



COURT MARTIAL

Citation: *R v Kent*, 2013 CM 3031

Date: 20131122

Docket: 201359

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal S. Kent, Accused

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

REASONS FOR FINDING

(Orally)

[1] Corporal Kent is charged with three service offences under the *National Defence Act* concerning a sole and short incident that allegedly occurred in the premises of a PMQ on 14 January 2013 at Canadian Forces Base Petawawa, Ontario.

[2] Firstly, he is charged with an offence laid under section 130 of the *National Defence Act* for storing a firearm, without lawful excuse, a 9-millimetre Sig Sauer P225 pistol in a careless manner; secondly with an offence also laid under section 130 of the *National Defence Act* for handling a firearm, without lawful excuse, a 9-millimetre Sig Sauer P225 pistol in a careless manner; and thirdly, with an offence laid under section 129 of the *National Defence Act* for failing to secure his service weapon, a 9-millimetre Sig Sauer P225 pistol, as it was his duty to do so.

[3] The evidence is composed of the following elements in order of appearance before the court, the testimony of:

- (a) Master Seaman Forbes; Master Seaman Descoteaux, the leading investigator of this case; Sergeant Whalen; Mrs. Ressor; Warrant Officer Strain, Mr Villeneuve; Mr James; and Corporal Kent, the accused on trial;
- (b) Exhibit 3, admissions made by the accused pursuant to paragraph 37(b) of the Military Rules of Evidence (MRE);
- (c) Exhibit 4, a copy of the publication on Operational Training, Training Safety, (B-GL-381-001/TS-000) issued on authority of the Chief of Land Staff and dated 24 September 2004 with Chapter 9 modified on 26 January 2007;
- (d) Exhibit 5, and electronic copy on a DVD of exhibit 4
- (e) Exhibit 6, a copy of Chapter 4 of Volume 4 of the Security Orders for the Department of National Defence and the Canadian Forces, Military Police Policies and Technical Procedures, issued on Authority of the Chief of the Defence Staff, dated 11 October 2011;
- (f) Exhibit 7, a copy of the Duty Weapons Register;
- (g) Exhibit 8, a copy of a work order from the CFSU(O) Weapons shop, dated 1 February 2013;
- (h) Exhibit 9, a copy of the Serviceability and Function Report concerning a Sig Sauer P225, serial No. M638191, dated 7 February 2013;
- (i) Exhibit 10, a copy of nine pictures taken by Corporal Kent at Garrison Day on 24 August 2013 on Canadian Forces Base Petawawa;
- (j) Exhibit 11, a copy of an Aide Memoire for the Military Police Service Weapon (Sig Sauer P-225);
- (k) Exhibit 12, a copy of a PowerPoint presentation concerning the Military Police National Use of Force Programme;
- (l) Exhibit 13, a copy of a picture taken by Corporal Kent at Garrison Day on 24 August 2013 on Canadian Forces Base Petawawa;
- (m) the judicial notice taken by the court of the facts in issues under Rule 15 of the Military Rules of Evidence.

[4] At the beginning of the trial, during the examination-in-chief of the first prosecution's witness, an objection made by the defence counsel to a prosecution's question led to an adjournment during which was found out new information by the

prosecution who resulted in a new disclosure of information. This information was unknown by the prosecutor and defence counsel. Court was adjourned to the next morning and once it resumed, the defence counsel requested from the court to withdraw all admissions he made and contained in Exhibit 3. He explained to the court that in the light of the new information he received, his approach to some issues had changed and if he had known the information received through the recent disclosure made by prosecution earlier, he would have not made those admissions. The prosecution did not object to his request and confirmed that the recent information obtained through the recent disclosure could potentially result in such situation.

[5] The court allowed the withdrawal of the admissions made by defence counsel through Exhibit 3 because it was satisfied that they were made in circumstances they ought not to have been made. The court martial is empowered to control its own process and allowed to prevent manifest injustice. The prosecution was in a position to still be able to call evidence on the matter and cogent reasons were provided by the defence counsel for doing so.

[6] Corporal Kent, the accused on this trial, is a Canadian Forces Military Police member who joined the Regular Force in that trade in 2008. On 14 January 2013, the day of the incident, he was an investigator at the General Investigation Section (GIS) at the Military Police detachment on Canadian Forces Base Petawawa.

[7] On that day, he was on duty as an investigator and was wearing civvies. As usual he had his service weapon in his holster, a pistol Sig Sauer P225 with three magazines of eight rounds each and one round in the pistol's chamber.

[8] He went to the guardhouse on the base to eat his lunch around lunchtime. After eating lunch, he was text messaging with his wife and she invited him to join her at Amanda Ressor's house. Knowing that Sergeant Whalen's wife was there too he invited him to go with him, which they did. It took about two minutes to get there, the house being in the PMQs on the base.

[9] When they arrived they had to park their vehicle in the street, the parking being already full of vehicles. They made their way through the side door of the house, which is the entrance to the kitchen. They made their way to the living room where were four colleagues' wives with their respective children. Children were under six months old except for Amanda Ressor's son who was about three years old.

[10] At some point Corporal Kent went to the kitchen in order to get something for his son further to his wife's request. He was followed by Amanda Ressor's son. The kid asked him to see his service weapon. He decided to hand the kid with his service weapon. In order to do so he removed the magazine from the pistol while it was in his holster, he pointed it in a safe direction being the corner of the room, cocked the slide which resulted in a round being ejected, took the ejected round, inspected the barrel to make sure that there was no round, de-cocked the slide without having to pull the trigger and handed it to the kid. Cpl Kent took the magazine and the round and placed them on the kitchen's counter out of reach of the kid.

[11] The kid took the pistol with his two hands and proceeded to walk to the living room. Corporal Kent followed him closely in order to watch his pistol and the kid. He was one to two feet behind. As soon as the kid entered in the living room Sergeant Whalen saw him and took the pistol from his hands and gave it back to Corporal Kent. The kid had the pistol in his hands for about five seconds and started to cry because he was upset.

[12] Corporal Kent put the pistol back in his holster, went back in the kitchen where it took the magazine and put it back in the pistol. He took the round and put it in his pocket. Except for Sergeant Whalen nobody reacted to this incident. Amanda Ressor testified that it was brief, that she did not have time to have any emotion and that she felt safe.

[13] Sergeant Whalen smacked him in the back of the head. Both were there for about 10 minutes and they went back to the job. Once outside Sergeant Whalen told him that he didn't care what he did at home and that he did not want to make it a neighbour made of scene, to which he responded that I guess I made a mistake.

[14] Corporal Kent did not feel that he put people at risk and did considerer that they were safe. He was not arrested but his credentials were removed, he was moved to and MP field unit about two weeks after the incident. He was not precluded of possessing any weapon.

[15] On 30 January 2013, Master Seaman Forbes, a National Services Investigator, assisted the lead investigator of that incident. He seized a service weapon, to which a Sig Sauer P225 pistol located at position 38 in the vault. According to the Duty Weapons Register for the period of 8 to 17 January 2013, on 14 January 2013, Corporal Kent took and put back his service pistol in slot 38 in the vault at the guardhouse.

[16] He put the weapon in a locked box and brought it back the morning after to the lead investigator in Ottawa, Master Seaman Descoteaux. The serial number of the weapon he gave was M638199.

[17] Master Seaman Descoteaux confirmed that the weapon he received was a Sig Sauer P225 pistol with the serial number M638199. He did not recall the state of the weapon. He handed it to the evidence custodian, Mr Villeneuve.

[18] On 6 February, Master Seaman Descoteaux brought the pistol to the Weapons Shop in order to have a testing done about the serviceability of the weapon. On the work order, dated 1 February 2013, a Sig Sauer P225 serial number M638191 was declared in working order and capable firing. The serviceability and function report made by Mr James from the Weapons Shop stated that he deems the weapon to be serviceable further to its examination and the tests conducted on it.

[19] The weapon was given back to Master Seaman Descoteaux on 7 February 2013 and he put it in a temporary locker. The evidence custodian took it from the temporary

locker on 11 February 2013 and brought it in the vault. He is the only one having access from the inside to the temporary locker. During his testimony Master Seaman Descoteaux confirmed that the serial number of the weapon seized and currently in possession of the evidence custodian is M638191.

[20] Before this court provides its legal analysis, it's appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with the principle fundamental to all criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

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

[22] 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.

[23] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R v Lifchus* [1997] 3 SCR, 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts subsequent 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 arises 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 and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before a court.

[24] In *R v Starr* [2000] 2 SCR, 144, at paragraph 242, the Supreme Court 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....

[25] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute

certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case, Corporal Kent, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[26] What is evidence? 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.

[27] 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.

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

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

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

[31] 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.

[32] Subsection 86(1) of the *Criminal Code* reads as follows:

Every person commits an offence who, without lawful excuse, uses, carries, handles, ships, transports or stores a firearm, a prohibited weapon, a restricted weapon, a prohibited device or any ammunition or prohibited ammunition in a careless manner or without reasonable precautions for the safety of other persons.

[33] The essential elements of handling, without lawful excuse, a 9-millimetre pistol in a careless manner are:

- (a) the identity of the accused as the author of the offence
- (b) the date and place of the offence as alleged in the particulars of the charge;
- (c) the accused stored or handled a firearm;
- (d) the accused stored or handled the firearm in a careless manner; and
- (e) the accused had not lawful excuse for the way stored or handled the firearm.

[34] A firearm is a gun, a weapon with a barrel that can fire a shot, bullet or other projectile and can cause death or serious bodily injury to another person.

[35] In order to prove that Corporal Kent handled a firearm, the prosecutor does not have to prove that he fired the weapon. Nor does prosecutor have to prove that he injured or meant to hurt anybody. The weapon need not be loaded; nor pointed at anybody.

[36] To satisfy this requirement, the prosecutor must prove beyond a reasonable doubt at least that Corporal Kent had a firearm with him, that he pulled it out and held it in his hand in some manner or other. No more is required, but nothing less will do.

[37] The storage and handling of firearms is an activity that involves control over a thing that has the potential to cause serious harm to life and limb. The criminal law pays special attention to persons who have control over things like firearms. We expect those who voluntarily assume control over guns to act in a way that indicates respect for the inherent potential for harm of those firearms.

[38] The *Criminal Code* does not define the term "storage". Having read the definition of the words "storage" and "store" in the Concise Oxford dictionary, and referring to the decisions of *R. v. Bludau*, [1994] O.J. No. 2537 at paragraph 11, *R. v. Joe*, 192 A.R. 99 at paragraph 26, *R. v. Bickford*, 2000 ABPC 60 at paragraphs 23 to 26

and *R. v. Carlos*, 2002 SCC 35, I conclude that the plain meaning of this word is to reserve, put away or set aside for future use.

[39] In order to determine if Corporal Kent stored or handled the firearm in a careless manner, the court is not required to decide what was in Corporal Kent's mind at the time he stored or handled the firearm. Carelessness is the absence of the required state of care. To determine this question, the court must look at what Corporal Kent did and did not do, how he did it and did not do it, and what he said and did not say.

[40] The court should consider all the circumstances, including any personal characteristics of Corporal Kent that deprive him of the capacity necessary to have the mental state of care required in the circumstances.

[41] Careless storage or handling of a firearm involves a conduct that shows a marked departure from the standard of care that a reasonably prudent person would exercise in the same circumstances. If the court has a reasonable doubt that Corporal Kent's way to store or handle the firearm showed a marked departure from the standard of care that a reasonably prudent person would exercise in the same circumstances, or that Corporal Kent took reasonable precautions to live up to that standard of care, this element has not been proven.

[42] It is not always an offence to store or handle a firearm in a careless manner. It is an offence, however, if the person who stores or handles the firearm in that way has no lawful excuse for doing so.

[43] A lawful excuse is an excuse that the law recognizes and for which it provides. Conduct is excused, not because the law approves of it, but because the law does not treat it, in the circumstances, as a crime.

[44] Section 129 of the *National Defence Act* reads in part as follows:

- (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.
- (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.

[45] The essential elements of the offence of neglect to the prejudice to good order and discipline under section 129 of the *National Defence Act* are:

- (a) the identity of the accused as the offender;
- (b) the date and place of the offence;
- (c) the omission as alleged in the charge really occurred;
- (d) that the omission amounted to a blameworthy negligence, which includes to prove that:
 - (i) there was a standard of care to be exercised by the accused;
 - (ii) the omission of the accused was in relation with the standard of care;
 - (iii) the omission of the accused breached the required standard of care; and
 - (iv) the omission of the accused amounted to a negligence, which means that the acts or omissions of the accused constituted a marked departure from the expected standard of care.
- (e) the prejudice to good order and discipline, which includes to prove:
 - (i) the standard of conduct required;
 - (ii) the fact that the accused knew or ought to have known the standard of conduct required;
 - (iii) the fact that the omission of the accused amounted to a contravention of the standard of conduct.

[46] Concerning the essential element of neglect, this court has to find out if some evidence has been adduced by the prosecution concerning the conduct of the accused itself, which is the *actus reus*, and the requisite mental element of it, which is the *mens rea*.

[47] First, the negligence concept under section 129 of the *National Defence Act* must be addressed as a penal concept as I already stated in my decisions in *R v Gardiner*, 2008 CM 3021 and *R v. Nauss*, 2013 CM 3008. Generally speaking, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. Fundamental principles of military law justice require

that the law on penal negligence concern itself not only with conduct that deviates from the norm, but also with the offender's mental state. As established in *R v Beatty*, 2008 SCC 5, at paragraph 7, the modify objective test established in *R v Hundal*, [1993] 1 S.C.R. 867 remains the appropriate test to determine the requisite *mens rea* for negligence-based military service offences under the Code of Service Discipline.

[48] Concerning the *actus reus*, it must be defined by the applicable standard and the fact that the conduct of the accused did not respect it.

[49] Concerning the *mens rea* for negligence under section 129 of the *National Defence Act*, the remarks of the Supreme Court of Canada decision in *R v Beatty*, 2008 SCC 5, at paragraphs 48 and 49 are very relevant to this case. Further to a reading of those paragraphs I still conclude, as I did in *Gardiner* and *Nauss*, that for an offence of negligence under section 129 of the *National Defence Act* it is only necessary to establish an objective *mens rea* and a subjective one is not necessary in order to prove this offence.

[50] It is true that the accused testified on his own behalf on this trial. However, it is not one of those cases where the approach on the assessment of credibility and reliability expressed by the Supreme Court of Canada in *R v W. (D.)* must be applied. The facts related by all the witnesses, including the accused, are not controversial. The credibility and reliability of the accused is not at stake. Evidence presented by the prosecution confirmed what was told by the court by the accused. It is more a matter for the court about the application of the law to the facts put before this trial.

[51] Now, the court considers that the prosecution has discharged its burden of proof beyond a reasonable doubt concerning the identity, date and place regarding the three charges. As a matter of fact, there is no doubt that the testimony of the accused and the evidence adduced by the prosecution support such conclusion.

[52] Concerning the first charge, the court has to determine if it has been proven beyond a reasonable doubt that the accused stored a firearm and did that in a careless manner.

[53] The facts of this case did not disclose a situation where Corporal Kent stored his service weapon. At no moment, he did put away, set aside or reserve his service weapon for future use. He did remove any ammunition from his Sig Sauer P225 before giving it to the child but he kept a close eye on it by following him in the house. He did not move away from it or intended to be separated from it at any time.

[54] Then, it is the conclusion of the court that the prosecution has not proved beyond a reasonable doubt that Corporal Kent did store a firearm.

[55] Consequently, having regard to the evidence as a whole concerning this essential element of the offence, it is the conclusion of this court that the prosecution has not

proved beyond a reasonable doubt that Corporal Kent stored in a careless manner a firearm contrary to section 86 of the *Criminal Code*.

[56] Now about the second charge, the court is of the opinion that the prosecution has proven beyond a reasonable doubt that Corporal Kent handled a firearm. He took his Sig Sauer in his hands and clearly manipulated it. He told also to the court that on that day he had no reason to believe that his pistol would not be capable of firing.

[57] On that last issue I would like to indicate that the prosecution evidence, by itself, was troubling. If the accused had not confirmed that his weapon could do such thing, the court would have been left with the following evidence: a weapon seized and for which it could not be proven beyond a reasonable doubt that it was the one used by the accused on the day of the incident, considering the time elapsed between the incident and the time it was seized, the lack of information on its movement between 17 and 30 January 2013 and the impossibility for the prosecution to clearly link that weapon with the accused through serial number or any other circumstances; a weapon serviceable but for which it still exists a reasonable doubt about the fact that it was proven that it was the weapon seized that it was tested, considering the issue with the change of serial number that occurred during the seizure and that was left unexplained by the prosecution.

[58] Has the prosecution proved beyond a reasonable doubt that Corporal Kent handles his weapon in a careless manner? In order to do so, the prosecution had to prove beyond a reasonable doubt the applicable standard of care and that Corporal Kent's way to handle his firearm showed a marked departure from the standard of care that a reasonably prudent person would exercise in the same circumstances.

[59] Concerning the standard of care, the prosecution submitted that the firearm had to remain in the holster unless having any reason to use it. On that matter, evidence disclosed obviously that MP members are trained to know how to use their weapon in threatening situation, but it is not the case here. Also, there is some situation where they have to take away or remove their pistol from the holster; such as, when they interview a suspect in an interview room, they access correctional facilities or simply they clean their weapon.

[60] Unless being in those specific situations or that some specific set of facts may call for taking out their weapon, it is a common practice, while on duty, to leave the weapon in its holster. The weapon is loaded and ready to fire and by taking it out, it creates some kind of danger that may ultimately result in the use of it against the Military Police member.

[61] Then the court concludes that the prosecution has proved beyond a reasonable doubt the standard of care for handling a service weapon by a Military Police member on duty; which is, that the firearm had to remain in the holster unless having any specific reason to use it.

[62] Now, is Corporal Kent's way to handle his firearm showed a marked departure from the standard of care that a reasonably prudent person would exercise in the same circumstances? As mentioned by Chief Military Judge Dutil in *R v Sharp*, 2008 CM 1003 at paragraph 29, comments which I endorse without hesitation:

... it is a person trained and competent with the use of such a weapon where the subject of the use is also a military police person with the same level of training and experience....

[63] The court is of the opinion that the way Corporal Kent handled his weapon constitute a departure from the standard of care that a reasonably prudent person would exercise in the same circumstances but not a mark departure.

[64] It is clear that what Corporal Kent did was inappropriate in the circumstances. However, the way he did it does not disclose a marked departure from the standard of care that a reasonably prudent person would exercise in the same circumstances. Corporal Kent was foreseeing the risk of harm when he showed and handed out his weapon to this child of about three years old in a private house. He was fully aware that the weapon might discharge and cause any kind of injury or kill someone. In order to reduce that risk to zero, he removed properly all rounds from the pistol and kept them away from the child. He also kept the gun within arms reach by following the child when the latter decided to go away and show what he just got to people in the living room. There was no dangerous potential activity in the house, in fact, the environment was safe.

[65] Then, it is the conclusion of the court that the prosecution has not proved beyond a reasonable doubt that Corporal Kent's way to handle his firearm showed a marked departure from the standard of care that a reasonably prudent person would exercise in the same circumstances.

[66] Consequently, having regard to the evidence as a whole concerning the fact that Corporal Kent handled a firearm in a careless manner, it is the conclusion of this court that the prosecution has not proved beyond a reasonable doubt that Corporal Kent carelessly handled a firearm contrary to section 86 of the *Criminal Code*.

[67] Finally, concerning the third charge, has Corporal Kent failed to secure his service weapon? The plain meaning of the term "secure" refers to protect against threats, make safe or manipulate in a safe manner, as indicated by the Concise Oxford dictionary. Also, the evidence disclosed that Military Police members are trained to make safe, secure their weapon by specific measure that they are trained on, such as applying safety precautions when handling it.

[68] Also, evidence has been adduced by prosecution through Warrant Officer Strain that in order to keep the weapon safe from others, a Military Police member could not take out his service weapon from the holster except, as a mentioned it earlier, for specific reasons.

[69] Then, it is the conclusion of this court that this essential element has been proved by the prosecution beyond a reasonable doubt.

[70] Now, is that the omission amounted to a blameworthy negligence? The court concludes that it has been proven beyond a reasonable doubt that there was a standard of care to be exercised by the accused, which is that the firearm had to remain in the holster unless having any reason to use it, that the omission of the accused was in relation with the standard of care and that the omission of the accused breached the required standard of care.

[71] Is the omission of the accused amounted to a negligence, which means that the acts or omissions of the accused constituted a marked departure from the expected standard of care? For the exact same reasons the court articulated concerning the same issue on the second charge, the court concludes that the prosecution proved a departure but not a marked departure from the expected standard of care. Corporal Kent was foreseeing the risk of harm when he took out his weapon from his holster. The way and the context he did it demonstrates his awareness about the dangers associated with taking out his service weapon. He stayed with the child on all time and the environment was safe.

[72] It is the conclusion of the court, having regard to the evidence as a whole that the prosecution has not proved beyond a reasonable doubt that the omission of Corporal Kent amounted to a blameworthy negligence and that this omission constituted a prejudice to good order and discipline.

[73] I would like also to comment on the prejudice to good order and discipline. From the court perspective, the prosecution failed also to prove this essential element beyond a reasonable doubt. There was no actual prejudice proven, nor any potential one. This incident was very limited in time and to those who saw it. It did not cause any impact at the unit or among the police detachment members. It is not a situation where it can be inferred from the circumstances or as a natural consequence of the proven act.

[74] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of storing and handling, without lawful excuse, a Sig Sauer P225 pistol in a careless manner contrary to section 86 of the *Criminal Code*, and failing to secure a Sig Sauer pistol contrary to section 129 of the *National Defence Act*.

FOR THESE REASONS, THE COURT:

[75] **FINDS** Corporal Kent not guilty of the first, second and third charge on the charge sheet.

Counsel:

Major A.-C. Samson, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander P.D. Desbiens, Directorate of Defence Counsel Services
Counsel for Corporal Kent