Citation: *R. v. Petty Officer 1st Class A.E. Libby,* 2007 CM 4024

Docket: 2006105

STANDING COURT MARTIAL
CANADA
HALIFAX, NOVA SCOTIA
HER MAJESTY'S CANADIAN SHIP HALIFAX

Date:30 June 2007

PRESIDING:LIEUTENANT-COLONEL J-G. PERRON, M.J.

HER MAJESTY THE QUEEN
v.
PETTY OFFICER 1ST CLASS A.E. LIBBY
(Accused)

FINDINGS
(Rendered orally)

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[1] The accused, C69 532 249 Petty Officer 1st Class Libby, is charged with having committed four offences. Petty Officer 1st Class Libby stands accused of one charge under section 130 of the *National Defence Act* of having committed public mischief contrary to section 140 of the *Criminal Code* of Canada; of one charge under section 129 of the *National Defence Act* of lying to a military policeman; and of two charges under section 114 of the *National Defence Act* of stealing fuel from the Canadian Forces.

[2] The prosecution asserts that the evidence presented to this court provides beyond a reasonable doubt for every element of the alleged offences. The prosecution argues that PO1 Libby committed the alleged offences by using a DND fuel card for his personal use. The prosecution also contends the accused would have lied about his identity to a member of the military police to avoid detection. The accused asserts that the evidence has not proven beyond a reasonable doubt the identity of the accused as the offender for all charges.

[3] The evidence before this court martial is composed essentially of the following: Judicial notice, testimonies and exhibits. Judicial notice was taken by the court of the facts and issues under rule 15 of the *Military Rules of Evidence*. The testimonies heard in the order of their appearance before the court are those of: Officer

Cadet Gaudet, Master Seaman St. Coeur, Chief Petty Officer 2nd Class Birks, Chief Petty Officer 1st Class Wood, Mr Miles, Commissionaire House, Commissionaire Stewart and Commissionaire Keddy. Ten exhibits were entered by the prosecution by consent and one exhibit was entered by defence counsel on consent.

[4] Before this court provides its legal analysis of the charges, it is 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. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them. 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 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. The 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.

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

[7] In *R. v. Starr* [2000] 2 S.C.R. 144, the Supreme Court of Canada held that:

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

of probabilities.

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, PO1 Libby—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] 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.

[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. Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, the court will assess a witness's opportunity to observe, a witness's reason 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 the conclusion that an accused will lie where the accused chooses to testify. Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanor 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. Minor discrepancies which can and do innocently occur do not necessarily mean that the testimony should be disregarded, however, deliberate falsehood is an entirely different matter, it is always serious and it may well taint a witness's entire testimony. 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.

[10] The accused has presented no evidence in this case, therefore the court

must focus its attention to the third step of the test found in the Supreme Court Decision of *R. v. W.(D.),* [1991] 1 S.C.R. 742. As established in that decision, 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.

[11] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue before the court. Firstly, I will deal with the three charges that pertain to the alleged events of 17 February 2006. During his examination-in-chief, Officer Cadet Gaudet testified that he went to Willow Park at approximately 1700 hours on 17 February 2006, to put gasoline in his military police patrol car because he was coming to the end of his shift. He was on duty at the time and was dressed in his operational patrol dress (OPD); that is to say, in black pants, black shirt and bullet proof vest. He was driving a Ford Crown Victoria, Police Interceptor, with military police markings and police lights. Upon arriving at the fuel pumps, he noticed a civilian vehicle beside pump number three and he parked his car beside pump number two. He described the fuel pump area as a cement island raised a foot off the ground. Pump number three is on the lefthand of the pump and pump number two is on the right-hand of the pump, as he saw it. He thought that pump number one is a diesel pump. Officer Cadet Gaudet testified that it was normal, not unusual, to see civilian vehicles at fuel pumps. The person at pump number three seemed familiar to him and he started speaking to that person. The individual had problems activating the pump with his fuel card and Officer Cadet Gaudet tried to help him. The individual and the Officer Cadet fueled their respective car at the same time. Officer Cadet Gaudet testified that they had a conversation that lasted approximately three to five minutes and that they were standing approximately four to five feet from each other. He testified that the individual spoke a lot and was overly polite and appeared nervous. Although the individual told the Officer Cadet that he was the CO of HMCS KINGSTON and that Officer Cadet Gaudet had worked on a stolen monitor file for him when Officer Cadet Gaudet would have asked him where they had met before, this information did not register with Officer Cadet Gaudet at that time. Both finished fueling their vehicle at about the same time.

[12] Officer Cadet Gaudet testified that the individual was driving a red Ford Ranger. Officer Cadet Gaudet then saw the individual leave the pump area and leave in

a northerly direction. He testified that he found this odd, since the exit was to the south of the pumps. Officer Cadet Gaudet parked his vehicle by the exit and waited for the individual to leave Willow Park. He noted the vehicle's licence plate number when the individual drove out of Willow Park. The vehicle had a Nova Scotia licence plate, CAE 691. Once the individual had left Willow Park, Officer Cadet Gaudet returned to pump number three and noted the amount of gasoline the individual had taken, this amount was 37.35 liters.

[13] Officer Cadet Gaudet returned to the MP Section at Windsor Park and attempted to find out who was the CO of HMCS KINGSTON by calling the base operator. He testified that he received unreliable information from the base operator. He then used the Canadian Police Information Center, CPIC, to get the identity of the registered owner of the licence plate, CAE 691 Nova Scotia. According to CPIC, the plate was registered to a Mr Andrew Libby. Officer Cadet Gaudet then conducted a search on the DND Outlook email system to determine if a Mr Libby worked in the Halifax area. The search revealed that an Andrew Libby was Petty Officer 1st Class with HMCS HALIFAX. Officer Cadet Gaudet then testified that it was at that time in his investigation, when he saw the name, that he realized he had worked with PO1 Libby in the past. He testified that in 1997, after recruit training in Saint-Jean, he had been posted to Halifax while awaiting further training and that he had worked at Cape Scott and had been supervised by PO1 Libby who was a Master Seaman at that time.

[14] The next day, Officer Cadet Gaudet called HMCS HALIFAX to confirm that PO1 Libby was a member of that unit and determine if a fuel card was missing. He was advised that all fuel cards at HMCS HALIFAX were accounted for. Officer Cadet Gaudet testified that he was investigating why PO1 Libby was fueling his personal vehicle at Willow Park since there appeared to be no explanation why PO1 Libby would be fueling his personal vehicle with a DND fuel card. He made arrangements to meet PO1 Libby at Windsor Park on 20 February 2006, so that PO1 Libby could properly identify himself and provide a statement. On 20 February, the dispatcher advised Officer Cadet Gaudet that someone was waiting for him in the lobby area of the MP section. Officer Cadet Gaudet testified that he had a good look at that person through the stained glass door leading to the lobby area and that he recognized that person as the person he had seen at Willow Park on 17 Feb 2006. Officer Cadet Gaudet testified that he recognized him as that person because he had worked with him in the past and the person possessed the same physical characteristics; very tall, moustache, slim-built, athletic, as the person he had seen on 17 Feb 2005.

Charge number one, public mischief

[15] The prosecution had to prove the following essential elements of this

offence beyond a reasonable doubt:

> The identity of the accused as the offender and the date and place as alleged in the charge sheet.
>
> That the accused told A82 591 616 Corporal Gaudet that he was the CO of HMCS KINGSTON.
>
> That the accused intended to mislead Corporal Gaudet.
>
> That Corporal Gaudet was a peace officer.
>
> That the accused made the statement to divert suspicion from himself.

[16] I will now apply the test found in *R. v. W.(D.)* as quoted above. More specifically, the first question I must ask myself is, on the basis of the evidence which I do accept, am I convinced beyond a reasonable doubt of the identity of the accused as the offender? The evidence provided by Officer Cadet Gaudet on the events of 17 to 20 February 2006 is uncontested and is not contradicted by the accused. As indicated during his cross-examination, the SAMPIS entries Officer Cadet Gaudet made during the weekend of 18/19 February 2006, indicate the following:

> That an individual that looked familiar to Officer Cadet Gaudet attempted to use pump number three to fuel a red Ford Ranger, but had some difficulties with the pump.
>
> Officer Cadet Gaudet engaged in a conversation and asked the individual where they had previously met.
>
> The individual answered that he was the CO of HMCS KINGSTON.
>
> The individual was described as a bit nervous and overly polite.
>
> Later, during the cross-examination, defence counsel appeared to be quoting portions of the taped-meeting of 20 February 2006 between Officer Cadet Gaudet and PO1 Libby at the military police station when

he asked Officer Cadet Gaudet to confirm that he had said to PO1 Libby that he recognized PO1 Libby from the past and that PO1 Libby would have offered a response to which Officer Cadet Gaudet replied, "Must be, I have met so many people, I am sure you have too."

Although Officer Cadet Gaudet could not remember saying these exact words, he agreed he could have said them. Although defence counsel argued that the fact that Officer Cadet Gaudet knew PO1 Libby is not present in his notes or in his SAMPIS entries, in that, it was said in court for the first time, I note defence counsel did not challenge Officer Cadet Gaudet on that issue during his cross-examination.

Defence counsel also quoted a portion of the SAMPIS entry concerning the interview, specifically, "No doubt in Corporal Gaudet's mind that this was the individual he had seen fueling the red Ford Ranger." Although he could not remember the exact phrase, Officer Cadet Gaudet answered it was a true statement.

[17] This evidence from Officer Cadet Gaudet during his examination-in-chief and during his cross-examination clearly establishes that he knew the accused before he saw him on 17 February 2005. He had seen the accused for a period of a few days to about two weeks in 1997 and had identified him as a Master Seaman at that period of time. He had observed the individual for approximately two to five minutes while at the gasoline pumps at Willow Park at approximately 1700 hours on 17 February 2006. There was no evidence pertaining to the lighting or the visibility at the time of that meeting. There was no evidence to indicate that anything hindered Officer Cadet Gaudet's view of the accused at that meeting. Officer Cadet Gaudet was approximately four to five feet from the individual at that meeting, this is consistent with two people filling their vehicles from opposite sides of the same fuel pump. There was no evidence that Officer Cadet Gaudet's attention was distracted from the individual during the meeting of 17 February 2006, to the contrary, he was engaged in a conversation with the individual and he was trying to ascertain why he thought he knew that person. He had tried to help the individual with the fuel pump. The information that he received, specifically that the individual was the CO of HMCS KINGSTON and that Officer Cadet Gaudet had worked on a stolen monitor file for him, had caused Officer Cadet Gaudet to start questioning himself about the identity of this person. This initial reaction to the individual statement as to his identity and the fact that he left in a direction opposite of the gate led Officer Cadet Gaudet to wait by the gate to see when the individual would leave Willow Park and to note the licence plate number of the vehicle driven by the individual.

[18] Exhibit 12 is a CFB Halifax access control register for Willow Park for Friday, 17 February 2006. It does not contain any entry indicating that a civilian vehicle bearing licence plate CAE 691 entered or left Willow Park on that date. Commissionaire Stewart testified that CF members and DND employees entering Willow Park during working hours on week days were not registered and that all vehicles were just registered during silent hours. Exhibit 12 indicates that silent hours started at 1700 hours on 17 Feb 2006. This omission does not bring any doubt on the fact—this omission, by that I mean no entry indicating licence plate CAE 691—does not bring any doubt on the fact that Officer Cadet Gaudet did note licence plate CAE 691 on the vehicle driven by the accused at Willow Park on 17 Feb 2006. It is reasonable to infer from the testimony of Officer Cadet Gaudet that PO1 Libby had entered Willow Park before 1700 hours that day, thus his vehicle would not have been registered by the Commissionaire.

[19] Officer Cadet Gaudet's actions during the weekend of 18/19 February and his conversation with the accused on 20 Feb 2006 are consistent with his impressions following his initial meeting with the unknown individual on 17 February 2006. Upon seeing the person sitting in the lobby area, Officer Cadet Gaudet was positive it was the same person he had seen on 17 February 2006. This opinion was clearly stated on the 20 Feb 2006, SAMPIS entry. Although the exact explanation for their previous meeting seems to have been uttered for the first time in this courtroom, the entry in SAMPIS and the two conversations on 17 and 20 February 2006 with the accused clearly show that Officer Cadet Gaudet had met the accused before 17 Feb 2006. Although it surely would have been preferable that Officer Cadet Gaudet would have written in his notebook or in his SAMPIS entry more information on the physical characteristics of the individual he saw on 17 Feb 2006, the court finds his evidence to be consistent and uncontested. His explanations are quite reasonable considering the events of 17 to 20 February 2006 and his prior work relationship with the accused. The court is satisfied beyond a reasonable doubt that Officer Cadet Gaudet did see the accused using pump number three at approximately 1703 hours on 17 February 2006.

[20] It is also clear from the evidence from Mr Miles that Willow Park is a part of CFB Halifax and is located in Halifax, Nova Scotia. It is also clear from Officer Cadet Gaudet's uncontested evidence that he began an investigation on 17 February 2006 because of his doubts as to the veracity of the statements made to him by PO1 Libby. A statement pertaining to his identity as the CO of HMCS KINGSTON along with his answer to Officer Cadet Gaudet, that Officer Cadet Gaudet had previously worked for him on the stolen monitor file, caused Officer Cadet Gaudet to have suspicions about this individual and thus, he began investigating this suspicious situation.

[21] There is no doubt that PO1 Libby could recognize Officer Cadet Gaudet as a member of the military police since he was dressed in the normal patrol uniform and he was driving a clearly marked military police car. Officer Cadet Gaudet testified that he is a qualified member of the military police and is in possession of his credentials. At the time of the offence he was employed as a patrolman at the formation military police section, thus it has been established that Officer Cadet Gaudet is a peace officer by the application of section 2 of the *Criminal Code*, "peace officer", definition (g) and section 156 of the *National Defence Act.* Petty Officer 1st Class Libby was not truthful with Officer Cadet Gaudet when he provided him with false information concerning his identity. It is clear from the evidence of Chief Petty Officer 1st Class Wood that PO1 Libby was a member of HMCS Halifax at the time of the offence. He was not truthful because he was using a DND fuel card to put gasoline owned by the CF in his personal vehicle.

[22] The evidence from Master Seaman St. Coeur and Chief Petty Officer 2nd Class Birks indicate that the fuel card for HMCS SUMMERSIDE was reported lost in early February 2005. Evidence from Mr Miles indicates that fuel card 1080 was issued to HMCS SUMMERSIDE in 1999. Exhibit 5 shows that fuel card 1080 was used at pump number three at 1703 hours on 17 Feb 2006 and that 37.35 liters of unleaded gasoline was pumped. Evidence from Officer Cadet Gaudet indicates that 37.35 liters of fuel was pumped from pump number three by PO1 Libby on 17 Feb 2006 at approximately 1703 hours. This exact amount was inscribed in his notebook at 1709 hours on 17 Feb 2006. Evidence from Mr Miles and CPO2 Birks indicate that such fuel cards are issued to units to be used to fuel CF vehicles or vehicles rented by the CF. It is evident from this evidence that PO1 Libby knew, or should have known, that he could not use this card for his personal use. The court finds that it can reasonably infer from the evidence it has accepted that PO1 Libby provided this false information to Officer Cadet Gaudet in an attempt to make him believe that PO1 Libby had some authority to use a DND fuel card, and thus, he attempted to divert suspicion from himself.

<u>Charge number two, conduct to the prejudice of good order and discipline</u>

[23] The prosecution had to prove the following elements of the offence beyond a reasonable doubt:

> The identity of the accused as the offender and the date and place as alleged in the charge sheet.
>
> That the accused told a military policeman that he was the CO of HMCS KINGSTON.

That the accused knew this statement to be false.

That the accused intentionally made that statement.

The prejudice to good order and discipline resulting from the conduct.

[24] For the reasons explained in charge number one, I find that the identity of the accused and date and place of the offence have been proven beyond a reasonable doubt.

[25] Officer Cadet Gaudet testified that the individual with whom he spoke at the gas pumps at Willow Park on 17 February 2006, and that he identified as PO1 Libby on 20 February 2006, had identified himself as the CO of HMCS KINGSTON. This evidence was not challenged by defence counsel. It was confirmed during Officer Cadet Gaudet's cross-examination, when defence counsel read portions of Officer Cadet Gaudet's SAMPIS entries of 18 or 19 February 2006. As indicated previously at charge one, the evidence demonstrates that PO1 Libby could clearly recognize Officer Cadet Gaudet as a military policeman. This evidence proves beyond a reasonable doubt that PO1 Libby did tell a military policeman that he was the CO of HMCS KINGSTON.

[26] The evidence from Chief Petty Officer 1st Class Wood identified PO1 Libby as a petty officer 1st class and a member of HMCS HALIFAX. This proves beyond a reasonable doubt that Petty Officer 1st Class Libby knew this statement to be false. Did PO1 Libby intentionally make this statement? One must look at PO1 Libby's words and conduct at the time of the alleged offence to determine his intention at that time. PO1 Libby was engaged in a conversation that could be characterized as social with Officer Cadet Gaudet on 17 February 2006, he was in the process of using a DND fuel card to put gasoline in his personal vehicle. The evidence clearly indicates that he did make the statement intentionally.

[27] Finally, does telling a military policeman that he was the CO of HMCS KINGSTON, knowing that it was false, constitute a conduct that is prejudicial to good order and discipline? Chief Petty Officer 1st Class Wood is the Coxswain of HMCS HALIFAX and as such one of his main responsibilities is to ensure the welfare and discipline of the ship's crew. He testified that the military police have a role to play in the maintenance of discipline when the crew is off the ship. He agreed that providing false information to the military police would have a detrimental effect on the military police's ability to assist him in maintaining discipline. He also felt that people would be surprised if such an incident occurred because it does not happen everyday.

[28] Chief Petty Officer 1st Class Wood also testified that a petty officer 1st class must be honest, trustworthy and possess integrity to be an effective leader and that they must mentor their subordinates in these leadership qualities. The subordinates on his ship look up to that rank and expect honesty and trustworthiness. He testified that the conduct of lying to a member of the military police could violate these expectations and could have an adverse effect on the discipline of these subordinates. He testified it definitely would not have a positive effect if a senior non-commissioned member lied to the military police. He further testified that such conduct could have an adverse effect on the discipline and morale of his immediate subordinates. Chief Petty Officer 1st Class Wood also testified that these alleged offences were not known on board ship since he had kept this information close to him. Chief Petty Officer 1st Class Wood testified that he knows the accused very well since 2001. Therefore, it would appear that the events at the origin of these charges would not be known to the crew of HMCS HALIFAX at this time. This is consistent with the notion of innocent until proven guilty. These events will surely, at some time in the future, become known to the crew. The allegations remain allegations until a court determines if they have been proven beyond a reasonable doubt.

[29] Justice Ewaschuk in *R. v. Latouche* (2000) 147 C.C.C. (3d) 420 CMAC characterized the offence of conduct to the prejudice of good order and discipline as a:

> ... "result crime" inasmuch as the accused's underlying conduct must be prejudicial to good order and discipline.

[30] In *R. v. Jones* (2002) CMAC 11, the Court Martial Appeal Court, understood Ewaschuk J. to be saying that:

> [F]or a charge under subs. 129(1) to be made out, there must be proof of prejudice to good order and discipline since the subsection prohibits "conduct to" such prejudice.
>
> (...)
>
> [7] Proof of prejudice can ... be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is ... proof beyond a reasonable doubt.

[31] As noted by Colonel Carter in the *Captain McKöena* standing court martial:

> Prejudice is not defined in the Queen's Regulations and Orders ....

The Queen's Regulations and Orders instruct us to use the Concise Oxford Dictionary in such cases. I will also adopt as a definition for prejudice the following:

> [H]arm or injury that results or may result from some action or judgement.

[32] Chief Petty Officer 1st Class Wood appeared quite proud when he testified that the level of good order and discipline was exceptional on HMCS HALIFAX. He commented that the chiefs and the POs worked together towards this high morale and good discipline onboard ship. As is the case in any team, this team effort for the welfare and the good order and discipline of the ship's crew can be affected by the conduct of one person. PO1 Libby is a member of this team. Although his personal conduct on 17 February 2006 that is the subject of this court martial is not known to the ship's crew at this time, it will be known once this court martial terminates its proceedings.

[33] This court has found that PO1 Libby has lied to a member of the military police when he identified himself as the CO of HMCS KINGSTON. The crew of HMCS HALIFAX as well as other CF members will become aware of this fact. Chief Petty Officer 1st Class Wood testified that the conduct of lying to a member of the military police could violate the high expectations subordinates have of their senior non-commissioned members—and I should say senior non-commissioned officers—and could have an adverse effect on the discipline of these subordinates. He further testified that such conduct could have an adverse effect on the discipline and morale of his immediate subordinates.

[34] The conduct cannot have had any impact on the discipline of the ship's crew since they are presently unaware of this conduct. The question to be answered is: Will the conduct be prejudicial to the good order and discipline of the ship's crew when they become aware of this conduct? In a situation such as ours, the prejudice does not exist as we speak because the ship's crew does not know about the conduct, but the evidence from Chief Petty Officer 1st Class Wood demonstrates that once this conduct is known to the ship's crew, it will have a detrimental effect on discipline. I find that the evidence may lead the court to infer beyond a reasonable doubt that the logical consequence of this conduct will be harmful to the good order and discipline of his subordinates and other members of the ship's crew. This conduct on the part of a senior NCO responsible for the mentoring of his subordinates in the qualities of leadership which include respect for the law and rules and regulations, as well as the trust that must exist between members of combat units and warships will be eroded by the conduct of

PO1 Libby.

Charge number three, stealing

[35] The Prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

> The identity of the accused as the offender and the date and place as alleged in the charge sheet.
>
> That the accused took without colour or right or fraudulently 37.35 liters of fuel valued at $31.37.
>
> That the fuel was the property of the CF and that the accused intended to deprive the CF of this fuel.

[36] For the reasons explained in charge number one, I find that the identity of the accused as the offender and the date and place of the offence have been proven beyond a reasonable doubt. The evidence from exhibit 5 and Officer Cadet Gaudet clearly demonstrates that PO1 Libby did put 37.35 liters of unleaded gasoline into his personal vehicle from pump number three at Willow Park. He did this by using a DND fuel card. His fuel card was identified as fuel card 1080, from the evidence of Officer Cadet Gaudet, Master Seaman St. Coeur, Mr Miles and exhibit 5.

[37] It is clear from the testimony of Mr Miles and Officer Cadet Gaudet that these fuel pumps are to be used to fuel DND vehicles or vehicles rented by DND. It is also clear from the evidence of Mr Miles that the gasoline at Willow Park is the property of DND. The vehicle in which PO1 Libby put 37.35 liters of gasoline from pump number three had a licence plate number CAE 691. According to the CPIC check made by Officer Cadet Gaudet made on 17 February 2006, this licence plate was registered to Andrew Libby. The court was not provided with any evidence that would suggest that PO1 Libby had any authority to fuel his personal vehicle at a DND fuel pump, therefore, the fact that the accused went to Willow Park to put 37.35 liters of unleaded gasoline into his personal vehicle is conclusive evidence that he intended to deprive DND of this gasoline.

Charge number four, stealing

[38] I will now address the fourth charge. The prosecution had to prove the essential elements of this offence beyond a reasonable doubt:

> The identity of the accused as the offender, and the date and place as alleged in the charge sheet.
>
> That the accused took without colour of right or fraudulently 295.65 liters of fuel valued at $281.91.
>
> That the fuel was a property of DND and that the accused intended to deprive DND of this fuel.

[39] While I agree with defence counsel that this case raises numerous questions concerning the loss of fuel card 1080; the actions, or lack of appropriate actions, on the part of those responsible for the management of DND resources; and the conduct of the military police investigation in the unauthorized use of this card, one must not loose sight of the purpose of a trial. This court must determine if the prosecution has proven beyond a reasonable doubt that the accused is guilty of the offences found on the charge sheet. To do this, the court must use the evidence presented at trial. This evidence may be direct evidence or circumstantial evidence. As noted by the prosecutor, circumstantial evidence plays an important part in this fourth charge. The prosecution must prove that the facts were such as to be inconsistent with any other rational conclusion than that the accused was the guilty person. As stated in *R. v. McIver,* [1965] 1 C.C.C. 210, Ontario High Court of Justice; affirmed at [1965] 4 C.C.C. 182, Court of Appeal; and affirmed [1966] 2 C.C.C. 289, Supreme Court of Canada:

> The rule makes it clear that the case is to be decided on the facts, that is, the facts proved in evidence and the conclusions alternative to the guilt of the accused must be rational conclusions based on inferences drawn from proven facts. No conclusion can be a rational conclusion that is not founded on evidence. Such a conclusion would be a speculative, imaginative conclusion, not a rational one.

[40] In *R. v. Torrie*, [1967] 3 C.C.C. 303, Ontario Court of Appeal; and followed in *R. v. Wild*, [1970] 1 C.C.C. 67, Alberta Court of Appeal; affirmed [1970] 4 C.C.C. 40, Supreme Court of Canada, the Ontario Court of Appeal stated:

> I recognized that the onus of proof must rest with the Crown to establish the guilt of the accused beyond a reasonable doubt, but I do not understand this

> proposition to mean that the Crown must negative every possible conjecture, no matter how irrational or fanciful, which might be consistent with the innocence of the accused.

[41] As stated in McWilliams, Canadian Criminal Evidence, some evidentiary basis must be provided to make the court reach a rational conclusion other than the guilt of the accused. This basis need not be from evidence presented by the accused, but it still must be present in the evidence presented to the court during the trial.

[42] Officer Cadet Gaudet testified that he was unable to identify another vehicle or other driver other than PO1 Libby who had been at Willow Park when fuel card 1080 was used. Officer Cadet Gaudet would have used the access control register for Willow Park to identify PO1 Libby on those occasions. Officer Cadet Gaudet testified in cross-examination that he had not investigated every possible CFR number because a person could enter any number at the pump. He had focused his investigation at the times card 1080 was used at Willow Park when PO1 Libby was registered as being present at Willow Park.

[43] When trying to arrive at a finding for charge number four, the court must answer the following question: Can the court reach a rational conclusion or a rational inference, from the evidence it accepts, that PO1 Libby used fuel card 1080 on the dates alleged by the prosecution to steal gasoline from DND? The court has already accepted that the evidence proves beyond a reasonable doubt that PO1 Libby was in possession of fuel card 1080 on 17 February 2006. Exhibit 5 proves that fuel card 1080 was used at Willow Park to obtain unleaded fuel from pump number three on the following dates and times:

22 May 2005, 1554 hours, 64.58 liters;

14 June 2005, 1947 hours, 67.01 liters;

2 July 2005, 1647 hours, 46.84 liters;

12 August 2005, 1914 hours, 52.26 liters;

24 December 2005, 1332 hours, 61.61 liters; and

14 January 2006, 1616 hours, 48.95 liters.

[44] Exhibits 7, 8, 9, 10, 11 and 13 are access control register logs for Willow Park. Commissionaires House, Stewart and Keddy explained how they inserted the information on the access control registers. They testified that the time was either taken from their watch or from a clock in the commissionaire's hut at the gate. They also testified that their clock is not connected to the computer system of the fuel pumps. The destination was given to them by the driver and they looked at the licence plate of the vehicle and obtained a piece of identification, a CF identification card or a driver's licence, to insert a name, unless they knew the individual. None of them testified that they knew PO1 Libby. The manner in which the remarks section was filled varied from one commissionaire to another.

[45] Exhibit 9 is dated 22 May 2005 and indicates that a Libby, driving a vehicle bearing CAE 691, entered Willow Park at 1559 hours and left at 1604 hours. Exhibit 5 indicates that unleaded gasoline was obtained from pump number three at 1554 hours.

[46] Exhibit 13 is dated 14 June 2005 and indicates that a PO1 Libby, driving a vehicle licence plate CAE 691, entered Willow Park at 1949 hours and left at 1959 hours. Exhibit 5 indicates that unleaded gasoline was obtained from pump number three at 1947 hours.

[47] Exhibit 8 is dated 14 January 2006 and indicates that a Libby, driving a vehicle bearing licence plate CAE 691 entered Willow Park at 1619 hours and left at 1623 hours. Exhibit 5 indicates that unleaded gasoline was obtained from pump number three at 1616 hours.

[48] Although it would appear from exhibit 5 that on these three dates pump number three was used before PO1 Libby would have entered Willow Park, the court accepts the evidence presented by the prosecution to explain the discrepancy in timings and the court finds that the timings are close enough for the court to reasonably infer from the evidence given by the commissionaires and the evidence found at exhibits 5, 8, 9 and 13, that PO1 Libby was at Willow Park when card 1080 was used at pump number three on 22 May 2005, on 14 June 2005 and on 14 January 2006.

[49] Exhibit 10 is dated 2 July 2005 and indicates that a Libby, driving a vehicle bearing licence plate CAE 691 entered Willow Park at 1647 hours and left at 1652 hours. Exhibit 5 indicates that unleaded gasoline was obtained from pump number at 1647 hours.

[50] Exhibit 11 is dated 12 August 2005 and indicates that a "Libbey", I spell, L-i-b-b-e-y, driving a vehicle bearing licence plate CAE 691, entered Willow Park at 1913 hours and left at 1920 hours. Exhibit 5 indicates that unleaded gasoline was obtained from pump number 3 at 1916 hours.

[51] Exhibit 7 is dated 24 December 2005 and indicates that a Libby, driving a vehicle bearing licence plate CAE 691 entered Willow Park at 1330 hours and left at 1336 hours. Exhibit 5 indicates that unleaded gasoline was obtained from pump number three at 1332 hours.

[52] The destination box in exhibits 7, 8, 9, 10, 11 and 13 all contain the same entry for Libby, licence plate CAE 691. That destination is either WL-22 or W-22. The remarks box contains different information on each occasion.

[53] The court notes that "MSE" is inserted in the remarks column of exhibit 9. While it was suggested by defence counsel that MSE would stand Mobile Support Equipment, the court is also aware that Chief Petty Officer 1st Class Wood testified that PO1 Libby belonged to the Marine System Engineering department aboard HMCS HALIFAX. An acronym for Marine System Engineering can also be MSE, although the court notes that no evidence was presented on the meaning of the acronym MSE.

[54] Exhibits 7, 8, 9, 10, 11 and 13 provide evidence that was not contradicted by any other evidence that shows that on four occasions a Libby, I spell L-i-b-b-y, entered Willow Park on those dates, driving a vehicle bearing a licence plate CAE 691 registered to the accused. Then on one occasion a PO1 Libby, I spell L-i-b-b-y, entered Willow Park on those dates driving a vehicle bearing a licence plate CAE 691 and on one occasion a Libbey, I spell L-i-b-b-e-y, entered Willow Park on those dates driving a vehicle bearing a licence plate CAE 691. The court considers this last entry as consistent with the other entries and qualifies it as a simple spelling mistake on the part of the commissionaire.

[55] There was some evidence that licence plate CAE 691 would have been in the possession of a Mr Nickerson sometime in June 2006. The court was not provided with any information that would indicate when PO1 Libby would have lost control of this licence plate. The court does not find this information pertinent or relevant to this case since the evidence reveals fuel card 1080 was de-activated in February 2006 and that the CPIC check conducted on 17 February 2006 revealed that licence plate CAE 691 was registered to the accused.

[56] The court also notes that pump number three was used on the six occasions included in charge four. The CFR number entered on those occasions are either four or three-digit numbers that are quite similar except for one. Those numbers are 4077, entered four times; 477 entered once; and 2257 entered once. The court finds that the evidence it accepted on the identity of PO1 Libby as being the person who had used fuel card 1080 on 17 February 2006 at pump number three at Willow Park combined with the evidence of PO1 Libby's presence at Willow Park on the six occasions fuel card 1080 was used to obtain unleaded fuel from pump number three can permit the court to rationally infer that PO1 Libby is the person who used fuel card 1080 on those six occasions to obtain unleaded fuel from pump number three.

[57] The prosecution has thus proven beyond a reasonable doubt the identity of the accused as the offender for charge number four. The evidence from exhibit 5 and exhibits 7, 8, 9, 10, 11 and 13, demonstrates that PO1 Libby did put 357.26 liters of fuel into his personal vehicle from pump number three at Willow Park. He did this by using a DND fuel card. This fuel card was identified as fuel card 1080 from the evidence at exhibit 5. It is clear from the testimony of Mr Miles and Officer Cadet Gaudet that these fuel pumps are to be used to fuel DND vehicles or vehicles rented by DND. It is also clear from the evidence of Mr Miles that the gasoline at Willow Park is the property of DND.

[58] The vehicle in which PO1 Libby put 357.26 liters of gasoline from pump number three had a licence plate number CAE 691. According to the CPIC check made by Officer Cadet Gaudet on 17 Feb 2006, the licence plate was registered to Andrew Libby, the accused. The court was not provided with any evidence that would suggest that PO1 Libby had any authority to fuel his personal vehicle at a DND fuel pump. The fact therefore that the accused went to Willow Park to put 357.26 liters of unleaded gasoline into his personal vehicle is conclusive evidence that he intended to deprive DND of this gasoline.

[59] Exhibit 5 indicates fuel card 1080 was used 41 times during the period of February 2005 to February 2006. This exhibit shows that card 1080 was used at Willow Park 29 times, at Shearwater seven times, and at Dock Yard five times. It was not used during the month of September, October and November of 2005. It was used at Willow Park in the following manner:

25 times to obtain unleaded gasoline from pump number three;

once to obtain unleaded gasoline from pump number two; and

three times to obtain diesel from pump number one.

Twelve different codes were entered as the CFR number during these 41 uses of card 1080. Three of these twelve entries are five-digit numbers that resemble a CFR number.

[60] The evidence does not explain who used card 1080 on the other 35 occasions and for what purpose. The evidence at exhibit 5 showed that card 1080 was not used during the months of September 2005, October 2005 and November 2005. Chief Petty Officer 1st Class Wood testified that HMCS HALIFAX was deployed to the Mediterranean during this period of time and that PO1 Libby was part of this deployment. There are still many questions that are unanswered pertaining to the possible illegal use of this card. There are many questions to be answered as to why this situation was allowed to happen after the loss of this card was reported to the competent authorities. There are also many theories that can be advanced as to who might have used this card.

[61] The prosecution's duty was to provide this court with evidence to prove beyond a reasonable doubt the guilt of the accused on the charges before this court. The court finds that the prosecution has accomplished this task.

[62] Petty Officer 1st Class Libby, please, stand up. Petty Officer 1st Class Libby, the court finds you guilty of charge number one; directs that the proceedings for charge number two be stayed; finds you guilty of charge number three; and finds you guilty of charge number four, with a special finding that you stole 357.26 liters of fuel valued at $281.68. You may sit down.

LIEUTENANT-COLONEL J-G. PERRON, M.J.

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