Citation: *R. v. Sergeant J.J.G.M.L. Bergeron*, 2006 CM 41

Docket: V200641

STANDING COURT MARTIAL
CANADA
QUEBEC
2nd BATTALION, THE ROYAL 22e RÉGIMENT
VALCARTIER, COURCELETTE

Date: May 16, 2006

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN
v.
SERGEANT J.J.G.M.L. BERGERON
(Accused)

VERDICT
(Delivered Orally)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] Sergeant Bergeron is charged with an offence punishable under section 130 of the *National Defence Act*, contrary to section 87 of the *Criminal Code*, to wit that he did point a firearm, and the prosecution had laid a charge in the alternative under section 129 of the *National Defence Act*, to wit an act to the prejudice of good order and discipline. The charges allege that the accused pointed a firearm at the person of a Private Thériault, on or about January 14, 2005, at Valcartier Garrison, Courcelette, Quebec. Sergeant Bergeron is also charged with another count of committing an act to the prejudice of good order and discipline, alleged to have been committed on the same date at the same place. The details of that charge allege that Sergeant Bergeron, in that case, asked Private Boudreau to point a firearm at his temple.

EVIDENCE

[2] The evidence before this court martial is essentially composed of the following:

a. The testimony heard: in the order in which they appeared before the Court, the testimony of Private Thériault, Private Boudreau, Warrant Officer Masson, Warrant Officer Kelly and Sergeant Bergeron, the accused in this case.

b. Exhibit 3, a Canadian Forces publication that is part of an order entitled "9 mm Pistol", B-GL-385-003/PT-002.

c. Exhibit 4, a Canadian Forces publication that is part of an order entitled "Training Safety", number B-GL-381-001/TS-000. It sets out the broad outline of the Canadian Forces policy governing the use or misuse of arms, ammunition and explosives. Paragraph 5 of that publication states that its purpose is to set out the organization, responsibilities, rules and procedures that apply to the safe conduct of training on firing ranges and in land training areas. Paragraph 6 adds that it applies to all firing ranges and land and ground training areas, both belonging to DND and private, that are used by elements of the Canadian Forces that use arms or apply the training procedures it describes. In fact, paragraph 7 clearly states that the publication is the governing authority for all aspects of safety during individual and group training on firing ranges and in land training areas.

d. Exhibit 5, paragraphs 12 to 28 of a Canadian Forces publication entitled "Close Combat".

e. Exhibit 6, a document entitled "Member's Personnel Record Resumé" relating to the accused.

f. Exhibit 7, an excerpt consisting of paragraphs 55 to 70 of a document identified as "B-GL-382-004/FP-000, interim". The document was admitted in evidence for limited purposes: to show that it had been provided to the accused by Warrant Officer Kelly at an interview that took place after the incidents that are the subject of this case; the document is of no relevance in disposing of the case.

g. The admissions made by the accused in relation to the evidence of identity, date and place.

h. The judicial notice taken by the Court of the facts and issues that are relevant to rule 15 of the Military Rules of Evidence.

THE FACTS

[3] The facts of this case therefore essentially relate to the events that took place in one of the corridors of the building of the 2nd Battalion, The Royal 22e Régiment, when Sergeant Bergeron held an impromptu training session for about ten people from his platoon, on the morning of January 14, 2005, at Garrison Valcartier, Courcelette, Quebec. The objective of the training was to familiarize young soldiers with the Browning 9 mm pistol.

[4] Although the testimony revealed some contradictions or inconsistencies, having regard to the evidence as a whole, the evidence is that Sergeant Bergeron decided to hold a session to familiarize a group of about ten people with the Browning 9 mm pistol, while another group was receiving information about a particular type of missile. Sergeant Bergeron was an instructor qualified to teach the handling of light weapons, including the Browning 9 mm. The evidence is that the instruction regarding the 9mm pistol was not part of the initial training of young infantry members, because it is not a weapon that they have to use at the beginning of their career. This was therefore an opportunity for that small group to familiarize themselves with the weapon.

[5] The evidence heard was that some of the group of ten people, including Privates Thériault and Boudreau, were assigned to go and get five 9 mm pistols from the quartermaster, while the others were to bring rectangular tables on which the weapons would be assembled and dismantled by the students. The group was divided into teams of two people for each weapon. Private Thériault said that he was in the group that went to get the weapons, but he then changed his testimony and said that he was actually one of the ones who set up the tables. He said that the tables were arranged parallel to the wall. Sergeant Bergeron had his back to the wall. The tables were set up between him and the students. Private Thériault testified that Private Boudreau was on his left. This was the first time that Private Thériault had received training on this weapon. Private Thériault recalled that Sergeant Bergeron first gave an initial demonstration of the procedure to be performed, and the students followed, in turn. He did not recall whether the sergeant informed them about safety measures to follow with the weapon, but he said he was the second in his group to assemble/dismantle the weapon after Sergeant Bergeron demonstrated it. Private Thériault knew that there was no ammunition, blank or live, during this training. Private Boudreau testified that Private Thériault was on the other side of the table, diagonally across, contrary to what Private Thériault said, and Private Boudreau added that there was only one table. The evidence before the Court, however, satisfies the Court that there were in fact two tables.

[6] Private Boudreau testified that Sergeant Bergeron was in fact in the middle. He said that the weapons were dismantled and Sergeant Bergeron did not give safety instructions. It is clear, however, that no soldier testified as to how, exactly, these “safety instructions” are to be understood. The evidence as a whole, however, shows

that the steps in the visual demonstration given by Sergeant Bergeron included the safe handling of the weapon. The evidence given by Privates Thériault and Boudreau seems to show that it was after the demonstration of assembling and dismantling that Sergeant Bergeron pointed his weapon at the temple of Private Thériault. Private Thériault testified that Sergeant Bergeron gave a demonstration of the sequence to follow for dismantling the weapon. He then tried it in reverse. The students then did it, when it was tested after reassembly, with Private Thériault being the second in his group to do it. According to Private Thériault, Sergeant Bergeron then told them, and demonstrated, that when the weapon was rested on an object, the parts of the weapon could not slip and the weapon could not fire. It was at that point that Sergeant Bergeron advanced toward him and placed his weapon against his temple, describing the action in the context of his previous explanation. Private Thériault was surprised by what his superior officer did and stepped back, and then asked him what he was doing, asserting that one did not do this. The sergeant asked him whether he was afraid, and Private Thériault said no, but that in his opinion one did not do this. Sergeant Bergeron then went back toward Private Boudreau to continue the demonstration, and asked whether Private Boudreau wanted to aim at Sergeant Bergeron the same way. Private Thériault said he was deeply offended by the manoeuvre and left the training session shortly afterward, and went and reported the incident to Warrant Officer Masson. As he put it, he was very upset. According to Private Thériault, this was the first time that something like this had happened to him during training, in the many weapons training sessions he had been in to that date.

[7] Private Boudreau said that following the demonstration of the assembling and dismantling of the weapon, Sergeant Bergeron again spoke to the students about the scenario of being taken hostage by an enemy armed with an identical pistol. He then explained that if the weapon were pushed backward, it would not fire, demonstrating with his hand that the parts of the weapon moved backward when pressure was brought to bear on the barrel. Private Boudreau reported that after that demonstration, Sergeant Bergeron wanted to demonstrate it in the context of a hostage-taking, where the weapon was pressed against the head. Then, using Private Thériault as an example, he wanted to demonstrate that by pressing the head against the barrel of the weapon, the whole thing would move back and it could not fire. Private Boudreau said that Sergeant Bergeron then asked Private Thériault to come up for the demonstration. He said that Private Thériault dug in his heels and even stepped back, not appearing to appreciate the demonstration. According to Private Boudreau, Private Thériault in fact expressed his displeasure to Sergeant Bergeron. Sergeant Bergeron then went back toward him and asked him to point his weapon at his head, because Private Thériault seemed to be afraid. As he did that, he took Private Boudreau's weapon by the barrel to put it to his forehead, Private Boudreau having let go of it, and explained the manoeuvre for evading and disengaging when the weapon is pointed at one's head. Private Boudreau, too, was surprised by Sergeant Bergeron's request because this was the first time he had witnessed this kind of demonstration at a training session on

weapons handing, because he had always been taught never to point a firearm at a person.

[8] Warrant Officer Masson testified that Private Thériault did go to his office that morning and that he thought he was upset. He then asked him, without giving any further details, whether it was normal to point a weapon at one's temple during a weapons training session. Warrant Officer Masson then hastened to the place where the 9 mm training was happening to put an end to it and instruct Sergeant Bergeron to go and take the weapons back to the quartermaster and go to Master Warrant Officer Lareau's office. Warrant Officer Masson testified that he then met with the students in a classroom and told them that what Sergeant Bergeron had done was not acceptable and that he would not be providing any more weapons training. Warrant Officer Masson testified that the students were stunned and open-mouthed. He said that their eyes were watery and they were staring at the ground. It must be noted that Warrant Officer said nothing in his testimony about whether he was aware of the context in which Sergeant Bergeron gave the demonstration of the weapon to Private Thériault's temple. The Court can make no finding, from the evidence as a whole, as to whether the students' reaction resulted from the acts of Sergeant Bergeron himself or from Thériault's or Masson's reaction to the demonstration, although the Court recognizes that they were undoubtedly all surprised by the manoeuvre. The description given by Warrant Officer Masson went well beyond any description of the physical or psychological state of the participants in response to Sergeant Bergeron's manoeuvre, having regard to the testimony of Private Thériault and Private Boudreau, although they were the people affected by what Sergeant Bergeron did. The account given by Warrant Officer Masson is hard to reconcile with the testimony of Private Boudreau and Private Thériault on this point.

[9] Warrant Officer Kelly testified as both an expert witness and an ordinary witness. He described the safety measures and national standards to be followed in instruction periods about light weapons, including the 9 mm. He testified that the evasion and disengagement technique demonstrated by Sergeant Bergeron on Private Thériault was not part of the type of manoeuvre that he was familiar with as a standards officer, although he recognized that this manoeuvre could have been taught to Sergeant Bergeron in a different context. He said that a weapon may not be pointed at another person during a weapons handling course and that it must always be handled safely.

[10] As an expert, he explained that these issues are governed by the publications filed with the Court as Exhibits 3 and 4. He added that there are no instructions about pointing a weapon at someone's temple during a close combat course. The Court would note that the context of this case does not involve a close combat situation. Warrant Officer Kelly acknowledged that it is possible to give informal advice that is not provided for in the context of specific instruction. He added that the strict rules prohibiting pointing weapons relate to manoeuvres for preparing to fire blank or live ammunition. That is in fact why, the witness said, they are taught and practised without ammunition when the training is to prepare students for firing

manoeuvres. The witness also acknowledged that there are a variety of training situations in which soldiers may point a firearm at another person.

[11] Sergeant Bergeron gave his version of the facts. He acknowledged that he had not stated that the weapons were unloaded when the training started, although that was what would normally be done. He explained how he did the demonstration of assembling and dismantling the weapon before the students did it, in turn. That was when he went beyond the formal aspect of his course, and dealt with the possibility of a situation that might arise in a real operation. He said that he wanted to teach them a characteristic of the 9 mm pistol that might save their life. After demonstrating the manoeuvre, which involves putting pressure on the weapon to get away or to push the weapon back to prevent it from firing, he used Private Thériault as an example. His version corroborated Private Boudreau's on all but two points: Sergeant Bergeron said that he pointed at Private Thériault's forehead and asked Private Boudreau to point at his throat. This summarizes all of the facts that the Court considers to be relevant to the disposition of this case.

THE PRESUMPTION OF INNOCENCE AND THE STANDARD OF PROOF BEYOND A REASONABLE DOUBT

[12] Before applying the law to the facts of the case, it is useful to consider the presumption of innocence and the standard of proof beyond a reasonable doubt, which is an essential element of the presumption of innocence.

[13] Whether a case involves charges are under the Code of Service Discipline, before a military court, or proceedings before a civilian criminal court on criminal charges, an accused person is presumed innocent until the prosecution has proved his or her guilt beyond a reasonable doubt.

[14] This burden of proof rests on the prosecution throughout the trial. An accused person does not have to prove his or her innocence. The prosecution must prove each of the essential elements of a charge beyond a reasonable doubt.

[15] Proof beyond a reasonable doubt does not apply to individual pieces of evidence or various parts of the evidence. It applies to the evidence on which the prosecution relies to prove guilt, as a whole. The prosecution has the burden of proof throughout the trial, and it never shifts to the accused.

[16] A court must find an accused not guilty if it has a reasonable doubt as to his or her guilt, after assessing the evidence as a whole. The expression "beyond a reasonable doubt" has been used for a very long time. It is part of the history and tradition of our judicial system. In *R. v. Lifchus* [1997] 3 S.C.R. 320, the Supreme Court of Canada stated how reasonable doubt must be explained in a jury charge. The principles in *Lifchus* have been applied in a number of subsequent appeals. Essentially,

a reasonable doubt is not be an imaginary or frivolous doubt, and cannot be based on sympathy or prejudice. It must rather be based upon reason and common sense. It must be logically connected to the evidence or lack of evidence.

[17] In *R. v. Starr* [2000] 2 S.C.R. 144, at paragraph 242, Mr. Justice Iacobucci, for the majority, said:

> ... 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.

It is useful to recall, however, that it is virtually impossible to prove something to an absolute certainty, and that the prosecution is not required to do that. There is no such standard of proof in law. The prosecution must prove the guilt of the accused, Sergeant Bergeron, who is before us here, beyond a reasonable doubt.

[18] As I said earlier, the appropriate approach to the standard of proof is to assess the evidence as a whole, and not to assess individual pieces of evidence separately. It is therefore essential to assess the credibility and trustworthiness of the testimony, having regard to the evidence as a whole.

[19] The standard of proof beyond a reasonable doubt also applies to questions of credibility, and the Court need not make a definitive determination of the credibility of a witness or group of witnesses. In addition, the Court need not believe the testimony given by a person or group of person in its totality. If the Court has a reasonable doubt about Sergeant Bergeron's guilt as a result of the credibility of the witnesses, it must acquit him.

[20] In the circumstances, the law requires that the Court find the accused not guilty:

> a. first, if the Court believes the accused's version; and
>
> b. second, even if the Court does not believe the accused, if it has a reasonable doubt as a result of the testimony given by the accused, after examining it in the context of the evidence as a whole.

The final point is that if, after assessing the evidence as a whole, the Court does not know whom to believe or has a reasonable doubt as to whom to believe, it must give the accused the benefit of that doubt and acquit him. That approach was proposed in *R. v. W.(D.)* [1991] 1 S.C.R., 742, at page 758, by Mr. Justice Cory, in a context in which the trial judge could have given the jury instructions regarding credibility as it relates to the standard of proof beyond a reasonable doubt; I quote:

> 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.

[21] And so, having made these comments about the presumption of innocence and the standard of proof beyond a reasonable doubt, including when it applies to questions of credibility, the Court will now examine the facts disclosed by the evidence, having regard to the applicable law.

ANALYSIS

[22] The evidence before the Court is such that the Court must make a finding as to the credibility and trustworthiness of the witnesses, having regard to the evidence as a whole. The Court has examined all of the testimony having regard to the evidence as a whole. There is no magic formula for deciding whether a witness is credible or what weight is to be placed on testimony. However, the Court has paid attention to, among other things, the integrity and intelligence of each of the witnesses, their ability to observe and their capacity to report their observations to the Court. The Court has considered their capacity to recall events, taking into account the fact that some events or facts may affect every person differently. The Court has observed the witnesses, paying attention to factors such as whether the witness was honestly trying to tell the truth, and whether the witness was sincere and candid or biased, hesitant or evasive.

[23] Testifying is not an everyday experience. People react and present themselves differently. They have different abilities, values and life experiences. There are quite simply too many variables for a witness's demeanour to be the only factor or the most important factor in making a decision.

[24] The versions of the facts given by the witnesses whom the Court heard are generally credible. Contradictions or inconsistencies in their testimony are, in the Court's opinion, a result of the passage of time. The trustworthiness of their testimony has, however, been affected by this, from what the Court observed. Private Thériault had difficulty remembering the details surrounding Sergeant Bergeron's manoeuvre when he pointed the pistol at his temple, but that may be explained by his great surprise at being the victim of such an action. There is no doubt that he did not appreciate it, and rightly so, given his lack of experience in this area, as compared to Sergeant Bergeron. With respect to Sergeant Bergeron, the Court generally believes his testimony, except

on the fact that he pointed at Private Thériault's forehead rather than his temple. The Court accepts the testimony of Private Thériault and Private Boudreau on that point. Warrant Officer Masson and Warrant Officer Kelly are credible, but their testimony is not conclusive and sufficient to dispose of the issues here, whether the question of lawful excuse in relation to the first count or the question of to the prejudice of good order and discipline in relation to the third and fourth counts.

The first count (in the alternative to the third count): An offence punishable under section 130 of the *National Defence Act* contrary to section 87 of the *Criminal Code*

[25] Subsection 87(1) of the *Criminal Code* reads as follows:

> Every person commits an offence who, without lawful excuse, points a firearm at another person, whether the firearm is loaded or unloaded.

On the first count, the statement of the details of the charge is generally admitted by the defence, although it formally admitted only the elements relating to the identity of the accused and the date and place of the commission of the offence. The defence argued that the accused had a lawful excuse, and more specifically that the accused had an innocent purpose when he pointed the Browning 8 mm pistol at Private Thériault's forehead or temple, depending on whether it is the version given by the accused or the version given by Private Thériault and Private Boudreau.

[26] The opinion in the case law is unanimous in saying that it is impossible to give a general definition of lawful excuse. If the law that creates the offence does not assign it a precise meaning, as is the case in prosecutions under section 87 of the *Criminal Code*, its meaning must be inferred from the purpose of the charge but also having regard to the context and circumstances of the case. It is clear, however, that determining whether an excuse is lawful is not a matter left to the accused to decide. Whether there is a lawful excuse will be determined based on an objective rather than a subjective standard.

[27] Citing *R. v. Holmes* [1988] 1 S.C.R. 914, the prosecution argued that lawful excuse may be based solely on a defence that, in common law, constitutes sufficient reason to relieve a person of criminal liability and offences associated with specific offences, or rather defences associated with specific offences. The prosecution argued that the manoeuvre that involved aiming at Private Thériault's temple, in the context of this case, was not provided for an authorized in Canadian Forces doctrine, at least in the rules and principles set out in the publication dealing with the 9 mm pistol, Exhibit 3, or training safety, Exhibit 4. Accordingly, the prosecution said that the accused cannot rely on lawful excuse in relation to the first count.

[28] The demonstration given by Sergeant Bergeron in fact seems to me to go beyond the bounds of the formal training provided for in relation to this weapon, and it is clear that the training safety measures do not contemplate such a situation. The prosecution focused particularly on subsections 104, 107 and 108 of that publication in support of its argument in relation to the prohibition on pointing a weapon. Paragraph 104 deals with live ammunition training, while paragraphs 107 and 108 deal with the complete safety checks that apply to instructors or soldiers who have been provided with weapons for the purposes of instruction in firing. In the context of this case, there was never any question of firing live ammunition, or even blank ammunition, and the weapons provided to Sergeant Bergeron were all dismantled.

[29] The defence of lawful excuse is not limited solely to a defence that, at common law, comprises sufficient reason for relieving a person of criminal liability and offences associated with specific offences – defences associated with specific offences, however. That is clear from the decision in *Holmes*. This expression includes the lawful excuse of innocent intent. Contrary to what Judge Verdon decided in *R. v. Rainville*, cited by the prosecution, the offence of pointing a firearm is not similar in nature to the offences with which Captain Rainville was charged. That is why Judge Verdon concluded that the Court saw no factual or legal basis for any defence of excuse or justification, which is not the situation in this case.

[30] The evidence before this Court tends to support the theory, at least as stated by Private Boudreau and Sergeant Bergeron, that the accused did not point at Private Thériault's temple without warning or without first explaining the context in which the demonstration was being given. It took place in the context of a demonstration and informal explanation of a manoeuvre for disengaging or evading in a hostage-taking. The demonstration when beyond the formal assembling, dismantling and testing after dismantling of a 9 mm pistol. Sergeant Bergeron testified about a technique he had been taught by specialists in JTF 2. If the version recounted by Private Boudreau, corroborating Sergeant Bergeron on this point, is believed, they were indeed surprised by the manoeuvre, but it was connected with the demonstration explained by Sergeant Bergeron. That does not mean that, in the contact of training given to people with little or no experience in the infantry, this kind of demonstration is normal or appropriate, but that is not the nature of a charge of pointing a firearm without lawful excuse. For these reasons, the Court believes that the accused has succeeded in raising a reasonable doubt with respect to guilty intent.

The third count (in the alternative to the first count): An act to the prejudice of good order and discipline (section 129 of the *National Defence Act)*

[31] On the third count, in the alternative to the first count, committing an act to the prejudice of good order and discipline, under section 129 of the *National Defence Act*, the defence had to prove beyond a reasonable doubt, in addition to identity, date and place, which are in fact admitted by the defence:

a. the act with which the accused is charged: in this specific case, pointing a Browning 9 mm pistol at Private Thériault's temple;

b. that the act was, in the circumstances, to the prejudice of good order and discipline; and

c. the guilty intent of the accused at the time the offence was committed.

[32] The prosecution did not succeed in proving beyond a reasonable doubt that there was a rule that formally and absolutely prohibited what Sergeant Bergeron did in pointing at Private Boudreau's temple in the context of demonstrating a disengagement/evasion manoeuvre when a person is taken hostage and the enemy is pressing a 9 mm weapon to a prisoner's temple. Neither Exhibit 3 nor Exhibit 4, nor the testimony given by the expert witness Kelly, are sufficient to prove such a rule. The numerous operations in which the Canadian Forces have taken part in recent years have been increasingly demanding and dangerous. It is therefore crucial that the training that prepares our soldiers be capable of enabling them to deal with the real and potential dangers that they may face. That training must be rigorous and must take place in a context that is as close as possible to the real conditions they may have to face. However, the fact that the informal demonstration of a technique which, based on the evidence heard, is real and is not the result of an invention on the part of the accused designed to frighten, threaten or intimidate the soldiers, should be taught, and if it is, discernment should be used in teaching it, that is, it should be taught to people with experience or somewhere other than in the course to familiarize them with the 9 mm pistol, is not in itself sufficient reason to prove beyond a reasonable doubt that the act was to the prejudice of good order and discipline in the context of this case. This is not a situation in which the circumstances permit the Court to find clearly that there was prejudice, as there was in the case decided by the Court Martial Appeal Court in *Jones*. The evidence before this Court, as a whole, shows that what Sergeant Bergeron did was neither violent nor gratuitous. His action was connected with the explanation he was giving these students about the manoeuvre to perform to disengage from or evade a weapon in a hypothetical hostage-taking situation in which a soldier had a similar 9 mm pistol pointed at his or her temple. There is no doubt that the young students were surprised by this demonstration and that they did not particularly appreciate the initiative undertaken by Sergeant Bergeron. In the context of inexperienced soldiers, this is entirely understandable, when the demonstration takes place in the context of an instruction period dealing with a light weapon with which they had little or no familiarity, when their instructors in the handling of various weapons constantly tell them never to point a weapon.

[33] How can we expect them to know, in fact, what is part of the formal or informal part of the instruction period, if they are not told? Sergeant Bergeron's conduct in this respect is entirely blameworthy and inexcusable for a soldier of his rank

and experience. He should have adapted his message to his audience, and he did not do that. Nonetheless, the prosecution has not succeeded in proving beyond a reasonable doubt that Sergeant Bergeron's wrongful act was to the prejudice of good order and discipline. Certainly Private Thériault was deeply shocked and complained to Warrant Officer Masson, who even testified that the students were stunned and open-mouthed. He testified that their eyes were watery and they were staring at the ground. As I said earlier, the description given by Warrant Officer Masson went well beyond any description of the physical or psychological reaction of all of the participants given by the witnesses Thériault and Boudreau, although they were the people affected by what Sergeant Bergeron did. There is also no evidence before this Court that the situation in any way deteriorated afterward or that a soldier, Private Thériault or anyone else, was unable to perform his or her duties or lost confidence in his or her chain of command or in Sergeant Bergeron himself. The Court recognizes, however, that in other circumstances a specific act could constitute an act to the prejudice of good order and discipline. The evidence of the act itself would, in such a case, show that the prejudice occurred as a natural consequence of the act proved. From the evidence as a whole, Sergeant Bergeron's action does not fall into that category. Accordingly, it must be acknowledged that the evidence shows that if this incident was closed on the morning on which it occurred, leaving aside what happened between Sergeant Bergeron and his superior officers. In this kind of case, the disciplinary or administrative action taken by the chain of command against Sergeant Bergeron cannot comprise proof beyond a reasonable doubt that the act was to the prejudice of good order and discipline. For these reasons, the accused must be given the benefit of the reasonable doubt on the third count, both in relation to the rule and in relation to the prejudice to good order and discipline.

The fourth count (in the alternative to the first count): An act to the prejudice of good order and discipline (section 129 of the *National Defence Act)*

[34] For the same reasons, the accused must also be given the benefit of the reasonable doubt on the fourth count, because the prosecution has not discharged its burden of proof both in relation to the rule and to the prejudice to good order and discipline.

DISPOSITION

[35] Accordingly, the prosecution having previously withdrawn the second count, this Court finds you not guilty on the first, third and fourth counts.

LIEUTENANT-COLONEL M. DUTIL, M.J.

Counsel:

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