Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20220504

Docket: CMAC-615

Citation: 2022 CMAC 4

CORAM: **CHIEF JUSTICE BELL**
PHELAN J.A.
SCANLAN J.A.

BETWEEN:

SERGEANT CARL PÉPIN

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 25, 2022.

Judgment delivered at Ottawa, Ontario, on May 4, 2022.

REASONS FOR JUDGMENT BY: SCANLAN, J.A.

CONCURRED IN BY: CHIEF JUSTICE BELL
PHELAN, J.A.

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REASONS FOR JUDGMENT

SCANLAN, J.A.

I. Background

[1] The Appellant, Sergeant (Sgt) Carl Pépin, was charged with four offences under the *National Defence Act:* Sections 114, 115, 124 and 129. He was tried before a General Court

Martial. The second and fourth charges, under 115 and 124 respectively, were dismissed by the Judge. He agreed the Prosecution had not proven a *prima facie* case for those two offences.

[2] The Appellant was found guilty of the charge under s.114 (stealing) and s.129 (conduct to the prejudice of good order and discipline). He was fined $300.00, and received a reprimand.

[3] The Appellant was a reservist in the Canadian Armed Forces, operating in Iraq in 2019. More specifically, he was a machine gunner in a CH-146 Griffon Helicopter operating out of Camp Taji, near Baghdad. He shared space in barracks with another force member: Corporal (Cpl) Tanguay. Within that space, the Appellant had a small private area including a nightstand. While the Appellant was out of the country, in Kuwait, his roommate, accompanied by a Sgt Villeneuve, was looking for an air filter. They chose to look in the private space occupied by the Appellant. During that search for the air filter, they discovered a box of fifty live 9-millimetre rounds of ammunition in the Appellant's nightstand.

[4] The timing of what transpired after the ammunition was discovered is important in relation to the legal issues that arise in this appeal. Cpl Tanguay testified that it was not normal for a box of ammunition to be stored as it was. Soldiers were not permitted to have unauthorized ordnance on base. He knew that if he had the serial and lot number from the box, it could be traced to see to whomever the ammunition had been issued. On October 24, at around 7:00 P.M. (AST) he recorded the serial number and put the box back where he found it. The following morning, Cpl Tanguay and Sgt Villeneuve decided to report the discovery to their chain of

command, Sgt Joannette. Sgt Joannette says he went to look at the box and recorded the lot and serial numbers. Sgt Joannette then advised his chain of command: Major (Maj) Côté (at the time of the alleged offences he held the rank of Captain) and Captain (Capt) Poulin. They, in turn, reported the matter to the Military Police (MP). Warrant Officer (WO) Francuz, an MP, confirmed the complaint was first made to him by Maj Côté and Capt Poulin, on October 25.

[5] Later still Cpl Tanguay, accompanied by WO Francuz and another MP, Cpl Lauder, went to the Appellant's room. At Court Martial, the Judge ruled Cpl Tanguay was by then operating as an agent of the police and that the search and subsequent seizure were illegal. As a result, the box of ammunition was not admissible in evidence at trial.

[6] As I have noted above, it was prior to the seizure by WO Francuz and Cpl Lauder that Cpl Tanguay, Sgt Villeneuve and Sgt Joannette obtained the serial and lot numbers from the box of ammunition. Using those numbers, they were able to determine the ammunition was part of a batch issued for use, and recorded as used in its entirety, at a firing range a few months earlier where the Appellant had served as a Range Monitor.

[7] The Prosecution requested that the evidence obtained prior to the MP involvement be admitted at trial. The Judge referred to the timing of its acquisition in permitting its admission.

[8] Another issue relates to statements the Appellant made to the MP prior to being charged. Upon his return to Iraq, the Appellant was asked by the MP about the ammunition. There were three separate interactions. He asks that statements to the MP be excluded based on

alleged breaches of his *Charter* rights. I will discuss the Appellant's interactions and statements to the MP in greater detail below.

[9] The Appellant also argues that if the statements are not excluded, the Judge erred in his instructions to the Panel by not giving the Panel the instruction provided for in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397) [*W.(D.)*].

II. Issues on appeal

A. *Charter challenges*

(1) Did the Judge make an error in his analysis and application of s. 7 of the *Charter*?

(2) Did the Judge err in his interpretation and application of sections 10(a) and (b) of the *Charter*?

(3) Did the Judge err in permitting a witness for the Prosecution to refer to the evidence otherwise excluded in accordance with s. 24(2) of the *Charter?* This is in reference to the box of ammunition seized from the nightstand by the MP, and which was excluded based on it having been seized in contravention of the *Charter*. The Appellant argues the Judge erred when he allowed evidence from Cpl Tanguay and Sgt Joannette as to the discovery, the recording of the serial numbers, and tracing the box of ammunition back to the Appellant.

B. *Challenge to the instructions to the Courts' Martial Panel:*

(1) Did the Judge err in his legal instructions to the Panel at the Court Martial?

- Should the Judge have instructed the Panel to have used a *R. v. W.(D.)* approach when analyzing the statements of the Appellant?
- (At the commencement of submissions on appeal, Appellant counsel advised the Appellant would not be arguing that there was an error in relation to instruction on motive or in relation to Q.R. & O. Article 36.29.)

III. Analysis

A. *Standard of Review*

[10] The Appellant did not identify any clear error of law in relation to the *Charter* challenge. The Respondent argued all of the Appellant's grounds of appeal were alleged errors of law. I am satisfied that the *Charter* challenges, as framed by the Appellant, are questions of mixed fact and law. Extractable errors of fact are reviewable on the standard of palpable and overriding error. For purposes of appellate jurisdiction, the application of law or a legal standard to a set of facts is considered a question of law: *R. v. Araujo*, 2000 SCC 65, [2000] 2 S.C.R. 992; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381. Upon appellate review, the application of law to facts is characterized as a question of mixed law and fact: *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 144 D.L.R. (4th) 1; *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235.

[11] The box of ammunition and reference to it after admission of the box itself was refused, I characterize as an assertion of an error in law. The standard I apply is one of correctness.

[12] As to mis-direction or non-direction of a jury panel, this is a question of law subject to a standard of correctness (*R. v. Elder*, 2015 ABCA 126, 599 AR 385). This includes situations where judges fail to mention something that should be mentioned. Not all cases of non-direction amount to mis-direction: *R. v. Calnen*, 2019 SCC 6, [2019] 1 S.C.R. 301.

B. *Did the military judge err in his ruling in relation to Section 10(b), right to counsel, and section 7, right to silence under the Charter?*

(1) The Appellant made statements to the MP on three different dates: November 10th, 14th and 16th, 2019. He now asserts they should all have been excluded because of breaches of his *Charter* rights; specifically sections 10(a) and (b) and 7.

[13] At the risk of repetition, I begin the analysis of this issue with a more fulsome review of the background. When the box of ammunition was discovered, the Appellant was not in Iraq, he was in Kuwait. The discovery was reported through the chain of command and eventually to the MP. On October 25, 2019, two MPs, Francuz and Lauder, attended at the Appellant's room and Cpl Tanguay showed them the location of the bullets. Cpl Lauder photographed and seized the box of bullets which he proceeded to securely store elsewhere on the base. A warrant for the seizure of the bullets was subsequently acquired on October 28, and executed on October 31.

[14] The Appellant returned to the base on November 10, 2019 and was informed by his superior, Maj Côté, that WO Francuz wanted to speak to him. That same day the Appellant met briefly with WO Francuz, who informed him of the discovery of the box of bullets in the nightstand. The conversation was brief as the Appellant had things to do and WO Francuz was concerned there may be a language barrier. It was agreed they would talk later. No *Charter* caution or rights were read during that encounter.

[15] On November 14th, Maj Côté informed the Appellant that WO Francuz wanted to meet again that afternoon. The meeting occurred in a room equipped with video and audio recording. At trial, WO Francuz testified that by November 14th, he had not narrowed his suspect

list; had not zeroed in on the Appellant as a suspect, and had no reasonable and probable ground to arrest him. WO Francuz therefore did not read the Appellant his *Charter* caution or rights. At the beginning of the meeting, he emphasized it was voluntary and the Appellant was under no obligation to stay and talk, explaining further that anything said during the interview could be used as evidence in the investigation. He showed the Appellant that while the door was locked from the inside, it could be opened and he was free to leave at any time. The meeting was recorded. In addition to WO Francuz and the Appellant, a Sgt Dumont was present to act as an interpreter if required.

[16] In submissions, Appellant Counsel argued the events that transpired should be considered in the context of the military command and discipline structure. The Appellant argued that when a superior officer tells a soldier to attend at a meeting, it is tantamount to an order, not a mere request, hence the first two meetings should be viewed in the context of a person attending pursuant to an order. Attending pursuant to an order, the Appellant says, means he was not free to leave. The Appellant also suggests that by the time the November 14th meeting occurred, WO Francuz already knew of the ammunition, where it was found, and its recorded use at the firing range. By the end of the meeting, the Appellant was offered a polygraph. That is indicative of the fact that by then the Appellant was at least a suspect. The MP would not be asking non-suspects to take a polygraph. The Appellant argued that it was unreasonable to suggest he was not the number one suspect on November 14, and that he should have been given his *Charter* rights and caution.

[17] Counsel referred to *R.* v. *Grant*, 2009 SCC 32, [2009] 2 S.C.R. 353, suggested the factors in *Grant* were present here, but in reality, were not applied. In *Grant*, two undercover officers doing surveillance said the accused had been acting suspiciously and they asked a uniformed officer in the area to stop him. There were no grounds to detain the accused at that stage and the Trial Judge found the accused was not, in fact, detained. On appeal the court revisited the issue of detention and determined the accused had been detained without reasonable and probable grounds, that it was arbitrary and a breach of s. 9 of the *Charter*. A loaded firearm the accused had, was found to be derivative evidence and ruled to be admissible on the basis that it would not undermine the fairness of the trial.

[18] In the Supreme Court of Canada, the majority determined that the preliminary questioning by the officer was a legitimate exercise of police power but found the questioning took on a character of interrogation and became inherently intimidating to the accused. The majority agreed that although the accused had not been physically detained, he was psychologically detained once the questioning changed from confirmation of his identity to whether he "had anything he shouldn't". McLachlin C.J.C. and Charron J. writing for the majority, noted that appellate courts must approach the trial judge's decision with deference but in that case "… the trial judge's conclusion on the question of detention is undermined by certain key findings of fact that cannot be supported by the evidence." (para. 45). They wrote:

> [46] This is not a clear case of physical restraint or compulsion by operation of law. Accordingly, we must consider all relevant circumstances to determine if a reasonable person in Mr. Grant's position would have concluded that his or her right to choose how to interact with the police (i.e. whether to leave or comply) had been removed.

[19] Like the Appellant, Mr. Grant did not testify so the court did not know his subjective perceptions. The Court considered a reasonable person in his position "(18 years old, alone, faced by three physically larger policemen in adversarial positions)" (para. 50) and concluded his right to choose how to act and whether he could leave had been removed by the police. He was, the Court said, psychologically detained contrary to s. 9 and he was not informed of his *Charter* right to counsel.

[20] As in *Grant* I, like the Trial Judge, look at all the circumstances in this case to determine if the Appellant was detained at or during the November meetings. I have already noted WO Francuz said he did not have reasonable and probable grounds to arrest the Appellant at any time during the November 14th meeting. Although the Appellant was directed by a superior officer to meet with WO Francuz, WO Francuz went to great lengths to assure the Appellant he was not detained, and he was free to leave. The Appellant was not a youthful person, staring down, or virtually surrounded by three physically larger persons. He was a battle-hardened Sergeant working as a helicopter machine gunner - alone in a space with WO Francuz and an interpreter. When WO Francuz spoke to the Appellant on November 10th, he was essentially brushed off as the Appellant said he was busy, and he had things to attend to. None of this points to a person who was psychologically detained on November 14th.

[21] I also ask whether the Appellant was actually detained on November 14th. WO Francuz said during the November 14th meeting that he had not identified the Appellant as a sole suspect and did not have reasonable and probable grounds to arrest him. By that time he knew

where the ammunition was found, the serial numbers had been recorded and revealed that it was reported as having been used.

[22] None of that alters the fact the Appellant was not arrested or detained. Section10 rights are triggered by arrest or detention. *R. v. Suberu*, 2009 SCC 33, [2009] 2 S.C.R. 460, makes it clear, focussed suspicion alone is not enough to establish detention. Focused suspicion with jeopardy and something more than a general inquiry may be sufficient to give rise to a claimant's reasonable belief that he or she is detained or not permitted to leave (see *R. v. Folker*, 2016 NLCA 1, 332 C.C.C. (3d) 57). Here there was evidence the Appellant was out of the country when the ammunition had been found and there was also evidence the Appellant had a dispute with another soldier so as to cloud the issue of who may have placed the box of ammunition in the nightstand.

[23] The Appellant argues that, but for what happened on the 14th, what occurred on the 16th would not have occurred. That may well be true, but in the absence of any infringement of the s.10 rights on the 14th there is nothing about the 16th that can be excluded. It was the Appellant who asked for a meeting with WO Francuz on November 16th. At first, they met outdoors and the Appellant said: "So you want to know how I had the bullets in my possession?" That was something of a spontaneous utterance. WO Francuz immediately stopped the conversation. They met again about one hour later in an interview room, again with Sgt Dumont acting as a translator. WO Francuz repeated what the Appellant said to him earlier that day and explained what the offences of stealing and conduct to the prejudice of good order and discipline meant. He then advised the Appellant as to the *Charter* right to silence and the right to counsel.

They were repeated in French by Sgt Dumont. The Appellant consented to continuing the interview. He claimed: he found the ammunition in a common area, and after taking them for safety reasons, forgot they were in his bag until he noticed them later; he put them in his nightstand and forgot about them again.

[24] In a decision rendered February 3rd, 2021 the Judge ruled that the s. 10(a) and (b) rights and the right to silence had not been violated, hence the statements of November 10th, 14th, and 16th were all admissible. In his decision, the Judge found the Appellant had not been physically or psychologically detained at the time he gave his statements and that they were free and voluntary. The judge referenced *R. v. Suberu, supra,* and *R. v. Grant, supra,* in relation to the issue of whether the appellant had been psychologically detained, concluding that there was no detention at the time of any of the statements. He also ruled that the right to silence had not been violated.

[25] On the issue of free and voluntariness, the Judge relied upon Rule 42 of the *Military Rules of Evidence*, C.R.C., c. 1049 and *R. v.* Oickle, 2000 SCC 38, [2000] 2 S.C.R. 3, in ruling the statements admissible. He concluded the Prosecution had demonstrated the free and voluntary nature of statements beyond a reasonable doubt.

[26] I am not convinced the Judge erred in his conclusions related to the alleged *Charter* breaches. I would dismiss this ground of appeal.

C. *Did the military judge err in permitting a witness for the Prosecution to make reference to the evidence otherwise excluded under Section 24(2) of the Charter?*

[27] This relates to the box of ammunition found in the nightstand in the Appellant's private space at Camp Taji. As noted, the box of ammunition was eventually seized by the MP. In a decision rendered February 3, 2021 the Judge ruled seizure of the box of ammunition was in breach of the s. 8 of the *Charter* (protection against unreasonable search and seizure). The evidence was excluded pursuant to Section 24(2) of the *Charter.*

[28] Despite this exclusion, the Judge allowed non-MP witnesses to testify about having found the box of ammunition in the Appellant's nightstand and about having obtained and traced the serial and lot numbers back to the firing range where the Appellant had served as Range Monitor.

[29] The Appellant argues that once the Judge ruled that the MP breached the *Charter* in relation to their search of the nightstand and the seizure of the box of ammunition, any reference to that ammunition and where it was found should have been excluded.

[30] I am satisfied the discovery of the ammunition and the serial numbers obtained and traced prior to the involvement of the Military Police is determinative of this issue. I had noted above, after the initial discovery Cpl Tanguay and Sgt Villeneuve returned the ammunition to where they found it. The discovery was not reported through the chain of command to Sgt Joannette until the following day. Sgt Joannette's evidence was that he went to the Appellant's room to obtain the lot number and serial numbers. The serial and lot numbers on this specific box

of ammunition showed it as having been used in its entirety at the July 8 firing range where the Appellant served as a Range Monitor. The discovery of the ammunition was then reported to Maj Côté. Evidence as to the location and identifying lot and serial numbers existed independent of any search by the MP. It was not the product of any illegal search or seizure by persons in authority, or agents of the state.

[31] The Judge examined the lawfulness of the subsequent search and seizure by MP in the context of the *Charter*. That involved a consideration as to what occurred when the Police entered the private space of the Appellant, first viewing and photographing, then removing the box of ammunition. The MP's involvement was separate and distinct from the accidental discovery in the nightstand. When the ammunition was discovered, and the numbers obtained from the box, Cpl Tanguay, Sgt Villeneuve, and Sgt Joannette were not state actors.

[32] The provisions of the *Charter* are intended to protect persons from search or seizure by police authorities absent legal justification. When searches or seizures are not conducted in accordance within the *Charter*, courts have the ability to impose sanctions, including excluding the evidence. In his February 3rd decision, the Judge determined the Appellant's s. 8 rights, protecting him from unreasonable search and seizure, had been violated and excluded the box of ammunition from evidence, referencing section 24(2) of the *Charter*.

[33] Normally a decision to exclude evidence is final absent a change in circumstances (*R. v. Cole*, 2012 SCC 53, [2012] 3 S.C.R. 34 at para. 100). It is not a change in circumstances that

distinguishes this case. It is the timing of the independent discovery of the ammunition by non-state actors that makes the difference.

[34] This case is somewhat similar to the situation in *R. v. Fliss*, 2002 SCC 16, [2002] 1 S.C.R. 535, where tape recordings were excluded from evidence but not the testimony of a police officer who could independently recall the conversation with the accused. In this case, the separation is even more pronounced than it was in *Fliss*.

[35] The Respondent also compared this to case to *R. v. Giguère*, 2015 QCCQ 1354, 18 C.R. (7th) 387, saying had the box of ammunition itself been removed by Cpl Tanguay or Sgt Villeneuve before police intervention there would have been no doubt as to the admissibility of the testimony of the discovery. In *Giguère,* pornographic photos of young children were discovered accidentally by the partner of the accused. She was a non-state actor searching for music files. In spite of the photos having been excluded under s. 24, *viva voce* evidence as to the images found on the computer was allowed to prove the offence.

[36] I agree with the Military Judge in this case. The subsequent search and seizure by the MP did not affect the admissibility of the evidence obtained prior to police involvement. I see no error in allowing the Panel to hear the *viva voce* evidence related to the discovery of the box of ammunition, and the tracing of the serial and lot numbers. This was evidence obtained independent of the police and not subject to scrutiny pursuant to s. 8 provisions of the *Charter*.

D. *Jury instructions: Should the judge have instructed the Panel to have used a R. v. W.(D.) approach when analyzing the statements of the appellant?*

[37] Counsel for the Appellant argues that even though Sgt Pépin did not testify during his trial, it was an error not to instruct the Panel using a *W.(D.)* formula. This, they suggest is because, even though he did not testify, there were two audio-video statements of the Appellant before the Panel, and at least portions of them were exculpatory. Referencing the exculpatory portions of the statements the Appellant now argues a *W.(D.)* style instruction was required.

[38] During the pre-charge conference, the Prosecution raised the question as to whether special instructions were warranted in relation to the statements given to the police. The Judge said the Appellant's statements were not testimony and the credibility and reliability of those statements must be done in the normal manner rather than using the *W.(D.)* approach. Defence counsel agreed with the Judge, stressing that his client had not testified and the *W.(D.)* instruction was not required. There is no allegation of ineffective assistance of counsel here.

[39] It is incongruous for trial counsel to adopt a strategy at trial and then, in the absence of any assertion of ineffective assistance of counsel, to then argue on appeal that the Judge was wrong. The statements as admitted were both exculpatory and inculpatory. It is understandable that counsel may not want the Panel to focus too much on the inculpatory aspects of the statements. A failed trial strategy should not form the basis of an appeal unless it is clear that an injustice would result (see *Calnen, supra*). While trial counsel's position is not determinative of the issue, I am satisfied that, in this case, it is indicative of the fact that if there was any flaw it was neither serious nor prejudicial.

[40] Defence counsel at trial was very involved in the jury charge discussions. In *R. v. Polimac,* 2010 ONCA 346, 254 C.C.C. (3d) 359, Doherty J.A., stated at paragraph 96:

> Counsel's duty to assist the court in fulfilling its obligation to properly instruct the jury, referred to by Fish J. in *R. v. Khela*, [2009] 1 S.C.R. 104 at para. 49, … takes on added significance where counsel has been given a full copy to the proposed instructions and an ample opportunity to vet them, and has engaged in a detailed pre-trial dialogue with the trial judge. In those circumstances, counsel's position at trial becomes very important when evaluating the complaints, raised for the first time on appeal, that matters crucial to the defence were not properly addressed by the trial judge in her instructions.

[41] Ultimately, it is for the trial judge to appropriately instruct the jury (*R. v. Jacquard*, [1997] 1 S.C.R. 314, 113 C.C.C. (3d) 1, para. 38; *R. v. Khela*, 2009 SCC 4, [2009] 1 S.C.R. 104). Here, in the pre-charge conference counsel did not want *W.(D.)* to go to the jury. He also had an opportunity to address the Judge after closing arguments, after receiving a draft jury charge and after the Panel was instructed. There are cases where the lack of instruction is so serious to warrant a new trial (See for example *R. v. Arcangioli*, [1994] 1 S.C.R. 129, 87 C.C.C. (3d) 289, and *R. v. Chambers*, [1990] 2 S.C.R. 1293, 59 C.C.C. (3d) 321). This is not one such case.

[42] There have been a number of cases where exculpatory evidence has been introduced by the Prosecution through crown witnesses or out-of-court statements made by the accused, and it was subjected to a *W.(D.)* analysis (see: *R. v. Ryon*, 2019 ABCA 36, 371 C.C.C. (3d) 225; *R. v. S.L.*, 2020 NSSC 95, 169 W.C.B. (2d) 386). Courts in many provinces have taken the position that where there is exculpatory evidence introduced by the Prosecution whether the accused testifies or not, a *W.(D.)* instruction is warranted (see: *R.S.L. v. R.*, 2006 NBCA 64, 209 C.C.C. (3d) 1; *R. v. Brass*, 2007 SKCA 94, 226 C.C.C. (3d) 216; *R. v. Thomas*, 2008 MBCA 75, 234

C.C.C. (3d) 520; *R. v. D.(B)*, 2011 ONCA 51, 266 C.C.C. (3d) 197; *R. v. Vollant*, 2011 QCCA 1309, 2011 CarswellQue 8438; *R. v. Purchase*, 2015 BCCA 211, 324 C.C.C. (3d) 257).

[43] It is important that the underlying principles of the *W.(D.)* instructions are communicated (see for example *R. v. Dinardo*, 2008 SCC 24, [2008] 1 S.C.R. 788; *R. v. S.(W.D.)*, [1994] 3 S.C.R. 521, 93 C.C.C. (3d) 1; *R. v. R.E.M.*, 2008 SCC 51, [2008] 3 S.C.R. 3). In this case, the inculpatory and exculpatory excerpts were before the Panel. The accused's credibility was challenged by the Crown in relation to the exculpatory portions of the statements. Defence counsel countered, criticizing the Crown's assertion that the inculpatory portions should be believed but not the exculpatory part. Credibility, including the Appellant's statements, was clearly before the Panel.

[44] I refer to the comments of Justice Abella in *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 SCR 5, speaking of the purpose of *W.(D.)* instructions where she said at para. 8:

> It is noteworthy that in *W.(D.)* itself, despite the trial judge's error in instructing the jury that they were engaged in a credibility contest, the conviction was upheld. This of course does not give trial judges licence to wrongly analyse credibility issues, but it does serve to remind that what *W.(D.)* offered was a helpful map, not the only route. Its purpose was to ensure that triers of fact – judges or juries – understand that the verdict should not be based on a choice between the accused's and the Crown's evidence, but on whether, based on the whole of the evidence, they are left with a reasonable doubt as to the accused's guilt … As Fish J.A. noted in dissent in *R. v. Levasseur*, (1994). 89 C.C.C.(3d) 508 (Que. C.A.), at p. 532, in language approved by this Court ([1994] 3 S.C.R. 518 (S.C.C.)):
>
> The trial judge must make it indisputably clear to the jury that reaching a verdict is not simply a question of choosing the more believable of the two competing stories …. To protect the innocent from conviction, we require proof beyond a reasonable doubt. The application of this standard to questions of credibility is an

> entrenched part of our law. The direction most consonant with this principle is a clear and specific instruction, where credibility is an important issue. That the jury must apply to it the test of reasonable doubt.

[45] There are no magic words to be used in a *W.(D.)* type instruction and a *W.(D.)* type instruction will be preferable where there is potentially exculpatory evidence for an accused within the Crown's evidence. However, the Court must focus on substance over form – the substance of the *W.(D.)* must be captured. Although a *W.(D.)* type of instruction might have been preferred here I am not convinced the lack of that instruction justifies setting aside the verdict. A full reading of the instructions to the Panel reveals a clear instruction on the concept of proof beyond a reasonable doubt. It was clear the Crown alone had the burden of proving its case beyond a reasonable doubt. The Judge explained that burden is never displaced:

> Le fardeau de la preuve appartient à la poursuite et n'est jamais déplacé.

[46] The Panel was instructed as to the requirement to consider the evidence as a whole. There is no single incantation to convey the principles set out in *W.(D.)*. The Judge made it clear that all the evidence must be weighed.

[47] I am not convinced the instruction as given worked a serious injustice on the Appellant. The fact his trial counsel urged the Judge not to include a *W.(D.)* instruction supports this determination. For trial counsel to adopt strategy and appellant counsel to then use that as a basis of appeal is inconsistent at best, and unsustainable in the absence of any apparent injustice.

[48] I would dismiss this ground of appeal.

IV. Disposition

[49] I would dismiss the appeal.

"J. Edward Scanlan"
J.A.

"I agree.
B. Richard Bell, Chief Justice"

"I agree.
Michael Phelan, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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