

**Citation:** *R. v. Corporal R.P. Joseph*, 2005 CM 41

**Docket:**F200541

**STANDING COURT MARTIAL  
CANADA  
ONTARIO  
CANADIAN FORCES BASE NORTH BAY**

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**Date:**12 January 2006

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

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**HER MAJESTY THE QUEEN**

**v.**

**CORPORAL R.P. JOSEPH  
(Accused)**

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**FINDING**

**(Rendered orally)**

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**INTRODUCTION**

[1] Master Corporal Joseph, this court finds you guilty of the first charge. You may break off and sit with your counsel.

[2] Corporal Joseph, as he then was, was charged with an offence punishable under section 130 of the *National Defence Act*; that is to say, committed an assault contrary to section 266 of the *Criminal Code*.

[3] This charge arises from a series of events that occurred in the late afternoon or early evening of 19 June 2004 at the residence of Corporal Joseph located at 30 Royal Crescent, North Bay.

**THE EVIDENCE**

[4] The evidence before this court consists of the following:

- a) The testimonies heard during the trial; that is the testimony of Mr. Michael Sime, Ms Jennifer Parker, Corporal Panke and Master Corporal Joseph;
- b) The court taking judicial notice of those facts and matters under Military Rule of Evidence 15; and
- c) A printed copy of Topper's Pizza online ordering web page filed before the court as Exhibit 3.

## **THE FACTS**

[5] The facts surrounding this case begin in the afternoon of 19 June 2004 at Corporal Joseph's residence located at 30 Royal Crescent at Canadian Forces Base North Bay. Corporal Joseph is accompanied in his house by guests, namely Corporal Bertrand and his two children and a Mr. Jason Powers. The children are playing outside with Corporal Joseph's own two daughters aged four and eight. As suppertime is getting closer, Corporal Joseph decides to order pizza at Topper's Pizza using their Internet web site to place the order online. According to his testimony, Corporal Joseph is familiar with ordering pizza online from that web site as well as placing orders by phone.

[6] As it appears at Exhibit 3, every Topper's Pizza came with a free house dip whether it was ordered by phone or using the Internet. However, Corporal Joseph understood that the dipping sauce came automatically with Internet orders because you could not choose to select or unselect that choice on the web site. This belief is consistent with Exhibit 3. After placing the order, Corporal Joseph carries his normal business in the house. Approximately 40 minutes later, he realizes that the order has not yet arrived. Normally such an order would arrive within 30 or 40 minutes. Corporal Joseph decides to inquire with Topper's Pizza on the phone as to the status of his order, because it had been placed online. A Topper's Pizza employee tells him that the order was received and the pizza on its way. Corporal Joseph carries on with his business for 10 to 15 minutes until he decides to call again at Topper's Pizza. On this second occasion, someone tells him that the order was received and that the pizza is on its way having just left. Corporal Joseph starts to be frustrated because he was told 15 minutes earlier that it had already left.

[7] Approximately 10 to 15 minutes later, Corporal Joseph is about to inquire for the third time, when the pizza finally arrives after more or less twice the amount of time usually required for similar orders. A Topper's Pizza delivery person, Mr. Sime, delivers it. Mr. Sime arrives in his vehicle and parks it across the driveway of the house located at 30 Royal Crescent. He is accompanied by his fiancée, Ms Parker, who sits in the front passenger seat. Mr. Sime exits his vehicle with two pizza boxes and walks to the entrance door. He meets

Corporal Joseph at the door. Corporal Joseph is inside the house where Mr. Sime is at the doorstep. Mr. Sime hands him two pizza boxes. According to Corporal Joseph, Mr. Sime asks to be paid more or less 30 dollars. Corporal Joseph takes both pizza boxes and place them on a small table to his left. As the order came late, Corporal Joseph opens the top box to check if the pizza is still warm. He notices that a topping is missing, as well as the dipping sauce, which is normally placed in one corner of the pizza box in a plastic cup. Somewhat frustrated, Corporal Joseph tells Mr. Sime that the dipping sauce is missing. In turn, Mr. Sime asks him to pay for the pizzas. He tells him again that the sauce is missing which causes Mr. Sime to reply somewhat that Corporal Joseph doesn't have the sauce, because he did not order it. According to Corporal Joseph, this response surprises him. He tells Mr. Sime that the dipping sauce is normally complementary with orders made through the Internet, but this does not seem to affect Mr. Sime in any way, to the contrary.

[8] According to Corporal Joseph, Mr. Sime acts in such a way that he is blaming Joseph—Corporal Joseph, and that this issue is not his problem. Corporal Joseph says that he is thrown off by this remark. He tells Mr. Sime again that the dipping sauce is included when orders are made through his web site, to which the Topper's Pizza employee replies that it is not his web site. At this time, the situation has escalated into a confrontation of egos where words are exchanged between the two individuals. Corporal Joseph testifies that Mr. Sime does not listen to him, nor does he accept any blame or responsibility for the missing dipping sauce and pizza topping. Mr. Sime testifies to the effect that Corporal Joseph tells him that he gets the dipping sauce every time, but he says also that Corporal Joseph tells him that he did not order the pizza online. Mr. Sime testifies that he offers to order the sauce for the client, although Corporal Joseph maintains that he made that suggestion himself.

[9] In any event, Mr. Sime makes a phone call to Topper's Pizza using Corporal Joseph's phone where it is ascertained that another delivery person would bring the dipping sauce because that person was delivering pizza nearby. This solution appears to be somewhat acceptable to Corporal Joseph. But according to Corporal Joseph, Mr. Sime reiterates to him, after completing the call, that he had not made the order for the dipping sauce, because that order did not come through the order at the office. Therefore, Mr. Sime continues to argue with the client. Corporal Joseph is then very frustrated, but Mr. Sime is also very annoyed. Corporal Joseph tells Mr. Sime that he will pay for the pizza but to the next driver, meaning that he will pay when he gets the dipping sauce. According to Corporal Joseph, he has had enough with dealing with Mr. Sime who acted like it was the customer's fault and he felt that the first delivery was so late that he should pay only the second delivery person, that is when the delivery would be completed to his satisfaction. Mr. Sime not only rejects this proposal, but requests payment in full immediately.

[10] At this point, Corporal Joseph has had enough with this whole situation and tells Mr. Sime that he doesn't want the pizza. According to Corporal Joseph, Mr. Sime is

now very upset and tells his customer that he has to pay for the pizza. Mr. Sime testifies that it is Corporal Joseph who was upset and that if Corporal Joseph had told him that he was no longer willing to take the pizza, Mr. Sime would have simply taken the pizzas back to Topper's Pizza where the staff would have shared it—or shared them. At this time, Corporal Joseph grabs the top box, which was not fully closed, and passes or holds it out to Mr. Sime who refuses to take it and still request to be paid. Corporal Joseph testifies, that in doing so, Mr. Sime then puts his hands up and beside him at the chest and shoulder level to indicate he would not take it. Despite this clear sign that the delivery person does not want to take the pizza back, Corporal Joseph then turns the pizza box upward and manages to hold it to Mr. Sime's hands using enough force or pressure that Mr. Sime has to keep it in his hands otherwise the box would fall on the ground. In other words, Mr. Sime was forced to grab the pizza.

[11] Mr. Sime describes this moment in a different manner. According to him, Corporal Joseph grabbed the first pizza and pushed him with it so hard that he had to step backwards, although he softened his testimony in cross-examination stating that he took a step back because he was not expecting that the customer would hand the pizza back to him. Mr. Sime says that Corporal Joseph's gestures caused the box to hit him on the chin, although Mr. Sime would not have revealed this detail to the police in previous interviews. Once Mr. Sime holds the first pizza box, Corporal Joseph turns on his left side and grabs the second box. He then puts it on the first box that is now being held by Mr. Sime horizontally with his hands up front. Corporal Joseph describes that he does that in a gentle manner where Mr. Sime says that it was thrown flat on his hands, which were holding the first box. Corporal Joseph asks Mr. Sime to leave. According to Mr. Sime, as he is turning to walk away, Corporal Joseph shouts at him. He turns back to see that a slice or piece of pizza was thrown at him. Mr. Sime testifies that he is able to grab the pizza with his left hand and put it on the top box.

[12] In cross-examination, Mr. Sime said that the piece of pizza was coming right at him but on his side, although he maintained that the piece was not handed out to him. In cross-examination, Ms. Parker testified to the contrary and she corroborates Corporal Joseph who says that he grabbed a pizza piece on the ground and held it out to Mr. Sime, although in a rude gesture. In direct examination, she had said the pizza slice was tossed at Mr. Sime. Corporal Joseph testifies also that Mr. Sime grabbed the piece with his left hand and squished it. Corporal Joseph then turns back and walks in the house where he agrees with his friend Bertrand to take the kids to MacDonald's. In the meantime, Mr. Sime is calling at Topper's Pizza using Ms. Parker cellular telephone when he asks that someone contact the police. Although she does not see any contacts or heard any conversation between Mr. Sime and Corporal Joseph, Ms. Parker testifies that she could see that they were both angry. This situation continues when Corporal Joseph, his friend and the four children exit the house to get into the minivan to go to the restaurant. Mr. Sime's vehicle is then blocking the driveway. Ms. Parker testified that a man told them to leave because they

had to get out of the driveway. Her fiancé would have replied that they were not going anywhere.

[13] A military police patrolman, Corporal Panke, arrives very shortly after or approximately—a few minutes or approximately at the time where this exchange is taking place. Mr. Sime notes that Corporal Joseph talks to the police using the constable's first name and is allowed or it is agreed between the two that he can leave to return only 25 minutes later. This upsets Mr. Sime even more and he is now very angry at the whole situation stating that he would have punched him in the face, referring to Corporal Joseph. Corporal Joseph leaves his residence where Mr. Sime attends the military police section in his vehicle that is driven by Ms. Parker. She testified that she and Mr. Sime had a lively conversation about the incident as she was driving to the police station to provide statements. In the process of being interviewed by the military police, Ms Parker and Mr. Sime were not separated from each other in order to avoid tainting their version of events. Mr. Sime was not injured during the exchange.

#### **THE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE**

The first charge (Section 130 of the *National Defence Act* - Section 266 of the *Criminal Code*)

[14] The first charge alleges a contravention of section 130 of the *National Defence Act* contrary to section 266 of the *Criminal Code*. It is alleged that Corporal Joseph, on or about 19 June 2004, at or near CFB North Bay, Ontario, did commit an assault on Mr. Michael Sime. In addition to the elements of the offence dealing with the identity of the offender as well as the date and place where the alleged offence was committed, the prosecution had to prove beyond a reasonable doubt:

- a) That Corporal Joseph intentionally applied force to Mr. Michael Sime;
- b) That Mr. Michael Sime did not consent to the force that Corporal Joseph intentionally applied and;
- c) That Corporal Joseph knew that Mr. Michael Sime did not consent to the force that Corporal Joseph intentionally applied.

#### **PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT**

[15] And before this court provides its legal analysis, it's appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with the principle fundamental to all criminal trials.

And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[16] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under Criminal Law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[17] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[18] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. 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. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court but also on what that evidence does not tell the court. The fact that a person has been charged is 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 appear on the charge sheet before a court.

[19] In *R. v. Starr* [2000] 2 S.C.R., 144, at paragraph 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.

On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case, Master Corporal Joseph, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused

is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

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

[21] It is not unusual that some evidence presented before the court may be contradictory. Often witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

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

[23] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative? Finally, was the witness' testimony consistent with itself and with the uncontradicted facts?

[24] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and it may well tint a witness' entire testimony.

[25] The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is no reason—unless there is a reason, rather, to disbelieve it.

[26] As the rule of reasonable doubt 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 to fully believe or disbelieve one witness or a group of witnesses. It is

true that this case raises some important credibility issues but it is not one of those cases where the approach on the assessment of credibility expressed by the Supreme Court of Canada in *R. v. W.(D)*. can strictly be applied, because Corporal Joseph admitted to the use of force. The issue is whether the use of force was wrongful in the circumstances as pointed out by defence counsel.

[27] Having instructed myself as to the onus and standard of proof, I will now turn to the question in issue put before the court and address the legal principles.

### **QUESTIONS IN ISSUE**

[28] The defence counsel suggests that the issue before the court is limited to whether or not the giving back of the first pizza box in the manner described by Corporal Joseph, being the only credible and reliable version according to the defence, constitutes an unlawful or wrongful application of force. The defence submits that the court should have a reasonable doubt on this issue. Alternatively, the defence suggests that if the court concludes to an unlawful use of force, the facts and the context of this case are such that the court should acquit because it is so trifling in nature as to trigger the application of *de minimis non curat lex*.

### **ISSUES OF CREDIBILITY**

[29] The nature of the evidence in this case requires this court to make certain findings as to the credibility of various witnesses.

*Mr. Sime*

[30] The court does not find his testimony to be very credible nor reliable. He testified to the best of his knowledge in most areas, except when it raised issues with his own behavior and belligerent attitude towards Corporal Joseph. He tried to portray his involvement in a light mostly favorable to him. He was clearly very angry and upset at this whole situation. In cross-examination, he had to recognize that the manner and the degree of force used by Corporal Joseph was significantly less than what he had described. In cross-examination, he admitted that some details given in direct-examination, had not been disclosed during previous interviews with the police or were simply incorrect. The court is convinced that his perception and recollection of events in direct examination was somewhat exaggerated. This is likely not attributable to a conscious and deliberate attempt to lie, but his recollection of events was likely affected by his emotional state at the time of the incident.

*Ms. Parker*



[31] Ms. Parker testified in an honest and straightforward manner, but her testimony is not very determinative with regard to the crucial facts. It is reasonable to conclude that her version of events or her general understanding of the whole incident was tainted by the discussions she had with her fiancé Mr. Sime on their way to the police station or when they were both waiting for the police to arrive at Corporal Joseph's residence. The court retains from her testimony that both men were angry at each other and that Mr. Sime became angrier when her fiancé realized that the police constable and Corporal Joseph knew each other and when the constable let Corporal Joseph go to McDonalds to return only in 25 minutes.

*Corporal Panke*

[32] Corporal Panke testified in a straightforward matter. He is the police constable who attended at Corporal Joseph residence. He is credible and reliable. He agreed with counsel that he should not have conducted his interviews of Mr. Sime and Ms Parker by asking leading questions as this is not a proper investigative technique because of the risk of tainting and that he did not separate the complainant from his fiancée as he should have. The court believes his testimony when he described how Mr. Sime became more angry when he let Corporal Joseph go and made his comment concerning that if Mr. Sime had known, he would have punched Corporal Joseph in the face, or words to that effect.

*Master Corporal Joseph*

[33] Master Corporal Joseph testified in a calm and straightforward manner. He was not evasive or argumentative. He did not try to embellish his version, except when he said that he put the second pizza box on top of the first box held by Mr. Sime in a gently manner. In the context where Corporal Joseph was admittedly very frustrated at that time and where both persons were angry at each other, the court does not find this part of his version to be credible. That is not to say that he did place the second box on top of the first one in a manner that was either aggressive or rude. The court accepts his testimony when he says that he has had enough of dealing with Mr. Sime who acted like it was the customer's fault and he felt that the first delivery was so late that he should pay the second delivery person when the delivery would be completed to his satisfaction. The court accepts Corporal Joseph's testimony concerning his description of Mr. Sime's emotional state that lead to Corporal Joseph's grabbing of the top box, which was not fully closed, and where he passed or held it out to Mr. Sime who refused to take it and still requested to be paid. The court accepts Corporal Joseph's testimony where he said that Mr. Sime then put his hands up and beside him at the chest and shoulder level to indicate he would not take it, nevertheless, Corporal Joseph then turned the box upward and managed to hold it to Mr. Sime's hands using enough force or pressure that Mr. Sime had to keep it in his hands otherwise it would have fallen on the ground. In other words, Mr. Sime was forced to grab the pizza.

## DECISION

[34] The court answers the following questions:

- a) Did Corporal Joseph intentionally applied force to Mr. Michael Sime?

In the context of an unlawful assault, it must be said that the application of force may be direct or indirect. The force applied may be violent, or even gentle. To be an assault, however, Corporal Joseph must have applied the force intentionally and against Mr. Sime's will. An accidental touching is not an intentional application of force.

The word "intentionally" refers to Corporal Joseph's state of mind when he applies the force. "Intentionally" means "on purpose", in other words, not by accident. The court must consider all the circumstances surrounding the application of force. The court shall take into account the nature of the contact and any words or gestures that may have accompanied it along with anything else that indicates Corporal Joseph's attitude or state of mind at the time he applied the force to Mr. Sime.

The evidence accepted by the court indicates the situation had escalated into a confrontation of egos between the accused and Mr. Sime. Mr. Sime did not listen to Corporal Joseph, nor did he accept any blame or responsibility for the missing dipping sauce and the missing topping on the pizza. Mr. Sime made a phone call to Topper's Pizza using Corporal Joseph's phone where it was ascertained that another delivery person would bring the dipping sauce because that person was delivering pizza nearby and this solution was somewhat acceptable to Corporal Joseph. But Mr. Sime continued to argue with his client. Corporal Joseph became very frustrated, where Mr. Sime was also very annoyed.

The argument escalated when Corporal Joseph refused to pay Mr. Sime, but would rather pay the second driver when he would get the dipping sauce. Mr. Sime, not only rejected this proposal, but requested payment in full immediately. At that point, Corporal Joseph has had enough with this whole situation and told Mr. Sime that he no longer wanted the pizza. Mr. Sime became even more upset and told his customer that he had to pay. Corporal Joseph then grabbed the top pizza box, which was not fully closed, and passed or held it out to Mr. Sime who refused to take it and still requested to be paid. Mr. Sime then put his hands up and beside him at the chest and shoulder level to indicate he would not take it. Despite this clear sign that the

delivery person did not want to take the pizza back, Corporal Joseph turned the box upward and managed to hold it to Mr. Sime's hands using enough force or pressure that Mr. Sime had to keep it in his hands otherwise it would have fallen on the ground. In other words, Mr. Sime was forced to grab the pizza as I said previously.

Mr. Sime describes this moment in a different manner but the court believes Mr. Sime's response in cross-examination when he said that he made a step backward because he was taken by surprise when Corporal Joseph handed out the pizza to him. The story continues when, as Mr. Sime was holding the first pizza box, Corporal Joseph turned on his left side and grabbed the second box. He then puts it on the first box that was being held by Mr. Sime horizontally with his hands up front, and then Corporal Joseph asked Mr. Sime to leave. And this incident culminated with the arrival of the military police.

Having considered these facts and the circumstances in which they occurred, the court is satisfied that the prosecution has establish beyond a reasonable doubt that Corporal Joseph has used intentional force against Mr. Sime when Corporal Joseph turned the box upward and managed to hold it to Mr. Sime's hands using enough force or pressure that Mr. Sime had to keep it in his hands otherwise it would have fallen on the ground.

The second question is:

b) Did Mr. Michael Sime consent to the force that Corporal Joseph intentionally applied?

The court is satisfied that based on the same evidence, Mr. Sime did not consent to the application of force.

Third question:

c) Did Corporal Joseph knew that Mr. Michael Sime did not consent to the force that Corporal Joseph intentionally applied?

The evidence establishes beyond a reasonable doubt that Corporal Joseph was so frustrated with this customer experience that he went ahead anyway, not caring whether Mr. Sime consented or not. Therefore, the court is satisfied that Corporal Joseph had the required knowledge. This is not a case where the prosecution could rely on willful blindness because when Mr. Sime

raised his hands up and beside him at the chest and shoulder level, he indicated clearly that he would not take the pizza box. This was a clear sign that the delivery person did not want to take the pizza back.

[35] Counsel for the defence argues or argue that, should the court conclude to the wrongful use of force, it is so trifling in nature that the doctrine of *de minimis non curat lex* should apply. The defence relies on several decisions in support of its position, but mostly on the cases of *R. v. Lepage* (Sask. Q.B.), [1989] S.J. No. 579 and *R. v. Starratt* (1971), 5 C.C.C. (2d) 32, a judgement from the Ontario Court of Appeal. Based on the evidence that the court accepts as credible, which is mainly found in Corporal Joseph's own testimony, I have concluded that Corporal Joseph's action constitutes an assault in the technical sense of the *Criminal Code*.

[36] There has been considerable discussion amongst jurists over the doctrine of *de minimis non curat lex* on the basis that the criminal justice system should not be concerned with matters that are trifling in nature. Although it has been applied in many cases, the issue of the mere recognition of the existence of such a defence has not been put to rest. To illustrate this point, I refer to the recent case of *R. v. Kubassek* (2004), 188 C.C.C. (3d) 307, a judgement from the Ontario Court of Appeal, where Cutzman J.A stated, starting at paragraph 17:

[17] The Crown's position on this appeal reduces itself to two basic submissions. The first is that the principle *de minimis non curat lex* has no application as a defence in criminal law. The second is that, even if can be raised as a defence in criminal proceedings, the principle was not available in the circumstances of this case.

[18] I agree with the Crown's second submission and do not find it necessary to decide the first.

[19] The principle *de minimis non curat lex* is of considerable antiquity. The first record of the principle in the law reports is found in *Taverner v. Dominum Cromwell* (1594), 78 E.R. 601. Over two centuries later, the meaning of the expression was amplified in a case involving the seizure of a British ship for breach of British revenue laws by exporting logwood from Jamaica to the United States, which prohibited its importation: *The Reward* (1818), 2 Dods. 265, 165 E.R. 1482. In rejecting an invitation by the owners of the ship to reverse its condemnation because of the relative insignificance of the amount of logwood in issue, Sir Walter Scott (later Lord Stowell) said, at 269-270 Dods., 1484 E.R.:

The Court is not bound to a strictness at once harsh and pedantic in the application of statutes. The law permits the qualification implied in the ancient maxim *De minimis non curat lex*. Where there are irregularities of very slight consequence, it does not intend that the infliction of penalties should be inflexibly severe. If the deviation were a mere trifle, which, if continued in practice, would weigh little or nothing on the public interest, it might properly be overlooked.

[20] Within the last decade, the Supreme Court of Canada has touched upon, but not resolved, the question whether the *de minimis* principle provides a defence to a criminal charge. In *R. v. Hinchey* (1996), 111 C.C.C. (3d) 353 (S.C.C.), which involved a charge of corruption of a government employee, L'Heureux-Dubé J., writing for the majority of the Court, acknowledged the possibility that the *de minimis* principle might operate as a defence to criminal culpability, but specifically left the question open. She said in *obiter*, at para. 69:

[A]ssuming that situations could still arise which do not warrant a criminal sanction, there might be another method to avoid entering a conviction: the principle of *de minimis non curat lex*, that "the law does not concern itself with trifles". This type of solution to cases where an accused has "technically" violated a *Code* section has been proposed by the Canadian Bar Association, in *Principles of Criminal Liability* (Ottawa: The Association, 1992), and others: see Professor Stuart, *Canadian Criminal Law*, 3rd ed. (Scarborough, Ont.: Carswell, 1995) at pp. 542-46. I am aware, however, that this principle's potential application as a defence to criminal culpability has not yet been decided by this Court, and would appear to be the subject of some debate in the courts below. Since a resolution of this issue is not strictly necessary to decide this case, I would prefer to leave this issue for another day.

[21] In *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)* (2004), 180 C.C.C. (3d) 353, the Supreme Court upheld the constitutionality of s. 43 of the *Criminal Code*, which provided that schoolteachers, parents or persons standing in the place of a parent were justified in using force by way of correction of a child under their care if the force did not exceed what was reasonable in the circumstances. The decision of the majority was rendered by McLachlin C.J.C. Binnie, Arbour and Deschamps JJ. each wrote dissenting reasons. In Arbour J.'s dissent, she expressed the view that *de minimis non curat lex* does exist as a common law defence: see paras. 200-208. But all that McLachlin C.J.C., speaking for the majority of the Court, said on the subject, at para. 44, was:

Arbour J. argues that parents who face criminal charges as a result of corrective force will be able to rely on the defences of necessity and "*de minimis*". The defence of necessity, I agree, is available, but only in situations where corrective force is not in issue, like saving a child from imminent danger. As for the defence of *de minimis*, it is equally or more vague and difficult in application than the reasonableness defence offered by s. 43.

[22] Like L'Heureux-Dubé J. in *Hinchey* and McLachlin C.J.C. in *Canadian Foundation*, I do not find it necessary to determine in the present case whether the *de minimis* principle operates as a defence in criminal law. I say that because even assuming, for the purpose of disposition of this appeal, that it does, the application of the label "trifling" to Ms. Kubassek's conduct constituted an error of law that is amenable to correction by this court.

[37] In the context of this case, there is no doubt that when Corporal Joseph applied the pizza box on Mr. Sime's raised hands, despite this clear sign that the delivery

person did not want to take the pizza back, this use of force was intentional. Corporal Joseph had decided to deal with that matter as he did. He could have managed this incident differently such as talking himself to a person in authority at Topper's Pizza or in trying to diffuse the situation. He could have maintained his position not to pay for the delivery and even take the pizza outside of his home without having to force it on Mr. Sime. In retrospect, it must be understood that he had every reason to be frustrated and upset. However, this is not a defence in the circumstances. Although he suffered no injury, Mr. Sime was taken by surprise despite his clear gestures that he would not take the pizza back. Corporal Joseph chose to ignore them completely. He rather chose to resolve the matter by himself using force intentionality. In the context of this case, the court believes that to minimize this assault by ascribing to it the designation "trifling" or "trivial" is to ignore the realities of what transpired between Mr. Sime and Corporal Joseph, even if, in the court's opinion, Mr. Sime was highly confrontational and did not try to understand his customer. In the result, I conclude that the facts in the present case cannot be said to fall within the ambit of the defence assuming that it would be a defence available at law. I conclude that the facts of this case cannot be said to fall within the ambit of *de minimis non curat lex*.

[38] It must be understood that when cases fall within the lowest range of criminal responsibility or blameworthiness, the prosecution plays a significant role in the exercise of the prosecutorial discretion. However, when the courts are seized with these very minor offences, they must deal with them according to law. That is not to say that the offender should suffer any punishment that would have an irremediable repercussion as a result of this conviction in light of the circumstances.

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