



COURT MARTIAL

Citation: *R v Day*, 2011 CM 4026

Date: 20111125

Docket: 201147

Standing Court Martial

Canadian Forces Base Gagetown
Gagetown, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Captain T. Day, Accused

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

REASONS FOR FINDING

(Orally)

[1] The accused, Captain Day, is charged with negligently performing a military duty imposed on him and with neglect to the prejudice to good order and discipline.

[2] The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt that Captain Day had a duty to obtain information on the location of patrol call sign 24 and to pass this information to Run-up 3B and that he failed to perform this duty. Defence counsel argues the evidence before this court does not prove beyond a reasonable doubt that Captain Day is guilty of these offences. Furthermore, defence counsel argues that the principle in *Kienapple* applies to charges 1 and 2 and charges 3 and 4.

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

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

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

[6] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term, "beyond a reasonable doubt," has been used for a very long time. It is part of our history and traditions of justice.

[7] The Supreme Court of Canada, in *R v Lifchus*, [1997] 3 S.C.R. 320, proposed a model chart on reasonable doubt. 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 that evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

[8] In *R v Starr*, [2000] 2 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 Captain Day, beyond a reasonable doubt. To put it in perspective, if the court is convinced, or would have been convinced, that the accused is probably or likely guilty, then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[9] Evidence may include testimony under oath or solemn affirmation before the court by witnesses. It could be documents, photographs, maps or other items introduced

by the witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

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

[11] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue before the court. The evidence before this court is composed essentially of the following: judicial notice, exhibits, admissions by the accused 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, judicial notice under Military Rule of Evidence 16(1)(e) of two Canadian Forces publications; namely, B-GL-331-002/FP-001, *Staff Duties for Land Operations*; and of B-GL-392-004/FP 001, *Infantry Volume IV, Infantry Patrolling*. Nine exhibits were produced by the prosecution and defence counsel presented twelve exhibits. The admissions made by Captain Day may be found at Exhibit 3. The witnesses heard in the order of their appearance before the court are Major McDonnell, Captain Corey, Captain Lloyd, Master Corporal Dickison, Master Corporal Guilbeault, Sergeant LeClair, Captain Vincent and Major Gardner. The witnesses are deemed credible but the reliability of certain witnesses' evidence is affected by the passage of time.

[12] On 23 January 2009, Captain Day was a member of A Squadron and he was stationed at Forward Operating Base Ma'Sum Ghar. He was acting as duty officer at the tank squadron/forward operating base command post. He commanded a tank troop, call sign T13. The A Squadron combat team left Forward Operating Base Ma'Sum Ghar in the morning to participate in an operation in the Panjwai East area of operations. Their role in the joint patrol with M Company was to establish a cordon around a village. The purpose of the mission was to get situational awareness on the enemy and the local population. The combat team was composed of the acting OC, Captain Johnson; the Battle Captain, Major Gardner, Captain Gardner at the time; two tank troops; an infantry platoon from M Company; an engineer section; and various support elements (see Exhibit 18).

[13] The MIRC system is one of the communications systems used by Task Force Afghanistan and the 3 RCR Battle Group and was described as a chat system similar to the MSN chat system. Every subunit within the 3 RCR Battle Group had access to the MIRC system. At 1156 hours (all times local), call sign 2, N Company command post, posted on the MIRC system that call sign 24 was departing Forward Operating Base Wilson for its patrol. At 1209 hours, call sign 2 posted on MIRC that call sign 24 was in a leaguer at grid 3181 9313. Ten minutes later, call sign 2 posted on MIRC that call sign 24's location was 3187 9329. At approximately 1230 hours, Corporal Dickison,

soon after having assumed command of Run-up 3B, noticed friendly troops in the area and requested details on this patrol on the camp security radio net (see Exhibit 20). The Forward Operating Base Ma'Sum Ghar command post replied a few minutes later there were no details on this patrol.

[14] Between 1302 hours and 1510 hours, call sign 2 provided numerous postings on MIRC concerning call sign 24. None of these postings contained a grid reference. At 1521 hours, call sign 2 requested a restricted zone of operations (ROZ) at grid 3271 9473 to permit call sign 24 to conduct a blow in place (BIP) of one illumination round, artillery casings and medical supplies found in the compound of interest. At 1523 hours, the Battle Group Senior Duty Officer indicated the ROZ and BIP were good to go and to advise five minutes before the BIP and when the BIP would be complete.

[15] At approximately 1529 hours, Run-up 3B reported on the camp security radio net two fighting-aged males at grid 330 939 (see Exhibit 20). At 1535 hours, call sign 2 advised five minutes to BIP (see Exhibit 13). The Battle Group Senior Duty Officer acknowledged the warning. The BIP occurred. Immediately after the BIP, 3B reported a rocket attack and engaged the suspected launch site of the rocket attack. The suspected site was actually the BIP and the location of call sign 24. A check fire was then sent over the Battle Group radio net by call sign 2.

[16] The particulars of the first charge read as follows: In that he, on or about 23 January 2009, at or near Forward Operating Base Ma'Sum Ghar, Kandahar Province, in the Islamic Republic of Afghanistan, while acting as the A Squadron duty officer, failed to obtain, as was his duty to do, information regarding the location of a Canadian patrol known as call sign 24. The prosecution had to prove the following essential elements for the 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 a particular military duty was imposed on Captain Day, specifically that Captain Day had to obtain information regarding the location of a Canadian patrol known as call sign 24;
- (c) that Captain Day was aware of the duty imposed upon him;
- (d) that a standard of care was to be exercised by Captain Day;
- (e) the conduct of Captain Day in relation to this military duty;
- (f) that this conduct showed a marked departure from the conduct of a reasonable person in the circumstances;
- (g) that Captain Day failed to direct his mind to the risks and the need to take care; and

- (h) whether Captain Day possessed the requisite capacity to appreciate the risk flowing from his conduct.

[17] The date and location of the alleged offence is not an issue in this trial. Captain Day was the duty officer for Forward Operating Base Ma'Sum Ghar in Kandahar Province in Afghanistan on 23 January 2009. He was aware he had been tasked to perform that duty. These elements of the offence are not an issue for any of the four charges.

[18] Did Captain Day have a duty to obtain information regarding the location of a Canadian patrol known as call sign 24? At approximately 1230 hours, Run-up 3B contacted Forward Operating Base Ma'Sum Ghar command post. 3B informed the command post that he could see a friendly patrol at grid 3181 9322 and he asked for further details (see Exhibit 20) and the testimonies of Master Corporal Dickison and Master Corporal Guilbeault. A few minutes later, the command post told him there were no details (see testimony of Master Corporal Dickison and Master Corporal Guilbeault).

[19] The same topographical map was used to create Exhibits 4, 14, 19, and 23. Major McDonnell created Exhibit 4. He described the map as a typical military map that is used by an armoured officer. He described it as an enlarged map of Ma'Sum Ghar. His area of operations was Panjwai East and the N Company's area of operations was Zhari district. The Arghandab River separated the areas of operations. The map in the Ma'Sum Ghar command post was similar to the topographical map found at Exhibit 4 and it showed the area of operations for Ma'Sum Ghar, N Company and M Company. Major Gardner created Exhibit 23 and he described the map as familiar and he also described the different area of operations using this map. Captain Corey was shown a map similar to Exhibit 4. He testified it was the type of map he has been using since he joined the CF. He used this map to describe the areas of operations for N Company and for A Squadron. It is clear from this evidence that the topographical map shown to the witnesses is a typical military map of the Ma'Sum Ghar area and that it was used in the Ma'Sum Ghar command post.

[20] The location provided by call sign 3B, grid 3181 9322, was in the N Company area of operations since it was on the northern side of the Arghandab River. But it was also within the area of influence of Forward Operating Base Ma'Sum Ghar because it was an area from which rocket attacks aimed at Ma'Sum Ghar had been launched (see testimonies of Major McDonnell and Major Gardner). Major Gardner testified Run-up 3B had the best view of the area of rocket attacks. An area of influence is larger than an area of operations and it is an area which can influence a unit or subunit and be influenced by the unit or subunit (see testimonies of Major McDonnell, Major Gardner and Captain Lloyd).

[21] Capt Lloyd posted call sign 24's location twice on the MIRC: at 1209 hours, a leaguer at 3181 9319, and 1219 hours, giving a locstat 3187 9321. He then requested a ROZ for call sign 24 at grid 3271 9473 for a BIP of an illumination round.

[22] During his cross-examination, Major McDonnell agreed that a duty officer did not have to seek out information on other subunits if they did not enter his area of operations. Subunits were not responsible to seek information on other subunits, since it was the responsibility of the battle group to provide that information. Prior to the incident, he did not order the duty officer to report on the movement of other subunits in other area of operations. But he also testified that a duty officer managed the information entering the command post and should pass on the information of friendly forces in his area of influence to those who need to have that information. He testified that a duty officer must pass on information on a BIP that could have an effect on his area of operations.

[23] Major Gardner testified that the tracking of friendly forces depended on their proximity to his area of operations and whether they were in his area of influence. A duty officer had to monitor communication systems, pass information to higher headquarters and pass actionable information to the appropriate persons.

[24] Captain Lloyd testified that a duty officer had to maintain situational awareness on friendly forces and enemy forces in the area of operations and in the area of influence. A duty officer had to be aware of events outside the area of operations if they could influence the area of operations. This applied to all command posts and duty officers. A duty officer had to pass relevant information to higher headquarters and to his subordinate elements. Captain Lloyd also testified that a ROZ and a BIP are important for subunits because it is a controlled explosion and individuals need to know if it is near enough to be seen or heard. He also explained why a range in another area of operations but near to his area of operations would be of interest to him. He would inform his troops of this range so they would not think it is a contact. Captain Lloyd testified information relevant to the Battle Group and to flanking units was posted on the MIRC and that the MIRC was no different than the combat radio net. The combat radio net was used primarily for operations. Captain Lloyd stated it was never acceptable that the MIRC not be monitored in a command post, any command post.

[25] During his cross-examination, Captain Lloyd concurred that he did not specifically try to get T1's attention (A Squadron) when he posted the ROZ and BIP on the MIRC and that A Squadron would want to be aware of the ROZ and BIP since they were in A Squadron's area of influence, but he also stated he had no reason to believe T1 would not see the information on the MIRC.

[26] Captain Cory testified that he had served as a duty officer in the Ma'Sum Ghar command post. The most important task for a duty officer was to maintain situational awareness of the location of red and blue forces on the battlefield and it had to be taken seriously. A duty officer was expected to know what was happening in the whole Battle Group and be able to brief his commander. This was expected of every duty officer.

While he did not expect Ma'Sum Ghar command post to monitor the movement of friendly forces in other area of operations, Captain Corey testified he did expect Ma'Sum Ghar command post to be interested in what he was doing in their area of influence since it was the main area of rocket attacks.

[27] Sergeant LeClair had acted as duty officer at the Ma'Sum Ghar command post on numerous occasions. He testified that, as an intelligence representative for A Squadron, he prepared threat warnings and information on the enemy for the Panjwai and Zhari area of operations. He explained that it was prudent to provide one for Zhari since it was so close to their area of operations. He also testified that passing timely information to those that needed it was a responsibility of a duty officer.

[28] It is clear from this evidence that Captain Day had a duty to obtain information on call sign 24 when he was contacted by Run-up 3B. Call sign 24 was in the Ma'Sum Ghar area of interest and in an area of particular interest and importance for Ma'Sum Ghar. 3B was tasked with protecting the forward operating base and he had indicated the presence of friendly forces in that area. Captain Day had a duty to obtain relevant information on the location of the friendly patrol in his area of interest, especially after having received a request for information by 3B. He also had a duty to obtain information on the BIP and ROZ, when it was posted, since it was in his area of influence and in an area where rocket attacks had been launched against Forward Operating Base Ma'Sum Ghar.

[29] Was Captain Day aware of this military duty? Although he could not remember that event, Master Corporal Guilbeault testified that Captain Day would have told him what to answer to 3B. According to Master Corporal Guilbeault, Captain Day would have tried to find details but was unsuccessful.

[30] Major Gardner testified that duty officers had to read the daily situation reports (DSR) and that it was emailed to the duty officer account on tacnet as a Word document. The duty officer had to read and understand Exhibit 7. Exhibit 7, Command Post Operations, provides that the duty officer must monitor all communications, which includes the MIRC. Duty officers had to maintain situational awareness by reading the battle group DSR and other reports. Paragraph 18 stipulates that patrolling schedules for the next 24 hours for M and N Companies can be found in the latest DSR emailed to the duty officer. It is clear from this evidence that duty officers had a duty to be aware of the information contained in the Battle Group DSR and thus the activities of the other subunits.

[31] Captain Lloyd testified the role of a duty officer was to maintain situational awareness on friendly forces and enemy forces in the area of operations and in the area of influence and to liaise with higher headquarters and with subordinate elements.

[32] Major McDonnell and Major Gardner described the informal duty officer training given to the troop commanders of A Squadron during the pre-deployment training. Major Gardner testified that no duty officer, which includes Captain Day,

expressed any concerns on their abilities as a duty officer. Troop commanders rotated on a weekly basis as command post duty officer.

[33] The evidence clearly indicates the role of a duty officer was to maintain situational awareness by monitoring the MIRC and other communication devices and by reading the DSR and that Captain Day was aware of this requirement. The duty officer had to maintain situational awareness of relevant information concerning friendly forces and enemy activity in his area of operation and in his area of influence. Captain Day was aware of Run-up 3B's request for information concerning a friendly patrol in his area of influence.

[34] The court finds the evidence proves beyond a reasonable doubt that Captain Day knew he had a duty to obtain information on call sign 24.

[35] What was the standard of care to be exercised by Captain Day? A duty officer had to monitor the MIRC and other means of communications. He had to maintain situational awareness on information originating from within his area of operations and from his area of influence.

[36] What was the conduct of Captain Day in relation to his military duty? It would appear that Captain Day was monitoring the MIRC regularly (see Exhibit 13). At 1103 hours he provided an EROC sitrep and at 1112 hours he provided some info on the A Squadron combat team Zulu vehicles. At 1156 hours, call sign 2, Captain Lloyd, indicated that call sign 24 was departing Forward Operating Base Wilson for a patrol, and at 1209 hours call sign 2 provided information on their leaguer at grid 3181 9319. At 1211 hours the Battle Group Senior Duty Officer contacted T1, which is Ma'Sum Ghar command post, to request that Ma'Sum Ghar advise the ADC to Commander Task Force Kandahar of their new pickup time. At 1219 hours call sign 2 provided a locstat for call sign 24 at 3187 9329 and indicated they were moving north-east.

[37] At approximately 1230 hours, Run-up 3B contacted the command post on the camp security radio net to ask for further details on the friendly forces patrol at grid 3181 9322. At 1231 hours, Captain Day acknowledged the Commander's pickup time on the MIRC (see Exhibit 13).

[38] There is one line of text between the entry concerning the leaguer and the Senior Duty Officer's post call pertaining to the Commander's pickup time and there are seven lines of text between the entry concerning the locstat and Captain Day's acknowledgement of the Commander's pick up time.

[39] Captain Day was not paying attention to information originating from other subunits unless they were specifically addressed to him. He was focussed on internal A Squadron matters or dealing with communications from higher headquarters.

[40] Did this conduct show a marked departure from the conduct of a reasonable person in the circumstances? The A Squadron combat team departed Ma'Sum Ghar at

approximately 0656 hours (see Exhibit 15). Between 0714 hours and 1536 hours, T1B or T19B, both being Major Gardner, provided info or sitreps to the Battle Group Headquarters on 30 occasions (see Exhibit 15). Other than the contact reports at 1242 hours, 1246 hours and 1250 hours, Captain Day only provided two postings on the MIRC concerning the combat team operations.

[41] Captain Day was alerted by Run-up 3B to the presence of friendly troops in his area of influence at grid 3181 9322 and was asked for further details. Captain Lloyd had posted information concerning call sign 24's leaguer at grid 3181 9319 and had provided a locstat for call sign 24 at 3187 9329 and had indicated they were moving north-east. These grid references are practically identical to the one provided by 3B. A quick review of the MIRC station should have provided him the information requested by 3B. It appears he did not do that since he would have told Master Corporal Guilbeault there was no information to be given to Run-up 3B. There is no evidence before the court that indicates Captain Day was occupied in some manner that would prevent him from looking for the info on the MIRC.

[42] Captain Day also had a duty to read the DSR. Exhibits 17 and 18, which are the 3 RCR DSRs for 21 and 22 January 2009, indicate that call sign 24 will conduct a patrol to Kalachah on 23 January 2009. The location reported by Run-up 3B is between Forward Operating Base Wilson and Kalachah (see Exhibit 4).

[43] The A Squadron combat team contact was not a significant contact, since Major Gardner, who was actively involved in this operation, could hardly remember it as well as Sergeant LeClair and Master Corporal Guilbeault. Major Gardner testified the contact was quickly defeated by the tanks. At 1257 hours there had been no contact for five minutes (see Exhibit 16). This contact lasted approximately 15 minutes. The planned operation continued as can be seen from the sitreps from T1B at Exhibit 15. Major Gardner described the combat team net as normally busy for a typical combat team operation. He stated it was not a high intensity tempo. Master Corporal Guilbeault could not remember A Squadron coming under attack and remembered his shift to be an average shift until the incident with 3B. The op tempo peaked at that point.

[44] Major Gardner testified the combat radio net was not busy that day and that the Battle Group preferred to use the MIRC if it was not involved in an operation. Captain Lloyd specified there was no significant traffic over that net until the incident. He stated the Battle Group radio net was not commonly used but was monitored.

[45] While the court accepts the evidence of the witnesses that the different logs do not represent a complete picture of the activities occurring on the different radio nets or in the command post, the court must nonetheless examine the evidence it has to come to its finding. A review of Exhibits 13, 15 and 22 indicates that Captain Day was not actively involved in the combat team operation, although he had to monitor the combat team radio net with the assistance of the radio operator. The radio operator was primarily responsible to monitor the combat team radio net. Captain Day was not

communicating on the Battle Group radio net (see Exhibits 15 and 22). There are only 12 communications registered on the camp security log from 1200 hours to 1544 hours.

[46] Exhibit 13 seems to give the court a more complete picture of Captain Day's actions on 23 January 2009. At 1521 hours, call sign 2 requested a ROZ for a BIP at grid 3271 9473 for call sign 24. At 1523 hours the battle group senior duty officer granted the request and requested a five minute warning and completion report. At 1526 hours the Senior Duty Officer informed T1 that helicopter training would take place and one would land at Ma'Sum Ghar. Captain Day replied 21 seconds later, requesting a timing when the Battle Group would one. There are nine lines of text on the MIRC log for these communications.

[47] At 1533 hours, Captain Day posted that QRF was heading back to Ma'Sum Ghar and he posted at 1534 hours that EROC was back at Ma'Sum Ghar. At 1535 hours, Captain Lloyd posted five minutes to BIP and the Battle Group Senior Duty Officer acknowledged. At 1537 hours, Captain Day posted that the QRF was back at Ma'Sum Ghar. There are seven lines of text on the MIRC log for these communications. At 1541 hours, Captain Day posted that call sign 72 had finished the range at NDC and then he immediately posted a contact report for a rocket. At 1542 hours, Captain Lloyd posted a positive detonation on the BIP.

[48] Captain Day was not inundated with information on the MIRC system when he was asked for information on the friendly patrol by Run-up 3B and when a ROZ for a BIP by call sign 24 was requested by call sign 2. He was performing regular duty officer duties. The A Squadron combat team contact had been short and relatively uneventful. A quick review of his map would have shown him that the BIP was in his area of influence and in sight of Run-up 3B. It appears he did not do that. He did not pay attention to this exchange between call sign 2 and Battle Group Headquarters.

[49] The word "negligently" in section 124 of the *National Defence Act* signifies that Captain Day either did something or omitted to do something in a manner that was a marked departure from the conduct of a reasonable person in all the circumstances of the case. This reasonable person must be put in the circumstances of the accused when the events occurred in order to assess the reasonableness of the conduct. By so placing the reasonable person, the standard remains that of the reasonably prudent duty officer, but it is appropriately contextualized (see *R v Beatty* 2008 SCC5, paragraph 40).

[50] The offence of negligently performing a military duty requires more than just carelessness on Captain Day's part. What he failed to do must be a marked departure from the expected standard of conduct in the performance of a specific military duty. A mere departure from the standard expected of a reasonable person in similar circumstances will not suffice to ground liability for penal negligence, which is required of an offence under section 124 *National Defence Act*. The distinction between a mere departure and a marked departure from the norm is a question of degree.

[51] What the court has to decide, in all the circumstances, is not what Captain Day meant to do, but, rather, whether Captain Day performed his duty in a manner that was a marked departure from the manner in which a reasonable, prudent duty officer would perform his duty in the same circumstances.

[52] Some activities may impose a higher *de facto* standard than others. This flows from the circumstances of the activity, not from the expertise of the actor. It is a uniform standard regardless of the background, education or psychological disposition of the actor (see *R v Day* 2011 CMAC 3, paragraph 12).

[53] The circumstances surrounding his omission to obtain information on call sign 24 when it was requested by Run-up 3B and when a ROZ for a BIP for call sign 24 were requested and granted do not explain or excuse his omission to do so. He was in an active war zone. His forward operating base was often under attack by rockets or mortars that originated from the area being patrolled by call sign 24 and where the BIP was planned. He had a duty to maintain the proper situational awareness of his area of operations and of his area of influence for the safety of his forward operating base and the safety of his fellow soldiers of the flanking subunits. He had been in theatre since September 2008 (see Exhibit 8) and had performed the duties of duty officer at the Ma'Sum Ghar command post on a weekly basis once every three or four weeks since his arrival in Afghanistan.

[54] Most witnesses described the area protected by Run-up 3B. Captain Day must have also known that 3B had the responsibility to engage any threat or attack coming from that area. Maintaining situational awareness of friendly forces in sight and within the range of his main camp defence platform, a Leopard 2 tank with a 120-millimetre main armament, is an important task. It is simple common sense. It prevents the engagement of Canadian troops by other Canadian troops. Simply put, it saves lives.

[55] Captain Day did not put his mind to this task. He had two evident occasions to obtain information on call sign 24 and both times he failed to do it. He seemed more focused on acknowledging pick up timings for the Commander Task Force Kandahar or reporting subunits arriving in Ma'Sum Ghar. The court finds that the evidence proves beyond a reasonable doubt that Captain Day performed his duty in a manner that was a marked departure from the manner in which a reasonable, prudent duty officer would perform his duty in the same circumstances.

[56] Did Capt Day fail to direct his mind to the risks and the need to take care?

[57] Run-up 3B had alerted him to the presence of friendly troops in his area of influence. A ROZ and a BIP had been authorized in his area of influence. He failed to pay attention to the information he was receiving from 3B and from the MIRC. Sergeant LeClair testified that Captain Day muttered, "I missed it" three times after Captain Lloyd had called for the check fire. Sergeant LeClair realized Captain Day was referring to the BIP when Sergeant LeClair looked at the MIRC. Captain Day did not direct his attention to this important information he was receiving from 3B and from the

MIRC and the possible risks of not monitoring the presence of friendly troops in his area of influence.

[58] A BIP could easily be confused with an attack on the camp. A reasonable duty officer would have alerted his camp defence force elements of the upcoming BIP to prevent any possible confusion and unnecessary tension. Run-up 3B responded to a perceived threat of a rocket attack. Run-up 3B carried out its SOPs and ROEs as the crew had been taught to do. They were responding using the information they had on the perceived attack.

[59] The court finds the evidence proves beyond a reasonable doubt that Captain Day did fail to direct his mind to the risks associated with his failure to obtain information on call sign 24 and the need to take care.

[60] Did Captain Day possess the requisite capacity to appreciate the risk flowing from this conduct?

[61] Captain Day never informed Major McDonnell or Major Gardner that he did not feel competent to perform the duties of duty officer. There is no evidence before this court that would indicate that on 23 January 2009 he did not have the capacity to appreciate the risk flowing from his conduct. The court finds Captain Day did possess the requisite capacity to appreciate the risk flowing from his conduct.

[62] The particulars of the second charge read as follows: In that he, on or about 23 January 2009, at or near Forward Operating Base Ma'Sum Ghar, Kandahar Province, in the Islamic Republic of Afghanistan, while acting as the A Squadron duty officer, failed to ensure, as was his duty to do, that the tank crew, in Run-up position 3B was provided with all the relevant information regarding the location of a Canadian patrol known as call sign 24. The prosecution had to prove the following essential elements of the 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 a particular military duty was imposed on Captain Day, specifically that Captain Day had to ensure that the tank crew in Run-up position 3B was provided with all the relevant information regarding the location of a Canadian patrol known as call sign 24;
- (c) that Captain Day was aware of the duty imposed on him;
- (d) that a standard of care was to be exercised by Captain Day;
- (e) the conduct of Captain Day in relation to the military duty;

- (f) that this conduct showed a marked departure from the conduct of a reasonable person in the circumstances;
- (g) that Captain Day failed to direct his mind to the risks and the need to take care; and
- (h) whether Captain Day possessed the requisite capacity to appreciate the risk flowing from his conduct.

[63] Did Captain Day have to ensure that the tank crew in Run-up position 3B was provided with all the relevant information regarding the location of a Canadian patrol known as call sign 3B? Major McDonnell testified it was not acceptable for a duty officer to not pass info on troops in the area of influence and it was not acceptable for a duty officer not to maintain situation awareness. Captain Lloyd testified that if information is relevant to his subunit, he acts on it; this would also apply to other subunits.

[64] It is abundantly clear from this evidence and the evidence of Major Gardner, Captain Corey and Sergeant LeClair that a duty officer had a duty to pass information in a timely manner to the individuals who needed the information, be they from a higher headquarters or from within his subunit. Run-up 3B had an important role to play in the defence of Ma'Sum Ghar. This tank crew could observe an area that had been the launch site of numerous rocket attacks against Forward Operating Base Ma'Sum Ghar. This area was inside the Ma'Sum Ghar area of operations as well as within N Company area of operations. The portion within the N Company area of operations was deemed part of the area of influence of Forward Operating Base Ma'Sum Ghar. The location of friendly forces within such an area is an important piece of information. 3B had requested information concerning friendly forces in that area. The call sign 24 BIP was within the Ma'Sum Ghar area of influence and within range of 3B's 120-millimetre main gun.

[65] The court finds the evidence proves beyond a reasonable doubt that Captain Day had to ensure that the tank crew in Run-up 3B was provided with all the relevant information regarding the location of a Canadian patrol known as call sign 24.

[66] Was Captain Day aware of the duty imposed on him? Based on the evidence accepted by the court, the court finds that Captain Day was aware of this duty.

[67] What standard of care was to be exercised by Captain Day? The evidence also clearly demonstrates that Captain Day had to ensure that relevant information was provided in a timely manner to those who needed the information. This is pure common sense and essential in a theatre of war.

[68] What was the conduct of Captain Day in relation to this military duty? Captain Day did not provide any information pertaining to call sign 24 to the tank crew of Run-up position 3B.

[69] Did this conduct show a marked departure from the conduct of a reasonable person in the circumstances? The duty officer plays a critical role in the passage of information from outside sources to elements of his subunit. He performs that role by maintaining situational awareness on activities in his area of operations and in his area of influence. Just as a higher headquarters is responsible to provide the subunit with information, the duty officer must do the same for his elements. The different means of communications in the command post and the DSR provide him with this information. The duty officer must then pass this information to the elements that need it to perform their tasks and duties.

[70] Captain Day did not have any information concerning call sign 24, thus he could not provide this information to 3B. The court has already found the reasonable person in the circumstances would have found that information. Captain Day would have had that information if he had been diligent in performing his duties. A reasonable duty officer would have passed onto 3B the information concerning call sign 24's activities in the Ma'Sum Ghar area of influence. The court finds the evidence proves beyond a reasonable doubt that Captain Day's failure to provide information on call sign 24 to Run-up 3B is a marked departure from the conduct of the reasonable duty officer in the same circumstances.

[71] Did Captain Day fail to direct his mind to the risks and the need to take care? Captain Day did not pay attention to the information concerning friendly forces in his area of influence he received from 3B and from the MIRC. He did not consider the risks associated with his omission to pass on critical information on friendly forces to a key element of the defence of Forward Operating Base Ma'Sum Ghar. Captain Day did fail to direct his mind to the risks and the need to take care.

[72] Did Captain Day possess the requisite capacity to appreciate the risk flowing from his conduct? For the same reasons as found in charge No. 1, the court finds Captain Day did possess the requisite capacity to appreciate the risk flowing from his conduct.

[73] The particulars of the third charge read as follows: In that he, on or about 23 January 2009, at or near Forward Operating Base Ma'Sum Ghar, Kandahar Province, in the Islamic Republic of Afghanistan, while acting as the A Squadron duty officer, failed to obtain all the relevant information regarding the location of a Canadian patrol known as call sign 24. It is an alternate to the first charge. The prosecution had to prove the following essential elements of 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 a particular military duty was imposed on Captain Day, specifically that Captain Day had to obtain information regarding the location of a Canadian patrol known as call sign 24;

- (c) that Captain Day was aware of the duty imposed upon him;
- (d) that a standard of care was to be exercised by Captain Day;
- (e) the conduct of Captain Day in relation to this military duty;
- (f) that this conduct showed a marked departure from the conduct of a reasonable person in the circumstances;
- (g) that Captain Day failed to direct his mind to the risks and the need to take care;
- (h) whether Captain Day possessed the requisite capacity to appreciate the risk flowing from his conduct; and
- (i) the prejudice to good order and discipline resulting from the negligence.

[74] The court has already found that the evidence proves beyond a reasonable doubt that Captain Day was negligent when he failed to obtain relevant information regarding the location of a Canadian patrol known as call sign 24. The court must now determine whether this negligence is prejudicial to good order and discipline.

[75] Prejudice to good order and discipline is not an abstract concept. There must be proof of prejudice to good order and discipline. Proof of prejudice can be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act.

[76] The standard of proof is proof beyond a reasonable doubt. Prejudice is not defined in the *Queen's Regulations and Orders*. In the context of a charge laid under section 129 of the *NDA*, the definition of prejudice is as follows "harm or injury that results from some action or judgement".

[77] Run-up 3B fired one high explosive anti-tank (HEAT) round from its 120-millimetre gun at the location of the perceived rocket attack. The round hit the ground approximately 50 metres from members of call sign 24. Shrapnel was sent flying, hitting a wall behind Captain Corey and one piece fell between the legs of a soldier. Thankfully, this round did not injure anyone. This incident occurred because Captain Day had not obtained the necessary information on call sign 24's position and had not relayed this information to 3B.

[78] Following the check fire, Captain Corey quickly departed the area. As a consequence of this engagement by 3B, Captain Corey changed his exit route to ensure he would not be within sight of 3B. His patrol went through the village in a north-west direction, and then through grape fields and wadis. This route offered him less visibility to observe possible threats around him and prevented him from relying on Ma'Sum

Ghar to support him should he be in contact with the enemy. He usually preferred as much visibility as possible, especially from his friendly forces. This new route had a negative impact on the safety of his troops.

[79] He feared for the safety of his soldiers following this incident. None of his soldiers wanted to walk in sight of 3B. His troops were angry and their anger was directed at the Canadian tanks. This fear remained after the incident. Captain Corey had to take extra time to brief his troops on the location of the tanks and on the ROE for the tanks. Although some of his troops understood that it was a mistake, he had to provide more details to his troops than was normally required because his troops needed to hear these details.

[80] Master Corporal Dickison was the crew commander for Run-up 3B. He testified that after the check fire has been ordered by the command post, he felt surprised and annoyed. He was scared he had killed a Canadian soldier and he was quite upset. His demeanour on the witness stand clearly changed during this portion of his testimony and the court could easily see that this incident still caused emotions in him. He was very angry with his command post and he lost trust in the command post for the rest of the tour.

[81] There is a simple sequence of events that led to this incident. Captain Day failed to obtain the information on the location of call sign 24 and he failed to provide that info to 3B. 3B then fired at the location of 24 because 3B believed Forward Operating Base Ma'Sum Ghar was being attacked by a rocket.

[82] Would 3B have fired at the location of call sign 24 if it have been advised that a BIP was about to happen? Probably not. But 3B did not have that information because Captain Day did not provide him that information. The firing of one 120-millimetre HEAT round at the location of call sign 24 was a consequence of Captain Day's negligence in not passing this information on the location of call sign 24 and on the BIP to 3B.

[83] This caused much consternation amongst the members of call sign 24 and Master Corporal Dickison. As a consequence of this near miss, Captain Corey had to lead his troops using a new, more dangerous route to ensure they would not be within view of 3B. Following this incident, he also had to provide his troops with more information when he gave them orders and his troops were wary of the tanks. Master Corporal Dickison lost trust in his command post for the rest of the tour.

[84] Trust is an important aspect of good order and discipline. Fellow soldiers must be able to trust each other. A lack of trust may well lead to indecision and ultimately failure. A lack of trust erodes good order and discipline.

[85] The court finds that the prejudice to good order and discipline is an indirect consequence of Captain Day's negligence in failing to obtain information regarding the location of a Canadian patrol known as call sign 24. Since it is an indirect consequence

and not a natural consequence, meaning a direct consequence, the court finds Captain Day not guilty of this offence.

[86] The particulars of the fourth charge read as follows: In that he, on or about 23 January 2009, at or near Forward Operating Base Ma'Sum Ghar, Kandahar Province, in the Islamic Republic of Afghanistan, while acting as the A Squadron duty officer, failed to inform the tank crew, in Run-up position 3B with all the relevant information regarding the location of a Canadian patrol known as call sign 24. It is alternate to the second charge. 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 a particular military duty was imposed on Captain Day, specifically that Captain Day had to ensure that the tank crew in Run-up position 3B was provided with all the relevant information regarding the location of a Canadian patrol known as call sign 24;
- (c) that Captain Day was aware of the duty imposed upon him;
- (d) that a standard of care was to be exercised by Captain Day;
- (e) the conduct of Captain Day in relation to this military duty;
- (f) that this conduct showed a marked departure from the conduct of a reasonable person in the circumstances;
- (g) that Captain Day failed to direct his mind to the risks and the need to take care;
- (h) whether Captain Day possessed the requisite capacity to appreciate the risk flowing from his conduct; and.
- (i) the prejudice to good order and discipline resulting from this negligence.

[87] The court has already found that the evidence proves beyond a reasonable doubt that Captain Day was negligent when he failed to ensure that the tank crew in Run-up position 3B was provided with all the relevant information regarding the location of a Canadian patrol known as call sign 24. The court must now determine whether this negligence is prejudicial to good order and discipline.

[88] Based on the evidence described at charge No. 3, the court finds the evidence clearly proves beyond a reasonable doubt that prejudice to good order and discipline was a natural consequence of Captain Day's negligence in failing to ensure that the tank

crew in Run-up position 3B was provided with all the relevant information regarding the location of a Canadian patrol known as call sign 24.

[89] Defence counsel has argued that the rule in *Kienapple* applies to this case and that Captain Day cannot be found guilty of both charges 1 and 2 or of charges 3 and 4. Captain Day is charged with two counts of negligent performance of a military duty. He is accused of failing to obtain information on call sign 24 and is accused of failing to provide this information to 3B. One charge deals with his duty to obtain the information and the other charge pertains to his failure to pass this information to 3B.

[90] The cases reviewed in *R v Prince* [1986] 2 S.C.R. 480, all involve different offences, such as manslaughter and assault causing bodily harm in the *Prince* matter, and hunting out of season and hunting at night without lights in the *McKinney v R* [1980] 1 S.C.R. 401, being two examples. While these different charges are based on one specific incident, the courts found them to be "distinct delicts, causes or matters which would sustain separate convictions" (see *Prince* at paragraph 23). In *McKinney*, the accused had been found hunting during the night and thus had been charged with hunting out of season and hunting at night without lights.

[91] While the court has already examined each offence individually and has reached its conclusion whether the evidence has proven each offence beyond a reasonable doubt, there remains the need to cast a global examination of the matter at hand. While the court has found the evidence reveals Captain Day had two distinct duties as a duty officer; namely, maintaining situation awareness on friendly forces in his area of operations and area of influence and providing the relevant information in a timely manner to those who needed it, the line of separation between these two duties is quite slim. What is the purpose of maintaining situational awareness if not to pass along the relevant information to those who need it? One has to look at this situation through the lens of common sense.

[92] The crux of the matter in the case at hand is the failure of Captain Day to provide Run-up 3B with the relevant information on the location of call sign 24. He failed to do that because of his negligence in failing to obtain the information on the location of call sign 24 over the period of approximately 1200 hours to 1530 hours on 23 January 2009.

[93] He is charged twice under section 124 of the *NDA*. We are not dealing with two distinct charges under the *NDA* or the *Criminal Code* that have different elements of the offence. The facts supporting these two charges are intertwined. They form a cohesive sequence of events that lead to the incident. Therefore, the court finds the rule in *Kienapple* does apply to charges 1 and 2.

FOR THESE REASONS, THE COURT:

[94] **FINDS** you guilty of charge No.2; finds you not guilty of charge No. 3; and directs that the proceedings on charges 1 and 4 be stayed.

Counsel:

Lieutenant-Commander D.T. Reeves, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

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Counsel for Captain T. Day