

Citation: *R. v. Master Corporal C. A. Matusheskie*, 2008 CM 3014

Docket: 200770

**STANDING COURT MARTIAL
CANADA
CFB PETAWAWA
ONTARIO**

Date: 2 April 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

**HER MAJESTY THE QUEEN
v.
MASTER CORPORAL C. A. MATUSHESKIE
(Accused)**

**FINDING
(Rendered orally)**

INTRODUCTION

[1] Master Corporal Matusheskie is charged with one offence punishable under section 83 of the *National Defence Act* for disobeying a lawful command of a Superior Officer.

[2] The facts on which this count is based relate to events that occurred between 15 and 20 January 2007, at or near Canadian Forces Base Petawawa. More specifically, further to an order he received from Warrant Officer Green on 16 January 2007, Master Corporal Matusheskie allegedly conducted, on the very same day, modifications to cocking handles for C7 rifles, despite the fact he was ordered not to do so the day before by his direct supervisor, Sergeant Mercredi.

THE EVIDENCE

[3] Other than the convening order and the charge sheet, the evidence before this court martial is composed essentially of the following facts:

The testimony heard. In the order of their appearance before the court, the testimony of Warrant Officer Green, Sergeant Mercredi, Master

Corporal Matusheskie, the accused in this trial, Master Warrant Officer Miner and Major Rudderham;

Exhibit 3, a hard copy of an email from Warrant Officer Green to Master Corporal Matusheskie dated 3 November 2006;

Exhibit 4, a hard copy of a photograph depicting a tactical latch and its identification tag taken by Sergeant Mercredi;

Exhibit 5, a real tactical latch;

Exhibit 6, a hard copy of an email from Master Corporal Matusheskie to Mr. Turner dated 15 November 2006;

Exhibit 7, a copy of a handwritten note made by Warrant Officer Green with a financial code on it;

Exhibit 8, a copy of the Technical Update No. 28 concerning "non-authorized weapons modifications" from Director Land Requirements 5 (Combat Lethal and Non-Lethal Requirements)/Director Soldier Systems Program Management 5 (Small Arms);

Exhibit 9, a hard copy of an email from Major Rudderham to Master Warrant Officer Miner dated 15 November 2006;

Exhibit 10, the purchase order dated 17 November 2006 and the supporting documents concerning the purchase of tactical latches;

The admissions made by the accused in accordance with section 37(b) of the Military Rules of Evidence concerning the essential elements of the offence about the identity, date, and place for the offence he is charged with; and

The judicial notice taken by the Court of the facts and issues under Rule 15 of the Military Rules of Evidence.

THE FACTS

[4] In September 2006 was established the Operational Mentor Liaison Team, the acronym "OMLT," pronounced "omelet" in this trial, by the Canadian Forces. The mission of this new unit was to teach to Afghan National Army, ANA, soldiers and shadow them during offensive and defensive operations in Afghanistan.

[5] The Commanding Officer of the 3 PPCLI was designated as the Commanding Officer of this unit. 64 military members from 31 different units over the country were posted to that new unit. It was planned to deploy this unit during the period of February

and March 2007. For training purposes, the unit was located at Canadian Forces Base (CFB) Petawawa, where many members of it were already located.

[6] The 3 Royal Canadian Regiment, 3 RCR, is also located on CFB Petawawa and the OMLT was composed partially of members of that unit. Warrant Officer (WO) Green was a member of the 3 RCR and was posted to OMLT during the fall of 2006.

[7] At the beginning of November 2006, further to some training and discussions with unit members, WO Green decided to inquire about modifying the cocking handle of OMLT C7 and C8 rifles. The unit being composed of various soldiers from various locations who had different standards for cocking handles on these types of weapons, he learned that a "Badger" was available to modify the cocking handle on them. Instead of using two fingers to pull the cocking handle, one was enough. This modification would then make easier the use of the weapons in combat because it allows a faster and swifter manipulation without breaking.

[8] The item put on the cocking handle of the C7 rifle to modify it is called a tactical latch and is made by the company "Badger Ordnance," (see exhibit 4). Moreover, WO Green had trained with weapons having this modification and he knew that some other units in the Canadian Forces put it on their own weapons because of its effectiveness.

[9] Witnesses and lawyers used different terms to describe the tactical latch, including terms as "Badger" or "cocking lever." As a matter of clarity, the court will use in its decision, other than for quoting a witness, the term "tactical latch."

[10] Based on his own experience and knowledge, WO Green initiated steps in order to find a tactical latch to modify the cocking handle of C7/C8 rifles belonging to OMLT. As Warrant Officer Green said to the court, "The badger itself was out there and we went and got it."

[11] The OMLT had no support unit in order to fill its logistical needs. This is why Warrant Officer Green went to see first the Regimental Quarter Master, the RQ, of the 3 RCR, Master Warrant Officer Miner, to check if it was okay with him to order things for OMLT through his organization. MWO Miner agreed to do so with a condition: OMLT financial code had to be provided in order to purchase any item. MWO Miner made this specific request because 3 RCR had no additional budget to purchase things for any other unit than its own.

[12] In order to get it, WO Green went to see a weapons technician he had confidence in. At the beginning of November 2006, he went to the 3 RCR Maintenance Company to meet the weapons technician, Master Corporal Matusheskie. WO Green and the accused had developed, at that time, a professional and friendly relationship through their years at the 3 RCR. They had a friendly discussion about the tactical latch. WO Green asked him if he knew about what the JTF and the CSOR were using for a better cocking handle than what OMLT was using at the time. WO Green also asked him if he knew about any solution concerning this specific matter. Basically, he asked Master Corporal

Matusheskie if he could find somewhat of a Badger or a cocking handle that OMLT could use to go to Afghanistan with to answer unit members' abilities and weapons drills.

[13] Master Corporal Matusheskie told WO Green that the best solution would be the tactical latch made by the company Badger Ordnance. He explained that he could not order it himself because OMLT weapons were not under his responsibility, but with the proper catalogue number and a financial code, he could initiate the proper request in the 3 RCR supply system, being aware of the approval given by the 3 RCR RQ, Master Warrant Officer Miner.

[14] Warrant Officer Green informed the OMLT Commanding Officer and the Logistics Officer of his findings and recommendations concerning the tactical latch, and both officers approved his request to get it, considering this as a matter of improving effectiveness in combat.

[15] As is disclosed by Exhibit 9, a chain of emails was initiated by WO Green, up to Master Warrant Officer Miner, and involving first Master Corporal Matusheskie, in order to proceed with the purchase of the tactical latch. Proper authorities were involved. They provided their approval for the purchase of 60 tactical latches and a financial code was provided to do so by OMLT. As disclosed by Exhibit 10, those items were ordered in the Canadian Forces supply system by the 3 RCR supply organization.

[16] On 15 January 2007, which is a Monday, Sergeant Mercredi, a weapons technician who is the direct supervisor of Master Corporal Matusheskie, saw a military member at the maintenance control office with a bag. He approached him and asked him if he could help. The military member was from the 2 Combat Engineer Regiment (2 CER) and had a bag of tactical latches that he wanted to give to a Corporal or Master Corporal "M." Sergeant Mercredi suggested to him the name of Master Corporal Matusheskie, to which the military member identified right away as the person he was looking for. Knowing that Master Corporal Matusheskie was on the rifle range, Sergeant Mercredi told the military member that he was not aware that tactical latches were ordered for 3 RCR weapons and that Master Corporal Matusheskie was not in the unit at the time. He told to the military member to go back to his unit with the bag.

[17] It is important to mention, as a matter of understanding, that at that time, 2 CER has been designated as the supply support unit for OMLT. It is possible for the court to infer that things ordered previously for OMLT may have ended at 2 CER's location. It also can explain the presence of the 2 CER's military member at the 3 RCR maintenance control office.

[18] After he met the 2 CER's member, Sergeant Mercredi started to inquire about modifications to be made to 3 RCR C7/C8 cocking handles by installing a tactical latch on them. There was no authorization in 3 RCR to proceed with this modification. There was no work order in the maintenance control office referring or authorizing such modification. In fact, there was no verbal or written authorization, and nobody in the unit was aware of such thing.

[19] When Master Corporal Matusheskie returned from the rifle range at the end of the afternoon, Sergeant Mercredi met him. It is during this conversation that he learned that WO Green, a member of the OMLT, made the purchase of the tactical latch within the 3 RCR supply system, and that Master Corporal Matusheskie intended to install them on C7 rifles belonging to OMLT.

[20] Sergeant Mercredi informed Master Corporal Matusheskie that his chain of command was unaware that he was going to conduct those modifications. He also said to him not to do anything else, any modification to these cocking handles on C7 rifles belonging to OMLT, because he had to get confirmation from Ottawa that they were authorized to do this, and then he said "Do not carry on." Master Corporal Matusheskie acknowledged the order he received, and both carried on with their other things to do that day. Sergeant Mercredi informed his chain of command by talking to his immediate supervisor, Warrant Officer Rouleau, about his findings on the tactical latch, and informed him about the actions he took and the instructions he gave to Master Corporal Matusheskie concerning this matter.

[21] On 16 January 2007, after the parade, just after 0730 hours, WO Green met Master Corporal Matusheskie at the 3 RCR unit location. WO Green brought him the tactical latches in a bag and asked him to proceed with the modification to the cocking handles. Basically, Master Corporal Matusheskie had brand new cocking handles in his shop and he had just to modify them. After that, he had just to give the cocking handles modified to WO Green who will make sure that they will replace the older one on the weapons belonging to OMLT.

[22] According to the accused, he mentioned clearly to WO Green that Sergeant Mercredi told him not to proceed with the modification until he heard from him. Master Corporal Matusheskie told the court that the instructions of WO Green were to carry on with the modification and to not care about what was said by Sergeant Mercredi. Considering the need to train and the OMLT training tempo, Master Corporal Matusheskie considered that he had no other option than to proceed with the modification. Moreover, it appeared clearly to him that Warrant Officer Green wanted this to be done quickly, and the tone of his voice and the wording he used did not leave any doubt to him about his intent.

[23] However, Warrant Officer Green told the court that all along the steps he went through with Master Corporal Matusheskie to purchase and get installed the 60 tactical latches on cocking handles for C7/C8 rifles belonging to OMLT, he was looking for a favor. He told clearly to the court that he never ordered the accused to proceed with the modification; however, he conceded that it could have been perceived by the accused as an order, and it would have been to Master Corporal Matusheskie to raise the issue. He does not remember that he was told by the accused that there was any issue involving Sergeant Mercredi on the modification of cocking handles.

[24] Master Corporal Matusheskie then proceeded with the modification to the cocking handles by putting the tactical latch on them that he received from Warrant Officer Green. Corporal Buffett helped him.

[25] Sergeant Mercredi took steps that morning to learn from Ottawa if the modification with the tactical latch on the cocking handle for C7/C8 rifles belonging to OMLT was authorized or not. After he talked to Chief Warrant Officer Crocker, an expert and authority in that matter, he learned that such modification was not authorized.

[26] Sergeant Mercredi went to the weapons shop where he found out that Master Corporal Matusheskie was already conducting modifications on cocking handles by putting tactical latches on them. Sergeant Mercredi asked him why he carried out the modification considering that he told him not to do so. The accused then responded that he thought that the issue was sorted out between WO Green and him.

[27] Sergeant Mercredi told the accused that WO Green was not in his immediate chain of command, and that he was, and all requests for that type of concern should be addressed through him, or at least through the control office.

[28] Sergeant Mercredi told finally to the accused to remove the tactical latch from the cocking handles and return the tactical latches to his office, something that Master Corporal Matusheskie did after the Sergeant left the place.

[29] Sergeant Mercredi quarantined the tactical latches. Sometime after, WO Green went to see Master Corporal Matusheskie and found out that the tactical latches were with Sergeant Mercredi. He went to Sergeant Mercredi's office and asked the latter to give him back the tactical latches because they were belonging to OMLT. Sergeant Mercredi gave them back to WO Green and the latter left the office.

[30] According to WO Green, it is when he had to go to Sergeant Mercredi's office that he learned, for the first time, on the issue between Sergeant Mercredi and the accused concerning the fact to conduct modifications to the cocking handles for C7/C8 rifles belonging to OMLT.

[31] For Sergeant Mercredi, it was the end of the story until he was requested to provide a written statement concerning this matter. However, on Saturday, 20 January 2007, Warrant Officer Green went to Master Corporal Matusheskie's house. According to the accused, Warrant Officer Green asked him to conduct the modification on the cocking handles, which he did at his house later. According to Warrant Officer Green, he remembered that he went to the accused's house, however, he denied that he asked him to conduct modifications on cocking handles that day. WO Green told the court that he could not remember how and when he brought back the tactical latches to Master Corporal Matusheskie, but he is sure that he did so and that the accused made the modification to the cocking handles.

[32] Warrant Officer Green told to the court that Master Corporal Matusheskie was the man to get things done. He is a good technician, he knows what he is doing, and he goes to people you can trust. Master Corporal Matusheskie was the point of contact from the beginning of this project, and he finished the task.

**THE APPLICABLE LAW
AND THE ESSENTIAL ELEMENTS OF THE CHARGE**

[33] Section 83 of the *National Defence Act* reads as follows:

Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

[34] Then the prosecution had to prove the following essential elements for this offence beyond a reasonable doubt. The prosecution had to prove the identity of the accused and the date and place as alleged in the charged sheet. The prosecution also had to prove the following additional elements: the fact that an order was given to Master Corporal Matusheskie, and that it was lawful, and Master Corporal Matusheskie received or knew the order; the fact that Master Corporal Matusheskie was given the order by a superior officer, and that this status was known by him; and the fact that Master Corporal Matusheskie did not comply with the order.

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

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

[37] 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.

[38] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R. v. Lifchus* [1997] 3 S.C.R., 320, the Supreme Court of Canada proposed a

model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[39] In *R. v. Starr* [2000] 2 S.C.R., 144, at paragraph 242, the Supreme Court held that:

... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

[40] 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 Master Corporal Matusheskie, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[41] 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.

[42] 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.

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

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

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

[46] 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.

[47] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court and address the legal principles.

ANALYSIS

[48] Further to the evidence adduced by the prosecutor, the admissions made by the accused at the beginning of this trial, including the ones he made in his testimony, and according to what was said by the defence counsel on her final address to the court, all essential elements of the offence have been proved in this case.

[49] However, the defence counsel submitted to the court that Master Corporal Matusheskie never intended, on 16 January 2007, to disobey the lawful order given by Sergeant Mercredi on 15 January 2007 because he had to comply with a later lawful order given by Warrant Officer Green on 16 January 2007.

[50] Essentially, the defence counsel refers to the concept of conflicting lawful commands and orders that can be found at *Queen's Regulations and Orders for the Canadian Forces* (the *QR&O*) article 19.02, to explain the absence of any intent from the accused for not complying with the order given by Sergeant Mercredi. This article reads as follows:

19.02 – CONFLICTING LAWFUL COMMANDS AND ORDERS

(1) If an officer or non-commissioned member receives a lawful command or order that he considers to be in conflict with a previous lawful command or order received by him, he shall orally point out the conflict to the superior officer who gave the later command or order.

(2) If the superior officer still directs the officer or non-commissioned member to obey the later command or order, he shall do so.

[51] In order to establish his defence based on the non-compliance of the order he received from Sergeant Mercredi on the basis of the concept of conflicting lawful commands and orders, the accused has to establish on a balance of probabilities:

first, that a command or order was given to him after he received the first one which is the subject of the charge; second, that the later command or order was lawful; third, that he pointed out to the superior officer that the later command or order was conflicting with the first one he received previously from another superior officer; fourth, that the superior officer directed him to obey the later command or order despite the fact he pointed out the conflicting issue about this command or order.

[52] Based on the evidence heard, the court has no issue with the first, third and fourth steps, meaning it is satisfied that the accused proved on a balance of probabilities: that an order was given to him by Warrant Officer Green after he received a first one by Sergeant Mercredi, which is the subject of the charge before this court; that the accused pointed out to Warrant Officer Green that the order he gave to him was conflicting with the one he received from Sergeant Mercredi; and that the accused was directed by Warrant Officer Green to obey his order despite that he pointed out the conflicting issue.

[53] However, the court is not satisfied that the accused has proven on a balance of probabilities that the later order given by Warrant Officer Green, on the morning of 16 January 2007, was lawful.

[54] Lawfulness of a command or an order is a matter of context. Often, the question at issue is about the validity of the basics supporting the order given. If it is manifestly unlawful at its face, then the subordinate receiving the order may decide not to obey, which is in accordance with the legal general principles concerning this matter.

[55] Lawfulness also includes the concept of authority to give commands and orders. Lawful commands or orders to military members can only be given by authorized persons, otherwise, armed forces could not carry on their missions because any people from anywhere could tell soldiers what to do or not to do.

[56] Subsection 18(2) of the *National Defence Act* allows the Chief of Defence Staff (the CDS) to established a chain of authority and accountability that goes from his office to the smallest element of the Canadian Forces and back to his office. This is what is usually called the chain of command. The CDS assigns a portion of his authority and accountability to some subordinate commanders that do the same within their own scope of authority and accountability to military members that are directly accountable to them. As mentioned by Justice Létourneau in his *Report of the Somalia Commission of Inquiry* in the chapter entitled “Structure and Organization of the Canadian Forces,” under the heading “Chain of Command”:

The chain of command, therefore, is a military instrument joining a superior officer– meaning “any officer or non-commissioned member how, in relation to any other officer or non-commissioned member, is by [the NDA], or by regulation or custom of the service, authorized to give a lawful command to that other officer or non-commissioned member” – to other officers and non-commissioned members of the CF. No other person, including ministers and public servants, is part of the chain of

command, nor does any other person have any command authority in the CF.

[57] The commanding officer of a unit like the 3 RCR has the discretion and authority to organize his unit in sub-units and assign authority and accountability to some subordinates that do the same, down to the lowest rank in the unit and back to him. He organizes his unit with the perspective that he is accountable toward his direct superior officer for the carrying of his missions. Therefore, only officers and non-commissioned members in the chain of command of the 3 RCR may give commands or orders to their subordinates. Nobody else can do this unless authorize by somebody within 3 RCR's chain of command.

[58] Then, it is loud and clear for the court that WO Green, despite the fact that he was a former member of the 3 RCR, was not in the chain of command of Master Corporal Matusheskie. Unless authorized to do so, WO Green had no authority whatsoever to give an order to the accused at the time of the incident. Moreover, the testimony of WO Green reflected exactly this concept. At no time, as he said, he had the intention to give an order to the accused. He asked for a favor, clearly knowing that he was out of the 3 RCR's chain of command and that he had no authority on the accused. He also clearly stated to the court that he should have requested permission to the chain of command of Master Corporal Matusheskie, which is the maintenance control office, in order to use 3 RCR human resources.

[59] Finally, I should say that Sergeant Mercredi told to the court that the nature of the order he gave to the accused was dealing with two concerns: first, to find out if the intended modification to the C7/C8 rifles was an authorized one; and second, if it was appropriate to use 3 RCR human resources under his authority to do the modification. It is important to remember that Sergeant Mercredi had to remind the accused about the chain command authority when he found out that Master Corporal Matusheskie was proceeding with the modification contrary to the order given.

[60] Having concluded that the lawfulness of the order given by WO Green has not been established on a balance of probabilities, it is the conclusion of this court that the defense raised by the accused referring to the concept of conflicting lawful commands and orders, that can be found at *QR&O* article 19.02, cannot be considered in order to assess if it raises a reasonable doubt on the essential element concerning the accused's non-compliance with the order which is the subject of the charge before this court martial.

[61] Even though it was not raised before it, the court martial also considered the defense of mistake of fact. In *R. v. Latouche*, 147 C.C.C. (3d) 420, the Court Martial Appeal Court described it as follows, at paragraph 35:

As a general rule, a mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter.

[62] In order to allow the court to consider this defence, first, the accused had to establish an air of reality for it. This concept has been defined by Justice Cory in the Supreme Court decision of *R. v. Osolin*, [1993] 4 S.C.R. 595, at page 682:

The term "air of reality" simply means that the trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged could have acquitted. If the evidence meets that test then the defence must be put to the jury. This is no more than an example of the basic division of tasks between judge and jury....

[63] It is not sufficient that the accused asserts some belief that he was mistaken, it has to be corroborated by some other evidence, as established at paragraph 17 and 18 of the Supreme Court decision in *R. v. Park*, [1995] 2 S.C.R. 836.

[64] During his testimony, the accused clearly stated that when Sergeant Mercredi caught him out in the weapons shop on 16 January 2007, while he was modifying the cocking handles contrary to the order he received, he told to the Sergeant that he thought that the issue had been discussed with Warrant Officer Green. Sergeant Mercredi confirmed this line of thought in his testimony. Then, it is the conclusion of this court that the accused has established an air of reality to the defense of mistake of fact.

[65] The factual backgrounds of this case has established that WO Green would have said to the accused, further to the latter pointing out the conflicting issue about the latest order he received to proceed with the modification, to not care about what was said about Sergeant Mercredi's specific instructions.

[66] It is also established, through the testimony of the accused, that the latter had no real difficulty to proceed with the modification. In fact, as he said to the court, "when parts to modify the cocking handles are issued from the supply system, you know it comes in, you see it, you know it is allowed to go on, and you put it on. That's the way it goes."

[67] The fact that somebody told Master Corporal Matusheskie to not care about the order he received from Sergeant Mercredi, and that the accused himself thought that the order he received was not really accurate with his own perspective on the matter, does not establish, objectively and subjectively, that the accused was mistaken in his belief for conducting modifications to cocking handles of C7 rifles contrary to the order he received from Sergeant Mercredi.

[68] As an example, it would have been a different situation if, in fact, WO Green would have told Master Corporal Matusheskie that he would discuss or successfully sort out with Sergeant Mercredi the issue in favor of conducting the modification when he ordered him to do so. Such thing was never established in any way before the court. Then, what was really said by WO Green to the accused was more of the nature of a personal moral approval than anything else for allowing him to do what he personally thought he was supposed to do.

[69] This is the conclusion of this court that the existence of a mistaken belief by the accused for allowing him to conduct modifications on cocking handles of C7 rifles has not been established.

[70] Consequently, having regard to the evidence as a whole, the prosecution has proved beyond a reasonable doubt all the essential elements of the offence of disobedience of a lawful command of a superior officer.

[71] Additionally, having regard to the finding of the court concerning the essential elements of section 83 of the *National Defence Act*, and the application of those elements to the facts in this case, the court considers that the prosecution has discharged its burden of proof by establishing beyond a reasonable doubt the fact that the accused did disobey, on 16 January 2007, the order he received from Sergeant Mercredi on 15 January 2007.

[72] Master Corporal Matusheskie, please stand up. Master Corporal Matusheskie, this court finds you guilty of the first and only charge on the charge sheet.

LIEUTENANT-COLONEL L-V. D'AUTEUIL, M.J.

COUNSEL:

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