21.06. As stated at charge 3, it is clear from the evidence of all of the witnesses and from Exhibit 9 that a third location had to be any location outside a radius of 800 kilometres from the member's post, home, or previous place of duty when one was applying for Third Location HLTA at the time Sergeant Lambert was deployed with the CHUD.

[87] Did Sergeant Lambert know or ought to have known the standard of conduct required? Major Boisvert explained to Sergeant Lambert the 800 kilometre rule of the Third Location HLTA. His email, Exhibit 9, also clearly stated no one was to travel to their home or come within 800 kilometres if taking Third Location HLTA. Although there is no evidence before this court that Chapter 10 of the CBI or that Section 21 of the MFSI were published in accordance with article 1.21 of the QR&O, it is clear from the evidence of Major Boisvert and Captain Welsh that Major Boisvert explained to Sergeant Lambert the contents of article 10.21.06 of the MFSI on 23 April. The email

on 22 April, Exhibit 9, also provided Sergeant Lambert that information. Further, while Sergeant Lambert stated during his interview with the military police that he did not recall signing any document that referred to the MFSI, Exhibit 5, signed by Sergeant Lambert on 26 January '09 clearly states "I have reviewed MFSI 10.21.06." The court has already stated that it does not believe Sergeant Lambert. The court finds that, based on the evidence it accepts, this evidence proves beyond a reasonable doubt that Sergeant Lambert knew or should have known that he was not authorized to travel to his home or come within 800 kilometres of his home when taking Third Location HLTA, as indicated in article 10.21.06.

[88] Did Sergeant Lambert's conduct constitute a breach of the standard of conduct required? Sergeant Lambert travelled to CFB Greenwood during his Third Location HLTA. This conduct was contrary to the provisions of article 10.21.06 of the MFSI. It was a breach of the standard of conduct required on the part of a person receiving Third Location HLTA.

[89] Was the conduct intentional? Sergeant Lambert stated to the military police that he went home during his Third Location HLTA because Ms Coderre told him he could as long as he did not claim that portion of his travel. The court has already explained why it does not believe Sergeant Lambert. The court finds the evidence it accepts proves beyond a reasonable doubt that Sergeant Lambert intentionally travelled to CFB Greenwood during his Third Location HLTA.

[90] What is the prejudice to good order and discipline resulting from the conduct? Paragraph 2 of section 129 of the *National Defence Act* reads as follows:

(2) An act or omission constituting an offence under section 72 or a contravention by any person of

- (a) any of the provisions of this Act,
- (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
- (c) any general, garrison, unit, station, standing, local or other orders,

is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[91] Section 129 clearly sets out that the contravention of any instruction published for the general information and guidance for the Canadian Forces is deemed to be prejudicial to good order and discipline. The prosecution need only prove the contravention to establish the prejudice to good order and discipline. The court has already found the prosecution has proven beyond a reasonable doubt that Sergeant Lambert contravened article 10.21.06 of the MFSI.

FOR THESE REASONS, THE COURT:

[92] **FINDS** Sergeant Lambert not guilty on charges 1 and 2. Finds Sergeant Lambert guilty of charge 3 and orders a stay of proceedings for charge 4.

Counsel:

Major P. Rawal, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander B.G. Walden, Directorate of Defence Counsel Services
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