

Citation: *R. v. Corporal E.H. Gagnon*, 2004 CM 36

Docket: V200436

**STANDING COURT MARTIAL
CANADA
AREA SUPPORT UNIT VALCARTIER
VALCARTIER, COURCELETTE**

Date: 5 November 2004

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, Military Judge

**HER MAJESTY THE QUEEN
Prosecutor
c.
CORPORAL E.H. GAGNON
(Accused)**

**VERDICT
(Delivered Orally)**

OFFICIAL ENGLISH TRANSLATION

I. INTRODUCTION

[1] Corporal Gagnon is charged under section 130 of the *National Defence Act* with an offence punishable under section 267(b) of the *Criminal Code*, to wit, assault causing bodily harm. The facts on which the first count is based relate to an altercation that took place in the single quarters in building 302 at Valcartier Garrison, between Corporal Gagnon and Corporal Brunet.

II. THE EVIDENCE

[2] The evidence before this Court Martial is composed essentially of the following facts:

(a) the testimony heard; in the order of their appearance before the Court, the testimony of Private Esth phan, Corporal Brunet, the alleged victim on the first count, Corporal Pelletier, Corporal Bernier, Corporal Dureau, Corporal Gagnon, the accused in this case, and Fran oise Dufour, the spouse of the accused;

(b) Exhibit 3, a medical report and medical report in rebuttal regarding the injuries suffered by Corporal Brunet on the night of February 20, 2003. Those documents were entered in evidence by consent;

(c) Exhibit 4, a silver grey metal keychain belonging to Corporal Brunet; and

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

The Facts

[3] The facts involved in this case thus relate essentially to an altercation that took place between Corporal Gagnon and Corporal Brunet on the night of February 20, 2003, outside the room occupied by Corporal Brunet in building 302 of Valcartier Garrison, which houses single members of the military. Certain facts that preceded the altercation, and other facts that occurred afterward, also provide important insight to assist in a proper understanding of the dynamics and the state of mind of the individuals involved in this case at the point when Corporal Brunet and Corporal Gagnon engaged in the use of violence. The Court has chosen to deal with the facts involved in this case in nine parts, as follows:

first, the storage of Corporal Brunet's furniture and the accommodation offered to Corporal Brunet by Corporal Gagnon and his wife, Fran oise Dufour;

second, the meeting on February 19, 2003, in the family home of Corporal Gagnon, between Corporal Gagnon, the accused, and Corporal Brunet, who were joined by Corporal Bernier;

third, the meeting on February 20, 2003, between Corporal Brunet, Fran oise Dufour and Corporal Bernier in Corporal Brunet's room in building 302;

fourth, the meeting on February 20, 2003, between Corporal Gagnon, Fran oise Dufour and Corporal Bernier;

fifth, the drive by Corporal Bernier and Corporal Gagnon on the way to Corporal Brunet's room;
sixth, the altercation in building 302 between Corporal Gagnon and Corporal Brunet;

seventh, the meeting between Corporal Gagnon and Corporal Brunet in Chauveau Hospital;

eighth, the meeting between the police and Corporal Gagnon at about half past midnight early in the morning of February 21, 2003; and

ninth, the meeting between the police and Corporal Brunet in his room in building 302 and the physical damage observed, as well as the condition of Corporal Brunet's face at about 7:30 on the morning of February 21, 2003.

The storage of Corporal Brunet's furniture and the accommodation offered to Corporal Brunet by Corporal Gagnon and his wife, Françoise Dufour.

[4] Corporal Gagnon and Corporal Brunet had known each other for over a year before the events of February 20, 2003. They began merely as co-workers and gradually became friends. Corporal Brunet spent time with the couple periodically. He said that he visited them at least 20 to 30 times over a period of eight to twelve months. According to Corporal Gagnon, over the course of that relationship, he became increasingly distrustful of Corporal Brunet.

[5] In early January 2003, Corporal Brunet separated from his spouse. Corporal Gagnon nonetheless, and with his spouse's agreement, offered to store Corporal Brunet's property and furniture in his home and also offered him accommodation for a few weeks, to help him out. Evidently, Corporal Brunet accepted the offer. According to Corporal Gagnon, he suspected that Corporal Brunet had, at the very least, amorous feelings toward his wife, Françoise Dufour.

[6] Corporal Brunet testified that Ms. Dufour had confessed to him that she was attracted to him. According to his version of the facts, he had met with Ms. Dufour, alone, only twice: in his former home in Limoilou, where she expressed her feelings for him, and at the Tim Horton's restaurant.

[7] According to Corporal Gagnon, Corporal Brunet moved out of his home to go and live in single quarters a few weeks later, at his request, because he was having difficulty tolerating some of Corporal Brunet's habits, and particularly his habit of

walking around with his torso bare in his house in the presence of other people, including his young daughter. However, he allowed him to leave his furniture in storage for a while. The evidence showed that Corporal Gagnon and his wife were also having some problems in January 2003. Corporal Gagnon and his wife then made the mutual decision to separate temporarily. In short, Corporal Gagnon and Corporal Brunet found themselves living in single quarters at the end of January 2003. According to Corporal Gagnon, he was depressed at that time, and he added that Corporal Brunet seemed to be supporting him in those difficult times, and went so far as to console him when he cried.

The meeting on February 19, 2003, in the family home of Corporal Gagnon, between Corporal Gagnon, the accused, and Corporal Brunet, who were joined by Corporal Bernier.

[8] During the day on February 19, 2003, Corporal Gagnon was in the family residence occupied by his wife. She was out. The evidence shows that he was still allowed access there. He then discovered a letter, in the trash can in the kitchen, that had been torn up into little pieces. According to his version of the facts, he stuck the little pieces back together and discovered that it was a confession by his wife of her love for Corporal Brunet.

[9] Late in the afternoon or early in the evening, Corporal Gagnon telephoned his very good friend Corporal Bernier. The two had met through their wives. According to his version of the facts, Corporal Bernier, unlike Corporal Gagnon himself, already knew that Corporal Gagnon's wife was having or had had an intimate relationship with Corporal Brunet, because his wife had told him about it after meeting with her very good friend Ms. Dufour. To get back to Corporal Gagnon, he then asked his good friend Corporal Bernier to help him out and to meet him at the family residence. Corporal Gagnon also telephoned Corporal Brunet and asked him to come and meet him at the family residence to talk to him.

[10] Corporal Brunet arrived at Corporal Gagnon's family residence, and Corporal Gagnon let him in. According to Corporal Brunet's version, he noticed that something was not right. According to him, Corporal Gagnon greeted him literally with a baseball bat. Corporal Gagnon told him that things weren't going well. He went down to the basement and came back with a baseball bat. Corporal Gagnon showed him the infamous letter written by his wife to Corporal Brunet. According to Corporal Brunet's version, Corporal Gagnon started violently hitting the kitchen counter and other things, which flew up in the air, with the bat. He noticed marks on the kitchen counter from this. Corporal Brunet was afraid. Corporal Gagnon, however, denied having used the bat. According to Corporal Brunet's version of the facts, Gagnon informed him of the

contents of the letter, to the effect that Françoise was in love with Corporal Brunet. Corporal Brunet testified before this Court that he explained to Gagnon that he was then sorry about the situation, but that the letter wasn't from him.

[11] Corporal Bernier arrived at the home and met the two individuals. He testified that he noticed that the baseball bat had been placed near the back door. He saw that the kitchen counter was cracked. He deduced from this that the marks were recent. According to Bernier, he observed that Corporal Gagnon was depressed and tired. The discussion continued. Gagnon and Bernier questioned Brunet directly concerning whether he had slept with Corporal Gagnon's wife. According to Corporal Bernier, Corporal Brunet denied everything, claiming that he would never do that to a friend, and cried. Ms. Dufour, however, testified to the contrary before this Court regarding the intimate relationship she had been engaged in with Corporal Brunet. Getting back to the meeting, it ended, and Corporal Brunet left. According to Corporal Brunet, the meeting lasted only 10 minutes and the tone was not aggressive. He was not threatened by Corporal Gagnon.

[12] The next day, Corporal Bernier became actively involved in this situation when he decided, on his own, to contact Ms. Dufour. She joined him at his home and, according to him, he explained the facts of life to her and told her that he had been informed by his spouse that Ms. Dufour had slept with Corporal Brunet on two occasions. He asked her to admit everything to her husband. Bernier found her to be unstable. According to him, he wanted to persuade her to talk to Corporal Gagnon right away, or else he was going to tell his friend everything. They then left separately, but with both going to building 302, to Corporal Brunet's room.

The meeting on February 20, 2003, between Corporal Brunet, Françoise Dufour and Corporal Bernier in Corporal Brunet's room in building 302.

[13] Early in the evening, Corporal Bernier and Ms. Dufour thus arrived at Corporal Brunet's room. She went in first. Corporal Brunet was surprised both that she was there and that Corporal Bernier was there. According to Corporal Brunet, Ms. Dufour told him she wanted to admit everything to her husband. She then wanted them all to meet at her home. He wanted nothing to do with it, and asked them to leave. According to Corporal Bernier, Brunet then said: [TRANSLATION] "I am going to end up in hospital for sure!" Bernier then gave him a lecture and he left with Ms. Dufour. Ms. Dufour testified that at this meeting, Corporal Brunet was acting as if he did not know what she was talking about. The meeting apparently lasted 10 to 15 minutes at most.

The meeting on February 20, 2003, between Corporal Gagnon, Françoise Dufour and Corporal Bernier.

[14] Corporal Bernier and Ms. Dufour went immediately to her home to meet with Corporal Gagnon. That meeting lasted several hours. Ms. Dufour then explained to Corporal Gagnon that she had in fact had a relationship with Corporal Brunet. According to the evidence heard, Corporal Gagnon broke down. He was flattened. However, he exhibited no aggressiveness. He was disconsolate and exhibited no violence. After a few hours, Corporal Gagnon then telephoned Corporal Brunet and told him that he wanted to talk to him. There was then a very short one-way conversation during which Corporal Gagnon called Corporal Brunet egotistical and said that he should come and get his furniture. According to the testimony of Bernier and Dufour, Corporal Gagnon was firm but he was not aggressive toward Corporal Brunet and did not threaten him in any way. It seems that Corporal Brunet did not want to have anything to do with it.

The drive by Corporal Bernier and Corporal Gagnon on the way to Corporal Brunet's room.

[15] Corporal Bernier and Corporal Gagnon left Corporal Gagnon's family home to go to building 302. Corporal Bernier had, a little earlier, offered to let Corporal Gagnon sleep at his home, but without success. According to the version given by Corporal Bernier and Corporal Gagnon, Corporal Gagnon wanted to go and tell Corporal Brunet to come and get his furniture and discuss the fact that he had twice slept with his wife. The two individuals agreed to go there together, to ensure that everything went smoothly. Corporal Bernier reported that Corporal Gagnon told him in the car that he wanted to punch Brunet twice, because he had slept with his wife twice. Corporal Bernier reported that he told him that was not a good idea, but did not really believe his friend because he seemed to be exhausted and depressed. Corporal Gagnon admitted he had said those words, but asserted that he had said them sarcastically, to lighten the atmosphere and his pain. According to him, he had no intention of actually going ahead with it.

The altercation in building 302 between Corporal Gagnon and Corporal Brunet.

[16] Once Corporal Gagnon was inside building 302, he went to Corporal Brunet's room, by going up a few stairs. Corporal Bernier followed him, but stayed at the bottom of the first stairs, or first landing. According to the accused, he banged on the door. Corporal Brunet replied: [TRANSLATION] "Who's there?" He then said: [TRANSLATION] "It's Éric" and Corporal Gagnon added that he did not want to fight. What he wanted was for Corporal Brunet to get his furniture out. Corporal Brunet

replied, in an aggressive tone, [TRANSLATION] “No, I am not getting my furniture out and I did not sleep with your wife.” Gagnon, according to him, strongly insisted that Brunet get his furniture out and deal with the situation like an adult. He invited him to discuss it outside. He then gave the door a good kick and told him, in a firm tone, [TRANSLATION] “Come out, we’re going to discuss it, there’s no problem.” Corporal Gagnon made no threat or incitement to violence. Corporal Bernier corroborated Corporal Gagnon’s version and said that Corporal Brunet told Corporal Gagnon to get out. That was when Corporal Gagnon, having been insulted, went to launch himself for a second kick at the door to open it, and Corporal Brunet came quickly out of his room.

[17] Corporal Brunet’s version is different. He said that when he heard the first bang on the door, he was sleeping. He did not remember whether he heard any words. Corporal Brunet said that he did not know who was there at first, but after the third bang he knew it was Corporal Gagnon. He was afraid and grabbed his keychain, to which his bunches of keys were attached, to leave in his car. He said that he had no intention of using the keychain as a weapon, but he grabbed it by putting at least two fingers inside. There is no doubt that he was afraid. He testified that he was putting his hand on the door when it gave way after Corporal Gagnon struck it a third time. He was convinced that Corporal Gagnon, as he put it, was going to break his face. The door was therefore open and, according to Corporal Brunet, Corporal Gagnon was enraged. Corporal Brunet told the Court that at that point he believed there was no way out. As he said himself, [TRANSLATION] “It was me or him!” He then pushed Corporal Gagnon back and they found themselves in each other’s arms. Corporal Brunet tried to get the upper hand and to reason with Corporal Gagnon, from one landing to the other. Some people heard the noise and shouted at them to stop. Corporal Brunet then fell on Corporal Gagnon. According to Brunet, he had control over Gagnon and Gagnon calmed down. It was then, according to him, that a person, Corporal Bernier, grabbed him from behind. Corporal Gagnon was then free of his hold and landed two or three punches on the left side of his face. He was dizzy and off balance. No further blows were exchanged, by either man.

[18] On cross-examination, Corporal Brunet said that he had a belly full of adrenaline and he did not know what to expect. He added that he had grabbed Gagnon by the throat and cut off his air, that he left him no chance. Corporal Brunet said that he hit the wall with his keychain during the fistfight, to scare Corporal Gagnon and make him stop. He also said that once he was seated astride Corporal Gagnon, he held onto his hands, or fists. None of the witnesses remembered or noticed Corporal Brunet striking the wall with the keychain in the manner described by Corporal Brunet.

[19] Private Estéphan lived below Corporal Brunet. He testified before this Court. He admitted that he could not see what was going on by opening his door and that it was the really heavy banging on the door that had attracted his attention. When he went out of his room, he saw the two protagonists arguing. According to him, they fell twice, and it was on the second fall that Corporal Gagnon landed on his back on the staircase underneath Corporal Brunet. He did not see Corporal Brunet with anything in his hands. The two individuals had each other by the collar. According to him, Brunet and Gagnon were on the upper landing, about ten steps higher, but he was not in a position to see them go up. He reported that after the second fall, a third person intervened to pull Corporal Brunet off. It was when Corporal Brunet was pulled from behind by the third person that Corporal Gagnon struck Corporal Brunet.

[20] Corporal Estéphan said, on cross-examination, that he had seen only one blow struck by Corporal Gagnon although he had said that several blows had been struck by Corporal Gagnon in a statement he provided to Corporal Brunet's lawyer on March 18, 2004, in relation to a civil action. Private Estéphan said that the incident lasted two minutes at the most, and that he was at least twenty feet away from the location where the altercation was taking place.

[21] Corporal Gagnon's version also differs from Corporal Brunet's from the point when the door to the room opened. According to his version of the facts, it was at the point that he was preparing to kick the door a second time that it opened quickly and Corporal Brunet burst out and attacked him with his arms stretched out and fists closed, and a metal object in one of his hands. Corporal Brunet struck him under the eye with that object, charging at him. Corporal Gagnon fell on the stairs from the landing. Corporal Brunet was on him and trying to get hold of him by the neck or choke him. Corporal Gagnon asked him to stop and told him that he did not want to fight. According to Gagnon, he was in fear of his life.

[22] Corporal Gagnon's version was that Corporal Brunet did not strike the wall with an object and that in any event he did not have time, since everything had happened in between 10 and 15 seconds. Corporal Gagnon said that it was when Corporal Brunet was on him that he grabbed him by the nostrils and landed two punches on his face so that Corporal Brunet would let go of the hold he had on him. Corporal Bernier then stepped in and pulled off the shaken Corporal Brunet, who had to that point been on top of Corporal Gagnon. Corporal Bernier and Corporal Brunet turned their backs and went into the adjacent bathroom. Gagnon went down to the landing. According to him, he was confused. According to Corporal Gagnon, he did not want an altercation. He was speaking to Corporal Brunet, telling him, among other things, not to go to the police and to act like an adult, claiming that he was shocked by the situation.

[23] Corporal Bernier, who had accompanied Corporal Gagnon, corroborated Corporal Gagnon's version in respect of the events that occurred when the door to Corporal Brunet's room opened and he came out. According to Bernier, it was when Corporal Gagnon pulled back to land another kick on the door that Corporal Brunet came quickly out of his room and landed a blow on Corporal Gagnon's eye. Corporal Gagnon lost his balance and fell backward into the staircase. It was when Corporal Gagnon was on his back that he hit Corporal Brunet on the eye. He told them to stop and he stepped in by grabbing Corporal Brunet by the throat to get him off. He took him to the bathroom and saw that his eyelid was blue and swollen and he was bleeding. Corporal Brunet asked him to let him go and told him that he was going to the military police. Corporal Gagnon then shouted at Corporal Brunet that he would make a man of him. There was still tension between the two protagonists. Corporal Bernier had not noticed whether Corporal Brunet had something in his hands at the time of the altercation, but he said that everything happened very fast, in five or ten seconds. Corporal Bernier did not recall whether Corporal Gagnon was, as he put it, [TRANSLATION] "cranked up" when they arrived at building 302, but he admitted that he might have said in a previous statement that this was the case. He added that Corporal Gagnon and himself had gone to see Corporal Gagnon's supervisor when Corporal Brunet went to the military police.

The meeting between Corporal Gagnon and Corporal Brunet in Chauveau Hospital.

[24] When Corporal Brunet arrived at the police station, he met with Corporal Dureau. Corporal Brunet was transported by ambulance to Chauveau Hospital to be treated for his injuries. When he got to the hospital, he was examined. While he was sitting in a wheelchair in a corridor at the hospital, Corporal Brunet saw Corporal Gagnon and Corporal Bernier who were also there, according to their testimony, to have the injury suffered by Corporal Gagnon attended to. Corporal Brunet reported that Corporal Gagnon started running toward him to insult him and tell him that he had got what he deserved. According to his version of the facts, a nurse called security and he was put in a room for protection. There was no physical contact. The version given by Corporal Gagnon and Corporal Bernier is somewhat different. Corporal Bernier reported that Corporal Gagnon met Corporal Brunet in hospital and said to him, in a normal tone, [TRANSLATION] "That will teach you to sleep with other people's wives", but nothing more. He added that he had seen his friend talking with a security guard for a few seconds, afterward. The military police tried to figure out what had really happened at the hospital, but, it seems, without success, because of a lack of cooperation on the part of the hospital's security services.

The meeting between the police and Corporal Gagnon at about half past midnight early in the morning of February 21, 2003.

[25] After receiving Corporal Brunet's complaint, Corporal Dureau and his colleague Pelletier went to Corporal Gagnon's home, at about half past midnight on February 21, 2003, after they had been called from his home. They then observed that he had a small cut above his eye. They placed Corporal Gagnon under arrest and took him to the military police station. Corporal Bernier went with him.

The meeting between the police and Corporal Brunet in his room in building 302 and the physical damage observed, as well as the condition of Corporal Brunet's face at about 7:30 on the morning of February 21, 2003.

[26] Early on the morning of February 21, 2003, the military police telephoned Corporal Brunet and asked to meet with him. Corporal Dureau and Corporal Pelletier went to Corporal Brunet's home. They saw him at about 6:10 a.m. Corporal Brunet's left eye was completely closed. The door had been forced, and the frame was damaged but still functional. Corporal Pelletier described the damage as follows: [TRANSLATION] "The door could theoretically have been locked, except that it would have opened if I had leaned on it." Corporal Pelletier took photographs of Corporal Brunet's face and the door on that visit. The evidence showed that those photographs now cannot be located. Corporal Brunet apparently said that he no longer wanted to make a complaint, but the police officers told him that the decision to halt the process was not up to them. It was because of medical complications that Corporal Brunet withdrew his complaint in May 2004, at his lawyer's suggestion, because of the civil proceedings before the courts. That action has now been settled. According to the evidence before this Court, the injuries to Corporal Brunet's eye were aggravated by the treatment he received after the incident.

III. THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE

[27] Paragraph 267(b) of the *Criminal Code* reads, in part, as follows:

267. Every one who, in committing an assault,

...

(b) causes bodily harm to the complainant,

is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years or an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months.

The prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the indictment. The prosecution also had to prove the following additional elements: the fact that Corporal Gagnon used force directly or indirectly against Corporal Brunet; the fact that Corporal Gagnon used that force unlawfully against Corporal Brunet, because the accused raised the issue of self-defence; and the fact that the assault caused bodily harm to Corporal Brunet resulting from the use of that force.

[28] 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 that is an essential component of the presumption of innocence.

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

[30] This burden of proof rests on the prosecution through 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.

[31] Proof beyond a reasonable doubt does not apply to individual items of evidence or different parts of the evidence; it applies to the whole of the evidence on which the prosecution relies to prove guilt. The burden of proof rests on the prosecution throughout the trial, and is never shifted to the accused.

[32] A court must find the accused not guilty if it has a reasonable doubt as to his or her guilt, after assessing the whole of the evidence. The expression “beyond a reasonable doubt” has been used for a very long time. It is part of the history and traditions of our judicial system. In *The Queen v. Lifchus* (1997) 3 S.C.R. 320, the Supreme Court of Canada stated the manner in which reasonable doubt is to be explained in a charge to a jury. The principles in *Lifchus* have been applied in a number of subsequent appeals. Essentially, a reasonable doubt is not an imaginary or frivolous doubt. It may not be based upon sympathy or prejudice. Rather, it must be based on reason and common sense. It must logically be derived from the evidence or absence of evidence.

[33] In *The Queen v. Starr* (2000) 2 S.C.R. 144, at paragraph 242, Iacobucci J., writing for the majority, said, and I quote:

... 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, however, to recall that it is virtually impossible to prove something with absolute certainty, and the prosecution is not required to do so. That kind of standard of proof does not exist in law. The prosecution must prove the guilt of the accused, in this case Corporal Gagnon, only beyond a reasonable doubt.

[34] As I noted earlier, the appropriate approach to the standard of proof consists of assessing the evidence as a whole, and not assessing individual items of evidence separately. It is therefore essential to assess the credibility and reliability of the testimony having regard to the evidence as a whole.

[35] The standard of proof beyond a reasonable doubt also applies to questions of credibility. The Court does not have to make a definitive determination as to the credibility of a witness or group of witnesses. Moreover, the Court does not have to believe the testimony given by a person or group of persons in its entirety.

[36] If the Court has a reasonable doubt regarding the guilt of Corporal Gagnon, which is based on the credibility of the witnesses, it must acquit him. When the decision depends entirely or virtually entirely on the credibility of the complainant and the accused, the question is not which of the versions of the facts is true or which of the complainant and the accused must be believed. Rather, the question is whether the prosecution has proved its allegations beyond any reasonable doubt.

[37] In those circumstances, the law requires that the Court find the accused not guilty: first, if the Court believes the accused's version, and second, even if the Court does not believe the accused, but it has a reasonable doubt as a result of the accused's testimony after examining the accused's statement in the context of the evidence as a whole. Lastly, 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.

[38] Having made these comments regarding the presumption of innocence and the standard of proof beyond any reasonable doubt, including when it applies to questions of credibility, the Court will now consider the facts in evidence having regard to the applicable law.

IV. ANALYSIS

[39] At the outset, the essential elements of the offence that relate to the identity of the accused and the date and place of the offence, and the fact that Corporal Brunet suffered bodily harm as a result of his altercation with Corporal Gagnon, are not contested. The questions in issue relate to the legality of what Corporal Gagnon did when he used force against Corporal Brunet and the right of the accused to argue self-defence in the circumstances of this case. The Court is of the opinion that an examination of the credibility of the witnesses heard by this Court is particularly important in determining whether the prosecution has discharged its burden of proof.

[40] The evidence before this Court is such that the court must make a determination regarding the credibility and reliability of the witnesses having regard to the evidence as a whole. The Court has carefully examined all of the testimony having regard to the evidence as a whole. There is no magic formula for deciding whether testimony is credible or what weight must be assigned to it. The Court considered, among other things, the integrity and intelligence of each of the witnesses, their capacity for observation, and their ability to report those observations to the Court. The Court considered their ability to recollect events, keeping in mind that some events or some facts may affect each person differently. The Court observed the witnesses, paying attention to factors such as whether the witness was honestly endeavouring to tell the truth, and whether he or she was sincere and frank or was biased, reticent and evasive.

[41] In assessing the credibility of each of the witnesses, the Court asked itself a number of questions. Did the witness appear to be honest? Did the witness have a particular reason for not telling the truth? Did the witness have an interest in the outcome of the case or a reason to present evidence favouring one party rather than the other? Was the witness capable of presenting accurate and complete observations regarding the event? Did the witness have the opportunity to do so? In what circumstances were the observations made? What was the witnesses condition? Was this an ordinary or extraordinary event? Did the witness give the impression of having a good memory? Did the witness have a reason to recall the events concerning which he or she testified? Did any inability or difficulty the witness experienced in recalling the events seem to be genuine or was it used as an excuse to avoid answering questions? Was the testimony of various witnesses consistent internally and with each other? Had the witness previously said or done something different? Were contradictions in the testimony so serious as to render the major aspects of it less credible or less reliable? Was the contradiction significant or minor? Was it an error in good faith or a deliberate lie? Did the contradiction result from a different statement by the witness or an admission on his or her part? Can it be explained? Does the explanation make sense? How did the witness behave when he or she testified (without placing too much importance on this, because appearances are sometimes misleading)?

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

[43] Corporal Gagnon testified before this Court. He was subject to vigorous cross-examination. He admitted that he had previous convictions, to which this Court assigns no negative weight in evaluating his credibility. Overall, Corporal Gagnon deliberately tried to persuade this Court that he was very calm and very steady when he arrived at Corporal Brunet's room. The Court does not believe him. The Court also does not believe him, or his friend Bernier, regarding the force with which he struck Corporal Brunet's door. The condition of the door shows the contrary, as do the shouting heard by the residents of building 302 who were disturbed by the ruckus. Perhaps he did not intend to assault Corporal Brunet or beat him up, but he was definitely angry. As his good friend Bernier said, he was "cranked". That is not sufficient, however, to reject his testimony in its entirety. Some details of the versions of the incidents are nonetheless profoundly different as between Corporal Brunet's version and the accused's version. The Court cannot conclude, on the evidence as a whole, that Corporal Gagnon was lying on essential matters, but the Court is satisfied that he deliberately tried to present himself in a particularly favourable light, for instance in his account of his actions in front of Corporal Brunet's door, the Superman attack on himself by Corporal Brunet when Brunet hurled himself at him with what he believed to be brass knuckles, and the way that he feared for his own life when Corporal Brunet was on him, despite the fact that his friend Bernier was a few steps away.

[44] Corporal Bernier corroborated the accused's testimony in very large part. There is no doubt that he has an interest in this case. He is not only the good friend and confidant of the accused, he is involved in this entire affair and was in part responsible for the cascade of events, when he knowingly, with all the good intentions in the world, got involved in the marital affairs of Mr. Gagnon and Ms. Dufour when no one had asked him for anything. Was he the agent provocateur or the good Samaritan? And does this make him a liar in some way? His detailed description and his excessive insistence in stressing the steadiness and calm exhibited by Corporal Gagnon during the evenings of February 19, 2003, and February 20, 2003, do not enhance the credibility of his testimony. The Court believes that he embellished, in a way, the evidence favourable to Corporal Gagnon. But the Court believes his testimony when he described the accused's state of mind during the evening of February 19, 2003, and during the meeting between Corporal Gagnon, his wife and himself at their home during the evening of February 20, 2003. That part of his testimony was validated by the description given by Françoise Dufour in her testimony before this Court, which will be commented on by this Court shortly. The Court also believes Corporal Bernier's account of the meeting

between Ms. Dufour and Corporal Brunet a few minutes earlier. The court is not satisfied, however, of the veracity of the version given by Corporal Bernier or by Corporal Gagnon, which had it that the blows to Corporal Brunet's face were struck before he pulled Corporal Brunet from his position of dominance over Corporal Gagnon.

[45] Corporal Brunet himself also tried to embellish his testimony and cast himself in the best role. His testimony was not corroborated, except with respect to the question of the point when the punch was thrown, that is, after Corporal Bernier had intervened. That version is the one given by Private Estéphan who was more than 20 feet away and who did not see all of the events. It is clear that he lied about his relationship with Ms. Dufour, if we believe the version given by Corporal Bernier, but also the version given by Ms. Dufour herself. That he lied to Corporal Gagnon, for reasons of his own, at their meeting on February 19, 2003, is one thing, but that he did it before this Court is another. That does not mean, however, that he lied about the crucial events, but the Court does not find him to be the most credible witness regarding a number of aspects of his testimony, for example the fact that he did not pick up his keychain because he wanted to get away by car, and that it was Corporal Gagnon who fell into his arms when the door gave way. The Court is of the view that the incident involving the baseball bat was exaggerated, although it seems reasonable to believe that Corporal Gagnon did in fact damage his kitchen counter. The Court does not believe him regarding the blows he struck against the wall with his keychain to frighten the accused. There is no doubt that he suffered unfortunate injuries.

[46] Françoise Dufour is the accused's spouse. Her testimony was brief and precise. She promptly admitted her relationship with Corporal Brunet and she described the meeting she had with Corporal Brunet on February 20, 2003, in the company of Corporal Bernier, and the meeting that followed between Corporal Gagnon, Corporal Bernier and herself at her home, shortly afterward. She described her spouse's emotional state at that meeting and the events that preceded the subsequent departure of Corporal Gagnon and Corporal Bernier. She is involved in this case and her spouse, with whom she is now cohabiting, is the accused. There is no doubt that she has an interest. She appeared nervous and embarrassed. But she testified clearly, precisely and honestly. The Court spent considerable time examining her credibility and it appears to be surprisingly frank. Is she perhaps an exceptionally talented actor? The Court does not believe this to be the case, having regard to her testimony and the evidence as a whole. The Court is of the opinion that Ms. Dufour's testimony is not only credible and reliable but also strengthens the credibility and reliability of portions of the testimony given by Corporal Gagnon and Corporal Bernier, which she corroborated.

[47] Private Estéphan testified to the best of his knowledge. He was not present for the entire scene, but he believed he had seen Corporal Gagnon throwing a punch at Corporal Brunet when Corporal Bernier pulled Corporal Brunet off when he was on top of Corporal Gagnon. He corroborated Corporal Brunet's testimony that the two protagonists had made it to the upper landing in the scuffle before Corporal Gagnon fell down the stairs. His testimony cannot, however, be used to reject either of the versions regarding the point at which Corporal Gagnon struck Corporal Brunet, in their entirety. In other words, Private Estéphan's testimony is relatively credible and reliable but it is not conclusive.

[48] The military police officers, Dureau and Pelletier, were both credible witnesses and there is no reason to doubt the reliability of their testimony. From their testimony, the Court accepts the description of Corporal Brunet's and Corporal Gagnon's injuries and the major damage caused to the door, which attests to the force used by Corporal Gagnon when he repeatedly struck it.

[49] With respect to the analysis of the law having regard to the facts of this case, the prosecution submits to the Court that the evidence is such that the case can be considered step by step. First, it invites the Court to find that the facts that preceded the opening of the door to Corporal Brunet's room by Corporal Brunet, before it opened on its own, constituted an assault within the meaning of paragraph 265(1)(b) of the Criminal Code. The prosecution submits that by his repeated actions against Corporal Brunet's door and his words, Corporal Gagnon was guilty of assault, because his acts constituted a threat. It added that it was Corporal Gagnon who thus unlawfully assaulted Corporal Brunet, and Corporal Brunet acted in self-defence when he pushed Corporal Gagnon away outside the door to his room. In addition, the prosecution said that because Corporal Gagnon provoked and initiated the assault, he cannot claim self-defence under section 34 of the Criminal Code. In the prosecution's submission, the accused cannot argue self-defence in the circumstances because it is based on no probative evidence and, again in the prosecution's submission, there is no doubt that the facts show that the accused commit an assault on the person of Corporal Brunet and that his injuries constitute bodily harm. The prosecution submitted a number of decisions to the Court in support of its argument, including *The Queen v. Holt* and *The Queen v. Gardner* on the question of assault under paragraph 265(1)(b), which reads as follows:

265. (1) A person commits an assault when

...

b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; ...

[50] If the assault falls under paragraph 265(1)(b), the prosecution must prove beyond a reasonable doubt that the accused attempted or threatened to apply force to Corporal Brunet when he struck the door and spoke the words. The prosecution would further have to prove that Corporal Gagnon had the ability to effect his purpose, at the time of the alleged assault, or that it caused Corporal Brunet to believe on reasonable grounds that he had the ability to do so.

[51] In Holt, cited by the prosecution, the accused Holt had made verbal threats to damage Constable Scotchman's vehicle if he did not leave his property and was, at the time, armed with an object. He then set about striking the constable's vehicle, repeatedly, with that object, shouting "Harass me will you, how do you like that". There was no doubt that this was a threat, or even an act itself.

[52] In Gardner, the accused was a member of a group of demonstrators whom a police officer tried to prevent from crossing the street. When the group approached the police officer, one person in the group shouted "Let's get him. Let's get him boy". When the group drew closer, the police officer struck the accused with his pocket flashlight. The accused was charged with assault under paragraph 265(1)(b). Here again, the threat was express, even though the police officer was not able to formally say that the accused was the person who had made the threat. The accused Gardner was in the front of the group and he had advanced toward the police officer. By so doing, he showed that he was then able to carry out his threat.

[53] The facts of this case differ substantially from the foregoing decisions. There is no doubt that a person does not have to wait to be struck before being able to defend himself or herself. That is not the issue. However, the burden of proving beyond a reasonable doubt that Corporal Gagnon's words constituted a threat rests on the prosecution. On the contrary, the evidence shows that he wanted Corporal Brunet to come out of his room to talk and that there would be no problem. He was not striking the door and threatening Corporal Brunet that he was going to strike him in turn once he got inside. The evidence is not sufficiently probative that such a finding can be made. We must conclude that it was entirely reasonable for Corporal Brunet to believe that the accused was at his residence strictly to break his face. Corporal Brunet's belief is easy to explain. It was a direct result of the preceding events; for example: the impromptu visit from Ms. Dufour earlier in the evening, when she told him that she wanted to admit everything to her husband; the meeting on February 19, 2003, between Corporal Brunet and Corporal Gagnon at which the victim denied any relationship with Ms. Dufour; and also, we must not forget the telephone call from Corporal Gagnon a few minutes earlier. Certainly, Corporal Gagnon was upset and angry, but he did not threaten him or attempt to assault him. Corporal Gagnon wanted him to come out of his room. He might perhaps

have assaulted Corporal Brunet if, once the door was open, Corporal Brunet had still refused to come out of his room or talk, but those are inferences that this Court is not permitted to draw, having regard to the evidence as a whole. In the circumstances, the Court is not satisfied that the prosecution has proved beyond a reasonable doubt that the accused committed an assault on the person of Corporal Brunet when he struck the door, having regard to the evidence as a whole.

[54] The prosecution also alleged that Corporal Gagnon was a trespasser within the meaning of sections 41 and 42 of the Criminal Code and that, accordingly, Corporal Brunet was entitled to defend himself. That is of little consequence in the circumstances. First, Corporal Brunet never asked Corporal Gagnon to leave his room. Second, Corporal Gagnon never resisted an attempt by Corporal Brunet to prevent his entry or to remove him. The only question that remains is whether the prosecution has proved beyond a reasonable doubt that Corporal Gagnon could not have acted in self-defence when he used force against Corporal Brunet by injuring his eye.

[55] This brings us to focus on the altercation that took place outside Corporal Brunet's room, during which Corporal Gagnon struck Corporal Brunet's face and caused him bodily harm. The defence submits that it is justified in arguing self-defence. The defence of self-defence is set out in section 34 of the Criminal Code. Section 34 reads as follows:

34. (1) Every one who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

(2) Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if

(a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made or with which the assailant pursues his purposes; and

(b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

Self-defence, under section 34(1), may be argued by an accused who unlawfully assaulted someone without having provoked the assault, used force that was simply necessary to repel the assault and did not intend to cause death or grievous bodily harm. The right to repel an assault is not limited to blocking the blows; it also means responding to it physically.

[56] Subsection 34(1) contains four essential elements. In order for that subsection to be relied on, the four elements must all be present. First, subsection 34(1) is not applicable unless Corporal Brunet unlawfully assaulted Corporal Gagnon. Second, subsection 34(1) is not applicable unless the initial assault by Corporal Brunet against Corporal Gagnon was not provoked by Corporal Gagnon. A person provokes an assault when he or she intentionally incites or urges another person to commit an assault against him or her. The provocation may take the form, for example, of blows, words or gestures. The Court is of the opinion that the prosecution has not proved beyond a reasonable doubt that none of those elements was present. There is no doubt that Corporal Brunet believed that he was definitely going to be assaulted, but that belief cannot make up for the absence of an initial assault by Corporal Gagnon. The same is true of provocation. Corporal Gagnon did not intentionally incite or urge Corporal Brunet to commit an assault against him.

[57] Third, subsection 34(1) applies only if the force used by the accused was not intended to be force to cause death or grievous bodily harm. Under section 2 of the Criminal Code, “bodily harm” means any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature. “Grievous bodily harm” means a grievous or serious injury to a person’s health or well-being. There is no evidence before this Court that Corporal Gagnon intended to cause death or grievous bodily harm to anyone in the acts that he had previously committed or the words he spoke before Corporal Brunet or anyone else. The words to the effect that he wanted to punch Corporal Brunet twice because he had slept with his wife twice cannot reasonably be interpreted as an announcement that he had the purpose of causing death or grievous bodily harm. The Court is of the opinion that the prosecution has not discharged its burden on this third element.

[58] Fourth, subsection 34(1) applies only if Corporal Gagnon did not use force beyond what was necessary to enable him to defend himself against the assault by Corporal Brunet. The fundamental question in relation to this fourth element may be stated as follows. Was or was not the force used by Corporal Gagnon excessive in relation to the type of assault or harm that it was supposed to prevent? In other words, was the force used by Corporal Gagnon proportionate to the actual or potential harm the accused was facing? It is important to note, however, that it is not the nature or extent of the injury to Corporal Brunet which resulted that determines whether the force used was excessive or beyond what was necessary. We must keep in mind that a person rarely has time for careful consideration when facing an assault. As one learned judge has said, detached reflection cannot be demanded in the presence of an uplifted knife. That is a quotation from Justice Holmes in *Brown v. United States of America* (1921), 256 U.S. 335 at page 343. That decision has subsequently been cited often. I also refer

to *The Queen v. Hebert* (1996) 107 C.C.C. (3d) 42 at page 50, a decision of the Supreme Court of Canada.

[59] In the circumstances of this case, the Court cannot be satisfied beyond a reasonable doubt that the accused struck Corporal Brunet while he was restrained by Corporal Bernier; struck Corporal Brunet while Corporal Bernier was in the process of pulling him from his position astride Corporal Gagnon, or struck Corporal Brunet while he was on top of him before Corporal Bernier had removed him.

[60] On the evidence introduced before this Court, the first two hypotheses are the most plausible. It must be noted that during that period, which lasted five or ten seconds at most, both protagonists' adrenaline, and Corporal Bernier's as well to a certain point, was at its peak. In the circumstances, it is risky to prefer either hypothesis. The Court is rather of the opinion that the blows were struck at a point in space and time that falls very near the moment when Corporal Bernier laid hold of Corporal Brunet to pull him toward himself. This is not a case in which a person intentionally took advantage of someone else being restrained by a third party to land blows on him while he was not capable of defending himself. On the contrary, both people were continuing to thrash about on the ground. It was when Corporal Brunet was off Corporal Gagnon's body that Corporal Gagnon was able to land two punches on his face, at a point when the hostilities were still underway.

[61] In the circumstances, it would be difficult to conclude that those punches constituted force that was disproportionate to the actual or potential harm that Corporal Gagnon was facing. We must keep in mind that he was the one lying on his back, in a staircase, his head pointing downward, with a person sitting on him and trying to control him by the neck or throat.

[62] Having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt that the force used by Corporal Gagnon when he struck Corporal Brunet in the face, causing him bodily harm, was excessive.

[63] Having regard to the findings of this Court concerning the essential elements of subsection 34(1) of the Criminal Code and the application of those elements to the facts of this case, the Court is not satisfied that the prosecution has discharged its burden of proof, by establishing that any of those essential elements of self-defence was not present.

[64] Accordingly, Corporal Gagnon is entitled to argue self-defence, since the Court has found, having regard to the principles stated by the Supreme Court of Canada in *The Queen v. Cinous*, [2002] 2 S.C.R. 3, that it has a foundation in the facts.

Corporal Gagnon certainly acted thoughtlessly and rashly, and even if the Court believes that he is probably guilty, that probability is not sufficient for a verdict of guilty. In the circumstances, he must be given the benefit of the reasonable doubt.

V. DISPOSITION

[65] Corporal Gagnon, please stand. This Court finds you not guilty on the first count. Be seated.

LIEUTENANT-COLONEL M. DUTIL, Military Judge

Counsel:

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