



COURT MARTIAL

Citation: *R v Gagné*, 2013 CM 4030

Date: 20131108

Docket: 201329

Standing Court Martial

Canadian Forces Base Valcartier
Courcellette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal S. P. Gagné, Accused

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR FINDING

(Orally)

[1] Corporal Gagné stands accused of one charge laid under section 130 of the *National Defence Act*, that is, breach of duty, contrary to section 80 of the *Criminal Code* of Canada, and one charge laid under section 127 of the *National Defence Act*, for, by neglect, having done an act in relation to a thing that may be dangerous to life, which act caused bodily injury to another person.

[2] The evidence before this Court consists of the facts and matters of which the Court took judicial notice under Rule 15 of the *Military Rules of Evidence*, 33 items of evidence, and the testimony of Private Michaud, Master Corporal Landry, Master Corporal Bernard, Sergeant Bard, Master Warrant Officer Lamoureux, Warrant Officer Trudeau, Major Lévesque, Sergeant Côté, Corporal Séguin, Master Corporal Rhéaume, Sergeant Simard, Sergeant Evans, three expert witnesses (Dr. Martineau, Mr. Bourget and Mr. Brassard) and Master Warrant Officer Daigle, who was called to testify for the

defence. Under Rule 16, the Court also took judicial notice of a Canadian Forces publication. Two interviews conducted by the Canadian Forces National Investigation Service with Corporal Gagné, including an audio recording of the interview of 29 March 2011, and a video recording of the interview of 20 March 2012, and the transcripts of both interviews, were also adduced (Exhibits 23, 26, 29 and 30).

[3] 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 principles fundamental to all criminal trials. Although these principles, of course, are well known to counsel, other people in this courtroom may well be less familiar with them.

[4] It is fair to say that the presumption of innocence is 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 an 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 the guilt of the accused. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution, never the accused. A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt or after having considered all of the evidence. The expression "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not something based upon 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 in no way indicative of his or her guilt.

[6] In *R v Starr*, [2000] 2 SCR 144, 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

[7] 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 beyond a reasonable doubt. To put this 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 a 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 has taken judicial notice. 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 or a witness's reasons to remember. The Court will consider, for instance, whether there was something specific that helped the witness remember the details or 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 a conclusion that an accused will lie where the accused chooses to testify.

[9] 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? Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and it may well taint a witness'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 question the Court must now ask itself is whether the evidence accepted by it leaves it with a reasonable doubt as to the guilt of the Corporal Gagné. To do so, the Court will first examine the evidence presented throughout the trial.

[11] The evidence clearly indicates that Corporal Gagné was at Observation Post Sherlock in the Islamic Republic of Afghanistan on 18 February 2011. Corporal Gagné shared a room with Private Michaud and troopers Paradis and Ménard in the sector occupied by his troop at observation post Sherlock. Trooper Ménard was evacuated on 17 February for medical reasons. Corporal Gagné had in his possession or under his care or control an explosive, specifically a C-13 grenade. A C-13 grenade is a thing that

may be dangerous to life or property. At around 0255 hours on 18 February 2011, the grenade exploded in the room occupied by Corporal Gagné. The explosion caused bodily injury to Private Michaud and Corporal Gagné (see Exhibit 4).

[12] The Court agrees with counsel that the witnesses are credible. At around 0245 hours on 18 February 2011, Master Corporal Landry entered the room and woke up Corporal Gagné. Corporal Gagné came out of his room wearing his combat shirt, his combat trousers and his boots. He went to the kitchen, where Master Corporal Landry spoke to him briefly. Corporal Gagné returned to his room to get his combat gear to go on sentry duty. About 30 to 60 seconds after he entered his room, the grenade exploded. Only Corporal Gagné and Private Michaud were in the room at the time of the explosion because Trooper Paradis was on sentry duty.

[13] Private Michaud was sleeping in the room at the time of the explosion. She woke up shortly before the explosion, but does not know why. She sat up on her camp bed in her sleeping bag and said “Simon”, Corporal Gagné’s first name, but seeing nothing in the room and receiving no response, she went back to sleep. She saw Master Corporal Landry outside the room before going back to sleep. Following the explosion, she tried to help Corporal Gagné but realized that she was too injured and left the room. She walked a few steps and was given first aid immediately. She was evacuated by helicopter about an hour later.

[14] Master Corporal Bernard arrived on the scene quickly, and he heard Corporal Gagné ask, [TRANSLATION] “Who did that?” while Corporal Gagné was still in the room. Sergeant Bard could hear Corporal Gagné groan and moan. He found Corporal Gagné’s tactical vest in the doorway and immediately moved it to a safer place because he was afraid that the ammunition in the vest could explode. He saw that the left side of the vest was damaged. Sergeant Evans, the first to enter the room, found Corporal Gagné lying on the ground: he was lying either on his back or his side, as he could not see his face. He got Corporal Gagné out of the room.

[15] Corporal Bernier-Drolet and two other people gave first aid to Corporal Gagné. He described Corporal Gagné as being conscious, but unable to understand what had happened. Corporal Gagné said that he [TRANSLATION] “was going on duty and there was an explosion”. Corporal Gagné was also able to say that his bandages were too tight. Corporal Bernier-Drolet informed Corporal Gagné that it had been his grenade. Corporal Gagné spoke throughout his treatment, but his condition worsened over time. Corporal Gagné was practically unconscious when he was evacuated by helicopter (see Exhibit P4). Master Corporal Rhéaume attempted to comfort Corporal Gagné while he was receiving first aid. He described Corporal Gagné as being calm but confused. He testified that Corporal Gagné did not seem to be aware of what had happened.

[16] Master Corporal Rhéaume was the first to enter the room to identify the cause of the explosion; he saw the fragmentation vest and the exploded ballistic plates. The fragmentation vest and the plate were close to the crater. Sergeant Simard entered the room after Master Corporal Rhéaume, and he found a small grenade spring embedded

in a cardboard box on the camp bed on the left when entering the room, but not the fly-off lever or “spoon” as it is known in military jargon. Warrant Officer Trudeau also entered the room at this point, and he found the striker spring in a cardboard box on the left. He does not know what happened to this spring.

[17] Major Lévesque inspected the tactical vest and saw that the left side was open. He saw tears in the two ballistic plates. He tested a grenade pocket and thought that it had not been used often. Sergeant Côté was ordered to clean the room, and he did so with Master Corporal Bernard. Master Warrant Officer Lamoureux was in charge of a Counter-IED team, and he travelled to OP Sherlock on 18 February at around 1000 hours. He could not carry out a full investigation as the room had been cleaned. He took photographs and recorded the statements of sergeants Côté and Evans. He prepared the report filed as Exhibit 27.

[18] Corporal Gagné was questioned by the investigators of the Canadian Forces National Investigation Service on two occasions, 29 March 2011 and 20 March 2012. During the first interview, he stated that he had no recollection of the incident: all he remembered was going to bed at 2200 hours and waking up in Germany. He also stated that he remembered hearing, [TRANSLATION] “Get out of there, get out of there”, but as if in a dream (Exhibit 23, pages 26 and 27). He does not remember being woken up (Exhibit 23, page 75). He does not remember getting up and stated that he was told that he did (Exhibit 26, page 40).

[19] During these interviews, he was questioned many times about the location of his equipment when he went to bed (Exhibit 23, pages 33, 60, 61, 62; Exhibit 26, pages 69, 70, 71 and 110). Even though he stated that he could not remember exactly where he put his equipment before going to bed, he responded that he usually hung his tactical vest on a hook on the wall between sentry duty shifts (Exhibit 23, page 61).

[20] He was also questioned about the grenade many times. He stated that he had taken the grenade from the combat vehicle he had occupied at the beginning of his tour (Exhibit 26, pages 59 to 61). He stated that the grenade was [TRANSLATION] “starting to get old” (Exhibit 23, pages 29 and 30). He also stated that his grenade was normal (Exhibit 26, page 60). He had inspected the grenade before moving it from his grenade pocket to a pocket on the right side of his tactical vest that was slightly above his waist. This pocket was empty. He stated that he had closed the pocket (Exhibit 23, pages 38 to 40). He was unsure whether he carried one or two grenades and whether he had one grenade pocket or two grenade pockets on his tactical vest (Exhibit 26, pages 63 and 64).

[21] He stated that he inspected the pin and the other thing. He explained that the other thing was [TRANSLATION] “the thing attached to the top there, like a hook” (Exhibit 23, page 43). He then stated that he had inspected his grenade about a week and a half before the explosion (Exhibit 23, page 44). But at pages 57 and 58, he also states that he had also inspected the grenade before putting it in the right pocket. On several occasions over the course of the two interviews, he stated that the pin had been

in place each time he inspected the grenade. He described the components of a grenade at pages 33 and 34 of Exhibit 26. He is unable to say whether there were signs of wear and tear on his grenade, but can confirm that the pin was there. He also stated that [TRANSLATION] “everything is there”, but was not asked what exactly he meant by this (page 65, Exhibit 26).

[22] He moved his grenade from his grenade pocket to his right pocket before going to secure the helicopter landing site during the evening of 17 February. He noted that all the pins were there and stated that he did not [TRANSLATION] “notice whether it was worn out or dented; I just checked what was most important” (Exhibit 26, pages 71 to 72). He also states that there were no norms or standards on how often to inspect grenades (Exhibit 23, page 68).

[23] Corporal Gagné is not a reliable witness. He claims to have no recollection of what happened after he went to bed at 2200 hours. He also claims to have had no recollection of the evening of 17 February in the first month that followed the explosion (Exhibit 26, page 88).

[24] Corporal Gagné explained why he moved his grenade from his grenade pocket to his right pocket and described how he did it, but the Court finds his explanations puzzling. After almost three months in Afghanistan, he decided that the grenade in his grenade pocket was too uncomfortable and that he would therefore put it in another pocket before securing the landing site and then putting the grenade in his combat vehicle. He claims to have been very anxious about handling the grenade and afraid of it, but he cannot remember whether he had one or two grenade pockets on his tactical vest and whether he kept one or two grenades on him. His grenade was so uncomfortable that he put it in another pocket, but he forgot to leave it in his vehicle when he arrived there and did not put it in his vehicle when he passed close by on his way to the landing site (see Exhibits 23 and 25). He stated that Trooper Ménard did not sleep in his room (Exhibit 26, page 42) even though the evidence at trial clearly establishes the contrary. He stated that there was white light for checking his grenade close to the combat vehicles but also that they were in blackout mode at night (Exhibit 26, page 86). These statements and contradictions raise questions about Corporal Gagné’s credibility.

[25] On the other hand, counsel for the defence suggests that the spontaneous statements made by Corporal Gagné right after the explosion, those reported by Master Corporal Bernard and Corporal Bernier-Drolet, have significant probative value and indicate that Corporal Gagné had no idea what caused the explosion and corroborate his statements during the interviews.

[26] A statement about a surprising event can be admissible, to prove its truth, if it was made while the person uttering the statement was filled with the excitement caused by the event in question. A statement describing or explaining an event or a situation, made while the person was perceiving the event or situation in question, or immediately afterwards, may be admitted to establish veracity. The standard underlying principle is

that reliability is based on the fact that the statement must have been made spontaneously before the person uttering it had the time to fabricate something.

[27] In *R v Shea*, 2011 NSCA 107, at paragraph 64, the Nova Scotia Court of Appeal provided the following summary of the law:

[64] A review of the case law shows that the key elements of this test are a statement that is spontaneously declared under shock or pressure sufficient to ensure the declaration's reliability and remove any suspicion of concoction or fabrication, and made under circumstances of relative contemporaneity to the traumatic event.

[28] The Court agrees with counsel for the defence that these spontaneous statements are of significant probative weight given the circumstances surrounding them.

[29] The Court heard the evidence regarding Corporal Gagné's reputation. Master Corporal Landry testified under cross-examination that, even though he could not speak for Corporal Gagné's reputation, he had never seen Corporal Gagné do anything that would put the lives of others in danger. Corporal Séguin testified that Corporal Gagné was liked by his peers, that he had a great deal of experience and that he personally would go on a mission with him. Master Warrant Officer Daigle testified that he considered Corporal Gagné to be at the same level as the other soldiers of his squadron in terms of security and work performance.

[30] A good reputation is not in itself a defence against a charge, but the Court can infer that a person with a good reputation would be less likely than someone else to commit the alleged offence. The Court must determine how much credibility and weight to afford to this evidence. The Court must examine the evidence for the accused's good reputation with all the other evidence to determine whether counsel for the prosecution has proven Corporal Gagné's guilt beyond a reasonable doubt.

[31] To make a finding, the Court must determine whether the prosecution has proven all the essential elements of each offence beyond a reasonable doubt. The particulars of the first charge are as follows:

[TRANSLATION]

In that he, without lawful excuse, on or around 18 February 2011, at Observation Post Sherlock, Islamic Republic of Afghanistan, having in his possession an explosive substance, breached his legal duty under section 79 of the *Criminal Code* leading to an explosion that caused bodily injury.

The essential elements of this charge are the following:

- (a) the offender's identity;
- (b) the date and place of the offence;

- (c) the C-13 grenade being an explosive substance;
- (d) Corporal Gagné having a C-13 grenade in his possession or under his care or control;
- (e) Corporal Gagné failing to fulfill his legal duty under section 79 of the *Criminal Code*;
- (f) Corporal Gagné not having a lawful excuse for this breach;
- (g) the C-13 grenade exploding as a result of this breach; and
- (h) the explosion causing bodily injury.

[32] The evidence accepted by the Court, and which has not been challenged by the accused, proves beyond a reasonable doubt the following essential elements of both charges: the offender's identity, the dates and the place of the offences; the C-13 grenade being an explosive substance; Corporal Gagné having a C-13 grenade under his care or control; and the explosion of the grenade causing bodily injury to people.

[33] As indicated by counsel for the prosecution, the prosecution's evidence is almost entirely circumstantial. A trier of facts may rely on both direct and circumstantial evidence to reach a verdict. Usually, witnesses report what they themselves saw or heard. This is direct evidence. However, witnesses sometimes describe things from which the Court is asked to draw certain inferences. Indirect evidence is sometimes called circumstantial evidence. The evidence submitted can also provide direct or circumstantial evidence.

[34] To reach a verdict, the Court may consider both types of evidence. In each case, the Court must decide what conclusions it will reach based upon the evidence as a whole, both direct and circumstantial. However, the Court cannot reach a guilty verdict based on circumstantial evidence, unless it is satisfied beyond a reasonable doubt that Corporal Gagné is guilty. An inference is a much stronger kind of belief than conjecture or speculation. If there are no proven facts from which an inference can be logically drawn, it is impossible to draw an inference. At best the Court would be speculating or guessing, and the Court cannot do this as its finding would not be proven beyond a reasonable doubt.

[35] The prosecution is largely relying on the report and the testimony of the expert witnesses to make its case. The expert witnesses provided opinions about certain issues that the Court must consider to dispose of the matter before it. As with any other witness, the Court may believe or accept the testimony of an expert in whole, in part, or not at all. The Court is not required to accept such testimony simply because it was given by an expert. To determine to what extent the Court can believe the opinion and to what extent it can rely on it, the Court must take into account the education, training and experience of the expert, the grounds for the expert's opinion, the relevance of the

methods used and other evidence in the present matter. When the expert's opinion is not challenged and the primary facts on which it is based are not at issue, the Court commonly accepts the opinion in the absence of a valid ground to draw a conclusion contradicting the opinion.

[36] The facts that an expert assumes or on which the expert relies to provide an opinion may be the same or not be the same as the facts the Court retains from the evidence presented during the trial. If an expert witness relies on facts that were not adduced in evidence, the expert's declaring these facts does not prove that they exist.

[37] The more the facts assumed on or relied on by an expert for an opinion resemble the facts the Court retains from the evidence, the more useful an expert opinion is to the Court. Conversely, the less the facts assumed on or relied on by an expert for an opinion resemble the facts the Court retains from the evidence, the less useful the expert opinion is to the Court.

[38] Did Corporal Gagné fail to fulfill his legal duty under section 79 of the *Criminal Code*? Section 79 of the *Criminal Code* imposes a legal duty on anyone who has an explosive substance in his possession or under his care or control to use reasonable care to prevent bodily harm or death to persons or damage to property by that explosive substance. The issue, therefore, before the Court is whether Corporal Gagné used reasonable care to prevent bodily harm or death to persons or damage to property by his C-13 grenade. This is a criminal negligence offence; a marked departure from the standard of care of a reasonably prudent person in the circumstances must thus be proven by the prosecution. As I wrote at paragraph 23 of my decision in *R v Salmond*, 2012 CM 4016,

... [t]he accused must be acquitted if a reasonable doubt exists either that the conduct in question did not constitute a marked departure from that standard of care or that reasonable precautions were taken to discharge the duty of care The Supreme Court of Canada has also recognized that certain activities may impose a higher of *facto* standard than others. This standard flows from the circumstances of the activity and not from the characteristics of the accused, (see *R v Day*, 2011 Court Martial Appeal Court 3, at paragraph 12).

The prosecution must first prove the accused's conduct.

[39] As I further wrote at paragraph 22 of my decision in *Salmond*, the Supreme Court of Canada affirmed at paragraph 46 of *R v Creighton*, 83 CCC (3d) 346 that "[t]he law does not lightly brand a person as a criminal". Moreover, at paragraph 6 of *R v Beatty*, 2008 SCC 5, the Supreme Court wrote as follows:

... conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, it is important not to conflate the civil standard of negligence with the test for penal negligence. Unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing *blameworthy* conduct. Fundamental principles of criminal justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, which establishes the *actus reus* of the offence, but

with the offender's mental state. The onus lies on the Crown to prove both the *actus reus* and the *mens rea*.

[40] What was Corporal Gagné's conduct? Corporal Gagné claims to have no recollection of the events that followed his sleep. The Court has no direct evidence of Corporal Gagné's actions in the seconds preceding the explosion.

[41] Here is what the Court understands from the submissions of counsel for the prosecution, who states that the standard of conduct is described in Note (A) of article 103.59 of the QR&O. This note reads as follows:

(A) Section 127 of the *National Defence Act* is designed to provide suitably for offences in relation to modern materials of war which inherently are so dangerous that an extreme degree of care in their handling is required. Responsibility is not dependent upon whether the accused intended the actual consequences which his wrong-doing produced.

He argues that the standard is an extreme degree of care in the handling of dangerous materials of war. He submits that not changing the position of one's grenade pocket on one's tactical vest and putting one's grenade in one's right pocket does not suffice for a conviction. He suggests that Corporal Gagné must have handled his grenade in his room in the dark as he stated having closed his right pocket when he put the grenade in this pocket. The prosecution insists that he must have handled the grenade as he is the only person who could have done so given that Corporal Gagné had told the police that no one had touched his equipment. He refers to *R v Yebe*, [1987] 2 SCR 168, to argue that this evidence proves beyond a reasonable doubt that Corporal Gagné handled the grenade before it exploded and he was the only person with the sole opportunity to do so and that his handling of it does not meet the standard of extreme care. Counsel for the prosecution then refers to Note (C) of article 103.59 of the QR&O to establish the law that must be considered to determine the *mens rea* of this offence. Note (C) reads as follows:

(C) The word "negligently" in section 127 of the *National Defence Act* signifies that the alleged offender either did something or omitted to do something in a manner which would not have been adopted by a reasonably capable and careful person in his position in the Service under similar circumstances.

Counsel therefore suggests that Corporal Gagné's actions caused the safety clip and the safety pin to be withdrawn and that he then dropped the grenade.

[42] The evidence clearly establishes that each soldier had to keep his protective and combat equipment within easy reach (see the testimony of Master Corporal Landry, Sergeant Bard and Master Warrant Officer Daigle). Even though most of the witnesses stated that they kept their grenades in their purpose-designed grenade pocket (Master Corporal Landry, Corporal Landry, Master Corporal Rhéaume), there is no evidence before the Court to suggest that an order or specific instruction had been issued in this regard. Master Warrant Officer Daigle, the squadron sergeant-major, and Master Corporal Bernard stated that no instructions were given during pre-deployment IBTS (individual battle task standard) training or on grenade ranges to keep grenades in grenade pockets. Master Corporal Daigle stated that no specific instructions on where to put the grenade were given before the incident. He explained that every soldier had to determine what worked best for him or her.

[43] Even though he cannot remember the exact location of his equipment at the time of the explosion, Corporal Gagné recalled that he usually hung his tactical vest on a hook on the wall of his room, close to his equipment. After examining Exhibits 11, 12, 13, 14, 18, 19 and 20, and Exhibit 31, the expert report dated 18 July 2011, and after considering the testimony of Dr. Martineau, Mr. Bourget and Mr. Brassard, the Court concludes that the evidence proves beyond a reasonable doubt that the grenade was on or very close to the ground when it exploded and that it was not in a pocket of the tactical vest. A comparison between the damage to the fragmentation vest and to the ballistic plates and the damage to Corporal Gagné's tactical vest clearly indicates that the fragmentation vest was between the grenade and the tactical vest.

[44] The expert evidence suggests that the two safety devices on the grenade, the safety pin and the safety clip, stop the fly-off lever from flipping off and thus from triggering the grenade firing mechanism (see Exhibit 31, page 12 of 13, and Exhibit 3, Figure 1-2). According to Exhibit 31 and Mr. Brassard, a grenade cannot explode if one of the safety devices is intact. He states that he has never heard from any sources at the Canadian Forces, from NATO or from the United States that a C-13 or M-67, the US version of the C-13 grenade, exploded with the safety measures being intact.

[45] But where is the evidence of the grenade being handled in the room? Which of the items of evidence presented at trial can allow the Court to draw the logical inference that Corporal Gagné handled his grenade in his room right before it exploded? The expert evidence, namely the report under Exhibit 31 and the expert testimony, proposes that the Court conclude that the grenade was on or very close to the ground underneath the fragmentation vest and that the tactical vest was on top of the fragmentation vest. This evidence suggests that Corporal Gagné was standing in front of his equipment when the grenade exploded. The experts base this conclusion on the following assumption: while Corporal Gagné was preparing to put on his combat gear, he heard a click from his grenade; he then took the grenade and reversed the order of his equipment to cover the grenade, first with the fragmentation vest and then with the tactical vest. The experts base this assumption on the type of damage caused to the equipment, the injuries of Corporal Gagné and of Private Michaud, the short time, and the following premises: Corporal Gagné's equipment was on the ground; the tactical vest was on the floor, and the fragmentation vest was on top of the tactical vest as this is the logical order of placing one's gear on the ground; and that grenades give a click before they explode.

[46] This evidence has nothing to do with Corporal Gagné's actions right before the explosion. Dr. Martineau speaks of the click of a grenade, but the Court heard no evidence indicating that a grenade makes a noise before it explodes. Dr. Martineau testified that she has never thrown a grenade. She stated that she could not think of any other scenario than the one she described in light of the nature of the damage and the injuries. The expert testimony makes no reference to Corporal Gagné's handling the grenade.

[47] Sergeant Côté watched his interview with the National Investigation Service to refresh his memory. He personally participated in inspecting his troop's grenades, and he remembered seeing worn grenades, grenades with tape around them and damaged clips, and one missing clip. Master Warrant Officer Daigle testified that, about two hours after the explosion, everyone in the squadron received the order to check their grenades and to bring them to the squadron if they had doubts. Even though this is hearsay, given that Master Warrant Officer Daigle stated under cross-examination that he had not seen the grenades but had received this information from his operations warrant officer, under examination, Master Warrant Officer Daigle stated that 53 grenades were collected and that some had bent spoons, others had tape on them, one was missing a safety clip, another had no safety pin, and the rod of one safety pin was [TRANSLATION] "shorter than usual". Even though this is hearsay, this description resembles the testimony of Sergeant Côté.

[48] The witnesses clearly indicated that the grenades were not like grenades taken out of their original packaging on a grenade range in Canada. The grenades were found in combat vehicles inherited from the previous contingent, and the equipment and weapons rotation was performed hastily. The soldiers took what they were given, in the condition in which it was given.

[49] Corporal Gagné stated many times in his interview that the pin of his grenade often caught in his grenade pocket (Exhibit 23, page 38, Exhibit 26, page 62), and that this stressed him. He stated that he inspected his grenade and that, despite the fact that it was not a grenade straight out of the manufacturer's package, given that he had taken it from his combat vehicle at the start of the tour, it had been in good condition and that the safety features were intact. He states that he did not modify his grenade. He had not wrapped tape around his grenade.

[50] It is obvious that Corporal Gagné, like so many other soldiers who do not have regular grenade training, was nervous about his grenade. He was much more comfortable with his C8 rifle. He drew particular attention to the safety pin while describing his inspections of his grenade. There is no evidence to suggest that Corporal Gagné had completed grenade NIAC before being deployed. Master Warrant Officer Daigle testified that he could not guarantee that everyone had thrown a real grenade during the annual IBTS of the 12 RBC. Corporal Gagné stated in his interview that he had not thrown a real grenade during IBTS (Exhibit 26, pages 97 to 99).

[51] The evidence indicates that many grenades were destroyed after the explosion, because of wear and tear and because some had damaged safety clips and one did not have one at all. The expert evidence suggests that a C-13 grenade cannot explode if both safety features are intact and undamaged (Exhibit 31 pages 12 of 13). The evidence indicates that it is likely that Corporal Gagné's tactical vest was hanging on the wall and that his fragmentation vest was on the ground when he went to sleep. Private Michaud believed that he had put his equipment on the ground, but she could not say for sure. Corporal Gagné stated that he closed his right pocket, but did not clearly describe how. This pocket is secured by Velcro and a clip. The pocket contained nothing but the

grenade. The Court was presented with no evidence regarding the state of this pocket when the tactical vest was taken outside of the room.

[52] Between 10 and 30 pounds of force are required to remove an undamaged safety pin. No one asked the expert to explain clearly what 10 pounds of force, the minimum force required to remove the pin, represents. Warrant Officer Trudeau explained under cross-examination that a soldier's tactical vest could weigh over 10 pounds.

Mr. Brassard explained that a great deal of force was required to remove a pin that had been modified so as to make it harder to remove and stated that he was unaware of grenades that had been modified to make them easier to throw. He testified that he had never thrown a grenade. Moreover, the evidence of Mr. Brassard as well as that of several ordinary witnesses suggests that several grenades had tape around them to keep the safety lever in place as a third safety measure.

[53] Mr. Brassard performed a study of 875 C-13 grenades in 2008, 468 of which were used in Afghanistan; the rest came from Canada (Exhibit 35). Mr. Brassard stated that 25 percent of the grenades from a particular lot and 8 percent of another lot from Afghanistan had damaged fly-off lever ears. He recommended that the grenades that were particularly damaged in that area be destroyed because it was possible that the safety clip would not prevent the fuse from being activated if the safety pin was accidentally withdrawn (see page 3 of 7 of Exhibit 35). He also stated in his recommendations that soldiers should be careful when handling these grenades to ensure that the ring attached to the pin was not exposed such that it could be pulled accidentally, thus causing the safety pin or safety clip to be inadvertently removed.

[54] Is it possible that the vest fell on the fragmentation vest during the night and that the grenade fell out of the pocket and rolled under the fragmentation vest? Is it possible that Corporal Gagné dropped his vest on the fragmentation vest when he unhooked it off the wall? Is it possible that the safety clip was damaged unbeknownst to Corporal Gagné? Is it possible that the vest fell and that the safety clip became undone when the grenade fell out of the pocket? Is it possible that the safety pin also became detached by catching on something? Is it possible that the fly-off lever was then activated when Corporal Gagné started picking up his gear from the floor?

[55] The evidence raises many questions. The experts were not asked these questions during the trial, and they could imagine only one scenario based on the information they had when they performed their study. The evidence accepted by the Court proves beyond a reasonable doubt that a C-13 grenade can only explode when both safety devices are removed and the fly-off lever is activated. The evidence accepted by the Court proves beyond a reasonable doubt that Corporal Gagné's C-13 grenade was on the ground and that his fragmentation vest and tactical vest were on top of the grenade.

[56] Circumstantial evidence requires the drawing of inferences from the evidence as a whole. The accused can only be found guilty if these inferences cast no reasonable doubt on his guilt. To return a verdict of guilty, the Court must be satisfied beyond a

reasonable doubt that the only rational conclusion to be drawn from the circumstantial evidence is that the accused is guilty.

[57] It was very dark in the room, so dark that Private Michaud could not see anything. The experts assumed that Corporal Gagné heard his grenade click, as a result of which he threw his combat gear, fragmentation vest and tactical vest on top of the grenade in a so-called “fight or flight” reaction.

[58] The Court has already mentioned the many reasonable questions that were raised by the evidence and that were not answered by the evidence presented to the Court during this trial. The Court simply does not know what happened in that room before the explosion. The Court knows that many grenades were worn. Corporal Gagné was clearly surprised right after the explosion.

[59] The Court concludes from this that the evidence does not show beyond a reasonable doubt how Corporal Gagné’s gear ended up on top of the grenade. The Court is not satisfied beyond a reasonable doubt that, as suggested by counsel for the prosecution, the only logical inference to be drawn from the facts is that Corporal Gagné handled the grenade in the seconds preceding the explosion. The evidence submitted to the Court does not establish Corporal Gagné’s conduct beyond a reasonable doubt.

[60] Every soldier clearly had to ensure that both safety features were intact on the grenade and in good condition. Every soldier also had to transport his or her grenade safely. Every soldier had to handle his or her grenade safely. There is no direct evidence to show that Corporal Gagné breached these duties. The Court is not satisfied beyond a reasonable doubt that the only logical inference to be drawn from the facts is that Corporal Gagné did not apply the proper safety measures or did not handle his grenade correctly before it exploded. The Court is not satisfied beyond a reasonable doubt that the only logical inference to be drawn from the facts is that Corporal Gagné breached these duties. The evidence submitted to the Court does not prove beyond a reasonable doubt that Corporal Gagné breached his legal duty under section 79 of the *Criminal Code*.

[61] The Court is quite surprised that counsel for the prosecution refers to a note from the QR&O as evidence of the specific standard of conduct applicable to this trial. As indicated at article 1.095 of the QR&O,

[t]he notes appended to articles in QR&O

- a. are for guidance of members; and
- b. shall not be construed as if they had the force and effect of law but should not be deviated from without good reason.

Exercising an extreme degree of care when handling materials of war is simply common sense. Common sense has its place in any trial. Common sense is the usual standard that applies to the actions of a reasonable person. But counsel must also

provide evidence establishing the specific standard for the case at bar. Counsel has failed to do this.

[62] The particulars of the second charge read as follows:

[TRANSLATION] In that he, on or around 18 February 2011, at Observation Post Sherlock, Islamic Republic of Afghanistan, negligently handled a grenade, occasioning an explosion that resulted in the injury of two people.

The essential elements of this offence are the following:

- (a) the offender's identity;
- (b) the date and place of the offence;
- (c) a C-13 grenade being a thing that may be dangerous to life;
- (d) Corporal Gagné doing an act in relation to the C-13 grenade;
- (e) this act causing bodily injury to a person;
- (f) Corporal Gagné's conduct showing a marked departure from the conduct of a reasonable person in the circumstances; and
- (g) Corporal Gagné having the requisite capacity to appreciate the risk flowing from his conduct.

[63] Did Corporal Gagné do an act in relation to the C-13 grenade? According to the prosecution, Corporal Gagné handled the grenade in his room in the dark before it exploded. As stated previously, the Court is not satisfied beyond a reasonable doubt that, as suggested by counsel for the prosecution, the only logical inference to be drawn from the facts is that Corporal Gagné handled the grenade in the seconds preceding the explosion. The evidence submitted to the Court does not prove beyond a reasonable doubt that Corporal Gagné did an act in relation to the C-13 grenade.

[64] Did this act cause bodily injury to a person? Even though the grenade caused bodily injury to two people, the Court has already determined that the evidence adduced does not prove beyond a reasonable doubt that Corporal Gagné did an act in relation to the grenade.

[65] Did his conduct show a marked departure from the conduct of a reasonable person in the circumstances? The Court believes that counsel for the prosecution is referring to the usual handling of a grenade during IBTS to establish the standard that would have been respected by a reasonable person. The Court has already concluded that the evidence does not establish beyond a reasonable doubt that Corporal Gagné did

handle his grenade in the seconds preceding the explosion. As indicated above, the Court is not satisfied beyond a reasonable doubt that the only logical inference to be drawn from the fact is that Corporal Gagné did not apply the proper safety measures or handle his grenade correctly before it exploded and that his handling amounts to a marked departure from the conduct of a reasonable person in the same circumstances.

FOR THESE REASONS, THE COURT:

[66] **FINDS** the accused not guilty on the first and second charges.

Counsel:

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