Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20150505

Docket: CMAC-575

Citation: 2015 CMAC 1

CORAM: **VEIT J.A.**
ZINN J.A.
ABRA J.A.

BETWEEN:

ORDINARY SEAMAN CAWTHORNE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Vancouver, British Columbia, on February 20, 2015.

Judgment delivered at Ottawa, Ontario, on May 5, 2015.

REASONS FOR JUDGMENT OF THE COURT BY: ZINN, J.A.

CONCURRED IN BY: ABRA J.A.

DISSENTING REASONS BY: VEIT J.A.

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REASONS FOR JUDGMENT

ZINN, J.A.

[1] Ordinary Seaman Cawthorne was convicted by a general court martial of two offences under section 130 of the *National Defence Act*: one count of possession of child pornography and one count of accessing child pornography. He appeals those verdicts.

Background

[2] The appellant was serving on the HMCS ALGONQUIN, which was on exercise near Hawaii. Two days after leaving Hawaii, on July 20, 2012, an iPhone was found by an able seaman who, in an effort to determine its owner, opened it and swiped the screen. He saw an image of a man having sex with a child and took the iPhone to a superior. The iPhone belongs to the appellant.

[3] The appellant candidly admitted accessing and possessing pornography on his iPhone, but not child pornography. He testified that he has been downloading pornography for "a very large number of years" and that he was looking for images of 18 and 19 year old girls. He testified that he would search 'teenage girls', access a website that contained an image board of the type of images he was interested in, and then he would download the entire thread of images. He testified that he did not review each image as they were downloading and had not reviewed any of the child pornography images found on his phone. The focus of the trial was on whether the Crown proved, beyond a reasonable doubt, that the appellant knowingly accessed child pornography, and was knowingly in possession of child pornography.

Grounds of Appeal

[4] Three grounds of appeal are advanced:

1. That the prosecution breached the rule in *Browne v. Dunn*, (1893) 6 R. 67, (H.L.) [*Browne v. Dunn*] when, in closing argument and referring to the evidence that some pictures on the iPhone had been deleted, submitted to the panel that "there is only one person who would be deleting them: Ordinary Seaman Cawthorne"

without having first cross-examined the appellant on the proposed inferences that he had deleted child pornography from his iPhone, and had checked the images before deleting them;

2. That the military judge erroneously allowed into the trial the images from the appellant's iPhone which had been ruled to have been obtained as a result of an unconstitutional search and seizure; and

3. That the military judge erred, notwithstanding his subsequent directions to the panel, in refusing to grant a mistrial after the appellant's girlfriend, when improperly asked in re-examination whether the accused "did in fact do those things?" responded "yes" before the objection of the appellant to the question was sustained.

[5] For the reasons that follow, I would dismiss the first two grounds of appeal and would allow the appeal on the third ground.

Analysis

1. Was the Rule in Browne v. Dunn breached?

[6] An expert witness called by the prosecution testified that images are numbered sequentially when they are stored in an iPhone. He had examined the appellant's iPhone and found that there were gaps in the numbering and therefore concluded that some images were missing.

[7] In his closing, the prosecutor put it to the panel that they could draw an inference that where a picture was missing, it was likely the result of it being deleted by the user of the iPhone and that could be used to infer knowledge of possession by the user of those images preceding or following the missing images.

[8] The appellant complains that the prosecutor's submission in closing breached the rule in *Browne v. Dunn* because the suggested inferences had not been put to him.

[9] The principle of fairness outlined in *Browne v. Dunn* is often referred to as a "Rule"; however, it is well to remember that a trial judge must apply not a particular mantra, but a principle. The principle is described in *R. v. Drydgen*, 2013 BCCA 253, where the British Columbia Court of Appeal approved the following from Sopinka, Lederman, Bryant & Fuerst, *The Law of Evidence in Canada*, 3rd ed. (Markham: LexisNexis, 2009):

> Accordingly, if counsel is considering the impeachment of the credibility of a witness by calling independent evidence, the witness must be confronted with this evidence in cross-examination while he or she is still in the witness box.
>
> The rule applies not only to contradictory evidence, but to closing argument as well. In *Browne v. Dunn*, Lord Halsbury added:
>
> > To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the panel afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

[10] As this extract demonstrates, the point of *Browne v. Dunn* was to characterize as unfair a process pursuant to which a witness would finish testifying without having had the opportunity of addressing an important negative claim from the party opposite. Nothing of that sort occurred here. The expert evidence which allowed the inference that Ordinary Seaman Cawthorne had deleted some pornographic images from his iPhone was led by the prosecution long before Ordinary Seaman Cawthorne was called upon to present his case, or to lead evidence himself. The appellant had the opportunity of cross-examining the expert, the opportunity of leading expert evidence of his own, and of testifying himself in relation to the obvious inference that could be drawn from the expert evidence.

[11] As noted by the Ontario Court of Appeal in *R. v. Sadikov*, 2014 ONCA 72 at paras 49-50, *Browne v. Dunn* is essentially a direction which applies to cross-examiners:

> What is termed the "rule in *Browne v. Dunn*" is a principle designed to provide fairness to witnesses and parties. It requires counsel to give notice to those witnesses whom the cross-examiner intends later to impeach. However, it is not a fixed rule: the extent of its application resides within the discretion of the trial judge. Whether, or to what extent, the rule will be applied depends on the circumstances of each case: *R. v. Giroux* (2006), 207 C.C.C. (3d) 512 (Ont. C.A.), at para. 42, leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 211, [2006] 2 S.C.R. viii.
>
> The so-called rule in *Browne v. Dunn* is a rule for cross-examining counsel to follow when counsel proposes to impeach a witness' account of events later by introduction of contradictory evidence. While counsel's failure to follow the *Browne v. Dunn* rule may resonate in a trial judge's findings of fact at the end of the trial, neither the rule nor any analogy to it prohibits findings of fact adverse to a witness' credibility absent compliance with *Browne v. Dunn*.

[12] Here, the challenge to the appellant's credibility had already been launched from the evidence of the Crown's expert; indeed, that is why the appellant responded to that evidence by testifying that he had not deleted any images.

[13] In the circumstances of this case, there can be no question of the importance and relevance of the expert's evidence on the issue of deleted images. The appellant was well aware of the prosecution's approach to this issue and had the opportunity of making full answer and defence in relation to it. There was no ambush; there was no trial unfairness on this point.

[14] Moreover, in his closing the military judge clearly instructed the panel that it need not accept the inference the prosecution suggested. He said:

> It must be noted that the expert witness did not provide the court with a specific opinion as to the precise meaning with regard to missing specific images in his retracted [*sic*] report. The prosecution has proposed that you could draw an inference that where a picture was missing in the report, it meant that it was likely the result of it being deleted by the user of the phone and that could be used to infer knowledge of possession by the user of those images preceding or following missing the images.
>
> Although such an inference may be made, you may find on the basis of the whole evidence that there are other reasonable inferences that can be made on the meaning of a missing image in the report. [emphasis added]

[15] There is no breach of *Browne v. Dunn*, nor was there any unfairness to the appellant by the prosecution suggesting that he was the most likely person to have deleted the images, and that they could infer from that that he knew what was on his iPhone. I would reject this ground of appeal.

2. Should the images obtained as a result of an unconstitutional search and seizure have been excluded?

[16] The military judge found that the search and seizure of Ordinary Seaman Cawthorne's iPhone were unlawful and a violation of his section 8 *Charter* rights. However, he declined the appellant's motion to exclude the evidence obtained from the iPhone.

[17] Subsection 686(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, states that on an appeal from conviction, a court may allow the appeal if it is of the opinion that the verdict is unreasonable or cannot be supported by the evidence, the trial judge committed an error of law, or there was a miscarriage of justice.

[18] Subsection 24(2) of the *Charter* provides that where "evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this *Charter*, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute."

[19] The Supreme Court of Canada in *R. v. Côté*, 2011 SCC 46 at para. 44, has instructed that on an application under subsection 24(2) of the *Charter* to exclude evidence, where the "judge has considered the proper factors and has not made any unreasonable finding; his or her determination is owed considerable deference on appellate review." In coming to his conclusion that the admission of the evidence would not bring the administration of justice into disrepute, the military judge took into account the appellant's rights of privacy, the delay in obtaining a search warrant, the innocent initial examination of the cell phone, the taking of legal advice by

the persons in authority on the ship, the good intentions of the military personnel throughout, and the fact that the leading decisions on cell phone privacy, such as *R. v. Vu,* 2013 SCC 60 and *R. v. Fearon,* 2014 SCC 77, had not been published when this incident arose.

[20] I concur with the finding of the military judge that there was no bad faith on the part of any of the state actors involved in the search and seizure, no evidence of any pattern of abuse, no evidence that any of the ship's personnel were trained in the law, and no evidence that the initial search was for any purpose other than identifying the owner of the iPhone.

[21] The military judge considered all of the relevant factors, made no unreasonable finding, and his decision is deserving of deference. I would reject this ground of appeal.

3. Should there have been a mistrial following the inadmissible reply evidence?

[22] The inadmissible evidence was given by the accused's former girlfriend, a witness for the prosecution, during her re-examination. During her examination-in-chief, she was asked a number of questions bearing on the evidence required to prove the charges. She was a hesitant and largely unhelpful witness for the prosecution.

[23] She testified that at Christmas time the appellant told her that when he was taken off the HMCS ALGONQUIN in Hawaii it wasn't just because of depression and sea sickness, as she had believed: "It was also because he'd been arrested for having inappropriate images on his phone." She testified that she did not "remember the exact specific words he used in the conversation, but that was the gist of it." When asked if he ever said anything about having images on his iPhone, she responded: "Not specifics that I can remember."

[24] She was asked if there was ever a time when they had further discussion and she responded: "I don't remember specifics of conversations, but I do remember a conversation where I asked him what types of images were on his phone." When asked what he told her, she testified: "I don't remember exactly what he said so I don't remember the specifics. He said they were children and I believe that he said they were both male and female." That was all she was able to recall.

[25] Her cross-examination was very brief — counsel asked only two questions. First, it was put to her that the conversations she had with the appellant amounted to him advising her of the allegations that had been made against him. She agreed. The second and final question was to much the same effect. She was asked: "So though you don't recall the context of — the exact wording of those communications, in essence they were advising you of what allegations had been made against him?" She responded: "Yeah."

[26] The re-examination consisted of the following exchange:

> Q. During any of those conversations, do you recall him saying that he did in fact do these things?
>
> A. Yes.

The answer was given before the defence could voice its objection.

[27] The military judge quickly sustained the objection, ruling that the evidence given on re-examination was inadmissible. He stated to the panel: "This question and this answer should be ignored by the panel. Clearly it does not arise from the cross-examination."

[28] The defence brought a motion for a mistrial on the basis of the prejudice arising from the inadmissible re-examination evidence. In his ruling, the military judge, agreed with the defence that the re-examination evidence could be understood as an admission by Ordinary Seaman Cawthorne that he knew that he had downloaded child pornography onto his iPhone and knew that he was in possession of it:

> I consider that the evidence ruled inadmissible may be relevant to a central issue of this case; namely, the *mens rea*, but I would add that this evidence could also be relevant to the *actus rea* with regard to the element of possession.

[29] The military judge dismissed the motion. He expressed his view that his earlier instruction to the panel was sufficient. Nonetheless, out of an abundance of caution, he issued a further midtrial instruction to the panel, as follows:

> You will recall that I gave you a specific instruction after the testimony of ... a witness that was called by the prosecution. You will recall that I asked you to ignore the unique question and answer that arose from the re-examination of the witness by counsel for the prosecution, because they were the product of improper cross-examination [*sic*].
>
> This instruction remains, but I further instruct you that you shall not draw any adverse inference against the accused Ordinary Seaman Cawthorne, from that inadmissible evidence because it is both unreliable and prejudicial. I therefore instruct you to completely and absolutely ignore the inadmissible evidence and that you shall evacuate from your mind anything about it.

[30] Here, the crux of the Crown's case was that the appellant had knowingly accessed child pornography and had thereafter retained it in his possession. In my view, the inadmissible evidence that Ordinary Seaman Cawthorne admitted "that he did in fact do these things" can only be taken as a reference to the "allegations ... made against him," the subject of the

immediately preceding question on cross-examination. The prosecutor acknowledged as much in his immediate response to the objection when he stated:

> Your Honour, I believe my friend's question was with reference to conversations: did he make — did he say that these were the allegations, and I simply asked, Did he also make the — say that he had in fact done these things. The — by stating "allegations" only, my friend left unclear, I submit, the rest of the conversation. [emphasis added]

[31] In *R. v. Khan*, 2001 SCC 86 at para. 26, the Supreme Court observed that there are two types of errors: There are harmless errors that are of a minor nature and can have no impact on the verdict and there are serious errors which would "justify a new trial, but for the fact that the evidence adduced was seen as so overwhelming that the reviewing court concludes that there was no substantial wrong or miscarriage of justice." Accordingly, this court must consider whether there was overwhelming evidence that Ordinary Seaman Cawthorne had knowingly accessed child pornography and had thereafter retained it in his possession.

[32] The evidence of the appellant's *mens rea* in relation to the offences for which he was charged consisted of the following: (i) his testimony about how he downloaded pornography onto his iPhone, accessing a site and then downloading the pictures without examining them; (ii) the absence of evidence that he made inquiries about the kind of pornography that he downloaded; (iii) the fact that a child pornography image came up as soon as the iPhone was swiped; (iv) the appellant's evidence that it was his habit to watch the downloaded digital material after his shift (although he testified that he had not done so since the ship had left Hawaii which was where the child pornography had been downloaded); and (v) an inference that the appellant had seen the images on the iPhone which the prosecution submitted could be

inferred from the fact that some images were deleted from the iPhone. Taken in its entirety, it is my view that this evidence was not overwhelming evidence of knowledge by the appellant.

[33] There was no evidence that the appellant had to or did examine the pictures as he downloaded them. There was no evidence that the image that presented itself when the iPhone was swiped by its finder had to have been last viewed just before it was closed, nor was there any evidence that it was last or ever viewed by the appellant. There was no evidence that pictures could only be deleted from the iPhone by taking a deliberate action after viewing them. There was no direct evidence that the appellant had viewed or was aware of the child pornography on his iPhone.

[34] The prosecution's case, at best, was that the knowledge of the appellant about the child pornography on his iPhone could be inferred from other evidence. Could that evidence alone have been sufficient evidence for a properly instructed jury to conclude beyond a reasonable doubt that the appellant had the *mens rea* necessary to convict? I think not.

[35] In my view, the additional introduction of a confession that the appellant did the things for which he was charged, was not only pivotal and central to the case, but was likely to be very weighty, whether consciously or not, in the panel's assessment of the evidence given that the defence had taken the irrevocable step of not cross-examining the former girlfriend about the nature of the relevant conversations she had with the accused during the period following the charges being laid.

[36] The military judge's warning to the panel to ignore the re-examination evidence was appropriately prompt, decisive, direct and complete. I accept that the panel was not a typical jury. It was comprised of military officers holding the rank of captain and above. This was a jury whose members had a uniform high degree of achievement as members of the military, and they were presumably accustomed to obeying orders.

[37] Nevertheless, because there was no overwhelming evidence of guilt based on the admissible evidence, it cannot be said that the panel's verdicts would have been the same, absent hearing the re-examination evidence of the former girlfriend which amounted to evidence of a confession from the appellant. In my view, a mistrial ought to have been granted.

Conclusion

[38] For these reasons, I would allow the appeal, set aside the findings of guilt and direct a new trial by court martial on the two charges laid against Ordinary Seaman Cawthorne.

"Russel W. Zinn"
J.A.

"I agree.
Douglas N. Abra"

VEIT, J.A. (DISSENTING REASONS)

[39] I agree with my colleagues on the disposition of the first two grounds of appeal.

[40] However, with respect, I have come to a different conclusion concerning the third ground of appeal, and, consequently, on the outcome of the appeal. I am of the view that, in deciding not to grant a mistrial, the military judge committed no error of law: the trial judge was in a privileged position to determine if the panel had understood, and would abide by, his instruction to ignore the impugned evidence obtained on re-examination. Moreover, in light of the overwhelming evidence of the accused's knowledge of the existence of child pornography on his smartphone, any error in the treatment of the impugned evidence by the trial judge would come within the *curative proviso* in s. 686 of the *Criminal Code*. I would therefore deny the appeal.

Facts and trial proceedings

[41] I find it necessary to expand slightly on the evidence and trial proceedings referred to by my colleagues. First, I refer to the evidence relating to the accused's cellphone, an iPhone 4S. The trial evidence establishes that the operation of such a cellphone is well within the experience of the trier of fact. According to the prosecution's expert, the accused's smartphone is one of the major types of cellphones: Appeal Book, Vol. II at p. 275. As the defence itself noted in objecting to the admissibility of expert evidence relating to that cellphone:

> We could power up the phone and pass it amongst the panel and they could look at it or we could provide it to them in hardcopy of what was on the phone. There is no expertise there and there's no issue there and there's nothing that requires the opinion of an expert. There are no inferences that my friend is suggesting the

> panel is going to need to make that this expert can assist with making.
>
> Appeal Book, Vol. II at p. 332, lines 10-17

[42] The defence made similar submissions with respect to the fact that it was unnecessary to hear expert evidence with respect to the ordinary operation of smartphones: Appeal Book, Vol. II at p. 334, lines 12-18.

[43] Although the trial judge allowed the evidence of the witness Birnie to be heard as expert evidence in certain specified areas, as is clear from his instructions to the panel concerning the evidence of the witnesses Butchers, Whitty and Buxton, the military judge also recognized that lay people might well have useful opinions about well recognized operations of the major types of smartphones: see for example Appeal Book, Vol. IV at p. 738, lines 21-32. The members of the panel might similarly be expected to have some experience with smartphones; they were entitled to use that experience and their common sense in assessing the evidence before them.

[44] Second, I refer to the entire evidence from the accused's former girlfriend: see Appendix A. There are at least two portions of that witness' evidence in chief which a trier of fact might consider to be a "confession" of knowing possession of child pornography by the accused to the witness: in the first highlighted portion, the witness was not speaking of allegations which had been made, but "what types of images were on his phone". The accused replied "[images] of children . . ." In the second highlighted portion, the witness was not referring to allegations, but to the accused's actions: "I ended the relationship because I didn't want his actions to come back onto me in the future." It may well be that the witness was uncomfortable, perhaps even reticent;

however, the military judge and the panel were in a better position than an appeal court to assess the meaning and effect of her evidence.

[45] Third, I refer to the entire instructions given to the panel by the military judge on the subject of the re-examination evidence: see Appendices A and B. To complete the picture of the instructions given to the panel, I also refer to Appendix C, the military judge's summation to the panel, which summation does not refer to the impugned re-examination.

[46] Fourth, I refer to the complete decision of the military judge in denying the application for a mistrial: see Appendix B.

a. Role of appeal court in determining whether a new trial should be granted

[47] My colleagues rightly, in my view, point to the decision of the Supreme Court of Canada in *R. v. Khan*, 2001 S.C.C. 86 [*Khan*], as the guide to whether a new trial should be granted. That court emphasized that s. 686 established new parameters for such decisions:

> [31] In addition to cases where only a minor error or an error with minor effects is committed, there is another class of situations in which s. 686(1)(b)(iii) may be applied. This was described in the case of R. v. S. (P.L.), [1991] 1 S.C.R. 909, at p. 916, where, after stating the rule that an accused is entitled to a new trial or an acquittal if errors of law are made, Sopinka J. wrote:
>
> > There is, however, an exception to this rule in a case in which the evidence is so overwhelming that a trier of fact would inevitably convict. In such circumstances, depriving the accused of a proper trial is justified on the ground that the deprivation is minimal when the invariable result would be another conviction.

> Therefore, it is possible to apply the curative proviso even in cases where errors are not minor and cannot be said to have had only a minor effect on the trial, but only if it is clear that the evidence pointing to the guilt of the accused is so overwhelming that any other verdict but a conviction would be impossible (see R. v. Nijjar, [1998] 1 S.C.R. 320; Alward v. The Queen, [1978] 1 S.C.R. 559; Ambrose v. The Queen, [1977] 2 S.C.R. 717; Dufresne v. La Reine, [1988] R.J.Q. 38 (C.A.); R. v. Welch (1980), 5 Sask. R. 175 (C.A.)).

[48] Those principles were recently re-affirmed by the Supreme Court of Canada in *R. v. Sekhon*, 2014 SCC 15:

> *The Curative Proviso is Appropriate in These Circumstances*
>
> [52] Section 686(1)(b)(iii) of the *Criminal Code*, known as the curative proviso, states:
>
> > 686. (1) On the hearing of an appeal against a conviction or against a verdict ... the court of appeal
> >
> > (*a*) may allow the appeal where it is of the opinion that
> >
> > ...
> >
> > (ii) the judgment of the trial court should be set aside on the ground of a wrong decision on a question of law, or
> >
> > (*b*) may dismiss the appeal where
> >
> > ...
> >
> > (iii) notwithstanding that the court is of the opinion that on any ground mentioned in subparagraph (*a*)(ii) the appeal might be decided in favour of the appellant, it is of the opinion that no substantial wrong or miscarriage of justice has occurred;
>
> [53] As this Court has repeatedly asserted, the curative proviso can only be applied where there is no "reasonable possibility that the verdict would have been different had the error ... not been made" (*R. v. Bevan*, [1993] 2 S.C.R. 599, at p. 617, aff'd in *R. v.*

Khan, 2001 SCC 86, [2001] 3 S.C.R. 823, at para. 28). Flowing from this principle, this Court affirmed in *Khan* that there are two situations where the use of s. 686(1)(*b*)(iii) is appropriate: 1) where the error is harmless or trivial; or 2) where the evidence is so overwhelming that, notwithstanding that the error is not minor, the trier of fact would inevitably convict (paras. 29-31).

[54] In my view, this case falls squarely within the latter category. As the trial judge ably demonstrated, Mr. Sekhon's evidence is a contrivance from beginning to end and need not be considered. With his evidence off the table, had the Impugned Testimony been excluded, the remaining admissible evidence pointing towards Mr. Sekhon's guilt is overwhelming. I have reviewed this evidence earlier and need not repeat it. Suffice it to say that the circumstantial evidence bearing on Mr. Sekhon's knowledge can lead to only one rational conclusion -- that Mr. Sekhon was aware of the cocaine secreted in the truck.

[55] The fob evidence on its own was devastating. As noted earlier, Mr. Sekhon himself testified that when he was given the fob, it was attached to the ignition key. As the trial judge noted, correctly in my view, "[t]he only logical conclusion to be drawn from [Mr. Sekhon's deliberate act of separating the fob from the keys] is that the accused did this to distance the fob from the truck because he knew that the fob controlled access to the hidden compartment which he would not want discovered" (A.R., vol. I, at p. 31). Standing alone, that finding was all but conclusive of Mr. Sekhon's guilt.

[56] But of course, it does not stand alone. It is part of a web of circumstantial evidence enveloping Mr. Sekhon from which he cannot escape. In this regard, it is important to note that when considering the second branch of the proviso in the context of a circumstantial case, it is necessary to look at the whole of the admissible evidence in assessing the strength of the case. It is not the task of an appellate court to parse each item of evidence in search of a possible innocent explanation. If that were so, it would be virtually impossible to ever satisfy the second branch of the proviso in a circumstantial case.

[57] In conclusion, the thoughts expressed by Binnie J. in *R. v. Jolivet*, 2000 SCC 29, [2000] 1 S.C.R. 751, and restated in *R. v. Sarrazin*, 2011 SCC 54, [2011] 3 S.C.R. 505, are in my view, apposite to the case at hand:

> Ordering a new trial raises significant issues for the administration of justice and the proper allocation

> of resources. Where the evidence against an accused is powerful and there is no realistic possibility that a new trial would produce a different verdict, it is manifestly in the public interest to avoid the cost and delay of further proceedings. Parliament has so provided. [*Jolivet*, at para. 46; *Sarrazin*, at para. 24] [emphasis added]

b. Application of the law to the evidence

[49] With this background, I return to the evidence that was properly before the panel.

[50] First and foremost, is the evidence of explicit child pornography images displayed on the appellant's smartphone. In my respectful view, this evidence is, in the context of all of the smartphone evidence presented, overwhelming evidence of the accused's guilt.

[51] The accused acknowledges that these images are pornographic; that the smartphone is his, and that he downloaded all the images that are on his phone. The only thing he contests is that he was knowingly in possession of that pornography.

[52] What then is the evidence from the smartphone itself that the appellant was knowingly in possession of child pornography?

[53] There is the evidence from the accused himself that, when downloading pornography, he accessed porn sites labelled "teenagers". Taking the labelling at its word, such sites could contain pornography involving children as young as 13, 14, 15, 16 and 17, all of which constitutes child pornography. An individual accessing such sites presumably knows the risks

involved. A trier of fact is entitled to take that information into account in determining if an individual accused is knowingly in possession of child pornography.

[54] The accused testified that, although, it was his custom to view pornography that he had downloaded in port at the end of his shifts while he was at sea, he did not watch any such materials during the two days while he was at sea after the ship left port on this occasion. The undisputed evidence is that, because he was at sea in a steel-hulled vessel, there was no access to the internet while he was at sea and this would have been known to the appellant. While at sea, the appellant could not be telephoning anyone, receiving messages, or accessing the internet. Yet, the evidence was that his smartphone was not stowed, but had physically migrated to the area between the accused's sleeping area and that of another military member's. The trier of fact was entitled to take the evidence concerning where the smartphone was found into account in determining whether the accused had, in fact, viewed images on his smartphone while he was at sea.

[55] The expert evidence was that some images on the accused's smartphone had been deleted. The fact that some images had been deleted was not challenged. However, the accused testified that he had not deleted any images. Relying on all of the evidence put before it about the accused's smartphone, the trier of fact was entitled to come to its own conclusion about whether the accused had deleted any images. If the trier of fact concluded that the accused had deleted certain images, this would, of course, have allowed the panel to conclude that the accused had trolled through the images on his phone – giving him knowledge of what kind of pornography he had on his phone - before deleting some of them.

[56] The only evidence that the first of the child pornography images on the accused's smartphone was the last thing viewed on the smartphone just before it was closed was provided by the witness Butchers; however, this use of smartphones is a matter which is within the potential personal experience of members of the panel and on which the panel was entitled to come to its own conclusions.

[57] Was this evidence – arising from the smartphone itself - sufficient for a properly instructed jury to conclude that the appellant had the necessary *mens rea* in relation to the child pornography offences? In my respectful view, it was. Although it is admittedly all circumstantial evidence, that evidence is powerful.

[58] In addition to the evidence derived from the smartphone itself is the evidence of the accused's admission of knowingly being in possession of child pornography made to the accused's former girlfriend.

[59] I agree with the appellant that, in the circumstances here, the re-examination answer, "Yes", could be construed by the trier of fact as an admission by the accused to his former girlfriend that he knowingly accessed and possessed child pornography. With respect, the trial judge's conclusion that the evidence was too vague to be a confession is not, in my respectful view, reasonable. The trial judge presumably was of the view that the words "do those things" might refer only to what the accused has admitted doing, which was downloading porn which is, of course, not illegal and could not be the subject of allegations of wrongdoing. However, the trial judge himself subsequently referred to the evidence on the re-examination as potentially

going to the *mens rea* of the offence as well as to the *actus reus* and to it being "prejudicial". The evidence could only be prejudicial if it was an admission of wrongdoing rather than an acknowledgement of an allegation.

[60] However, in deciding the prejudicial effect of what the Crown admitted was inadmissible evidence, the military judge had to determine how the impugned evidence related to the witness' admissible evidence. It may be that the former girlfriend's evidence was not helpful to the Crown and that she was uncomfortable in her role as witness; however, the trier of fact was entitled to assess all of her evidence and make its own decision about whether her evidence was helpful or not. As indicated above, that evidence arguably went beyond a mere assertion that the accused told her only about allegations and never discussed with her whether he had actually done what it was alleged that he had done. Indeed, that was precisely the objective of the cross-examination: to try to pin down whether, when all was said and done, the only thing which the accused had told his former girlfriend was that allegations had been made against him; if there had been no other way to interpret the witness' evidence in chief, the cross-examination would not have been necessary.

[61] Seen from that perspective, the military judge might even have come to the conclusion that the re-examination did, in fact, "arise out of the cross-examination". The scope of re-examination is fairly broad as can be seen from the following extract from Watt J.A.'s reasons in *R. v. Candir*, 2009 ONCA 915:

> The Principles Applied
>
> [148] It is fundamental that the permissible scope of re-examination is linked to its purpose and the subject-matter on which the witness has been cross-examined. The purpose of re-

> examination is largely rehabilitative and explanatory. The witness is afforded the opportunity, under questioning by the examiner who called the witness in the first place, to explain, clarify or qualify answers given in cross-examination that are considered damaging to the examiner's case. The examiner has no right to introduce new subjects in re-examination, topics that should have been covered, if at all, in examination in-chief of the witness. A trial judge has a discretion, however, to grant leave to the party calling a witness to introduce new subjects in re-examination, but must afford the opposing party the right of further cross-examination on the new facts: *R. v. Moore* (1984), 15 C.C.C. (3d) 541 (Ont. C.A.), at p. 568. [emphasis added]

[62] I might add parenthetically that the defence also initially objected to the re-examination evidence on the grounds that it was produced as a result of a leading question. In his decision denying the application for a mistrial, the trial judge did not specifically address the effect of a leading question. I assume that the trial judge implicitly ruled, rightly in my view, that the leading question issue posed no serious problem. Evidence obtained by a leading question is not inadmissible; rather, it is up to the trier of fact to consider whether the weight of the answer is negatively affected by the way in which it was produced: *R. v. Bhardwaj*, 2008 ABQB 504 at para. 45; *R. v. Gordon-Brietzke*, 2012 ABPC 221 at paras 41-57; *R. v. Parkes*, [2005] O.J. No. 937 at para. 44; S. Casey Hill, David M. Tanovich & Louis P. Strezos, *McWilliams' Canadian Criminal Evidence*, 5th ed. (Toronto: Canada Law Book, 2013) (loose-leaf revision 2013-4), at 21-8 to 21-16.

[63] Not surprisingly, however, given the position taken by the Crown, in the event the military judge agreed that the impugned evidence was inadmissible. This does not mean, however, that in making his subsequent decisions, the military judge would not have taken all of the pertinent circumstances, including the entirety of the former girlfriend's evidence, into

account. What he did do was to immediately instruct the panel that they were to ignore the evidence of the re-examination: see Appendix A, concluding remarks. This instruction was immediate, stern and comprehensive.

[64] The panel was not a typical jury: it was made up of military officers, none below the rank of captain. This was, therefore, a type of "blue ribbon panel": not only were these members of a uniformly high degree of achievement, as members of the military, they were presumably accustomed to obeying orders.

[65] The trial judge's assessment was that the panel had understood, and was prepared to abide by, his instruction to ignore the evidence: see the comments he made during his ruling on the mistrial application in the Appeal Book, Vol. IV at p. 635, as well as in Appendix B:

> However, it is clear that the members of the panel have clearly expressed their understanding of the limiting instruction provided to them to ignore the inadmissible evidence.

[66] This conclusion by the military judge is not substantiated by any part of the formal record of proceedings. I assume that the trial judge meant that, from his personal observation of the panel while he was giving his instruction, it was clear to him - perhaps by nodding for example - that the panel understood his instructions. In this same context, I note that there is no evidence to support the defence contention that the panel might secretly refuse to follow instructions, or that a panel member would likely ignore instructions because of the high public disdain for the charges or that the military chooses inexperience prosecutors resulting in ongoing prejudice to accused members.

[67] After hearing the application for a mistrial, the military judge gave a second mid-trial instruction to the panel: see Appendix B, concluding remarks. The proposed instruction was, in fact, given to the panel.

[68] In his summation to the panel, which is of course the equivalent of a charge to a jury, the military judge reviewed admissible trial evidence; he did not refer to the impugned evidence: see Appendix C.

[69] An appeal court in our position must engage in a two-step process: the first of which is to determine if an error was made and the second is to determine if the error, whether harmless or serious, results in a substantial wrong or miscarriage of justice. Indeed, because of the narrowness of the concept of "miscarriage of justice", the second step might be described generally as requiring an assessment of whether there has been a substantial wrong. Courts are also told that there will be no substantial wrong, even where a serious error has been committed if the evidence is "overwhelming" in favour of one result or another: see *Khan*.

[70] After reviewing the evidence and the positions of the parties, I have come to the conclusion that the military judge made no error when he exercised his discretion to deny the motion for a mistrial. He knew all of the evidence against the appellant arising from the smartphone itself and had heard the entirety of the former girlfriend's evidence. The military judge was therefore in a privileged position to assess the possible impact of the mishap on the jury and the effectiveness of the sharp warning that he issued. I would defer to his conclusion that his immediate and mid-trial instructions to the panel to ignore the re-examination evidence

was sufficient to remedy any ill effect that the inadmissible evidence might have had on the panel.

[71] If I were wrong in concluding that the military judge committed no error in denying the application for a mistrial, I would nevertheless rely on my assessment that the military judge's error did not, in all the circumstances, constitute a substantial wrong. As I have explained above, in my view the evidence against the appellant was overwhelming. In my respectful view, in light of the powerful evidence against the accused, there is no realistic possibility that a new trial would produce a different verdict than the one appealed from.

[72] For the foregoing reasons, I would deny the appeal.

"Joanne B. Veit"

J.A.

APPENDIX A

Extract from the testimony of J.J. (Appeal Book, Vol. III, pp. 519-524).

. . .

Q. Okay. I'm sorry. You say you got him a job at a grocery store? A. Yes.

Q. When abouts was that? A. I think I was about 15, so 2008.

Q. Okay. A. Sometime around there.

Q. All right. Now, at what point did your relationship-did your relationship develop further? A. At that time, briefly.

Q. Okay. So when did your relationship-if I−could I use the word "deepen" or . . . A. Uh-huh.

Q. Okay. When did that begin? A. In 2011.

Q. Okay. And how would you describe the relationship at that point? A. We started talking again. We hadn't spoken for a while before that. We got talking, we started dating and the relationship continued from that point.

Q. Was there a sexual component to the relationship? A. Yes.

Q. Okay. Where did you live at that time? A. In Nanaimo with my parents.

Q. Oh, okay, with your parents. And are you aware of where he lived at that time? A. He was living, at first, in Montreal during his basic training and then when he came back he was living on the base here.

Q. Okay. Now, during that period did you−did Ordinary Seaman Cawthorne ever live with you? A. He didn't live with me, no, but whenever he came up to visit on weekends he'd stay either in my parents' house or at his parent's house.

Q. Now, during your relationship did you ever exchange emails, texts, things like that? A. Yeah.

Q. Did you ever send photos back and forth to each other? A. Probably.

Q. Okay. Did you ever—and I don't mean ·to be indelicate. Did you ever send pictures of yourself in, you know, in undress, you know, to your boyfriend, that sort of thing? A. I don't remember.

Q. Okay. Is it possible you did? A. Possible, but I don't remember.

Q. Okay. Now, I understand that you and Ordinary Seaman Cawthorne had a discussion sometime in 2012? A. Yes.

Q. Can you please describe for the court that discussion? Begin with when was this? A. It was in the lead-up to Christmastime.

Q. Okay. How close to Christmas? Do you recall? A. It was in the week before Christmas, sometime in there.

Q. Of what year? A. Twenty-twelve.

Q. Okay. And can you please describe this conversation or discussion as best you can recollect?

A. Kyle told me that he had something he wanted to tell me and he wanted to wait after Christmas to tell me, but I said, you know, if have something to tell me, just tell me, it's okay. So he sat me down and he told me that when he was taken off the ship, the ALGONQUIN, in Hawaii, it wasn't just because of depression and sea sickness, which is the reason I believed he was taken off. It was also because he'd been arrested for having inappropriate images on his phone. I don't remember the exact specific words he used in the conversation, but that was the gist of it.

Q. Did he ever say anything about having images on his phone? A. Not specifics that I can remember.

Q. Okay. And what else do you recall about that conversation? Where did it take place? A. It was in my house in my family room.

Q. Okay. And what happened after he told you this? A. I was very upset. I left the room and went to the washroom crying and I asked him to leave and he left at that point.

Q. Did you see him again after that point? A. Yes.

Q. When did that take place? A. Later that day he came back to grab some things from my house and left to proceed to go back to Victoria. I went upstairs crying and told my mum what had happened and she called him to bring him back, because she didn't want him driving to Victoria in an upset state.

Q. Okay. And what−did he eventually go to Victoria or did he stay with you? What happened then?

A. He stayed over the Christmas period and then both Kyle and I went back to Victoria for a night at the end of Christmas and then I got upset and came back home a day early.

Q. Okay. Did you maintain your relationship with Ordinary Seaman Cawthorne after that?

A. Yes.

Q. Okay. For how long? A. About five, six months.

Q. And during that time or at any time did you ever discuss what he had told you again with him? A. Yes.

Q. And can you relate for us those discussions? A. I don't remember specifics of conversations, but I do remember a conversation where I asked him what types of images were on his phone.

Q. Okay. And what was his answer? A. I don't remember exactly what he said so I don't remember the specifics.

Q. What do you recall? A. He said they were children and I believe that he said they were both male and female.

Q. Okay. Did he say anything else? A. Not that I can recall.

Q. Now, when you were having these discussions with him, how clearly could you hear him?

A. What do you mean?

Q. Well, were−did this occur in a loud environment, a quiet environment? A. The initial conversation?

Q. Let's start with that one, sure? A. That was a quiet environment. We were both alone in my home at the time.

Q. Okay. And again−okay. So with regards to that discussion, what words can you recall, if any, that he used? A. I don't remember.

Q. Okay. So the next−you say you had other discussions with him where this was talked about. How many of those discussions did you have? A. We would have had a couple at least. I don't remember numbers.

Q. Okay. And when he said that there−the discussion that you recall where he said that there were images of children, male and female, can you recall anything else about' that discussion? A. No.

Q. Do you recall when that discussion was? A. I remember it was in my bedroom, but I don't remember a timeline.

Q. Okay. But would it have occurred during the period of your relationship? A. Yes.

Q. Okay. So you said five or six months your relationship continued after Christmas? A. Yes.

Q. Okay. If I may ask, how did your relationship end? A. I ended the relationship. I just−I couldn't-−I didn't want−I ended the relationship because I didn't want his actions to come back onto me· in the future.

PROSECUTOR (LCDR REEVES) : Thank you. Those are my questions. My friend will have some questions for you I imagine.

MILITARY JUDGE: Mr. Defence Counsel.

CROSS-EXAMINED BY DEFENCE COUNSEL

Q. Thank you, Your Honour. Ma'am, you've referred to a few telephone−not telephone−a few meeting conversations that you had. I put it to you that in those conversations you were advised by the accused of what the allegations were against him? A. Yes.

Q. So though you don't recall the context of−the exact wording of those communications, in essence they were advising you of what allegations had been made against him? A. Yeah.

DEFENCE COUNSEL: Those are all of my questions for this witness, Your Honour.

MILITARY JUDGE: Re-examination.

RE-EXAMINED BY PROSECUTOR (LCDR REEVES)

Q. During any of those conversations, do you recall him saying that he did in fact do these things? A. Yes.

DEFENCE COUNSEL: Your Honour, I don't see how that's something arising from my question that wasn't already dealt with by the prosecutor in his examination-in-chief.

MILITARY JUDGE: Mr. Prosecutor.

PROSECUTOR (LCDR REEVES): Your Honour, I believe my friend's question was with reference to conversations: did he make−did he say that these were the allegations, and I simply asked, Did he also make the−say that he had in fact done these things. The−by stating "allegations" only, my friend left unclear, I submit, the rest of the conversation.

MILITARY JUDGE: Thank you for submissions. This question and this answer should be ignored by the panel. Clearly it does not arise from the cross-examination. Thank you very much. Thank you, ma'am. You may leave. [emphasis added]

APPENDIX B

Decision of the Military Judge on the application for a mistrial (Appeal Book, Vol. IV, pp. 633-641).

> MILITARY JUDGE: Good morning, Ordinary Seaman Cawthorne. Counsel for the defence has presented an application at the end of the prosecution's case asking the court to declare a mistrial. Ordinary Seaman Cawthorne appears before the court−before this General Court Martial on charges laid under section 130 of the *National Defence Act*; namely, possession of child pornography under section−subsection 163.1(4) of the *Criminal Code* and accessing child pornography under subsection 163 .1 (4.1) of the *Criminal Code* respectively. The defence submits that inadmissible evidence presented during the trial, through the testimony of Ordinary Seaman Cawthorne's ex-girlfriend, is so prejudicial that the only remedy available consists in declaring a mistrial.
>
> The facts in support of this application arose during the testimony of J.J. who was the accused's girlfriend at the time of the alleged offences. During her direct examination, counsel for the prosecution asked her if she had been made aware of the reasons behind his repatriation from the ALGONQUIN in July 2012, while the ship was in Hawaii. Although she could not remember the specifics of the conversation, she remembered that he told her that it was only−it was not only for reasons of depression or sea sickness, but also because he was arrested for having inappropriate images of children, males and females, on his phone.
>
> In cross-examination, defence counsel did not ask any question with regard to that statement, but he asked the witness if she had been advised by Ordinary Seaman Cawthorne of what were the allegations against him. She answered: Yes. Counsel for the defence did not ask any other question to the witness. Counsel for the prosecution asked one question in re-examination. This question and its answer to it are the basis of this application−for this application. Counsel for the prosecution asked, ·"During any of those conversations do you recall him saying that he did in fact those things?" And the witness promptly answered: Yes. Immediately after this answer, counsel for the defence objected on the sole basis that this evidence was inadmissible because it did not arise from the matters covered in cross-examination. The court sustained the objection made by the defence and immediately issued a limiting instruction to the panel to ignore both the question and the answer provided, and the court ascertained that

the panel understood that limiting instruction. Shortly after, in absence of the panel, counsel for the defence informed the court that he wanted to make an application for mistrial, but that he was willing to wait at the end of the prosecution's case to present it. We are now at this stage of the proceedings.

The defence submits now that not only the inadmissible evidence was the result of improper cross-examination, which is acknowledged by the prosecution, but also that it was a leading question. He submits that the use of the noun "allegations" used during his cross-examination and the noun "things" used by the prosecution in re-examination caused an irreparable prejudice to the accused because the panel would erroneously apply a reasoning that would cause those "things" to constitute the very nature of the particulars of both charges on the charge sheet. Counsel for the defence is also submitting that he was deprived of re-examining the witness further to her answer in re-examination.

Counsel for the defence submits that the key issue in this trial relates to the elements dealing with the *mens rea* on both charges. In his view, the prosecution's evidence is weak and the admissible—the inadmissible evidence could serve to improperly strengthen the prosecution's case and its prejudice cannot be remedied other than by declaring a mistrial in the context of this General Court Martial, where the charges against the accused attract public disdain.

It is submitted that the limiting instruction provided to the panel was timely, delivered with sternness and authority, but, in retrospect, minimal. He argued that the only reason given to the panel for the limiting instruction was that the evidence was not the proper subject of cross-examination, although this was the only reason provided by the defence when he made his objection. Counsel for the defence suggested that he has observed some members of the panel looking at the accused in the different manner after hearing the inadmissible evidence.

Finally, the defence submits that he was aware of the potential that the witness could testify regarding a confession from the accused. He states that when the prosecution did not lead evidence of such confession in direct examination, counsel for the defence did not have to cover the area in cross-examination. He argues now that the admissible−inadmissible evidence would amount to this damaging confession and that he can no longer cross-examine the witness on that issue and he is deprived to make full answer and defence.

The prosecution acknowledged that the question was inappropriate but that the stern limiting instruction given to the panel to ignore both the question and the answer is sufficient in the circumstances. The prosecution submits that the defence was offered to recall the witness in any event. The prosecution submits that the evidence of this witness will be the subject of specific instructions to the panel by the presiding judge later in the proceedings and that both counsel will have the opportunity to address their concerns as it relates to the credibility and reliability of the witness' testimony. Prosecution concedes that the witness recollection of events was vague and that she was unable to answer several questions. He argues that the testimony of this witness will not be determinative to the issue identified as the key issue by the defence; namely, the *mens rea*. The prosecution submits that there is a considerable amount of evidence with regard to this element on both charges.

Firstly, I will briefly comment about the remark made by counsel for the defence that some members of the panel have looked at Ordinary Seaman Cawthorne in a different way after hearing the inadmissible evidence. This has not been observed from the bench. However, it is clear that the members of the panel have clearly expressed their understanding of the limiting instruction provided to them to ignore the inadmissible evidence. Whether this limiting instruction was insufficient in the circumstances and clearly requires an order declaring a mistrial is, however, a different issue.

Both parties have provided the court relevant jurisprudence in the context of mistrial application based on inadmissible evidence finding its way to a court martial panel. In the context of declaration of mistrial at a General Court Martial. The remarks made by Richards J.A. in *R v Dueck*, 2011 SKCA at page 45, at paragraph 30, illustrate the legal principles that apply in the circumstances: ·

> .... The power to grant a mistrial is an inherent discretionary power of a trial judge. It can, of course, be exercised after inadmissible evidence is disclosed in circumstances where the disclosure could cause material prejudice to the right of a fair trial. However, a mistrial should be declared only in the "clearest of cases" where there has been a "fatal wounding of the trial process" which cannot otherwise be remedied.

The determination must involve a balancing of interests of the accused and those of public justice, see *R v D.*, (1987), 38 CCC (3d) 434, at page 445, the decision of the Ontario Court of Appeal.

In the context of a jury trial or a General Court Martial, whether the right of the accused to make full answer and the defence is compromised to a degree that amounts to a fatal wounding of the trial process which cannot be salvaged by remedial measures other that by declaring a mistrial, these measures are the issuance of proper instructions to the jury or the panel of the court martial. It is important to state that in this case, such a protective and limiting instruction was promptly given to the panel after the hearing of the inadmissible evidence.

Was this instruction sufficient to ensure a fair trial, and, if not, a repeat of that instruction or the issuance of additional instructions be sufficient in the context of the inadmissible evidence and its potential impact on the fairness of the trial? Well, counsel for the defence argued that considering the profound disdain associated with crimes related to child pornography, some members of the panel members of the court martial may now ignore to follow the limiting instruction of the presiding judge and nonetheless apply the inadmissible evidence during their deliberations. However, the court must examine the situation from the premise expressed by Dickson CJC, in the context of the use of prior convictions in *R v Corbett* 1988 1 SCR 670, and also in 41 CCC (3d) at page 385, at page 400-401 from the CCC:

> [39] In my view, it would be quite wrong to make too much of the risk that the jury might use the evidence for an improper purpose. This line of thinking could seriously undermine the entire jury system. The very strength of the jury is·that the ultimate issue of guilt or innocence is determined by a group of ordinary citizens who are not legal specialists and who bring to the legal process a healthy measure of common sense. The jury is, of course, bound to follow the law as it is explained by the trial judge. Jury directions are often long and difficult, but the experience of trial judges is that juries do perform their duty according to the law.

This rationale was adopted by Lebel J. in *R v Khan*, [2001] 3 SCR 823 and also in 160 CCC (3d), and that decision was cited by both counsel. So in that decision Lebel J. made the following comment or remark at paragraph 82:

> [82] Thus, we should not presume that jurors are incapable of following instructions given by the judge. On the contrary, when the judge issues a clear and forceful warning about the use of some

> information, we are entitled to presume that it diminishes the danger that the jury will misuse this information when rendering its verdict.

The approach followed by Lebel J. in *Khan*, who dissented in the result, is appropriate in the context of an application for a mistrial resulting from inadmissible evidence that made its way to the panel. At paragraph 74 to 79−to 80−to paragraph 80, he wrote:

> [74] Courts should refrain from devising any strict formula in order to determine whether a "miscarriage of justice" has taken place. Irregularities which can occur during a trial may take many unpredictable forms.... Some may impact the trial in a way which deprives the accused of a fair defence, while others are less significant, depending on the circumstances. The gravity of irregularities which may occur must inevitably be evaluated by courts on a case-by-case basis. This being said, certain elements can provide reference points in determining whether a miscarriage of justice has occurred.
>
> [75] First, one should ask whether the irregularity pertained to a question which was, in law or in fact, central to the case against the accused. Thus, an irregularity which is related to a central point of the case is more likely to be fatal than one concerning a mere peripheral point (see e.g. *Olbey v*. *The Queen*, [1980] l S.C.R. 1008, at p. 1029). Of course, this issue will not always be absolutely determinative, and it is possible that a serious irregularity on a peripheral point can have rendered the trial unfair in reality or in appearance. Moreover, it is important to realize that some irregularities will not relate to a particular element in the case, but will rather create a general apprehension of unfairness on the whole of the case. This could occur, for instance, if jurors were led, through some irregularity, to feel greater sympathy for the Crown's case in general or greater antipathy towards the accused.
>
> [76] Second, the court of appeal should consider the relative gravity of the irregularity. How much influence could it have had on the verdict? What are the chances that the apprehended detrimental effect of the irregularity did in fact occur? How severe

could these detrimental effects have been for the accused's case? This is important not only in relation to an actual finding of unfairness, but also in relation to the appearance of unfairness. A single irregularity which is unlikely to have had any significant impact would seem to indicate to the reasonable observer that the trial appeared fair.

[77] When the court considers the gravity of the error, it should also consider the possible cumulative effect of several irregularities during the trial. Sometimes, a trial in which more than one error has occurred can be seen as unfair, even if these irregularities standing alone might not have been fatal on their own .... Conversely, when, apart from one alleged irregularity, the trial was otherwise error-free, the court may sometimes be justified in forgiving the error more easily.

[78] Third, one should be mindful of the type of trial during which the error has occurred. Was it a trial by jury or by a judge sitting alone? Sometimes, irregularities can have a more severe impact on the fairness of the trial when they occur during a trial before a judge and a jury. This is especially true considering that some irregularities can have a psychological effect, which we presume judges are more apt to overcome than juries. However, this question is not absolutely determinative, and some irregularities will render the trial unfair even if they occurred before a judge sitting alone, while other mistakes may not be fatal even if they took place before a jury. Thus, a well-instructed jury may have the capacity to overcome irregularities.

[79] Fourth, and related, is the possibility that the irregularity may have been remedied, in full or in part, at the trial. When the trial judge realizes that an irregularity has occurred, he or she may consider whether to declare a mistrial, but when possible, he or she may also attempt to remedy the error. The decision of whether or not to declare a mistrial falls within the discretion of the judge, who must assess whether there is a real danger that [the] trial fairness has been ....Although that discretion is not absolute, its exercise must not be routinely second-guessed by the court of appeal.

> [80] A decision on whether an incident has affected trial fairness in a way which would warrant declaring a mistrial must take into account any corrective measure which has been brought, or could be brought, by the judge to remedy the irregularity .... Similarly, it is interesting to note that in decisions involving the possibility of granting a "stay of proceedings", an inquiry into the possible alternative solutions available to remedy an apprehension of unfairness is also relevant...

Of those four elements, the following are relevant in the context of a declaration of mistrial sought as a result of inadmissible evidence before a court martial panel: One, whether the irregularity pertained to a question which was, in law or in fact, central to the case against the accused. Two, was it−what is the relative gravity of the irregularity? How much influence could it have on the finding of the panel? And three, can the irregularity create a general apprehension of unfairness on the whole of the case against the accused in permitting the panel to feel greater sympathy for the prosecution's case in general or greater antipathy towards the accused?

I have already stated that the court promptly issued a protective instruction to the panel immediately after the court had sustained the objection made by the defence. The panel was told to ignore both the question asked by the prosecution and the answer given by J. J. Although, I am not convinced that the inadmissible evidence is, in law or in fact, central to the case against the accused because of its inherent vagueness and questionable reliability, it definitely required a protective instruction that defence counsel described as being delivered with sternness and authority.

Nothing in the conduct of the members of the panel would provide the court with any reasonable suspicion that a member of the panel would not follow the instructions issued by the presiding judge at the time. However, I agree with counsel for the defence that the inadmissible evidence not only was the result of inappropriate cross-examination, but that its overall vagueness made it inherently unreliable and prejudicial.

It is fair to consider whether the inadmissible evidence has already created a general sense of unfairness against Ordinary Seaman Cawthorne. Unlike what defence counsel argued, that he has observed a change in the behavior of some members of the panel towards the accused after the instruction given to them to ignore the evidence ruled inadmissible, I had also the opportunity to

observe any change in the behavior of the panel and I respectfully do not share the concerns of the defence counsel.

It's also relevant to remind counsel that prior to the application for mistrial and in the context of the frequent adjournments required to deal with legal issues in their absence, I have repeated my preliminary instruction, with the approval of counsel, that members of the panel ought not to speculate during their absence from the court and that they had to keep an open mind.

It's also important to note that later, of course, counsel will have the opportunity to make submissions at the end of the case for the defence or for the prosecution. They will then be offered to provide input concerning the final instructions that I intend to provide to the panel. These instructions will also serve to emphasize once again their duty to only consider the admissible evidence and make their decision without sympathy, prejudice or fear and to assess that evidence impartially and with an open mind.

However, coming back to this mistrial application, I consider that the evidence ruled inadmissible may be relevant to a central issue of this case; namely, the *mens rea*, but I would add that this evidence could also be relevant to the *actus reus* with regard to the element of possession. However, even if the instruction given immediately after the objection formulated by the defence was sufficient in my view to remove the panel from being exposed to that inadmissible evidence any longer, it may be reasonably prudent to issue a further protective instruction that will address the inherently unreliable aspect of the evidence already ruled inadmissible and strongly instruct the panel that they shall not consider any part of it and shall totally ignore it.

The court remains alive to the concerns raised by the defence, but it is my conclusion that the instruction already given and the forthcoming supplementary instruction that I have just mentioned will or are sufficient remedial measures in the circumstances. For these reasons the application is dismissed.

As I said, I will provide another mid-trial instruction with regard to the improper cross-examination of J.J. and I propose that this instruction will be the following: "You will recall that I have-−or that I gave you a specific instruction after the testimony of J.J., a witness called by the prosecution. You will recall that I asked you to ignore the unique question and answer that arose from the re-examination of the witness by counsel for the prosecution because they were the product of improper cross-examination. This instruction remains, but I further instruct you that you shall not

draw any inference against the accused from that inadmissible evidence because it is both unreliable and prejudicial. I therefore instruct you to completely and absolutely ignore this inadmissible evidence and you shall evacuate it from your mind if you have not already–if you had not already done so. Do you understand?"

So, this is the mid-trial instruction I intend to provide to the panel when they return and I will ask counsel to consider this mid-trial instruction and to provide any comments they feel is appropriate in the circumstances either to extend this mid-trial instruction or to modify it. Thank you very much.[emphasis added]

APPENDIX C

Excerpt from the Military Judge's summation relating to the testimony of the witness J.J. (Appeal Book, Vol. IV, pp. 723-724).

> You heard the testimony of J.J. who claimed to have had conversations with Ordinary Seaman Cawthorne after the ALGONQUIN trip to Hawaii during the summer of 2012, where he would have told her something about the reason behind his repatriation from Hawaii. This subject would have been raised the first time in her home during the Christmas period of 2012. Although she could not remember the specifics of the conversation, she remembered that he told her that it was not only for reasons of depression or sea sickness, but also because he was arrested for having inappropriate images of children, males and females, on his phone. This subject would also have been discussed with him on a couple of occasions after.
>
> You have to decide whether you believe Ordinary Seaman Cawthorne made the statement, or any part of it. Regardless of who the witness is, it is still up to you to decide whether you believe that witness' evidence. In cross-examination, defence counsel asked a question with regard to these conversations. He then asked the witness, J.J., if she had been advised by Ordinary Seaman Cawthorne of what were the allegations against him. She answered, "Yes". She also said that she later asked him what type of images was on Ordinary Seaman Cawthorne's phone. She stated again that she cannot remember the specific words that he told her then, but only that it involved children, males and females. She also said that she could not recall if Ordinary Seaman Cawthorne had said anything else.
>
> In deciding whether Ordinary Seaman Cawthorne actually said these things, or any of them, use your common sense. Take into account the condition of Ordinary Seaman Cawthorne and of J.J. at the time of the conversation. Consider the circumstances in which the conversation or conversations took place. Bear in mind anything else that may make that witness' evidence more or less reliable. These conversations or discussions were not recorded and no notes were taken. J.J. testified that when the subject was raised the first time with respect that Ordinary Seaman Cawthorne had been arrested because inappropriate images were on his phone, she became very upset and left the room to go to the bathroom in her house. She could not remember specifically what was said at the time. Again, this conversation was not recorded and no notes were taken. In cross-examination, J.J. testified that Ordinary Seaman Cawthorne advised her of the allegations against him.

Unless you decide that Ordinary Seaman Cawthorne made a particular remark or statement, you must not use it against him in deciding this case. It is for you to decide whether you believe Ordinary Seaman Cawthorne made these statements, or any part of them. Regardless of who the witness is, it is still up to you to decide whether you believe that witness' evidence. And when I'm talking "witness" I'm talking about J.J. Unless you decide that Ordinary Seaman Cawthorne made a particular remark or statement, you must not use it against him in deciding this case.

It may also be possible that some or all of the statement made by- sorry–it may also be possible that some or all of the statement may help Ordinary Seaman Cawthorne in his defence. You must consider those remarks that may help Ordinary Seaman Cawthorne, along with all of the other evidence, unless you conclude that he did not make those statements. In other words, you must consider all the remarks that might help Ordinary Seaman Cawthorne even if you are not sure whether he said them.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	ABRA J.A.
DISSENTING REASONS BY:	VEIT J.A.
DATED:	MAY 5, 2015

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