



COURT MARTIAL

Citation: *R. v. Anderson*, 2014 CM 4012

Date: 20141113

Docket: 201435

Standing Court Martial

Gagetown Courtroom
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal G.M.E. Anderson, Accused

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Master Corporal Anderson is charged with three offences under the Code of Service Discipline preferred in the charge sheet signed by a representative of the Director of Military Prosecutions (DMP) on 29 July 2014 and introduced as Exhibit 2. The prosecution's case alleges that all three offences were committed in relation to the complainant, then-Officer Cadet Hartwick, on the occasion of celebrations surrounding the end of a Basic Military Officer Qualification-Land course (BMOQ-Land) late in the evening of 25 July 2013 at Dooly's in Oromocto, New Brunswick, near Base Gagetown. The identity of the accused and the time and place of the alleged offences are not contested.

[2] The first charge is laid under section 130 of the *National Defence Act (NDA)* for assault with a weapon, contrary to section 267(a) of the *Criminal Code*. The second charge, alternative to the first charge, alleges an offence against section 84 of the *NDA* for having offered a weapon against a superior officer. The third charge alleges an

offence against section 85 of the *NDA* for having used threatening language towards a superior officer.

THE EVIDENCE

[3] At the opening of the proceedings, the court took judicial notice of those facts and matters contained in Military Rule of Evidence 15.

[4] The prosecution called three witnesses and no documents were introduced as exhibits.

[5] The first witness was the complainant and alleged victim, Second Lieutenant Hartwick. He was promoted to his current rank upon graduation from the Royal Military College in Kingston, Ontario, in the spring of 2014, and is now employed at the School of Military Engineering on Base Gagetown. He testified about his background in the Canadian Armed Forces which consists mainly of four years of education at RMC. In the summer of 2013, he was attached posted to the Infantry School in Gagetown to undergo a BMOQ-Land course in the rank of officer cadet. He described the course and the various roles of the directing staff (DS) on the course, a group of officers and non-commissioned officers whose roles were to teach, train, mentor and evaluate him and fellow students mainly in leadership and fieldcraft skills. The DS would deliver orders and the students would execute them. He stated that the accused, Master Corporal Anderson, was the section second-in-command (2i/c) assigned to his section. He described his relationship with the DS, especially the accused, including two incidents which led him to believe that the accused disliked him, although he did not see grounds to complain about those incidents.

[6] Second Lieutenant Hartwick explained that on Thursday, 25 July 2013, the day preceding the formal end of the course, he attended the end-of-course party held at Dooly's in Oromocto. He arrived at around 2100 hours and consumed five to seven drinks, mainly beer with one rum and Pepsi. He described the evening from his point of view. He said that at a point in the evening he joined the tail end of an ongoing conversation involving the accused and other students when Master Corporal Anderson engaged in assessing his performance on the course telling him he was not a good candidate. He eventually walked away from the group. He stated that about one hour later the accused came towards him in the pool room and resumed the previous conversation telling him that he was a bad candidate. Second Lieutenant Hartwick added that some of his colleagues then approached and were asked if they agreed with that assessment. The answer was negative. At that point, Master Corporal Anderson would have asked the group if they had any weapon on them, and shortly thereafter, offered up a knife and pointed it, arm extended, at his throat two inches away while saying that he would kill him. He said that this was totally unexpected and that he felt threatened and never consented to having a knife pointed at him in such a fashion. Second Lieutenant Hartwick said the accused's eyes were intense and that he did not appear to be all there. He said that he remained calm, assessing the situation. He said that the accused mentioned to the group present that they should always have a weapon,

then moved the knife towards other persons present stating that he would kill them, too, in a specific order. He said that this encounter was interrupted by a fight which started close by. Second Lieutenant Hartwick said that he wanted to intervene to stop the fight from occurring, but that he was grabbed by Master Corporal Anderson who stated that it was not a good idea and prevented him from getting involved, a gesture which Second Lieutenant Hartwick said was appropriate and appreciated. Second Lieutenant Hartwick testified that he then retired to a patio door leading outside the back of Dooly's. Shortly thereafter, he left to get back to base by taxi accompanied by colleagues. At no point did Second Lieutenant Hartwick complain to security staff at Dooly's or to members of the DS present at the party as to what had occurred. He said that he was upset concerning what had happened and, upon returning to base, called his family and a cousin who was a captain employed in the Infantry School. He said that he went to work the next day, Friday, 26 July 2013, the last day of his course, to sign his course report and return some kit. He shook Master Corporal Anderson's hand and extended thanks before leaving the Gagetown base to return home on leave. He reported the incident the next day, Saturday, 27 July to military police.

[7] On cross-examination, Second Lieutenant Hartwick said that the course was not over at the time the party was held. He said that he paid for a drink for the accused during the party and refuted the suggestion that he did not like the accused. He admitted speaking with his colleague, Second Lieutenant Lee, about the incident immediately after it happened, and on occasions throughout the investigation, but denied any suggestion that he discussed the details of their respective versions as to what had happened. He said that he was certain of what he heard the accused say to him and others and denied inventing the story out of dislike for the accused.

[8] The second witness was Second Lieutenant Bowser, a course mate of Second Lieutenant Hartwick in the same section of the BMOQ-Land course and colleague through their years of study at RMC. He also described the course and the role of the DS as leaders. He testified that on 25 July 2013, he also attended the course party at Dooly's, arriving around 1900 hours after visiting a friend's place where he had been drinking. He admitted being intoxicated during the evening, but not to the point of not remembering things. He said he was sitting at the bar with the accused at one point in the evening and noticed the accused playing with a knife, joking around. He said that the accused was not angry at him and that he did not feel threatened by this behaviour. He described a second incident between 30 minutes and two hours later where he saw the accused holding the same knife close to Second Lieutenant Hartwick's neck. He said he did not hear the conversation between the two and was in movement at the time. He did not see the accused point the knife at anyone else. Second Lieutenant Bowser testified that he could not tell how long the incident lasted. He said that he left Dooly's at approximately 0200 hours in the morning. On cross-examination, Second Lieutenant Bowser confirmed that he did not report the incident; that he was asked in an email if he had seen the incident; and upon answering in the affirmative, he was interviewed by phone in the course of the investigation. He denied making up this story to help Second Lieutenant Hartwick.

[9] The third and last witness for the prosecution was Second Lieutenant Lee, another colleague of Second Lieutenant Hartwick at the Royal Military College and on the BMOQ-Land course in the same section in the summer of 2013. He described the contingent of DS responsible for the course and specifically for his section. He stated that he also attended a course party at Dooly's, arriving sober around 2100 hours and consuming 7 or 8 pints of beer on the premises. He said that, close to midnight, he heard a conversation involving Second Lieutenant Hartwick being criticized on his performance during the course by the accused. Getting closer, he heard the accused ask Second Lieutenant Hartwick if he wanted to fight him to which Second Lieutenant Hartwick would have replied in the negative. The accused then said, "Good choice because I have a knife." He said that he saw the accused pull out a knife and point it at Second Lieutenant Hartwick's throat at a distance of approximately 10 centimetres and heard the accused say, "I could kill you if I wanted to." He said that he did not see the accused point the knife at anyone else. He said that he found the accused's behaviour to be awkward, but thought that he was joking. He said that he left Dooly's approximately 30 minutes later accompanied by Second Lieutenant Hartwick. They discussed that night the number of odd events that had happened, including the knife episode. Yet, he did not complain to anyone at Dooley's or afterwards. He was requested to write a statement of what he had seen once he was back at RMC. On cross-examination, Second Lieutenant Lee said that he was certain about what he had heard and denied inventing the story. His memory was refreshed using an earlier statement given to investigators on the fact that he had seen the accused place the knife back in his pocket immediately after pointing it at Second Lieutenant Hartwick.

[10] After the close of the prosecution case, the defence called the accused, Master Corporal Anderson, to testify. He related his role as section 2i/c on the 10 weeks BMOQ-Land course, including acting as section commander at times. He said that the three officers who testified for the prosecution were under his care for the duration of the course. He described his style of instructor as firm but fair, and denied having anything against Second Lieutenant Hartwick stating that he treated him the same as the other candidates. He stated that he had no recollection of one of the two incidents related by Second Lieutenant Hartwick in his testimony. He, however, remembered the other, explaining why it was memorable and why he had to reprimand Second Lieutenant Hartwick on that occasion. When asked about the performance of Second Lieutenant Hartwick on course, he explained that Second Lieutenant Hartwick excelled in some areas, but was weak in others like most candidates. He said that at the end of the course, Second Lieutenant Hartwick had met all of the objectives and passed as he should. He described his day on 25 July 2013, and that he was invited to the end-of-the-course party organized by the students, as was customary. He explained that following supper at his home, he proceeded to a colleague's place and had one beer. He said that he was not intending to attend the party, but was convinced to do so by colleagues. He proceeded with his vehicle and once there was offered drinks by students, admitting consuming a minimum of seven drinks, whether beer, shots or highballs. He admitted to being intoxicated, but said he was able to stand on his own. He said he had conversations with candidates and said that he congratulated them on their success and offered advice for the next step in their training. He said that at one point some students

asked him what he thought their weaknesses were and how they can improve. He said that he answered them frankly, in doing so, commenting on Second Lieutenant Hartwick's weaknesses in reconnaissance skills and his difficulties in accepting direction. He said he was not angry when saying this and acting the same way as he had with other students throughout the conversation. He stated the conversation lasted about 20 minutes and concluded without violence in any way.

[11] The accused denied having a knife in his possession that night. He denied also having a knife out and holding it to anyone's throat or using threatening language against anyone. He said his evening ended rather abruptly after he had been hit on the side of the jaw from behind by a rather large man and hit his head on the floor. The incident originated when he confronted another man who was using foul language on a female civilian friend he was sitting with. He left Dooly's with a colleague and was picked up by his wife who dropped the colleague off before heading home. He saw Second Lieutenant Hartwick the next day and shook hands with him wishing him luck as the course was ending. Second Lieutenant Hartwick did not appear to him as being upset in any way. On cross-examination, the accused rejected allegations that he had let his personal views affect how he evaluated Second Lieutenant Hartwick or whether any views he might have had were relevant to whether Second Lieutenant Hartwick should have passed the course or not. When pressed on his alcohol consumption that night, the accused answered repeatedly that he had "a minimum of seven drinks".

THE ASSESSMENT OF THE EVIDENCE

General principles

[12] As evidenced by counsel's final submissions on findings, the disposition of this case rests on the court's assessment of the testimony of the four witnesses heard. As the trial unfolded, the prosecution called three witnesses who each stated that the accused pointed a knife at Officer Cadet Hartwick. Two of those witnesses heard words being pronounced by the accused which could constitute a threat to cause death. In his testimony, the accused denied having had a knife in his possession that night and denied uttering threatening words.

[13] In their cross-examination, both counsel attempted to discredit the other parties' witnesses by eliciting indicia of inconsistencies, partiality and capacity to observe, remember and communicate. They submitted, in their arguments, reasons why the court should disbelieve testimony on those bases. Despite the able submissions of counsel, the court is unable to interpret from the testimony heard any major inconsistency or indicia of partiality which would cause the rejection of the entirety of a witness's testimony on one or any of those bases.

[14] The third element on which counsel focussed in their examination of witnesses and submissions is the capacity to observe, remember and communicate displayed by the witnesses. It is indeed an element that the court must pay particular attention to in this case for two reasons. One, all of the witnesses admit to having been under the

influence of alcohol at the time the events took place, and second, the events took place over 15 months before trial. Yet, this issue revealed itself in the course of the examination of witnesses as the capacity to remember the events was tested and the witnesses frankly disclosed their doubts about the accuracy of certain elements of their evidence. These are issues that may affect the reliability of witnesses' testimony, an element which does not necessarily command a finding that the witnesses were not credible.

[15] Indeed, as Watt, J.A. wrote in *Clark v. The Queen*, 2012 CMAC 3 at para 48:

Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as the witness believes it to be. In a word, credibility. Accuracy concerns have to do with the actual accuracy of the witness' account. This is reliability. The testimony of a credible, in other words an honest witness, may nonetheless be unreliable.

[16] The court may accept or reject, some, none or all of the evidence of any witness who testified in the proceedings. Neither credibility nor reliability is an all or nothing proposition. A witness can be deemed reliable on some aspects and unreliable on others. It is a given, however, that to sustain a conviction, testimony must be reliable and capable of sustaining the burden of proof on a specific issue or as a whole. The court must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: *R. v. Thain*, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.

The assessment of credibility

[17] Despite the earlier summary of the various testimonies in the order they were heard at trial, the method of evaluating the impact of testimony on the required verdicts responds to different imperatives. Indeed, rendering a verdict is not a question of deciding whether the court believes the defence's evidence or the prosecution's evidence. As Cory J of the Supreme Court of Canada provided in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 at p. 757, referred to by both counsel in their submissions, the method of assessing credibility that I must follow in order to respect the fundamental principle obliging the Crown to prove the guilt of the accused beyond a reasonable is as follows:

First, if I believe the evidence of the accused, I must acquit.

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

Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

The credibility of the accused

[18] Following the close of the prosecution's case, the accused took the stand in his defence. Master Corporal Anderson came across to the court as well-spoken and calm. He is an instructor who is well versed in training methodology as applied by the Canadian Armed Forces and testified with authority on those issues and on his role as DS on the BMOQ-Land course, including specifically on the assessment and other interaction he has had with Second Lieutenant Hartwick, the complainant, during the course.

[19] The prosecution suggested that the accused had a motive to commit the offences charged, as he did not believe that the complainant should have been allowed by his superiors to pass the BMOQ-Land Course, and took advantage of an occasion during the end-of-course party to voice these concerns in an aggressive manner which degenerated to threatening words and the pointing of a knife. The difficulty with this theory is that it is not sufficiently supported by the evidence. Throughout cross-examination, the accused denied that personal, subjective views he could have had in relation to the complainant would in any way be relevant as to the necessarily objective assessment of his success or failure on the course. There was no independent evidence of a superior's decision which would have overruled the accused's opinion as to the ultimate success or failure of Second Lieutenant Hartwick on the course.

[20] Yet, as mentioned earlier, the court must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings. The assessment of the accused's evidence cannot occur in isolation of the other evidence heard, most specifically, the evidence of three witnesses who testified that they saw the accused handle a knife, on the evening of 25 July 2013, one of those witnesses having seen the accused handle a knife on two distinct occasions. Also, two witnesses heard the accused utter threatening words. The testimony of the accused, in denying that he had a knife in his possession that night and in denying that he threatened anyone, cannot be reconciled with the evidence of these other witnesses.

[21] This is not a matter of choosing between versions. Hearing the accused's testimony, it was clear for the court that the accused had prepared to deliver a very simple version of events. This was particularly apparent on cross-examination, first when answering questions regarding his personal feelings towards Second Lieutenant Hartwick, but most notably during questioning on his alcohol consumption. When asked about whether he could have had more than ten drinks, he provided the same answer repeatedly, "no more than seven" while appearing obviously embarrassed. This gave the court the impression of someone who was sticking to a well-prepared script. The court does not believe the veracity of the accused's version in relation to the possession of a knife and utterance of threatening words, the key aspects of the events of 25 July 2013 in relation to the charges. Therefore, as for the first step of the *W.(D.)* test outlined above, the court does not believe the version of the accused.

[22] Regarding the second step of the *W.(D.)* test, the nature of the denials of the accused as to having a knife in his possession, which the court does not believe, does not allow the court to be left with a reasonable doubt by the accused's version.

[23] Having found the veracity of the accused's testimony to be lacking, and being left in no doubt in rejecting the evidence of the accused, I must ask myself whether, on the basis of the evidence which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused. I now need to assess the strength of the prosecution's evidence.

The credibility and reliability of prosecution witnesses

[24] All three prosecution witnesses testified in a straightforward, dispassionate manner. Although Second Lieutenant Hartwick had a more personal experience to convey, he did not come across as vengeful. Second Lieutenants Bowser and Lee gave the impression that they were testifying because they had seen something of interest and it was their duty to relate this information to the court. All three witnesses acknowledged when they did not remember something and appeared to the court as being candid in their testimony.

[25] The defence attempted to raise the possibility of collusion between the prosecution's witnesses as to their recollection of the facts of what had happened on the evening of 25 July 2013 at Dooly's. The court cannot find support in the evidence regarding such collusion. The three witnesses were classmates at the Royal Military College in Kingston and were in contact regularly as the investigation was ongoing. The complainant is said to have provided names of potential witnesses to the authority conducting the investigation, who then contacted those persons. I find that the evidence is consistent to the effect that the extent of the discussions between those persons was initially limited to share their surprise as to the behaviour observed from the accused at Dooly's and subsequently extended to whether they had been contacted in relation to the investigation. At no point did the evidence reveal that the witnesses spoke about the details of the facts of what had happened.

[26] The fact that the complaint was not made at the earliest possible occasion was referred to by defence counsel during submissions but not pressed in any way. The court acknowledges that the fact that a prior complaint was made, when it was made, and why it was or was not made in a timely fashion, are all matters relevant and admissible to establish the conduct of the complainant in a criminal case, from which conduct the trier of fact is entitled to draw inferences relative to the credibility of that complainant's evidence. In this case, however, Second Lieutenant Hartwick's evidence is that he consulted family members immediately upon returning to his accommodation from Dooly's and made a formal complaint to police less than 48 hours later, once he was on leave. The court does not see this short delay in making a formal complaint as impeding on the credibility of Second Lieutenant Hartwick.

[27] That being said, it is clear that the three prosecution witnesses painted three pictures of the specific events as they unfolded on the evening of 25 July.

[28] Second Lieutenant Hartwick testified that Master Corporal Anderson came towards him in the pool room and resumed a conversation they previously had on the fact that he was a bad candidate. Master Corporal Anderson asked those present if they had any weapons on them. Shortly thereafter, Master Corporal Anderson offered up a knife and pointed it at Second Lieutenant Hartwick's throat, arm extended, the blade two inches away, while saying that he would kill him. He said that the eyes of Master Corporal Anderson were intense and that he appeared to not be all there. He said he felt threatened but remained calm, assessing the situation. He said that Master Corporal Anderson mentioned to the group present that they should always have a weapon, then moved the knife towards other persons present, stating that he would kill them too, in a specific order. He said that this encounter was interrupted by a fight which started close by.

[29] For his part, Second Lieutenant Bowser testified that he saw Master Corporal Anderson take out a knife and playing around with it while they were sitting together having a conversation at the bar at around 2100 hours. He said that Master Corporal Anderson was not angry at him so he did not think much of the event at the time and moved on to other conversations. He said that some time later in the evening, he saw Master Corporal Anderson pointing the same knife at Second Lieutenant Hartwick's neck. He could not tell how long the incident lasted and did not hear any words exchanged at the time. He was in movement at the time and did not see Master Corporal Anderson point the knife at anyone else.

[30] Finally, Second Lieutenant Lee testified that around midnight, Master Corporal Anderson was having a conversation with Second Lieutenant Hartwick, criticizing him for his performance on the course. He said he heard Master Corporal Anderson ask Second Lieutenant Hartwick if he wanted to fight him. The reply was negative. The accused then said, "Good choice 'cause I have a knife." He said that he saw Master Corporal Anderson pull out a knife and point it at Second Lieutenant Hartwick's throat, at a distance of approximately 10 centimetres, and heard the accused say, "I could kill you if I wanted to." He said that he did not see Master Corporal Anderson point the knife at anyone else and saw the accused putting the knife away in his pocket.

The evidence of prosecution witnesses and reasonable doubt

[31] Is the fact that the recollections of the three prosecution witnesses differ in the manner described above sufficient to leave the court with a reasonable doubt as to the commission of the offences?

[32] To answer this question, it is useful to discuss the notion of reasonable doubt.

[33] The accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The

standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that, before an accused can be convicted of an offence, the judge of facts must be satisfied, beyond reasonable doubt, of the existence of all of the essential elements of the offence.

[34] As for the meaning of the expression “beyond a reasonable doubt”, the Supreme Court of Canada in *R. v. Lifchus* [1997] 3 S.C.R. 320 tells us that a reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. It is not sufficient for me, as judge of facts, to believe the accused is probably guilty or likely guilty. In those circumstances, the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand, I must keep in mind that it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so.

[35] In this case, the offences were allegedly committed late on the evening of a party at a licensed establishment over 15 months ago, while everyone involved had been drinking and was intoxicated to some degree. In the court’s view, it would be expecting too much that, in those circumstances, each and every witness have the exact same recollection of events. In fact, it would be suspicious. It is legitimate for the prosecution to call witnesses in attempting to prove the commission of offences in circumstances where the accuracy of testimonies may be less than perfect. Expecting otherwise could leave many crimes unpunished. It is for the court to decide if frailties in evidence are sufficient enough to create a reasonable doubt on the guilt of an accused.

[36] Specifically, in this case, three witnesses saw Master Corporal Anderson handle a knife, one of those seeing him handle the knife on two occasions. For one to observe someone he or she knows handle a knife in a public place is significant enough to be remembered. The court is of the view that this testimony is reliable enough for it to conclude beyond reasonable doubt that Master Corporal Anderson had a knife in his possession and took it out, which allowed the three prosecution witnesses to see it. All three witnesses saw Master Corporal Anderson point the knife in the direction of Second Lieutenant Hartwick’s neck, arm extended to some degree. Once again, despite minor discrepancies as to where the events were observed or how much the arm was extended, the court finds that the evidence is sufficient to conclude beyond a reasonable doubt that Master Corporal Anderson pointed the knife he had in his possession to Second Lieutenant Hartwick’s neck. Finally, in terms of the words exchanged, two witnesses heard Master Corporal Anderson utter threats. The third witness did not testify that no words were exchanged; he said he could not hear what was said. Although the testimony of the witnesses differs as to what exactly was said, they both were positive to the effect that those words were “I will kill you” or “I could kill you.” The court finds that it has been proven that Master Corporal Anderson took out a knife in a public place, pointed it at Second Lieutenant Hartwick’s neck and pronounced words to the effect that he could or would kill Second Lieutenant Hartwick.

EVIDENCIARY FINDINGS APPLIED TO THE OFFENCES

Findings of facts applied to the essential elements of the first charge

[37] From this point on, I will refer to Second Lieutenant Hartwick by his former rank of officer cadet, as he is referred to on the charge sheet. As mentioned above, the elements of identity of the accused as the person who committed the offences and the date and place of the offences, 25 July 2013, are not contested.

[38] Consequently, in relation to the first charge under s. 267(a) of the *Criminal Code*, the prosecution concedes that there has been no actual application of force on Officer Cadet Hartwick, but submits that an assault was nevertheless committed on the basis of sub-paragraph 265(1) (b) of the *Criminal Code* 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;

265. (1) Commet des voies de fait, ou se livre à une attaque ou une agression, quiconque, selon le cas : . . .

b) tente ou menace, par un acte ou un geste, d'employer la force contre une autre personne, s'il est en mesure actuelle, ou s'il porte cette personne à croire, pour des motifs raisonnables, qu'il est alors en mesure actuelle d'accomplir son dessein;

[39] Consequently, in light of the evidence heard at trial, the prosecution had the burden of proving each of the following essential elements of the offence beyond a reasonable doubt:

- (a) that Master Corporal Anderson threatened, by act or gesture, to apply force to Officer Cadet Hartwick and had present ability to effect his purpose;
- (b) that Master Corporal Anderson intentionally threatened to apply the force;
- (c) that Officer Cadet Hartwick did not consent to the assault;
- (d) that Master Corporal Anderson knew that Officer Cadet Hartwick did not consent to the assault; and
- (e) that Master Corporal Anderson threatened to use a weapon, to wit, a knife.

[40] First, did Master Corporal Anderson threaten, by act or gesture, to apply force to Officer Cadet Hartwick and did he have present ability to effect his purpose? The court finds that the act of Master Corporal Anderson, in pointing a knife to Officer Cadet Hartwick's throat, and stating words to the effect that he will kill him or could kill him, constitutes a threat to apply force accompanied by present ability to effect his purpose.

[41] Second, did Master Corporal Anderson intentionally apply the force? The court finds that all of the evidence, including the movements made and the words spoken during the incident, show that Master Corporal Anderson applied force intentionally.

[42] Third, did Officer Cadet Hartwick consent to the force that Master Corporal Anderson applied? The testimony of Officer Cadet Hartwick reveals that he was surprised by the gesture of Master Corporal Anderson and never consented. There were absolutely no indications of voluntary agreement to this behaviour on the part of the accused, as confirmed by defence counsel in submissions. Consequently, the court finds that Officer Cadet Hartwick did not consent to the assault.

[43] Fourth, did Master Corporal Anderson know that Officer Cadet Hartwick did not consent to the force applied? The evidence of prosecution's witnesses reveals that they were surprised to see the accused point a knife at Officer Cadet Hartwick's throat. Indeed, people attending a public establishment to consume a few drinks in celebration of the end of a course cannot be deemed to consent to being threatened with a knife. The court finds that the accused proceeded with his threats in blatant disregard for the lack of consent of Officer Cadet Hartwick.

[44] Finally, did Master Corporal Anderson threaten to use a weapon, to wit, a knife? The evidence of prosecution witnesses reveals their description of the knife they saw. Although there is no unanimity on the precise length or colour, there is no doubt in the court's mind that the accused used a knife and that the knife used by the accused was a weapon, intended by the accused to be threatening to another person.

[45] Consequently, the court concludes that the first charge has been proven beyond a reasonable doubt.

Findings of fact applied to the essential elements of charges two and three

[46] Once again, it is worth repeating that there is no contention in this case about elements of identity and time and place of offence for any of the three charges.

[47] The other essential elements of the second charge, under s. 84 of the *National Defence Act*, are as follows:

- (a) Master Corporal Anderson offered a weapon against a person;
- (b) the use of violence (offering of the weapon) was intentional;

- (c) the person to whom violence was offered was a superior officer; and
- (d) the accused knew that the person was a superior officer.

[48] The other essential elements of the third charge, under s. 85 of the *National Defence Act* are as follows:

- (a) Master Corporal Anderson spoke the words alleged in the charge;
- (b) Master Corporal Anderson used threatening language;
- (c) the insulting words were expressed to a superior officer; and
- (d) the accused knew that the person was a superior officer.

[49] The findings of facts that the court has made in relation to the first charge would apply to the first two elements of charges two and three. However, the last two elements common to those two charges, namely that the offer of a weapon or expression of insulting words were each targeted at a superior officer, require further consideration on a different basis than previously undertaken, given that the relevant evidence is not contradictory. Specifically, in relation to this case, it is an essential element of the last two charges that the victim particularized in the charge, namely Officer Cadet Hartwick, was a superior officer to the accused, Master Corporal Anderson.

[50] What then is a superior officer? A member of the Canadian Forces in the rank of officer cadet is an officer, as this term is defined at s. 2 of the *National Defence Act*. The term “superior officer” is defined as follows:

“superior officer” means any officer or non-commissioned member who, in relation to any other officer or non-commissioned member, is by this Act, or by regulations or custom of the service, authorized to give a lawful command to that other officer or non-commissioned member;

« supérieur » Tout officier ou militaire du rang qui est autorisé par la présente loi, les règlements ou les traditions du service à donner légitimement un ordre à un autre officier ou à un autre militaire du rang.

[51] The court is of the view that this definition does not in itself preclude the possibility that a non-commissioned member (NCM) be authorized in some circumstances to give a lawful command to an officer. Indeed, the use of the term “other/*autre*” seems to relate to the need to define superior officer as a relationship between one person, officer or non-commissioned member, and another person, officer or non-commissioned member.

[52] That definition refers to authority to give lawful command conferred through three different means: the *Act*, the regulations and the traditions of the service. As far as the *Act* goes, there is nothing in the *National Defence Act* which provides specifically for the power of command, despite specific dispositions concerning a number of

officers such as the Chief of the Defence Staff and others. Indeed, s. 19 of the *National Defence Act* provides:

The authority and powers of command of officers and non-commissioned members shall be as prescribed in regulations.

[53] The regulation most closely related to the notion of “authority and powers of command” is found at QR&O 3.20 – Command Generally, which reads as follows:

In cases not otherwise provided for in QR&O, command shall be exercised by:

- (a) the senior officer present;
- (b) in the absence of an officer, the senior non-commissioned member present; or
- (c) any other officer or non-commissioned member, where specifically authorized by the Chief of the Defence Staff, an officer commanding a command or formation or a commanding officer.

[54] This is an “either/or” list which opens the possibility that a non-commissioned member who is not the senior officer or non-commissioned member present exercise command where specifically authorized by the Chief of the Defence Staff, an officer commanding a command or a formation or a commanding officer.

[55] This court has taken judicial notice of the QR&O under Military Rule of Evidence 15. Although there are QR&O governing command on ships and aircrafts, none would apply to the situation at hand. The court has not been informed or taken judicial notice of other specific orders or authorizations from the Chief of the Defence Staff, an officer commanding a command or a formation or a commanding officer confirming, for instance, that a member of the DS on a course held at the infantry school at CTC Gagetown is authorized to exercise command over and, therefore, give a lawful command to a student on course that would hold a superior rank, by virtue, for instance, of being an officer cadet. No such order or authorization was introduced in evidence.

[56] Yet, the court has heard evidence from all witnesses in this trial, which overwhelmingly point to a superior-subordinate relationship between students and DS which necessarily implies a power of command being exercised by the DS in relation to students of the rank of officer cadet during the BMOQ-Land course. Interestingly enough, this evidence was largely obtained from prosecution witnesses in direct examination, when asked if rank was still important even when attending the end-of-course party. The answer typically was that even if the atmosphere was more relaxed, ranks were still applicable as the DS was to be treated with deference due to them. This evidence makes sense. It is logical that in the kind of course described by witnesses, a firm superior-subordinate relation between students and DS be maintained at all times. Based on the evidence heard, it is difficult to imagine that the training objectives for

such a course could be reached if it is taught exclusively by officers superior in rank to students of the rank of officer cadet.

[57] After some discussion, the prosecution admitted in submissions that non-commissioned members could in certain circumstances exercise power of command over officers even if not specifically provided for in QR&O. The prosecution stated that the DS had power of command during the course but that the course party was not an official part of that course. The court rejects this position. Although the course party may not have been a mandatory part of the course, it was a customary event which had been organized with the knowledge of, and a certain level of participation by, the DS. In the kind of high intensity course described by witnesses, it is difficult to imagine the command relationship between students and DS of a subordinate rank changing 180 degrees at the close of the workday.

[58] The court is then confronted with the absence of evidence of an order which would show whether the testimony of witnesses as to the power of command effectively exercised by non-commissioned members, such as the accused, as DS over the students in the course conforms in law with the prescription of QR&O 3.20, specifically 3.20(c). That means the court is, in effect, unable to determine whether a non-commissioned member, such as the accused, has indeed power of command over an officer cadet in a course such as the BMOQ-Land. Yet, the court is not tasked with that determination. What the court needs to determine is whether the prosecution has discharged its burden of proving beyond a reasonable doubt that Officer Cadet Hartwick was a superior officer in relation to the accused, Master Corporal Anderson, on or about 25 July 2013. That burden rests on the prosecution.

[59] Should there have been no indication of a special situation indicating that the normal chain of command by rank was somewhat altered, the court could have found that the Crown had discharged its burden simply by virtue of the rank of the victim, versus the rank of the alleged perpetrator. In such a situation, should the defence wish to raise a reasonable doubt, the defence may have had an evidentiary burden to produce evidence to the contrary, as foreseen in Military Rule of Evidence 12(2). In this case, however, the evidence points overwhelmingly to the fact that Officer Cadet Hartwick was a subordinate, not a superior officer, in relation to the accused, in the circumstances of the case. Given that the prosecution has the burden to prove that Officer Cadet Hartwick was a superior officer, it keeps the burden of producing evidence to prove that fact beyond reasonable doubt in accordance with articles 10 and 12(1) of the *Military Rules of Evidence*. It is the court's view that the prosecution has not discharged its burden. In the limited, specific circumstances of this case and the evidence heard at this trial, the court is not convinced beyond a reasonable doubt that the violence offered or the words spoken by the accused were directed to a superior officer. Consequently, the accused cannot be found guilty of those two charges.

FOR THESE REASONS, THE COURT:

[60] **FINDS** Master Corporal Anderson guilty of charge no. 1.

[61] **FINDS** Master Corporal Anderson not guilty of charges no. 2 and no. 3.

Counsel

The Director of Military Prosecutions as represented by Lieutenant-Commander D.T. Reeves.

Lieutenant-Commander P. Desbiens, Defence Counsel Services, Counsel for Master Corporal G.M.E. Anderson.