Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20170623

Docket: CMAC-587

Citation: 2017 CMAC 3

CORAM: CHIEF JUSTICE BELL
MOSLEY, J.A.
KANE, J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL GOLZARI

Respondent

Heard at Ottawa, Ontario, on February 23, 2017.

Judgment delivered at Ottawa, Ontario, on June 23, 2017.

REASONS FOR JUDGMENT BY: MOSLEY, J.A.

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

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20170623

Docket: CMAC-587

Citation: 2017 CMAC 3

CORAM: **CHIEF JUSTICE BELL**
MOSLEY, J.A.
KANE, J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL GOLZARI

Respondent

<u>REASONS FOR JUDGMENT</u>

<u>Mosley J.A.</u>

I. INTRODUCTION

[1] This is an appeal from the acquittal of the Respondent by the military judge presiding at a Standing Court Martial on May 11, 2016. On his own motion, the military judge questioned whether a *prima facie* case had been made out against the Respondent on three charges under the

National Defence Act, RSC, 1985, c N-5 [NDA] and entered findings of not guilty on each of the charges.

[2] Her Majesty the Queen appeals the acquittals on two of the three charges: (1) wilfully obstructing a peace officer engaged in the execution of his duty contrary to paragraph 129(a) of the *Criminal Code,* RSC, 1985, c C-46 [*Criminal Code*] and punishable under section 130 of the NDA (the second charge); and (2) conduct to the prejudice of good order and discipline under subsection 129(1) of the NDA (the third charge).

[3] For the reasons that follow, I would grant the appeal and return the matter for a new trial before a different military judge.

II. FACTS

[4] At the relevant times, the Respondent was a member of the Canadian Forces Joint Signal Regiment and had 12 years of experience with the Canadian Forces. He was posted to Kingston, Ontario on a training assignment and was residing in an off-base commercial accommodation.

[5] The events underlying the charges took place during the evening of October 26, 2014 at the Vimy Gate of Canadian Forces Base Kingston. The base is normally open to anyone, military or civilian. At the time, the level of security at the base was elevated because two members of the Canadian Forces had been killed several days prior in separate incidents at Ottawa on October 22, 2014 and at St-Jean-sur-Richelieu on October 20, 2014. As a result, the Base Commander

had deployed Base Auxiliary Security Force (BASF) teams to control access onto the base at two different gates. Corporal Ingram was assigned to one of these BASF teams and he was checking vehicles entering the base through the Vimy Gate.

[6] Corporal Golzari, who was off duty, approached the Vimy Gate in his vehicle and was met by Corporal Ingram in front of the barrier blocking access. Corporal Ingram requested to see identification and asked Corporal Golzari where he was headed on the base, as he had asked of others allowed access on that evening. Corporal Golzari provided his military ID card, but refused to answer the other question. At first, he responded by saying that he did not know his destination, but after being pressed by Corporal Ingram, he stated that he did not have to answer any of Corporal Ingram's questions. In light of Corporal Golzari's refusal, Corporal Ingram called the military police for assistance and advised Corporal Golzari that he would be refused access.

[7] Sergeant Hiscock, a Military Police officer, arrived on the scene within a few minutes in a patrol vehicle with red and blue lights in the front. He was dressed in a Canadian disruptive pattern (CADPAT) uniform and wearing a military police vest. Corporal Butler, another Military Police officer, also arrived in a military patrol car with its police lights engaged shortly thereafter. Sergeant Hiscock was tasked, among other duties, with support to the BASF teams in their security duties at the gate on that evening. He responded to a call for assistance that there was a belligerent male at the Vimy Gate.

[8] Sergeant Hiscock approached Corporal Golzari after receiving a brief explanation of the situation from Corporal Ingram. Corporal Golzari informed Sergeant Hiscock that he did not feel he had to tell Corporal Ingram where he was going. Corporal Hiscock advised Corporal Golzari that as BASF, they had the right to know the destination details of individuals trying to enter the base because of the escalation of the security on the base. He further informed Corporal Golzari that the failure to provide such details could result in access being denied. Corporal Golzari responded that he did not have to provide any details of where he was going as he had been in the Canadian Forces for 12 years.

[9] As Corporal Golzari was uncooperative and cars were beginning to queue behind his car, Sergeant Hiscock asked Corporal Golzari to pull his car over to the side of the road out of the way of traffic, pointing his arm in the desired direction. Corporal Golzari refused to comply with the request. Sergeant Hiscock indicated that he was telling him as a Military Police officer to move his car over. Corporal Golzari refused. Sergeant Hiscock then said he was giving him a direct order as a Sergeant to move his car to the side. Corporal Golzari refused again.

[10] Corporal Butler intervened and told Corporal Golzari he could be arrested if he refused to comply. Corporal Golzari responded, “well then arrest me”. As a result, Corporal Butler placed him under arrest and took him to the military police detachment where he was held in custody until the arrival of a duty officer from his home unit, Lieutenant Anderson.

[11] Corporal Golzari was uncooperative with Lieutenant Anderson at first but eventually provided the information the duty officer required. Corporal Golzari was escorted back to Vimy Gate to retrieve his car and leave the base.

[12] Corporal Golzari was charged with three offences: (1) behaving with contempt toward Lieutenant Anderson contrary to section 85 of the NDA; (2) obstructing Sergeant Hiscock, a peace officer, in the execution of his duty contrary to paragraph 129(a) of the *Criminal Code* and punishable under section 130 of the NDA; and (3) conduct to the prejudice of good order and discipline for refusing to provide the details of his destination to Corporal Ingram when requested contrary to section 129 of the NDA.

[13] At the outset of the trial, the defence waived Corporal Golzari's rights to apply for further particulars of the charges or to raise jurisdictional or procedural objections to the trial proceeding. There was no dispute that the events took place within the boundaries of Canadian Forces Base Kingston. Video footage, without sound, of a security camera at the Vimy Gate from 7 p.m. to 10 p.m. on the night of October 26, 2014 was entered into evidence on consent. Corporal Ingram, Sergeant Hiscock and Lieutenant Anderson provided testimony on behalf of the prosecution.

III. DECISION UNDER APPEAL

[14] At the close of the prosecution's case, the military judge raised his own motion to question whether a *prima facie* case had been made out against Corporal Golzari on the charges,

pursuant to paragraph 112.05(13) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O).

[15] Counsel for the prosecution and the defence made submissions on the motion. Following the defence counsel's submissions, the prosecution was not given an opportunity to reply.

[16] In his decision, the military judge noted that paragraph 112.05(13) of the QR&O authorizes the military judge on his own motion, or the motion of the accused, to determine whether a *prima facie* case has been made out. The test, he noted, is whether there is evidence in the record, direct or circumstantial, upon which a jury or a properly instructed judge sitting alone could rationally conclude that the accused is guilty beyond a reasonable doubt. For the purposes of the *prima facie* ruling, the military judge assumed all of the evidence heard was true and assessed the reasonableness of the inferences to be drawn from the circumstantial evidence.

[17] As the prosecutor conceded in his submissions that there was no evidence of contemptuous behaviour in respect of the first charge, it was quickly disposed of by the military judge. The Appellant is not taking issue with the finding of not guilty in respect of that charge.

[18] With respect to the second charge, the military judge found that Sergeant Hiscock was a member of the military police and that Corporal Golzari knew that he was a member of the military police. However, the military judge found that Corporal Golzari did not have the requisite *mens rea* to establish his guilt under paragraph 129(a) of the *Criminal Code*. Therefore, Corporal Golzari was found not guilty of the second charge as well.

[19] The military judge noted that the prosecution did not present any evidence to establish that Sergeant Hiscock was a peace officer under section 2 of the *Criminal Code* and section 156 of the NDA and its regulations (Chapter 22 of the QR&O). Moreover, he found that the prosecution did not present any evidence to show that Corporal Golzari knew or was wilfully blind to the fact that Sergeant Hiscock enjoyed peace officer status under section 2 of the *Criminal Code*.

[20] As to the third charge, the military judge found that while the evidence established Corporal Golzari was expected to identify himself at the gate, there was no evidence to indicate that there was a standard of conduct requiring him to provide the details of his destination when entering the base. Corporal Golzari complied with the first duty and provided his valid military ID to Corporal Ingram. However, he refused to comply with the latter request, arguing that he was not under a duty to do so.

[21] The military judge concluded that there was no evidence of a standard of conduct imposed on Corporal Golzari and other persons to provide their destination details when entering the base on October 26, 2014. Notably, the military judge qualified his conclusion by stating that the duty to provide destination details at the gate may nonetheless exist; however, the court was not provided with any evidence by the prosecution which would allow him to draw that inference. As a result, the military judge found Corporal Golzari not guilty of the third charge as well.

IV. ISSUES

[22] The Appellant raises the following grounds on appeal:

A. The military judge erred in law in relation to the second charge in concluding that there was no evidence that the accused knew that Sergeant Hiscock was a peace officer; and,

B. The military judge erred in law in relation to the third charge in requiring the prosecutor to lead evidence of a standard of conduct and a breach of that standard in relation to the third charge.

[23] An error of law establishes this Court's jurisdiction under Section 230.1 of the NDA. Both grounds of appeal presented by the Appellant raise questions of law regarding the burden of proof to be satisfied by the prosecution. The Standing Court Martial raised its own motion of no *prima facie* case with respect to all three charges and moved to consider the availability of a directed verdict. This is a question of law that is not entitled to deference from this Court: *R v Tomczyk,* 2012 CMAC 4 [*Tomczyk*]; *R v Barros,* 2011 SCC 51, [2011] 3 SCR 368 at paragraph 48.

[24] The Respondent asks the Court to consider the following issues in response to the appeal:

A. When a regulatory enforcement mechanism exists, must it be used before invoking the far more serious offence of obstructing a peace officer?

B. When the obstructed person is military police, is proof that the accused was duly notified of QR&O 22.01-22.02 required?

C. Does section 129 of the NDA require a breach of duty that *did* prejudice good order and discipline?

[25] The first question raised by the Respondent was not argued before the Standing Court Martial and was not addressed by the military judge in his reasons for finding that there was no *prima facie* case for the accused to meet. On that basis, this Court could decline to consider it.

[26] Generally, courts of appeal will not allow an issue to be raised on appeal for the first time. The rationale for that rule is twofold as was stated by Madame Justice L'Heureux-Dubé in *R v Brown* [1993] 2 SCR 918 at paragraph 10 [*Brown*]: "[…] first, prejudice to the other side caused by the lack of opportunity to respond and adduce evidence at trial and second, the lack of a sufficient record upon which to make the findings of fact necessary to properly rule on the new issue".

[27] In *Brown,* at paragraph 20, Justice L'Heureux-Dubé set out three prerequisites which must be satisfied before a party is allowed to raise a new issue on appeal for the first time: (1) there must be a sufficient evidentiary record to resolve the issue; (2) it must not be an instance in which the accused for tactical reasons failed to raise the issue at trial; and (3) the court must be satisfied that no miscarriage of justice will result from denial of the request to raise such a new issue. See also *R. v. Warsing*, [1998] 3 SCR 579 at para 13, and *R. v Gibbons*, 2010 ONCA 77, [2010] OJ No 342 at para 57.

[28] I note that the Appellant did not object to the issue being raised before this Court, when counsel was asked directly at the hearing, and presented arguments on the merits of the question. As I have concluded that the matter must be returned for a new trial in which the issue may arise

in the context of a more complete evidentiary record, I think it appropriate for this Court to address it in these reasons.

[29] The other issues raised by the parties all relate to the burden of proof to be satisfied by the prosecution when seeking a conviction under paragraph 129(a) of the *Criminal Code* and subsection 129(1) of the NDA.

[30] I would restate the issues as follows:

A. When a regulatory enforcement mechanism exists, must it be used before invoking the more serious offence of obstructing a peace officer?

B. In deciding the second charge, did the military judge err in law by requiring evidence that would show that Corporal Golzari *knew* or was wilfully blind that Sergeant Hiscock was a peace officer, beyond the fact that he was a member of the military police?

C. Did the military judge err in law by concluding that the absence of evidence as to the existence of a *standard of conduct*, is fatal to the third charge brought under subsection 129(1) of the NDA?

V. RELEVANT LEGISLATION

[31] The relevant provisions of the *Criminal Code of Canada*, the *National Defence Act* and the *Queen's Orders and Regulations* are set out in an Annex attached to these reasons.

VI. ANALYSIS

A. *When a regulatory enforcement mechanism exists, must it be used before invoking the more serious offence of obstructing a peace officer?*

[32] The Respondent submits that Sergeant Hiscock was required to charge Corporal Golzari under section 11 of the *Government Property Traffic Regulations,* CRC, c 887 [GPTR], instead of resorting to the more serious offence of obstructing a peace officer under the *Criminal Code.* As noted above, this issue was not raised at the trial. At most, the GPTR were alluded to in the course of the prosecution's submissions. The military judge made no finding that Sergeant Hiscock had been engaged in the enforcement of the GPTR.

[33] At trial, the Respondent argued that Sergeant Hiscock was not in lawful execution of his duties, and therefore, his actions did not constitute obstruction. While he maintains that argument on appeal, he now contends that section 11 of the GPTR addresses the same misconduct that forms the basis of the charge of obstructing a peace officer, that is, failure to comply with the directions of a constable. Under section 21 of the GPTR, the punishment for contravention of section 11 would be a fine not exceeding $500 or six months' imprisonment, or both. In contrast, conviction of an indictable offence under paragraph 129(a) of the *Criminal Code* carries a penalty of imprisonment of up to two years.

[34] The Respondent argues that where a regulatory enforcement mechanism carrying a lesser penalty exists, it <u>must</u> be used before invoking a far more serious measure under the *Criminal Code*. In support of this proposition, he relies primarily on the Supreme Court's decision in *R v Sharma,* [1993] 1 SCR 650 [*Sharma*].

[35] With respect, I do not believe that *Sharma* stands for the proposition for which it has been cited by the Respondent. In *Sharma,* the appellant was charged under both a municipal by-

law and with obstructing a peace officer contrary to section 129 of the *Criminal Code*. The by-law offence related to selling flowers on a side-walk without a city license. The obstruction offence arose from the failure of the appellant to remove his display when instructed to do so by the officer. The Supreme Court found that the by-law was *ultra vires* the municipality and, as a result, the officer lacked authority to enforce it. That finding was fatal to both convictions.

[36] In dealing with the obstruction charge, Justice Iacobucci noted that the legislation under which the by-law had been enacted provided for more moderate means of dealing with infractions such as by ticketing the offender. Thus, even if the municipal by-law was valid, the police could not circumvent the lack of an arrest power for a violation by ordering someone to desist and then charging them with obstruction under the *Criminal Code*. This is not, in my view, what occurred on the evening of October 26, 2014.

[37] In argument, counsel for the Respondent pointed to the prosecution's submissions before the military judge, rather than to the evidence, to argue that Sergeant Hiscock was in fact enforcing the GPTR when he asked Corporal Golzari to move his vehicle. I note that Sergeant Hiscock did not himself provide that evidence and the military judge made no finding to that effect.

[38] It is trite law that submissions by counsel are not evidence and must be supported by evidence: *Mwanri v Mwanri,* 2015 ONCA 843, [2015] OJ No 6389 at para 32; see also *Rohit Land Inc v Cambrian Strathcona Properties Corp.,* 2015 ABQB 375, [2015] AJ No 658 at para

30, citing *Lister v Calgary (City),* [1997] AJ No 42 (Alta CA) at para 15; *Poff v Great Northern Data Supplies (AB) Ltd.,* 2015 ABQB 173, [2015] AJ No 291 at para 90.

[39] In this instance, the prosecutor's submissions with respect to the GPTR in responding to the military judge's motion were not supported by the evidence.

[40] Sergeant Hiscock's testimony was that when he arrived at the Vimy Gate to assist Corporal Ingram, he was exercising his role as a senior Military Police officer providing additional support to the BASF which was deployed by the Base Commander. Specifically, Sergeant Hiscock testified that he asked Corporal Golzari to move his vehicle because he did not know the situation and he was trying to determine what was going on.

[41] The question of whether the GPTR was available to Sergeant Hiscock at the relevant time, given the situation he was investigating when he arrived at the Vimy Gate, was not addressed by the military judge. In my view, the evidence is at best unclear as to whether Sergeant Hiscock was attempting to enforce the GPTR when he charged Corporal Golzari with obstructing a peace officer. The question was not put to him and there was no finding to that effect by the military judge in his review of the evidence. The fact that there may have been an alternative regulatory enforcement mechanism available to the Sergeant at the time is not, in my view, sufficient to establish that it should have been employed.

[42] The Respondent cites *R v Hayes,* [2003] OJ No 2795 [*Hayes*]; *R v Yussuf,* 2014 ONCJ 143, [2014] OJ No 1487 [*Yussuf*]; and, *R v Chayni,* 2016 ABPC 7, [2016] AJ No 37 [*Chayni*] in

support of his position. In each of these cases, unlike the present matter, the police officer was responding to a traffic-related infraction for which the legislature had provided an alternative means of enforcement. It was not necessary to invoke the *Criminal Code* charge and arrest powers in order to achieve compliance and enforce the provincial motor vehicle statute. I note that in *Yussuf*, above, the trial judge found that the accused's conduct escalated to the point that a criminal obstruction charge was appropriate. In my view, none of these cases stand for the proposition advanced by the Respondent that the police must in every instance choose a regulatory enforcement power.

[43] In *R v Waugh,* 2010 ONCA 100, [2010] OJ No 425 at paragraphs 39-41 [*Waugh*], the Ontario Court of Appeal emphasized that an obstruction charge under the *Criminal Code* will be inappropriate only where "precisely the same conduct" is the subject of the infraction of the provincial legislation and the obstruction.

[44] The Respondent submits that section 11 of the GPTR addresses the same conduct that forms the basis of the charge of obstructing a peace officer in this instance: failure to comply with directions given by a constable. Therefore, he argues, Sergeant Hiscock was restricted to pursuing the means of enforcement specified in the regulatory mechanism.

[45] In my view, it cannot be said that the obstruction charge was inappropriate as the conduct that Corporal Golzari was accused of was not "precisely the same conduct" that is prohibited under section 11 of the GPTR. The parties disagreed whether the evidence supported an inference that the offence of obstruct police was founded solely on Corporal Golzari's failure to

move his vehicle when directed to do so or related to Corporal Golzari's attempts to frustrate Sergeant Hiscock's investigation in support of the BASF team. The military judge noted the disagreement but made no finding in this regard.

[46] Based on the elevated security environment surrounding Canadian Forces Base Kingston following the murder of the two Canadian soldiers, one inference that could reasonably be drawn from Sergeant Hiscock's testimony is that he was investigating the situation to determine whether Corporal Golzari's actions presented a security concern. In the absence of evidence that establishes that he was solely exercising his authority under the GPTR, this Court is unable to reach the conclusion that the charge of obstruction was inappropriate.

B. *In deciding the second charge, did the military judge err in law by requiring evidence that would show that Corporal Golzari knew or was willfully blind that Sergeant Hiscock was a peace officer, beyond the fact that he was a member of the military police?*

[47] The military judge dismissed the second charge on the ground that the prosecution failed to offer any evidence of Corporal Golzari's knowledge of Sergeant Hiscock's peace officer status. In my view, that finding constituted an error in law as it was not necessary for the prosecution to advance any affirmative evidence of this element of the offence.

[48] The military judge accepted as a fact that (1) Sergeant Hiscock was a member of the military police, (2) that he identified himself as such to Corporal Golzari and the accused knew that he was such a person, (3) he was visibly dressed as a military police officer, and (4) that he arrived on the scene with a marked military police vehicle. He found that there was no evidence

that Sergeant Hiscock identified himself as a peace officer to Corporal Golzari or that there was any evidence to support that he was a peace officer.

[49] In my view, the military judge erred in failing to infer from the evidence that Sergeant Hiscock was a peace officer and that Corporal Golzari knew that fact in the absence of any evidence to the contrary.

[50] Military police are always peace officers with respect to persons subject to the Code of Service Discipline (CSD) under Part III of the NDA: see ss 22.01-22.02 of the QR&O; see also *R v Nolan,* [1987] 1 SCR 1212 at 1222-27 [*Nolan*]; *R v Courchene* (1989) 52 CCC (3d) 375 at 377-79 (ONCA). Moreover, as Corporal Golzari is a member of the Regular Force, he is subject to the CSD at all times and in all places: see paragraph 60(1)(a) of the NDA; see also *R v Moriarity,* 2015 SCC 55, [2015] SCJ No 55 at para 36 [*Moriarity*].

[51] It is not in question that *mens rea* under section 129 of the *Criminal Code* requires, in addition to the intention of committing the act or omission that forms the *actus reus* of the offence, that the accused knew or was wilfully blind to the status of the person obstructed as a peace officer: *R v Noel,* (1995) 101 CCC (3d) 183 at 191 (BCCA) [*Noel*].

[52] The difficulty of proving an accused's knowledge of an officer's peace officer status was discussed by Justice David Paciocco in *Yussuf,* above. He noted that what made such knowledge workable as a necessary or implied element of a criminal offence "is that absent an air of reality that there was a mistaken belief about the relevant fact, knowledge need not be litigated": *Yussuf,*

above, at para 50. Where a mistake of fact defence is raised, the evidential burden falls on the accused.

[53] In my view, there was no air of reality to the possibility that Corporal Golzari did not know that Sergeant Hiscock was acting as a peace officer on the night in question. As the military judge found, the evidence clearly established that Sergeant Hiscock was a member of the military police and that Corporal Golzari knew that he was such a person at the relevant time.

[54] During the events of October 26, 2014, the only way that Corporal Golzari could not have known that Sergeant Hiscock was a peace officer would be through mistake of law or ignorance of the law. The Respondent argues that ignorance of the law is an appropriate defence in the circumstances of this case because an essential element of the offence is premised on knowledge of provisions of the QR&O, namely sections 22.01 to 22.02. I disagree. Pursuant to section 72.2 of the NDA and section 19 of the *Criminal Code,* mistake or ignorance of the law is not an excuse.

[55] Section 22.01 of the QR&O incorporates the text of paragraph 2(g) of the *Criminal Code* referring to the appointment of Canadian Forces members under section 156 of the NDA. The other provisions set out the powers of peace officers appointed as military police. For convenience, these provisions are reproduced here:

22.01 – OFFICERS AND NON-COMMISSIONED MEMBERS – PEACE OFFICERS	**22.01 - OFFICIERS ET MILITAIRES DU RANG - AGENTS DE LA PAIX**
Section 2 of the Criminal Code	L'article 2 du Code criminel en

provides in part that “peace officer” includes

“(g) officers and non-commissioned members of the Canadian Forces who are

i. appointed for the purposes of section 156 of the National Defence Act, or

ii. employed on duties that the Governor in Council, in regulations made under the National Defence Act for the purposes of this paragraph, has prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers;”

partie prescrit qu' «un agent de la paix» comprend :

«g) les officiers et militaires du rang des Forces canadiennes qui sont :

i. soit nommés pour l'application de l'article 156 de la Loi sur la défense nationale,

ii. soit employés à des fonctions que le gouverneur en conseil, dans des règlements pris en vertu de la Loi sur la défense nationale pour l'application du présent alinéa, a prescrites comme étant d'une telle sorte que les officiers et les militaires du rang qui les exercent doivent nécessairement avoir les pouvoirs des agents de la paix.»

22.011 – DUTIES REQUIRING POWERS OF PEACE OFFICERS

For the purposes of subparagraph (g)(ii) of the definition of “peace officer” in section 2 of the Criminal Code, the following duties are prescribed to be of such a kind as to necessitate that the officers and non-commissioned members performing them have the powers of peace officers:

a. any lawful duty performed as a result

22.011 – FONCTIONS NÉCESSITANT LES POUVOIRS D’UN AGENT DE LA PAIX

Pour l’application du sous-alinéa g)(ii) de la définition de « agent de la paix » à l’article 2 du Code criminel, les fonctions ci-après sont prescrites comme étant d’une telle sorte que les officiers et les militaires du rang qui les exercent doivent nécessairement avoir les pouvoirs des agents de la paix :

a. les fonctions légitimes accomplies par suite

of a specific order or established military custom or practice that is related to any of the following matters:	d'un ordre précis ou selon une coutume ou pratique militaire établie et liées à l'un ou l'autre des domaines suivants :
i. the maintenance or restoration of law and order,	i. le maintien et le rétablissement de l'ordre public,
ii. the protection of property,	ii. la protection des biens,
iii. the protection of persons,	iii. la protection des personnes,
iv. the arrest or custody of persons, and	iv. l'arrestation ou la détention des personnes,
iv. the apprehension of persons who have escaped from lawful custody or confinement; and	v. l'arrestation de personnes qui se sont évadées de la garde ou de l'incarcération légitime;
a. any duty related to the enforcement of the laws of Canada that are performed as a result of a request from the Minister of Public Safety and Emergency Preparedness, the Commissioner of the Royal Canadian Mounted Police or the Commissioner of Corrections, under an Act, a regulation, a statutory instrument or a Memorandum of Understanding between the Minister	b. les fonctions liées à l'application des lois du Canada qui sont accomplies par suite d'une demande émanant du ministre de la Sécurité publique et de la Protection civile, du commissaire de la Gendarmerie royale du Canada ou du commissaire du Service correctionnel, présentée en vertu d'une loi, d'un règlement, d'un texte réglementaire ou d'un protocole d'entente

of Public Safety and Emergency Preparedness and the Minister of National Defence.

intervenu entre le ministre de la Sécurité publique et de la Protection civile et le ministre de la Défense nationale.

22.012 – POWERS OF OFFICERS AND NON-COMMISSIONED MEMBERS APPOINTED AS MEMBERS OF MILITARY POLICE

Section 156 of the National Defence Act provides:

"156. Officers and non-commissioned members who are appointed as military police under regulations for the purposes of this section may

a. detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence; and

b. exercise such other powers for carrying out the Code of

22.012 - POUVOIRS DES OFFICIERS ET MILITAIRES DU RANG NOMMÉS POLICIERS MILITAIRES

L'article 156 de la Loi sur la défense nationale prescrit :

«156. Les officiers et militaires du rang nommés policiers militaires aux termes des règlements d'application du présent article peuvent :

a. détenir ou arrêter sans mandat tout justiciable du code de discipline militaire - quel que soit son grade ou statut - qui a commis, est pris en flagrant délit de commettre ou est accusé d'avoir commis une infraction d'ordre militaire, ou encore est soupçonné, pour des motifs raisonnables, d'être sur le point de commettre ou d'avoir commis une telle infraction;

b. exercer, en vue de l'application du code de discipline

Service Discipline as are prescribed in regulations made by the Governor in Council.”	militaire, les autres pouvoirs fixés par règlement du gouverneur en conseil.»
22.02 – APPOINTMENT AS MEMBERS OF MILITARY POLICE	**22.02 – NOMINATION DES POLICIERS MILITAIRES**
For the purposes of section 156 of the National Defence Act, an officer or non-commissioned member is appointed as a member of the military police if they are qualified in a military police occupation and are in lawful possession of a Military Police Badge and an official Military Police Identification Card.	Pour l’application de l’article 156 de la Loi sur la défense nationale, sont nommés policier militaire les officiers et militaires du rang qui possèdent les qualifications d’un groupe professionnel de la police militaire et qui sont en possession légitime d’un insigne de la police militaire de même que d’une carte officielle d’identité de la police militaire.

[56] The Respondent submits that it is impossible to know when a military police officer is a peace officer without first knowing the QR&O provisions. The Respondent asserts that he could not have known the QR&O provisions because those regulations are not published in the *Canada Gazette* and, as such, their knowledge cannot be presumed: see *Statutory Instruments Act,* RSC, 1985, c S-22, s 20 [SIA]; see also *Statutory Instruments Regulations,* CRC, c 1509, para 7(a) and s 15(1).

[57] In my view, there is no merit to this argument. It relies on form over substance. The Respondent, as a member of the Regular Force, and a soldier with 12 years of experience within the Canadian Armed Forces (CAF), can be presumed to be familiar with the NDA and the

QR&O. Notably, the QR&O, the primary document of military law and regulations, is published on the National Defence and CAF website under *Policies and Standards.*

[58] The fact that Corporal Golzari knew that Sergeant Hiscock was a member of the military police was sufficient to satisfy the knowledge or mens rea element of the offence of obstruction. The prosecution was not required to present further evidence to prove the state of Corporal Golzari's knowledge in relation to Sergeant Hiscock's peace officer status. The military judge erred in law by elevating the burden of proof and by implicitly accepting Corporal Golzari's ignorance of the law defence.

C. *Did the military judge err in law by concluding that the absence of evidence as to the existence of a duty, or a standard of conduct, is fatal to the third charge brought under subsection 129(1) of the NDA?*

[59] The offence under subsection 129(1) of the NDA is very broadly worded. It covers "[a]ny act, conduct, disorder or neglect to the prejudice of good order and discipline […]". Acts or omissions constituting an offence under section 72 of the NDA or a contravention of any provision under the NDA or of any regulation, order or instruction published for the information and guidance of the Canadian Forces and attempts to commit offences under the NDA, are deemed to fall within the scope of subsection 129(1) without affecting the generality of the subsection: see NDA, ss 129 (2), (3) and (4).

[60] The military judge disposed of the third charge in the following words:

> As with any offense under section 129 of the *National Defence Act*, the prosecution must establish that the accused's act, conduct, disorder or neglect alleged in the charge did prejudice good order

> and discipline. In order to do so, the prosecution must lead evidence that there was a standard of conduct required of the accused in the circumstances. The evidence establishes that the accused was expected to identify himself at the gate and that he did comply with that requirement. There is no evidence that would assist the court to infer the existence of a standard of conduct imposed on the accused and other persons who wished to enter at Canadian Forces Base Kingston on 26 October 2014, that they had a duty to provide the details of their destination while entering on the base.

[61] The Appellant argues that the military judge erred in law by requiring proof of a standard of conduct or duty to provide the information regarding destination. The Respondent's position, as found by the military judge, is that proof of a duty and a breach of the duty is required to establish the offence under subsection 129(1) of the NDA. The Respondent further argues that the acquittal was justified because there was no evidence that his conduct did in fact result in prejudice to good order and discipline.

(1) Is proof of a standard of conduct required?

[62] The only standard of conduct required, the Appellant argues, is whether the conduct is prejudicial to good order and discipline. It does not require evidence of a separate standard against which to assess that conduct: *Smith v The Queen,* (1961) 2 CMAR 159 at 164 [*Smith*]; see also *R v Armstrong,* [2012] EWCA Crim 83 (CMAC) at para 19, a decision relating to a similar offence under the United Kingdom statute.

[63] In *Smith*, above, this Court pointed to the lack of any definition of the nature of the act, conduct, disorder or neglect that must be to the prejudice of good order and discipline, in the predecessor to subsection 129(1). In the absence of any definition, the Court held:

> [t]he military tribunal hearing the charge must of necessity determine from their experience and general service knowledge whether the "act" (as in this case) is one to the prejudice of good order and discipline. […] [t]he service tribunal may apply its general military knowledge as to what good order and discipline require under the circumstances, and so come to a conclusion whether the conduct, disorder, or neglect complained of was to the prejudice of both good order and discipline.

[64] The Respondent cites *Tomczyk* in support of the proposition that proof of a duty is required before there can be a determination of whether the conduct in question did prejudice good order and discipline. He relies on a statement at paragraph 28 of the decision that "the evidence adduced by the prosecution did not establish that the Appellant was under a duty to present himself for treatment" [emphasis added]. Based on that reference to "duty", the Respondent argues that the prosecution is required to provide evidence to demonstrate the existence of a duty or of a separate standard of conduct before determining whether that duty was breached in a way that is prejudicial to good order and discipline.

[65] The conviction under appeal in *Tomczyk* related to a charge of having failed to appear for medical treatment, as prescribed by the appellant's physician. The Court was careful to point out at paragraph 27 that treatment was to be distinguished from assessment to ascertain fitness for duty. Military personnel are usually free to consent to or refuse medical treatment. However, they are not free to ignore instructions to attend medical assessments to determine whether they are fit for deployment. In this instance, the evidence of the physician was that she had directed an assessment. The charge, as laid, could not be sustained. In the absence of an amendment to the charge or evidence that he was required to present himself for "treatment", the appellant was entitled to a directed verdict.

[66] The decision in *Tomczyk* does not stand for the broad proposition that subsection 129(1) of the NDA requires proof of an independent duty or of an objective standard of conduct. When the reasons of the Court are read in context, it is clear that the reference at paragraph 28 to a "duty to present himself for treatment" relates to the distinction made between treatment and assessment. Moreover, the evidence of the physician was clear that, even in the military context, consent was required for any medical treatment. There was no basis for a finding that "good order and discipline" required compliance in the particular circumstances.

[67] The Court's discussion of the elements of section 129 is found primarily in paragraphs 24 and 25:

> [24] Section 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF. Subsection 129(1) creates the offense while subsection 129(2) deems a number of activities to be prejudicial. In *R.v Winters (S.)* 2011 CMAC 1, 427 N.R. 311 at para 24 Létourneau J.A. summarized the constituent elements of a section 129 offence as follows:
>
> > When the charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline.
>
> [25] Proof of prejudice is an essential element of the offence. The conduct must have been actually prejudicial (*Winters*, *supra*, paras 24-25). According to *R. v. Jones*, 2002 CMAC 11 at para 7, the standard of proof is that of proof beyond a reasonable doubt. However, prejudice may be inferred if, according to the evidence, prejudice is clearly the natural consequence of proven acts; see *R. v. Bradt (B.P.)*, 2010 CMAC 2, 414 N.R. 219 at paras 40-41.

[68] In my view, *Tomczyk,* when read as a whole, does not require the prosecution to prove the additional element of a standard of conduct required of the accused such as, in the present circumstances, a duty to disclose destination particulars on entering upon the base. Accordingly, I agree with the Appellant that the military judge erred in law in acquitting the Respondent on this charge. While that conclusion is sufficient to dispose of the appeal with respect to the third charge, I will comment briefly on the respondent's second argument.

(2) Must the prosecution establish that the accused's conduct did in fact result in prejudice to good order and discipline?

[69] The phrase in subsection 129(1) "to the prejudice of good order and discipline" is not defined but has been applied to a broad range of conduct and omissions. It has been described as a "result crime" inasmuch as the accused's underlying conduct must be prejudicial to good order and discipline: *R v Latouche*, [2000] CMAJ No 3 at para 32.

[70] There is no dispute between the parties that prejudice must be established on the criminal law standard of beyond a reasonable doubt: *Tomczyk*, above, at para 25. However, they disagree on whether evidence must be presented to demonstrate that the conduct complained of did in fact result in prejudice to order and discipline.

[71] The Appellant submits that an actual breakdown of discipline need not result from the conduct to establish prejudice beyond a reasonable doubt. The Respondent contends that *Jones*, above, stands for the proposition that harmful effects must actually be found to have occurred. To conclude otherwise, the Respondent argues, would require this Court to overturn *Jones*. I disagree.

[72] As the Appellant notes, the degree of risk required to constitute prejudicial conduct has caused some confusion in the application of this provision. This has arisen from the use of the term "actual harm" in Court Martial decisions following *Jones*; see for example, *R. v Korolyk*, 2016 CM 1002 at para 16.

[73] In *Jones*, the appellant was convicted under subsection 129(1) for comments he made with respect to a superior officer. In discussing the elements of the offence, the military judge was found to have erred in failing to make a clear and unambiguous finding that the accused's conduct was prejudicial to good order and discipline. He used terms such as "may result", "may have" or "could have" in discussing the effect of the appellant's remarks.

[74] In using such terms, this Court found that the military judge had improperly enlarged the area of risk encompassed by the offence. The terms implied conjecture and a requirement for proof below the criminal law standard. Prejudicial conduct requires something more than "to bring into danger the concepts of good order and discipline." To import such a standard would result in the offence becoming unconstitutionally vague: *Jones*, above, at para 12.

[75] The military judge had also erred in applying the lesser standard when he took judicial notice of the effect of the accused's remarks. At paragraph 11, the Court in *Jones* noted:

> The issue was whether, in the circumstances of this particular case, the appellant's conduct *did* prejudice good order and discipline in that the remarks tended to bring a superior into contempt.
>
> [Emphasis in the original].

[76] However, a close reading of *Jones* demonstrates that the Court was careful to emphasize that prejudice need not be confined to a physical manifestation of injury to good order and discipline. At paragraph 7, the Court stated:

> Proof of prejudice can, of course, be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is, however, proof beyond a reasonable doubt.

[77] This language suggests that prejudice will be proven, beyond a reasonable doubt, so long as the totality of the circumstances supports the finding that the conduct in question would *likely* result in prejudice to good order and discipline. Since the Court in *Jones* left the window open to infer prejudice from the circumstances, I agree with the Appellant that "prejudice" encapsulates conduct that "tends to" or is "likely to" result in prejudice.

[78] Prejudice in its ordinary grammatical sense means "harm or injury that results or may result" (Concise Oxford English Dictionary). The addition of the words "to the" before "prejudice" incorporates an element of risk or potential and the expression, read as a whole, does not require that harmful effects be established in every instance. Though evidence of actual harmful effects may exist, it is not required for conduct to be punished in the context of military discipline. Military discipline requires that conduct be punished if it carries a real risk of adverse effects on good order within the unit; this is more than a mere possibility of harm. If the conduct tends to or is likely to adversely affect discipline, then it is prejudicial to good order and discipline.

[79] I also agree with the Appellant that in most instances, the trier of fact in a Court Martial should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge: *Smith,* above, at 164.

[80] There may be cases beyond the scope of common military experience and knowledge where it will be necessary for the prosecution to tender evidence of specific circumstances which create the prejudice. That was not the case here. The effect of the military judge's ruling was to impose a requirement for evidence of an order or direction that CAF members must cooperate with security guards when entering a base, even when that base is on high alert because of attacks on military personnel.

[81] There was ample evidence upon which the military judge, applying his own military experience and general service knowledge, could have determined whether Corporal Golzari's conduct tended to adversely affect good order and discipline. The only standard of conduct required by the offence was whether the conduct tended to have an adverse effect on good order and discipline. The military judge erred in requiring additional evidence of the existence of a standard obligating Corporal Golzari to provide his destination details to Corporal Ingram.

VII. DISPOSITION

[82] As a result of the conclusions reached above, I would set aside the findings of the military judge and direct that a new trial take place on the second and third charges.

"Richard Mosley"
J.A.

"I concur
B. Richard Bell"

"I concur
Catherine Kane"

ANNEX

Criminal Code, **R.S.C., 1985, c. C-46**	*Code criminal*, **L.R.C. (1985), ch. C-46**
Ignorance of the law	**Ignorance de la loi**
19 Ignorance of the law by a person who commits an offence is not an excuse for committing that offence.	**19** L'ignorance de la loi chez une personne qui commet une infraction n'excuse pas la perpétration de l'infraction.
Offences relating to public or peace officer	**Infractions relatives aux agents de la paix**
129 Every one who	**129** Quiconque, selon le cas :
(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,	**a)** volontairement entrave un fonctionnaire public ou un agent de la paix dans l'exécution de ses fonctions ou toute personne prêtant légalement main-forte à un tel fonctionnaire ou agent, ou lui résiste en pareil cas;
[…]	[…]
is guilty of	est coupable :
(d) an indictable offence and is liable to imprisonment for a term not exceeding two years, or	**d)** soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans;
(e) an offence punishable on summary conviction.	**e)** soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

National Defence Act, **R.S.C., 1985, c. N-5**	*Loi sur la défense nationale*, **L.R.C. (1985), ch. N-5**
Persons subject to Code of Service Discipline	**Personnes assujetties au code de discipline militaire**
60 (1) The following persons are subject to the Code of Service Discipline**:**	**60 (1)** Sont seuls justiciables du code de discipline militaire:
(a) an officer or non-commissioned member of the regular force**;**	**a)** les officiers ou militaires du rang de la force régulière;
Ignorance not to constitute excuse	**Impossibilité d'invoquer l'ignorance de la loi**
72.2 The fact that a person is ignorant of the provisions of this Act, or of any regulations or of any order or instruction duly notified under this Act, is no excuse for any offence committed by the person	**72.2** L'ignorance des dispositions de la présente loi, des règlements ou des ordonnances ou directives dûment notifies sous son régime n'excuse pas la perpétration d'une infraction.
Prejudicing good order or discipline	**Infraction et peine**
129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.	**129 (1)** Tout acte, comportement ou négligence préjudiciable au bon ordre et à la discipline constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.
Service trial of civil offences	**Procès militaire pour infractions civiles**
130 (1) An act or omission	**130 (1)** Constitue une infraction à la présente section tout acte ou omission :
(a) that takes place in Canada and is	**a)** survenu au Canada et punissable sous le

punishable under Part VII, the Criminal Code or any other Act of Parliament, or	régime de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale;
[…]	[…]
is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est déclaré coupable encourt la peine prevue au paragraphe (2).
Punishment	**Peine**
(2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,	**(2)** Sous réserve du paragraphe (3), la peine infligée à quiconque est déclaré coupable aux termes du paragraphe (1) est :
a) if the conviction was in respect of an offence	**a)** la peine minimale prescrite par la disposition législative correspondante, dans le cas d'une infraction :
(i) committed in Canada under Part VII, the Criminal Code or any other Act of Parliament and for which a minimum punishment is prescribed, or	**(i)** commise au Canada en violation de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale et pour laquelle une peine minimale est prescrite,
[…]	[…]
impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or	
Powers of military police	**Pouvoirs des policiers militaires**
156 Officers and non-	**156** Les officiers et militaires

commissioned members who are appointed as military police under regulations for the purposes of this section may

(a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the person's rank or status, who has committed, is found committing, is believed on reasonable grounds to be about to commit or to have committed a service offence or who is charged with having committed a service offence; and

(b) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

Appeal by Minister

230.1 The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:

[…]

du rang nommés policiers militaires aux termes des règlements d'application du présent article peuvent :

a) détenir ou arrêter sans mandat tout justiciable du code de discipline militaire — quel que soit son grade ou statut — qui a commis, est pris en flagrant délit de commettre ou est accusé d'avoir commis une infraction d'ordre militaire, ou encore est soupçonné, pour des motifs raisonnables, d'être sur le point de commettre ou d'avoir commis une telle infraction;

b) exercer, en vue de l'application du code de discipline militaire, les autres pouvoirs fixés par règlement du gouverneur en conseil.

Appel par le ministre

230.1 Le ministre ou un avocat à qui il a donné des instructions à cette fin peut, sous réserve du paragraphe 232(3), exercer un droit d'appel devant la Cour d'appel de la cour martiale en ce qui concerne les décisions suivantes d'une cour martiale :

[…]

(b) the legality of any finding of not guilty;	**b)** la légalité de tout verdict de non-culpabilité;
[…]	[…]
(d) the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge;	**d)** la légalité d'une décision d'une cour martiale qui met fin aux délibérations ou qui refuse ou fait défaut d'exercer sa juridiction à l'égard d'une accusation;
Appeal against not guilty finding	**Appel à l'encontre d'un verdict de non-culpabilité**
239.1 (1) On the hearing of an appeal respecting the legality of a finding of not guilty on any charge, the Court Martial Appeal Court may, where it allows the appeal, set aside the finding and	**239.1 (1)** Si elle fait droit à un appel concernant la légalité d'un verdict de non-culpabilité à l'égard d'une accusation, la Cour d'appel de la cour martiale peut :
(a) direct a new trial by court martial on that charge; or	**a)** soit ordonner la tenue d'un nouveau procès sur l'accusation devant une cour martiale;
(b) except if the finding is that of a General Court Martial, enter a finding of guilty with respect to the offence for which, in its opinion, the accused person should have been found guilty but for the illegality and	**b)** sauf en cas de verdict d'une cour martiale générale, soit consigner un verdict de culpabilité à l'égard de l'accusation dont, à son avis, l'accusé aurait dû être déclaré coupable, sauf pour l'illégalité, et prendre l'une ou l'autre des mesures suivantes :
(i) impose the sentence in accordance with subsections (2) and (3), or	**(i)** infliger la sentence en conformité avec les paragraphes (2) et (3),
(ii) remit the matter to	**(ii)** renvoyer l'affaire à la

the court martial and direct it to impose a sentence in accordance with subsections (2) and (3).	cour martiale en lui ordonnant d'infliger la sentence en conformité avec les paragraphes (2) et (3).
Queen's Regulations and Orders	***Ordonnances et règlements royaux applicables aux Forces canadiennes***
112.05(13) When the case for the prosecution is closed, the judge may, of the judge's own motion or upon the motion of the accused, hear arguments as to whether a prima facie case has been made out against the accused, and:	**112.05(13)** Lorsque le procureur de la poursuite a terminé la présentation de sa preuve, le juge peut, d'office ou à la demande de l'accusé, entendre les plaidoiries sur la question de savoir si une preuve prima facie a été établie contre l'accusé et :
a. if the judge decides that no prima facie case has been made out in respect of a charge, the judge shall pronounce the accused not guilty on that charge; or	a. si le juge décide qu'aucune preuve prima facie n'a pas été établie à l'égard d'un chef d'accusation, il déclare l'accusé non coupable sous ce chef d'accusation;
b. if the judge decides that a prima facie case has been made out in respect of a charge, the judge shall direct that the trial proceed on that charge.	b. si le juge décide qu'une preuve prima facie a été établie à l'égard d'un chef d'accusation, il ordonne que le procès se poursuive sous ce chef d'accusation.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-587
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. CORPORAL GOLZARI
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	FEBRUARY 23, 2017
REASONS FOR JUDGMENT BY:	MOSLEY, J.
CONCURRED IN BY:	BELL, CJ KANE, J.A.
DATED:	JUNE 23, 2017

APPEARANCES:

Major Dylan Kerr Captain Patrice Germain	FOR THE APPELLANT
Lieutenant-Commander Mark Létourneau Lientenant-Colonel Jean-Bruno Cloutier	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Military Prosecution Service Ottawa, Ontario	FOR THE APPELLANT
Defence Counsel Services, Gatineau, Quebec	FOR THE RESPONDENT