

Citation: *R. v. Corporal MacMullin*, 2004CM46

Docket: F200446

**STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
ASU/CFB GAGETOWN**

Date: 20 March 2004

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

HER MAJESTY THE QUEEN

v.

**CORPORAL D.G. MACMULLIN
(Accused)**

FINDING

(Rendered orally)

[1] Corporal MacMullin is charged under section 84 of the *National Defence Act* for striking a superior officer. He is charged in the alternative under section 130 of the *National Defence Act* with assault causing bodily harm contrary to paragraph 267(b) of the *Criminal Code*.

[2] Corporal MacMullin was also charged with the offence of drunkenness contrary to section 97 of the *Act* but the court found him not guilty after granting a motion made by the defence of non *prima facie*.

[3] The particulars of the first and second charges are identical with regard to the date and place; that is, on or about 13 August 2003, at or near Angus, Ontario. The first charge alleges that Corporal MacMullin punched N78 528 383 Lieutenant S.F. Cahill, where the second charge alleges that Corporal MacMullin did, in committing an assault upon N78 528 383 Lieutenant S.F. Cahill, cause bodily harm to him.

[4] Let me begin first with an explanation of the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is intertwined with that principle fundamental to all criminal trials, and these principles are well known to counsel, but other people in this courtroom may well be less familiar with them, and I

would say that it is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law.

[5] In matters dealt with, under the Code of Service Discipline, as in cases under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt, and that beyond a reasonable doubt. An accused person does not have to prove that he is or she is innocent. It is up to the prosecution to prove its case, on each element of the offence, beyond a reasonable doubt.

[6] The standard of proof beyond a reasonable doubt does not apply to 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 beyond a reasonable doubt rests upon the prosecution and never shifts to the accused person.

[7] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt, and that, after having considered all of the evidence.

[8] The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts subsequent decisions.

[9] In substance, a reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice. Rather, it is based on reason and common sense. It must logically come from the evidence or the lack of evidence. The fact that a person has been charged is, in no way, indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are those that are on the charge sheet before the court.

[10] What is evidence? Evidence may include testimony under oath or solemn affirmation that is rendered before the court by witnesses about what they observed or what they did; evidence also includes documents, photographs, maps, or other items introduced by witnesses; the testimony of expert witnesses; formal admissions of facts by either the prosecution or the defence; and matters of which the court takes judicial notice.

[11] It is not unusual that some evidence presented before the court may be contradictory. Often witnesses may have a different recollection of events, and the court has to determine what evidence it finds credible.

[12] Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe; a witness's reasons to remember, like, were the events noteworthy, unusual and striking or relatively unimportant, and therefore, understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial?

[13] This last factor, however, applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[14] 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's testimony consistent within itself and with the uncontradicted evidence?

[15] 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 may well tint a witness's entire testimony.

[16] A court is not required to accept the testimony of any witness except to the extent it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason not—to disbelieve it.

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

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

[18] On the other hand, it should be remembered that it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. The prosecution only has the burden of proving the guilt of an accused, in this case, Corporal MacMullin, beyond a reasonable doubt. To put it in perspective, if the court is convinced that the accused is probably or likely guilty, then the accused shall be acquitted.

[19] As I said earlier, the proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation. It is essential that the credibility and reliability of the witnesses be tested in light of all of the evidence presented at trial.

[20] In this case, the accused has chosen to testify. It is fair to say that his version of events contradicts in some important aspects the evidence heard from the witnesses called by the prosecutor. The evidence presented by the witnesses called for the prosecution also differs or, at least, reveals some inconsistencies, discrepancies on material, and relevant details in certain areas. In addition, some elements of the accused's testimony is not corroborated.

[21] As the rule of reasonable doubt also applies to the issue of credibility, the court is not required to definitely decide on the credibility of a witness or a group of witnesses, nor does the court need not fully believe or disbelieve one witness or a group of witnesses. If the court has a reasonable doubt as to the guilt of Corporal MacMullin arising from the credibility of the witnesses, then the court must find him not guilty.

[22] In a case such as this one where credibility is important and where the accused testified on his own behalf, the law requires that a court find the accused person not guilty:

[23] First, if the court believes the accused; and

[24] Second, even if the court does not believe the accused, but the court still has a reasonable doubt as to the accused's guilt after considering the accused's evidence in the context of the evidence taken as a whole.

[25] Finally, if after a careful consideration of all the evidence, the court is unable to decide whom to believe, the court must find the accused not guilty.

[26] This approach on the assessment of credibility, as it relates to the issue of reasonable doubt, was suggested by Justice Cory, as he then was, in the decision of the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, and at page 758, Justice Cory was saying:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[27] Over the recent years, the Supreme Court and various appellate courts, including the Court Martial Appeal Court in *Able Seaman Bernier v. Her Majesty The Queen*, Neutral Citation 2003 CMAC 3, have expressed that the W.(D.) principle is not a "magic incantation" which trial judges must mouth to avoid appellate intervention. Rather, *W. (D.)* describes how the assessment of credibility relates to the issue of reasonable doubt.

[28] What the judge must not do is simply choose between alternative versions and, having done so, convict if the complainant's version is preferred. Rather, *W.(D.)* reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's function is the more limited one of deciding whether the essential elements of a charge have been proved beyond a reasonable doubt. The ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day, in a criminal trial, is not credibility but reasonable doubt.

[29] Having instructed myself as to the onus and standard of proof, I will now examine the facts of this case as revealed by the evidence put before the court.

[30] The evidence before this court consists of the testimonies of Lieutenant Cahill, the alleged victim identified in the first and second charges, Corporal Rumbolt, Corporal Brostowski, Master Corporal Bartlett, Corporal Duffy, Doctor Patricia Ramsey, Private Gillis, and Corporal MacMullin.

[31] The evidence consists also of various exhibits filed before the court. Exhibits 3, 4, 5, and 6 are photographs taken of the accused's facial area on 15 August 2003, at the Military Police Section at CFB Borden.

[32] In addition, this court taking judicial notice of those facts and matters under Military Rule of Evidence 15 completes the evidence.

[33] The facts of this case can be summarized along this way. On 12 August 2003, members of the EME Branch posted in CFB Gagetown left that base to attend at the EME annual golf tournament held at CFB Borden. These persons were to attend, on special leave granted by the unit, so they were supposed to attend the golf tournament but also participate in other social activities from 13 August to 16 August 2003, and that included a meet and greet at the golfing club during the early evening; that is, from 1600 hours until at least 2000 hours.

[34] The CFB Gagetown delegation left the base in a cube van in order to participate to the golf tournament. These members were Sergeant Wilson, Private or Craftsman Gillis, Master Corporal Bartlett, Corporal Brostowski, Corporal Rumbolt, and Corporal MacMullin. They were not on duty. Their transportation was provided by the unit; that is, a vehicle as well as a credit card for fuel expenses. They were also

provided with money for two meals each way. Participants assumed the costs of their own lodging and paid for other meals. The cost of their green fees were partially subsidized. They did not file a TD claim on their return from Borden.

[35] The evidence reveals that the tournament was participative in nature and not a competitive event. On arrival in Barrie, near CFB Borden, they stopped at a beer store and bought two cases of 24 beers. The evidence indicates that Corporal Rumbolt and Corporal MacMullin bought that beer.

[36] Lieutenant Cahill, who was the Acting Operations Officer at the Maintenance Company of the Technical Services Branch in Gagetown, was supposed to participate as well at the golf tournament, but contrary to other participants from Gagetown, he was in Borden on temporary duty. Lieutenant Cahill had flown to Borden in order to attend at the EME Board of Directors Meeting on 13 August 2003. Participants to the golf tournament came from across Canada. This was a military-sanctioned event, but nobody was wearing military uniforms during the weekend.

[37] In the afternoon of 13 August 2003, Corporal MacMullin, Master Corporal Bartlett, and Corporal Brostowski spend hours at the driving range practising their golf. After practice, they go to their quarters to have a shower and they later show up at the meet and greet starting at 1600 hours to see Corporal Rumbolt and Private Gillis, but also to meet and socialize with other people.

[38] Once at the meet and greet, they all mingle, going from one group to another, from inside the club house to outside the club house. Corporal Brostowski does not drink alcohol during the meet and greet but for maybe a beer at dinner.

[39] Master Corporal Bartlett attends at the meet and greet between 1700 hours and 1800 hours and he drinks three to four beers during the party. Corporal Rumbolt is drinking as early as 1400 hours that afternoon, therefore, before attending at the meet and greet. There is approximately 100 attendees at the party; only Private Gillis testifies to a much lower number of people; that is, 30 to 40.

[40] After the EME Board of Directors meeting held on 13 August 2003, Lieutenant Cahill goes to the meet and greet to socialize with people including the CFB Gagetown's delegation. He arrives between 1730 and 1800 hours.

[41] During the party, Corporal Brostowski interacts a few times with Corporal MacMullin on the club house balcony and witnesses also some students who were rowdy. Corporal MacMullin was seen drinking beer there. Although unknown to Corporal Brostowski at the time, he sees an interaction between Lieutenant Cahill and some students where Corporal Brostowski seems to understand that the lieutenant is addressing some reprimands.

[42] Master Corporal Bartlett corroborates this incident adding that Lieutenant Cahill let the recipients know who he was. Lieutenant Cahill says that shortly after his arrival at the meet and greet, he did address the behaviour of some persons on the balcony further to comments or sexist remarks that were made by a Corporal Moss toward Private Gillis, whom he knew, after she informed Lieutenant Cahill that she had been offended by the sexist remarks. Private Gillis was not asked to confirm that event during her testimony. The evidence is unclear as to whether or not Corporal MacMullin was there at that specific moment or if he was paying any attention.

[43] The evidence indicates that Lieutenant Cahill speaks to Corporal Rumbolt and to Master Corporal Bartlett, amongst other persons, as he is going around during the meet and greet. Lieutenant Cahill testifies that it is only a few hours after his arrival at the party, that he is introduced to Corporal MacMullin by Master Corporal Bartlett or Corporal Rumbolt after which they talk about hockey. Corporal Rumbolt does not recall that and Master Corporal Bartlett did not comment on the subject.

[44] Between 1930 hours and 2000 hours, Corporal MacMullin, Lieutenant Cahill, Corporal Brostowski, Private Gillis, Corporal Rumbolt, and Master Corporal Bartlett agree, although not necessarily together at the same time, to leave the meet and greet in the cube van and go downtown after people get showered and changed as the case may be.

[45] Corporal MacMullin says that while they are walking to the van in the parking lot as they are leaving the meet and greet, he is talking to Lieutenant Cahill and Corporal Rumbolt. Corporal MacMullin says that when he speaks to Lieutenant Cahill at that time, he did not know him from before and did not know who he was.

[46] During that brief encounter, Lieutenant Cahill makes a derogatory comment with regard to Private Gillis. Corporal MacMullin testifies that he then informs Lieutenant Cahill that he did not want to hear such comments as he was or had been in a relationship with her. According to Corporal MacMullin, Lieutenant Cahill immediately apologizes. Lieutenant Cahill denies having made such a comment and Corporal Rumbolt did not comment on this event.

[47] The van therefore leaves the parking lot with all the individuals mentioned on board. The first scheduled stop being at a private residence located in Angus, which is about five minutes from CFB Borden to drop off Private Gillis, after which the remaining of them will go to the quarters to shower and change clothes as I've already mentioned.

[48] She and Sergeant Wilson are living at Sergeant Wilson's friends for the duration of the tournament. Corporal Brostowski is the designated driver as he is apparently the only sober person on board. They are all intoxicated, at various degree, but Corporal Rumbolt and Private Gillis are both drunk. The others are slightly

impaired after having consumed four to five beers during the meet and greet. The accused testifies that he had between six to eight beers at the time. As to Corporal Rumbolt, he testifies that he drank approximately 20 beers between 1400 hours until they left the meet and greet.

[49] Now turning to what the court refers to as the van sitting plan. Lieutenant Cahill testifies that during the short trip to the house, Corporal Brostowski is driving, Corporal Rumbolt is in the front passenger seat, Master Corporal Bartlett is in the second row behind the driver as Lieutenant Cahill sits behind Rumbolt. According to Lieutenant Cahill, Private Gillis is behind him as Corporal MacMullin is sitting on her left.

[50] Corporal MacMullin's recollection slightly differs in that he says he was sitting behind Lieutenant Cahill.

[51] Corporal Brostowski has a different version. He says that Corporal MacMullin sits in the front passenger seat on their way to the residence as Private Gillis is sitting behind Corporal MacMullin and beside Master Corporal Bartlett. According to Corporal Brostowski's version of events, Lieutenant Cahill is sitting in the third row behind Bartlett with Corporal Rumbolt to his left.

[52] As to Master Corporal Bartlett, he has another version of the sitting plan. Corporal MacMullin is in the front passenger seat with Rumbolt behind him. Lieutenant Cahill is behind Rumbolt. On the other side, Corporal Brostowski is of course driving.

[53] It is obvious to the court that the witnesses did not pay much attention to where they were all sitting in the van. These contradictions are not significant or fatal for the disposal of this case in light of the totality of the evidence.

[54] Once arrived at the private residence, Private Gillis exits the vehicle and walks towards the house. She sees that the property is locked. At the same time, the van is just pulling off. Corporal MacMullin sees the situation and he suggests that Corporal Brostowski stop the van and back up a few feet. Corporal MacMullin gets out and walks towards Private Gillis to talk to her. He tries to convince her to come back with them. MacMullin and Gillis are by the fence at that time.

[55] According to Corporal MacMullin, she wants to stay in front of the porch and drink beer and he does not find this to be a good idea as she is drunk and in a foreign neighbourhood.

[56] Corporal Brostowski, Lieutenant Cahill, and Master Corporal Bartlett all see that they are having a serious argument. They are talking loudly and gestures are made mostly by Private Gillis. They understand that she wants him to leave her alone,

although they can't hear what is being said. During that time, Corporal Rumbolt jumps over the fence and opens it.

[57] According to Corporal Brostowski, Private Gillis then goes around the house and gets in it. She is seen coming outside the house through the front door. Master Corporal Bartlett recalls that it is Corporal Rumbolt who unlocks the front door, but when Corporal MacMullin and Private Gillis are having an argument. Corporal Rumbolt testifies that he then sees MacMullin and Gillis having an argument. Corporal Rumbolt says that this is where he grabs Private Gillis to get her away the first time.

[58] Lieutenant Cahill not being aware, at that time, that Corporal MacMullin and Private Gillis had an intimate relationship shortly before, he decides, according to his version, to intervene in order to tame them down. Lieutenant Cahill is now outside the van as well. He asks Corporal MacMullin to come over and, after a few words are exchanged between them, Corporal MacMullin sits back in the van in the front passenger seat.

[59] In the mean time, Private Gillis is still screaming, yelling, and screeching. The more she screams, the more Corporal MacMullin becomes upset. Very shortly after, Corporal MacMullin walks back to the van and sits in the front passenger seat. As expressed by Corporal Brostowski and Master Corporal Bartlett, things seemed to be okay at this point despite Private Gillis who continues to be upset.

[60] Once inside the van, Corporal MacMullin opens a beer can or beer bottle and starts drinking apparently to cool down. The van's right sliding door is opened at that time. Corporal MacMullin says that he takes the beer from a case of beer located between the front seats. As to Master Corporal Bartlett, he rather refers to a 6-pack being in front of the van. Corporal Brostowski testifies that he does not know where the beer came from.

[61] Lieutenant Cahill recalls that he then asks Corporal MacMullin not to drink beer in a DND vehicle or to get rid of it, or words to that effect. He does not remember if he then grabs it or if Corporal MacMullin throws it out, but he says that the beer ends up on the ground. According to Cahill, Corporal MacMullin becomes more agitated and asks Lieutenant Cahill, "Who the fuck do you think you are?" or words to that effect. Lieutenant Cahill answers back with the following: "I am in your chain of command, I am Lieutenant Cahill, the Maintenance Company Acting Ops O," or words to that effect. Lieutenant Cahill then understands Corporal MacMullin tell him at this point the following: "I don't give a fuck about who you are," as he is trying to push his way out of the van.

[62] Lieutenant Cahill pushes the other way to keep him in. It is unclear whether or not Corporal Rumbolt is between the door and Lieutenant Cahill at that time, but this version is supported by Corporal Brostowski and, to some extent, by Master

Corporal Bartlett and Corporal MacMullin. Despite Corporal Brostowski and Master Corporal Bartlett touching Corporal MacMullin on the shoulder, the latter makes his way out of the vehicle.

[63] This version of events is totally corroborated by Master Corporal Bartlett and Corporal Brostowski, except that Corporal Brostowski recalls that Lieutenant Cahill identified himself twice, not once, as he was sitting in the van behind Corporal MacMullin just prior exiting the van through the side sliding door and go to the front passenger door where Corporal Rumbolt came in between the door and Lieutenant Cahill. Moreover, Corporal Brostowski recalls Corporal MacMullin say to Lieutenant Cahill, "I'll kill you," as Corporal MacMullin is trying to get out of the van.

[64] During this sequence of events, Corporal Brostowski would have tried to diffuse the situation in suggesting to Lieutenant Cahill to let Corporal MacMullin have his beer and cool down as he would not drive away. Lieutenant Cahill would have insisted to handle it his way or would not have listened. This version is not inconsistent with the evidence as there were words exchanged back and forth and where the situation was tense and volatile.

[65] Corporal MacMullin's version differs on the issue as to whether Lieutenant Cahill identified himself as an officer to him and on the sequence of events that ensued. Corporal MacMullin says that after he gets back in the front passenger seat, Lieutenant Cahill exits the van and tells him to be quiet and stay in the front seat.

[66] According to Corporal MacMullin, he doesn't know, at that time, that Lieutenant Cahill is an officer because he had met him only a few minutes before leaving the meet and greet and he had not been introduced to him, at least, formally. As Corporal MacMullin is sitting in the front passenger seat and Lieutenant Cahill tells him what to do, Corporal MacMullin is speaking to Corporal Brostowski with regard to the desired course of action they should take to resolve the situation, at which time, according to Corporal MacMullin, Corporal MacMullin opens a beer from the case located between the front seats. At that moment, Lieutenant Cahill tells him to put the beer away as Corporal Brostowski is telling Cahill to let Corporal MacMullin drink his beer.

[67] Corporal MacMullin then sees Private Gillis approaching and trying to get in the van through the side door while Lieutenant Cahill persists in telling him that he cannot drink beer in the van. Corporal MacMullin then throws the beer on the lawn. Private Gillis is still yelling and screaming at Corporal MacMullin as Corporal Rumbolt is holding her back 15 to 20 feet from the van.

[68] Corporal MacMullin tells Brostowski not only that he is the only one to calm her down, but that he's leaving. As he tries to exit the van, Lieutenant Cahill does not let him get out. They both push in opposite direction and Corporal MacMullin has

one leg partly outside the van. Finally, Corporal MacMullin forces his way out as Private Gillis is off to the right.

[69] As he gets out and is now on the side of the van, Lieutenant Cahill grabs him by the throat and neck as he continues pushing the door back on Corporal MacMullin and against the van. Corporal MacMullin makes his way out of the van and when his two feet are on the ground, he grabs Lieutenant Cahill's face and pushes him away using his left hand. While this occurs, Brostowski is still in the driver's seat and Bartlett in the back seat. Rumbolt is between MacMullin and Cahill where Gillis is behind Rumbolt towards the driveway.

[70] Corporal MacMullin recalls that Lieutenant Cahill then backs up as Corporal MacMullin starts walking towards the back of the van where Private Gillis breaks loose and attacks him. Rumbolt pulls her back and they both fall. Corporal MacMullin says that he is leaving, picking up his ball hat where Lieutenant Cahill crosses the lawn and comes in his direction. Corporal MacMullin tells him to stay where he is and repeats that he is leaving, as this is the only way Private Gillis will calm down.

[71] According to Corporal MacMullin, this is when Lieutenant Cahill continues to come at him and, as Corporal MacMullin does not know what Lieutenant Cahill will do and thinking of what Cahill just did to him, he hits Lieutenant Cahill in the face with his left hand. He then leaves and walks up the road to the base where he meets Corporal Duffy, a member of the military police, in his patrol vehicle.

[72] Corporal MacMullin testified that he only learns or realizes that the person with whom he had an altercation was an officer when Corporal Duffy informs him that night. This is not corroborated by Corporal Duffy and cannot be implied from the evidence, to the contrary.

[73] Lieutenant Cahill denies grabbing Corporal MacMullin by the throat or by the neck. Rather, he recalls that as Corporal MacMullin makes his way outside the van, this is the latter that grabs his face and puts one finger or a thumb in his eye. Lieutenant Cahill recalls pushing him back.

[74] In return, Corporal MacMullin starts swinging at Lieutenant Cahill's face four or five times. He asks him to stop as he is stepping back from Corporal MacMullin. He then turns away. Corporal MacMullin then attacks him from behind and smacks him two or three times again in the back of the head. Lieutenant Cahill then makes his way to the porch of the house with the help of others. He says that he was dazed at that time.

[75] Corporal Brostowski, who was referred to as being the sober one, and still sitting in the driver's seat, says also that as Corporal MacMullin gets out of the van,

it is Corporal MacMullin that forcefully grabs Lieutenant Cahill by the face and shoves him away. Brostowski never sees Cahill hit MacMullin.

[76] As Lieutenant Cahill comes back towards MacMullin, the latter punches Cahill. Corporal Brostowski recalls that Master Corporal Bartlett is still in the van at that time when this started. According to Corporal Brostowski, it is then that Private Gillis comes running and screaming at Corporal MacMullin with her arms flying. Corporal Brostowski realizes that the matter is out of control and he rushes to the house where he asks a neighbour to call the police. He then goes back to the action and sees Rumbolt trying to control Gillis as Bartlett is trying to get Cahill in the house. At this time, Cahill keeps insisting to sort things out and seems trying to go back towards Corporal MacMullin. Corporal Brostowski knows then that this wouldn't work.

[77] Master Corporal Bartlett does not recall Corporal Brostowski trying to diffuse the situation between Cahill and MacMullin. However, he corroborates Corporal Brostowski when he says that he is still in the van when Corporal MacMullin is trying to get out of the van. According to Master Corporal Bartlett, once Corporal MacMullin pushes the door open, this is when Corporal MacMullin gives one swing at Lieutenant Cahill's eye. Corporal MacMullin then follows with at least three punches in the face and may be some body shots. After the first hit, Master Corporal Bartlett leaves the van. After that first hit, Master Corporal Bartlett sees also Private Gillis start screaming again, hysterical, and out of control.

[78] In doing so, she runs at Corporal MacMullin trying to get at him. She is restrained by Corporal Rumbolt. Private Gillis, although not remembering much of the incident, corroborates this version when she says that it is after the first punch thrown at Cahill that she gets at Corporal MacMullin to get him to stop.

[79] Coming back to Master Corporal Bartlett, he adds that, after the third punch, he then grabs Lieutenant Cahill and tries to bring him to the house as he feels Cahill is in danger. This is consistent and corroborates significantly the versions of Corporal Brostowski and Lieutenant Cahill.

[80] After a careful review of these versions with the version of events provided by Corporal MacMullin dealing with the identification of Lieutenant Cahill as a superior officer, and also with regard to the sequence of events related to the physical altercation during which Lieutenant Cahill would have been the aggressor in grabbing Corporal MacMullin by the throat and neck, the court finds that Corporal MacMullin's version on these critical aspects, is not only uncorroborated and unsupported, but it is inconsistent. It is inconsistent with and contradicted by the totality of the evidence which the court finds to be credible, relevant, and admissible. However, the court finds credible and consistent that Corporal Brostowski did try to diffuse the situation in some way.

[81] Now pursuing with the sequence of events. Shortly after Lieutenant Cahill is brought inside the house, the Ontario Police arrived at the scene followed sometime after by the military police. As one of his eyes is bleeding, Corporal Brostowski then takes Lieutenant Cahill to a civilian hospital in the city of Orillia. After receiving treatment consisting of an eye patch and some ointment, he is sent back to the base pending a visit with an eye specialist. He meets the specialist the next day.

[82] During that consultation, he receives two to three stitches for a small cut eye lid and goes under surgery to repair an eye tear duct that requires the insertion of a small tube. He remains in the hospital overnight, as there is a general power failure in that area on 14 August 2003.

[83] At approximately 1700 hours, on 15 August 2003, photographs of Lieutenant Cahill are taken by the duty Photo Tech at CFB Borden. Some of these photos are Exhibits 3 to 6. Lieutenant Cahill sees Doctor Ramsey, a generalist family doctor working at the CFB Gagetown MIR on 19 August 2003, for a follow-up as the laceration split open after a sneeze. She refers him to a Doctor Purdy who in turn refers him to a Doctor Noftall who specializes in tear duct surgeries. Lieutenant Cahill goes under surgery again during the third week of September 2003.

[84] And this concludes the review of the evidence before this court.

[85] I now turn to a consideration of the elements of the offence that the prosecution must prove beyond a reasonable doubt with regard to the first charge:

First, the identity of the accused, Corporal MacMullin;

Second, the date and place of the offence; that is, on or about 13 August 2003, at or near Angus, Ontario;

Third, that the accused punched N78 528 383 Lieutenant S.F. Cahill;

Fourth, that the recipient of the punch, here it is alleged that the victim is Lieutenant Cahill, was a superior officer;

Fifth, that the accused knew that Lieutenant Cahill was a superior officer; and

Finally, that the accused had a guilty state of mind to use violence.

[86] With regard to the elements of the offence that the prosecution must prove beyond a reasonable doubt with regard to the second charge, these elements are:

The identity of accused, being Corporal MacMullin;

Second, the date and place; that is, on or about 13 August 2003, at or near Angus, Ontario;

Third, that the accused applied force to N78 528 383 Lieutenant S.F. Cahill; and

Finally, that the assault caused Lieutenant Cahill bodily harm.

[87] As I said earlier, the prosecution must prove beyond a reasonable doubt all the essential elements of each offence. The accused does not have to prove anything.

[88] The nature of the evidence in this case requires the court to make certain findings as to credibility of various witnesses and this is not a matter where one can choose between the version of the accused or of other witnesses.

[89] First, dealing with Corporal MacMullin. Corporal MacMullin was slightly impaired by alcohol during the events. He admitted drinking six to eight beers during the meet and greet. The court finds that his evidence is generally consistent with the evidence that has no significance or evidence that has little impact on him. However, his testimony cannot be retained when he says that he did not know who Lieutenant Cahill was. Although the court may have a reasonable doubt that Lieutenant Cahill did not specifically and fully made Corporal MacMullin aware that he was an officer during the meet and greet or that he was present and listening when Lieutenant Cahill reprimanded some students on the balcony, the court does not believe the accused when he says that Lieutenant Cahill never let him know that he was an officer when he asked not to drink the beer in the vehicle. The evidence of Cahill, Brostowski, and Bartlett is solid on this issue.

[90] According to that evidence, as Corporal MacMullin was becoming more agitated, he asked Lieutenant Cahill, "Who the fuck do you think you are?" or words to that effect. Lieutenant Cahill answered back with the following: "I am in your chain of command, I am Lieutenant Cahill, the Maintenance Company Acting Ops O," or words to that effect. Lieutenant Cahill then understands Corporal MacMullin tell him, at this point, the following: "I don't give a fuck about who you are," as he is trying to push his way out of the van.

[91] It is abundantly clear that Corporal MacMullin knew, at that time, that Lieutenant Cahill was not only an officer, but he was aware of his rank and where he was positioned in the chain of command. It is also abundantly clear, from that largely corroborated evidence, that Corporal MacMullin did not care that Lieutenant Cahill was such an officer. It had no impact on how he felt about the situation. He was very upset.

[92] As to Corporal MacMullin's recollection of the altercation he had with Lieutenant Cahill, it is also not credible and contradicted by corroborated and reliable evidence, with the exception that the court accepts as credible the version of the events that Corporal Brostowski tried to diffuse the situation between Corporal MacMullin and Lieutenant Cahill concerning the drinking of a beer in the van.

[93] Corporal MacMullin states that Lieutenant Cahill attacked him when the lieutenant grabbed him by the throat and by the neck. He suggests that he then pushed Lieutenant Cahill back to defend himself. Corporal MacMullin adds that it is when he is leaving the area, picking up his ball hat, that he sees Lieutenant Cahill cross the lawn and come in his direction. Corporal MacMullin says that he then tells him to stay where he is and repeats to Lieutenant Cahill that he is leaving, as this is the only way Private Gillis will calm down.

[94] According to Corporal MacMullin, this is when Lieutenant Cahill continues to come at him, and as Corporal MacMullin does not know what Lieutenant Cahill will do and thinking of what Cahill just did to him, he hits Lieutenant Cahill in the face with his left hand. He then leaves and walks up the road peacefully. Corporal MacMullin suggests that his actions were only made to protect his own person.

[95] In light of all the other evidence, but more specifically the evidence of Corporal Brostowski, Lieutenant Cahill, Master Corporal Bartlett with regard to their description of the events related to the physical encounter between Lieutenant Cahill and Corporal MacMullin, and even the evidence of Private Gillis on the narrow issue of how and why she attacked Corporal MacMullin after Corporal MacMullin had thrown the first punch at Lieutenant Cahill, the court does not believe the accused on this issue.

[96] The description of Cahill, Brostowski, and Bartlett is consistent and coherent within their own testimonies but consistent and coherent when considered together. Therefore, the court finds that Corporal MacMullin's evidence on the issue of his lack of knowledge that Lieutenant Cahill was a superior officer and that he acted in self defence is not credible and unsupported by the evidence when considered as a whole. The court does not believe Corporal MacMullin and is not left in a reasonable doubt by his evidence.

[97] Turning to Corporal Rumbolt. Corporal Rumbolt admitted being drunk during the incidents. He said that he drank approximately 20 beers from 1400 hours until their departure or until they departed the meet and greet in the van en route to Angus. He was referred as stumbling drunk. He testified in an honest and forthright manner. His memory is not the clearest due to his high level of intoxication, but his recollection is mostly coherent and corroborated by the evidence of Corporal Brostowski and Master Corporal Bartlett with regard to jumping over the fence and trying to control Private Gillis during the incidents. Without that corroboration, his evidence could not be reliable in light of his extreme level of intoxication.

[98] With regard to Corporal Brostowski. Corporal Brostowski is a key witness. He is the only sober person of all witnesses present at the scene. His sobriety is corroborated. He testified to the best of his knowledge and in a helpful and polite manner. His answers were straightforward. In cross-examination, he readily admitted telling the accused some time before the trial that he was not really happy at the situation because this cost him the opportunity to be deployed to Haiti. There is no basis to support the mere assumption that he would not have told the truth before this court in retaliation against the accused.

[99] Turning to Master Corporal Bartlett. Master Corporal Bartlett knew Lieutenant Cahill on 13 August 2003 and knew that he was in his chain of command. During the meet and greet, he had at least four beers and felt he had a buzz, but he was not drunk. He testified in a straightforward and forthcoming manner as well. He answered the questions to the best of his knowledge, and he was neither evasive nor hesitant. His testimony was coherent and consistent within itself and with others. It is largely corroborated by the testimonies of Lieutenant Cahill and that of Corporal Brostowski. The court finds him to be a credible witness.

[100] Lieutenant Cahill, he was not sober during the events after having had four or five beers in less than two hours during the meet and greet. He testified before this court in an honest and straightforward manner. One could argue that he may have misjudged or mishandled the situation when Corporal MacMullin opened a beer in the van, and that, certainly in light of the comments that were made by Corporal Brostowski, and that Lieutenant Cahill, in doing so, opened himself to an overreaction by Corporal MacMullin in the circumstances. That is not the issue, at least for the purpose of assessing his credibility and the reliability of his testimony before this court. The court finds him credible and his testimony is generally consistent and coherent within itself and with the testimonies of Corporal Brostowski and Master Corporal Bartlett.

[101] With regard to Private Gillis. Private Gillis was as drunk, if not more drunk, than Corporal Rumbolt at the time of the incidents. She had also been in a difficult relationship with Corporal MacMullin. There is no doubt that she has had her fair share of drinking and behaviour problems in the last years as she expressed it in answers to questions put to her by counsel for the defence.

[102] On 13 August 2003, she was not only drunk, but she was completely out of control as revealed by the evidence. She has been charged and convicted by her CO for assault against Corporal MacMullin in relation to these incidents.

[103] In court, she appeared emotionally fragile and heavily embarrassed. She could not remember a lot and her recollection is not good. She nonetheless testified honestly and to the best of her knowledge despite her embarrassment. The court retains one important element in her testimony. She was shocked after she saw Corporal

MacMullin hit Lieutenant Cahill for the first time. When her evidence is tested with that of Corporal Brostowski, Master Corporal Bartlett, Lieutenant Cahill, and, to some extent, Corporal Rumbolt, the court concludes that she is credible and her evidence is fairly reliable.

[104] Finally, Corporal Duffy and Doctor Ramsey. They both testified in an honest and straightforward manner, and their credibility is not in issue.

[105] This completes my remarks on the credibility of all the witnesses that appeared before this court and the reliability of their evidence.

[106] The issues as it relates to the first charge are twofold:

One, did Corporal MacMullin punch Lieutenant Cahill other than acting in self-defence?

Two, did Corporal MacMullin know that Lieutenant Cahill was a superior officer when he punched him?

[107] In light of the totality of the evidence accepted by the court, the answer must be yes to both questions. As said earlier, the court does not believe the accused when he says that Lieutenant Cahill never let him know that he was an officer when he asked him not to drink the beer in the vehicle. The evidence of Cahill, Brostowski, and Bartlett is clear, and I'll repeat, according to that evidence, as Corporal MacMullin was becoming more agitated, he asked Lieutenant Cahill, "Who the fuck to you think you are?" or words to that effect. Lieutenant Cahill answered back with the following: "I am in your chain of command. I am Lieutenant Cahill, the Maintenance Company Acting Ops O " or words to that effect. Lieutenant Cahill then understands Corporal MacMullin tell him at this point the following: "I don't give a fuck about who you are," as he is trying to push his way out of the van.

[108] It is abundantly clear that Corporal MacMullin knew, at that time, that Lieutenant Cahill was not only an officer, but he was aware of his rank and where he was positioned in the chain of command. And it is also abundantly clear, from that largely corroborated evidence, that Corporal MacMullin did not care that Lieutenant Cahill was such an officer. It had no impact on how he felt about the situation.

[109] The fact that they were not on duty, not in uniform is simply irrelevant. An officer of the rank of lieutenant is, by the mere application of section 2, section 21 of the *National Defence Act*, and Column I of the Schedule to the *Act*, a superior officer to a non-commissioned member holding the rank of corporal at all times.

[110] As to the nature of the acts committed by Corporal MacMullin, the evidence accepted by the court indicates that Corporal MacMullin first attacked

Lieutenant Cahill by grabbing his face and pushing him away and injuring his eye at that time. The evidence of Lieutenant Cahill, Doctor Ramsey, as well as Exhibits 3 to 6 prove beyond a reasonable doubt that the eye injury constitutes bodily harm within the meaning of the *Criminal Code*, i.e., "bodily harm" being any hurt or injury that interferes with Lieutenant Cahill's health or comfort, and this injury was more than something that is just brief or fleeting, or minor in nature.

[111] It is, therefore, after that grab by Corporal MacMullin that Lieutenant Cahill pushed him back, Lieutenant Cahill was punched at least three times, according to the testimonies of Lieutenant Cahill, Corporal Brostowski, and Master Corporal Bartlett which versions are slightly inconsistent with regard to the exact number of punches thrown at Lieutenant Cahill's head by Corporal MacMullin, but in the context of this case, this is not significant.

[112] It is also clear that Corporal MacMullin was not acting in self-defence against an unprovoked or even an unlawful assault by Lieutenant Cahill, that within the meaning of section 34 of the *Criminal Code*.

[113] In conclusion, there is evidence beyond a reasonable doubt that Corporal MacMullin punched, in more than one occasion, Lieutenant Cahill. As I said earlier, the court does not believe Corporal MacMullin on matters that are in issue and is not left in doubt by his evidence. The court is also, on the basis of the evidence it finds credible and reliable, convinced beyond a reasonable doubt by that evidence of the guilt of the accused on the first charge.

[114] Corporal MacMullin, please stand up.

[115] The court finds you guilty of the first charge and directs that the proceedings be stayed on the second charge as the offence of assault causing bodily harm was also proved beyond a reasonable doubt.

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