Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140613

Docket: CMAC-565

Citation: 2014 CMAC 7

CORAM: **COURNOYER J.A.**
MAINVILLE J.A.
GAGNÉ J.A.

BETWEEN:

MASTER CORPORAL LAFLAMME

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Hearing held in Ottawa, Ontario, on March 14, 2014.

Judgment delivered at Ottawa, Ontario, on June 13, 2014.

REASONS FOR JUDGMENT BY: COURNOYER J.A.

CONCURRED IN BY: MAINVILLE J.A.
GAGNÉ J.A.

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REASONS FOR JUDGMENT

COURNOYER J.A.

I. Introduction

[1] The appellant is appealing from a decision dated June 18, 2013[1] by the Standing Court Martial (Military Judge Jean-Guy Perron), which declared him guilty of two charges brought

1 2013 CM 4012.

under section 130 of the *National Defence Act*,[2] namely, obstruction of a peace officer contrary to section 129(*a*) of the *Criminal Code*[3] of Canada.

[2] The obstruction of two military police officers apparently occurred in the area surrounding the military base in Trenton, Ontario within the context of a policing operation to identify impaired drivers.

[3] The appellant argues two grounds of appeal: (1) the military judge did not provide adequate reasons to justify the rejection of the defence; (2) the military judge erred by rejecting testimony based on the rule set out in *Browne v. Dunn*[4] although he had already determined that it did not apply.

II. Background

[4] The two grounds of appeal are raised in the context where the appellant testified that a third police officer was present at the location of the intervention that led to the obstruction charges brought against him, whereas the prosecution had stated that there had been only two police officers at the scene. That police officer purportedly helped his colleagues hold the appellant on the ground, was apparently aggressive towards him and allegedly insulted him several times because the appellant was speaking French. A witness, Mr. Vivian, partially corroborated the appellant's testimony.

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2 R.S.C., 1985, c. N-5.
3 R.S.C., 1985, c. C-46.
4 (1893), 6 R. 67 (H.L.).

[5] The content of the testimony submitted by the defence raises the issue of the use of excessive force to restrain the appellant.

[6] That evidence was such that it would lead to an acquittal if it was believed or if it raised a reasonable doubt in the mind of the military judge because, as correctly noted in the respondent's memorandum, [TRANSLATION] "it would be difficult for the military judge to grant credibility to police officers who provided inconsistent testimony in respect of the personnel present".

[7] Furthermore, the respondent concedes that, if that were the case, the police officers would have thus omitted significant facts in their testimony, even proof of criminal conduct by the third police officer, and that it would consequently be difficult [TRANSLATION] "to give them sufficient credence to support a conviction". That doubt is likely to arise with respect to the two charges without distinction, because it is the honesty of the police officers that is called into question.

[8] Having described the general context, I now propose to refer briefly to the facts and reproduce the trial judge's findings on the two charges. I will then examine the principles of law involved and describe the military judge's decisions on the application of the rule set out in *Browne v. Dunn*. It will then be possible to apply the relevant principles of law.

[9] In my opinion, doing this will clearly show why it is necessary to order a new trial. Essentially, the military judge could not decide to not apply the rule set out in *Browne v. Dunn* and then apply it in his judgment when assessing the credibility of the witnesses. In doing so, it is

no longer possible to explain the verdict or to determine whether the principle of reasonable doubt was applied correctly.

III. Relevant provisions

[10] For ease of understanding, I reproduce the applicable provisions in this case, that is, paragraph 130(1)(*a*) of the *National Defence Act* and paragraph 129(*a*) of the *Criminal Code*.

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 punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	*a)* survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale;
…	[…]
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	*d)* soit d'un acte criminel et

liable to imprisonment for a term not exceeding two years, or	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.

IV. The facts

[11] The circumstances that gave rise to the charges against the appellant are described as follows by the military judge:

> [12] The evidence clearly indicates that Master Corporal Laflamme was driving his car at around 1 a.m. on February 5, 2012, when he was leaving the corporals' and privates' mess of the 8th Squadron and that he was heading for the base exit. The military police section of the squadron was conducting a RIDE (Reduce Impaired Driving Everywhere) operation on Anson Street, leading to the base exit to identify impaired drivers. This RIDE operation was planned because there was a special event at the corporals' and privates' mess in the evening of February 4, i.e. the viewing of UFC fights. This operation began around 11:30 p.m. on February 4. Corporals Ryan and Bains conducted this RIDE operation. All the events of this case took place at a defence facility.

V. Trial judgment

[12] The military judge found the appellant guilty of obstructing two military police officers.

A. *First charge*

[13] The military judge stated the following with respect to the first charge:

> [44] Master Corporal Laflamme showed his driver's licence to Corporal Ryan but he did not give it to her. It is not very important whether Corporal Ryan asked him to show or give her his driver's licence. Given the facts of our case, i.e. a police officer signalling twice with a flashlight to a driver at around 1 a.m. on a Canadian Forces base while a police car with its beacon lights on blocked the road leading to the base exit, common sense is that a person should stop and give the police officer his or her driver's license when he or she asks to see it. The term "produce" does not simply mean to show one's licence, but to produce it, i.e. to present it on request. Master Corporal Laflamme did not do this. Corporal Ryan was not able to identify him at that time. The fact of not giving his licence impeded Corporal Ryan's work and made it more difficult.

[14] The military judge rejected the appellant's testimony as follows:

> [58] Master Corporal Laflamme testified that he had not understood that Corporal Ryan was motioning to him to stop. Further, Mr. Vivian and the other stopped driver close to Corporal Ryan seemed to not have had any difficulty in understanding that they had to stop. Master Corporal Laflamme stated that he always co-operated with the police. Moreover, his testimony shows very little co-operation with Corporal Ryan.
>
> [59] Master Corporal Laflamme testified that he saw a patrol car with its beacon lights lit, blocking the road close to the base exit, that a police officer lit his car with a flashlight and that he understood that he should turn in the direction of the police officer but he did not understand that all this meant that he had to stop in the parking lot like the car stopped close to the police officer.

> [60] Master Corporal Laflamme only offered excuses to explain why he did not stop and he did not give his licence to Corporal Ryan. His testimony regarding his conduct, the interpretation of Corporal Ryan's actions and words and the situation in general is improbable and makes no sense.
>
> [61] Master Corporal Laflamme is not a credible witness. The court concluded that the evidence proves beyond any reasonable doubt that Master Corporal Laflamme voluntarily refused to stop his car and identify himself by not giving his driver's licence to Corporal Ryan. The court thus finds that the evidence proves beyond any reasonable doubt that Master Corporal Laflamme obstructed the work of Corporal Ryan.

B. *Second charge*

[15] Regarding the second charge, the military judge arrived at the following conclusion:

> [62] The court will now concentrate on the second charge. Did Master Corporal Laflamme obstruct the work of Corporal Bains? The prosecutor argues that the obstruction is composed of one or more of the following acts: not exiting the car, not giving his driver's licence so that Corporal Bains could identify him and resisting arrest at the time that he was handcuffed.
>
> [63] Master Corporal Laflamme testified that on Corporal Bains's arrival at his car, Corporal Bains asked to see his licence in a calm voice. Master Corporal Laflamme showed him as he had done with Corporal Ryan. Corporal Bains pointed his flashlight on the licence to see it and apparently came closer. There was very little light in this location. Corporal Bains then allegedly asked him to give him his licence and his wallet in a hysterical and aggressive tone and he gave them to him. Corporal Bains asked a commissionaire to translate that Master Corporal Laflamme was under arrest for drunk driving, trying to avoid a RIDE program and for not co-operating with police. Corporal Bains then asked him to get out of the car and he got out immediately. Corporal Bains told him to turn to face his car and Corporal Bains searched him. Following this, Corporal Bains asked him to put his left hand behind him to put handcuffs on him. When he tried to put his right hand behind him, he had trouble because his arm was not flexible and his arm tensed. He turned his head to talk to Corporal Bains. It was at this moment that he was put face-down on the ground.

[64] Corporal Bains testified that he came on the scene after Corporal Ryan had called him. He identified himself to Master Corporal Laflamme and asked him to get out of his vehicle. Master Corporal Laflamme asked him why. He asked him again to get out of his vehicle about three other times and Master Corporal Laflamme answered no and why. Master Corporal Laflamme got out of his vehicle. Corporal Bains asked Master Corporal Laflamme to give him a piece of identification. Master Corporal Laflamme answered why. Corporal Bains asked three or four times before Master Corporal Laflamme took out his ID card from his wallet to show it to him. Bains tried to take the card but Master Corporal Laflamme placed it behind his back. Corporal Bains contacted the dispatcher so that he could inform Master Corporal Laflamme in French that he would be put under arrest because he had not identified himself.

[65] Corporal Bains took Master Corporal Laflamme's wallet and gave it to Corporal Ryan. He asked Master Corporal Laflamme to turn toward his car and place his hands on the vehicle, which Master Corporal Laflamme did. He asked Master Corporal Laflamme to place his hands behind his back so that he could put the handcuffs on him but Master Corporal Laflamme resisted by keeping his arms tense and pushing back from the vehicle in Corporal Bains's direction. Master Corporal Laflamme turned around and faced Corporal Bains and seemed angry. Corporal Ryan's testimony on these events was similar.

[66] During his cross-examination, Master Corporal Laflamme testified that he had not gotten out of his car when Corporal Ryan had asked him at the time of his first contact with her. He asked her why she was asking him to do this and she answered because he had not stopped for the RIDE program.

[67] Master Corporal Laflamme and Mr. Vivian told the court that another male police officer was present during the arrest of Master Corporal Laflamme. Corporal Ryan and Bains testified that they were the only police officers on the scene. It appears that Mr. Vivian, wanting to inform his chain of command that he had observed troubling events the night of February 5, had spoken about this briefly with Master Corporal Laflamme in the days following. Master Corporal Laflamme apparently told him not to speak to him about it, but to speak to his lawyer in the near future. Mr. Vivian therefore made no complaint or any official statement. The court has difficulty in understanding why Master Corporal Laflamme did not tell Mr. Vivian to give an official statement when he learned that a witness could describe how he was

> allegedly mistreated by the police officers. The court does not believe this evidence.
>
> [68] Given the decision of the court on the application of the rule in *Browne v Dunn*, the court gives little weight to this testimony. The court considers that Corporals Ryan and Bains are credible.
>
> [69] This is a situation caused by the attitude and conduct of Master Corporal Laflamme. The sequence of events started when Master Corporal Laflamme decided not to stop in the parking lot. By refusing to give his driver's licence to Corporal Ryan as she had asked, he was causing increased tension. He testified that [translation] "the more that Corporal Bains yelled, the more time I took to turn around".
>
> [70] Although Corporal Bains repeated his order three times, Master Corporal Laflamme came out of his car. The court found that the evidence accepted by the court prove beyond a reasonable doubt that Master Corporal Laflamme did not give his driver's licence in a way that would allow Corporal Bains to identify him and that he resisted arrest.
>
> [Emphasis added.]

VI. Applicable principles

A. *Reasons for judgment*

[16] The principles in respect of the reasons for judgment, the burden and the standard of proof are well known. The judge must explain why he is rejecting testimony. This proposition is not a matter of controversy.[5] The judge must provide reasons for the judgment and not simply his

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[5] *R. v. D.(J.J.R.)* (2006), 215 C.C.C. (3d) 252, paras. 34-39 (Ont. C.A.); leave to appeal refused [2007] 1 S.C.R. x. Justice Charron referred to that decision approvingly in *R. v. Dinardo*, [2008] 1 S.C.R. 788, 2008 SCC 24, para. 25.

or her conclusion,[6] because "the accused is entitled to know why the trial judge is left with no reasonable doubt".[7]

[17] The judge must explain the basis of his or her decision because a failure "to sufficiently articulate how credibility concerns were resolved may constitute reversible error".[8] That is particularly crucial when the trial judge must resolve confused and contradictory evidence on a key issue.[9]

[18] Furthermore, in this case, "a trial judge's failure to explain why he rejected an accused's plausible denial of the charges does not mean the reasons are deficient as long as the reasons generally demonstrate that, where the [police officers'] evidence and the [appellant's] evidence conflicted, the trial judge accepted the [police officers'] evidence. No further explanation for rejecting the accused's evidence is required as the convictions themselves raise a reasonable inference that the accused's denial failed to raise a reasonable doubt".[10] I will determine in my conclusion whether that is the case.

[19] That said, it must however be noted that a court of appeal will examine the sufficiency of reasons using a functional test.

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6 *R. v. Feeney*, [1997] 2 S.C.R. 13, para. 32; *R. v. Maharaj (Y.M.)* (2004), 186 C.C.C. (3d) 247, para. 23 (Ont. C.A.) leave to appeal refused [2005] 1 S.C.R. xiv.

7 *R. v. Dinardo* [2008] 1 S.C.R. 788, 2008 SCC 24, para. 26; *R. v. Gagnon*, [2006] 1 S.C.R. 621, 2006 SCC 17.

8 *R. v. Dinardo* [2008] 1 S.C.R. 788, 2008 SCC 24, para. 26. See also *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, para. 23.

9 *R. v. Sheppard*, [2002] 1 S.C.R. 869, 2002 SCC 26, para. 55; *R. v. Dinardo*, [2008] 1 S.C.R. 788, 2008 SCC 24, para. 27; *R. v. Wadforth* (2009), 247 C.C.C. (3d) 466, para. 65 (Ont. C.A.).

10 *R. v. Vuradin*, [2013] 2 S.C.R. 639, 2013 SCC 38, para. 13.

[20] The scope of that test set out by the Supreme Court of Canada in *R. v. Sheppard*[11] is summarized as follows by Justice Charron in *R. v. Dinardo*:

> *Sheppard* instructs appeal courts to adopt a functional approach to reviewing the sufficiency of reasons (para. 55). The inquiry should not be conducted in the abstract, but should be directed at whether the reasons respond to the case's live issues, having regard to the evidence as a whole and the submissions of counsel (*R. v. D. (J.J.R.)* (2006), 215 C.C.C. (3d) 252 (Ont. C.A.), at para. 32). An appeal based on insufficient reasons will only be allowed where the trial judge's reasons are so deficient that they foreclose meaningful appellate review: *Sheppard*, at para. 25.[12]

[21] Ultimately, if the deficiencies in the judge's reasons do not foreclose meaningful appellate review and the verdict can be explained, there is no need to order a new trial.

[22] Alternatively, the appellant also argues that the standard and burden of proof were not correctly applied by the military judge.

B. *Assessing the credibility and reliability of witnesses*

[23] In *R. v. Clark*,[13] our colleague Justice Watt summarized the relevant principles for assessing the credibility and reliability of witnesses:

> [40] First, witnesses are not "presumed to tell the truth". A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced in the proceedings, unaided by any presumption, except perhaps the presumption of innocence: R. v Thain, 2009 ONCA 223, 243 CCC (3d) 230, at para 32.
>
> [41] Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by

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11 [2002] 1 S.C.R. 869, 2002 SCC 26.
12 [2008] 1 S.C.R. 788, 2008 SCC 24, para. 25.
13 2012 CMAC 3.

> the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense and rationality to reject uncontradicted evidence: *Aguilera v Canada (Minister of Citizenship and Immigration)*, 2008 FC 507, at para 39; *R.K.L. v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, at paras 9-11.
>
> [42] Third, as juries in civil and criminal cases are routinely and necessarily instructed, a trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings. Said in somewhat different terms, credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable, much less capable of sustaining the burden of proof on a specific issue or as a whole.

[24] There is also a need to make the distinction between the concept of the credibility of a witness and the concept of the reliability of a witness. Justice Watt provided the following distinction in *R. v. C.(H.)*:

> Credibility and reliability are different. Credibility has to do with a witness's veracity, reliability with the accuracy of the witness's testimony. Accuracy engages consideration of the witness's ability to accurately
>
> i. observe;
> ii. recall; and
> iii. recount
>
> events in issue. Any witness whose evidence on an issue is not credible cannot give reliable evidence on the same point. Credibility, on the other hand, is not a proxy for reliability: a credible witness may give unreliable evidence: *R. v. Morrissey* (1995), 22 O.R. (3d) 514, at 526 (C.A.).[14]
>
> [Emphasis added.]

[14] (2009), 241 C.C.C. (3d) 45, para. 41 (Ont. C.A.). See also *Pointejour Salomon v. R.*, 2011 QCCA 771, paras. 40-41.

[25] The Divisional Court of the Ontario Superior Court provided the following distinction between the two concepts in *S.D. v. Ontario (Criminal Injuries Compensation Board)*:

> Credibility involves an assessment of whether a witness is telling the truth as opposed to lying. Reliability relates to whether an honest witness may nevertheless be mistaken in what he or she believes to be the truth.[15]

C. *The rule set out in Browne v. Dunn*

[26] Our colleague Justice Weiler of the Court of Appeal for Ontario recently summarized the principles set out in *Browne v. Dunn* in *R. v. Dexter*.[16]

[27] Because of the issue's importance in this case, I reproduce her summary in full:

> 17 The rule in *Browne v. Dunn* is not merely a procedural rule; it is a rule of trial fairness. The rule was summarized by this court in *R. v. Henderson* (1999), 44 O.R. (3d) 628 (C.A.), at p. 636 as follows:
>
> > This well-known rule stands for the proposition that if counsel is going to challenge the credibility of a witness by calling contradictory evidence, the witness must be given the chance to address the contradictory evidence in cross-examination while he or she is in the witness-box.
>
> The cross-examiner gives notice by first putting questions to the witness in cross-examination that are sufficient to alert the witness that the cross-examiner intends to impeach his or her evidence, and second, by giving the witness an opportunity to explain why the contradictory evidence, or the inferences to be drawn from it, should not be accepted: see the comments of Lord Herschell in *Browne v. Dunn,* at pp. 70-71.
>
> 18 The application of the rule prevents a witness from being "ambushed". However, it does not require the cross-examiner to

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15 2010 ONSC 2562, para. 13.
16 2013 ONCA 744.

"slog through a witness's evidence-in-chief putting him on notice of every detail the defence does not accept": see *R. v. Verney* (1993), 67 O.A.C. 279, at para. 28. Only the nature of the proposed contradictory evidence and its significant aspects need be put to the witness.

19 The rule is also a rule of common sense. By enabling the trial judge to observe and assess the witness when he or she is confronted with contradictory evidence and given an opportunity to explain his or her position, the rule promotes the accuracy of the fact-finding process. In doing so, it enhances public confidence in the justice system.

20 The effect that a court should give to a breach of the rule in *Browne v. Dunn* will depend on a number of factors. In deciding how to address a breach, a trial judge may consider:

- The seriousness of the breach;
- The context in which the breach occurred;
- The stage in the proceedings when an objection to the breach was raised;
- The response by counsel, if any, to the objection;
- Any request by counsel to re-open its case so that the witness whose evidence has been impugned can offer an explanation;
- The availability of the witness to be recalled; and
- In the case of a jury trial, whether a correcting instruction and explanation of the rule is sufficient or whether trial fairness has been so impaired that a motion for a mistrial should be entertained.

Thus, the extent of the rule's application is within the discretion of the trial judge after taking into account the circumstances of the case: see *R. v. Lyttle*, 2004 SCC 5, [2004] 1 S.C.R. 193, at para. 65; *R. v. Werkman*, 2007 ABCA 130, 404 A.R. 378, at para. 9.

21 There are at least two permissive options to rectify the breach. One is for the trial judge to take into account the failure to cross-examine when assessing a witness's credibility and deciding

> the weight to be given to that witness's evidence: see *Werkman*, at paras. 9-11; *R. v. Paris* (2000), 138 O.A.C. 287, at para. 22. Another is to allow counsel to recall the witness whose evidence has been impeached without notice. As Moldaver J.A. explained in *R. v. McNeill* (2000), 48 O.R. (3d) 212 (C.A.), at paras. 47-49, where the concern lies in the witness's inability to present his or her side of the story, if the witness is available and the trial judge is satisfied that recall is appropriate, the trial judge ought to offer the aggrieved party that opportunity. The mechanics of when and by whom the witness should be recalled should be left to the discretion of the trial judge. If the aggrieved party who is offered this option declines it, then the trier of fact would simply decide whether to believe all, part or none of the [later] witness's evidence regardless of whether the evidence was uncontradicted.
>
> 22 Deference is owed to a trial judge's exercise of discretion in deciding how to deal with a breach of the rule unless error in principle is shown: see *R. v. Blom* (2002), 61 OR (3d) 51 (C.A.), at para. 20.
>
> [Emphasis added.]

VII. Application of the principles

[28] Before proceeding with the application of all of these principles, it is essential to describe the circumstances in which the issue of the rule set out in *Browne v. Dunn* was raised during the trial.

[29] After the defence closed its case, the prosecution applied to call rebuttal evidence because of testimony concerning the presence of a third police officer. It justified its application by raising the rule set out in *Browne v. Dunn*.

[30] Counsel for the appellant maintained that he cross-examined the military police officers with respect to the number of police officers involved in the appellant's arrest and the restraint imposed upon the appellant when he was placed on the ground.

[31] The military judge recognized that the question of the presence of a third police officer is an important issue regarding the credibility of the prosecution's case, but he found that the questions asked of the police witnesses should have been more precise. However, he decided that it was not necessary to recall a police witness because the evidence could be assessed in light of the rule set out in *Browne v. Dunn*.

[32] However, the debate on this issue, far from resolved, proceeded during a suspension of the military judge's deliberation at the request of the parties.[17]

[33] Counsel for the parties then informed the military judge that counsel for the appellant had sent the prosecutor who was responsible for the case at that time information on the presence of a third police officer, and that he had also told her that an independent witness was prepared to confirm that fact and provide a sworn statement in that respect.[18]

[34] The email exchanges in that respect were sent by counsel for the appellant to the prosecutor during the trial. They are not in the record before us.

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17 Appeal book, volume II, at p. 295.
18 Appeal book, volume II, at pp. 296-297.

[35] It was the prosecutor who was responsible for the case during the trial who made these clarifications to avoid a misunderstanding because he had justified his application to call rebuttal evidence by stating that the prosecution could not anticipate the nature of the testimony of the appellant and of Mr. Vivian, which, in light of the email previously received by the prosecution, was not consistent with the facts.

[36] On the basis of this new information, the military judge thus reviewed the previously rendered decision and made the following decision:

> [TRANSLATION]
>
> The rule set out in *Browne v. Dunn*, that rule: . . . establishes that if counsel seeks to challenge the credibility of a witness by calling [contradictory] evidence, the witness must be given the opportunity to address such evidence during cross-examination. The nature of the contradictory evidence must at least be put to the witness during cross-examination by counsel who plans to lead it.
>
> Here, I refer to paragraph 107 of *R. v. McCarroll*, 2008 ONCA 715. It is a rule of fairness, fairness towards the witness. And certainly, every rule of evidence must be evaluated in the context in which such rule must be used.
>
> What is the context here? The existence of a third police officer on the scene is an important issue for the defence. It is an issue that concerns the credibility of the prosecution witnesses. Credibility is an important element in this case. The accused and a defence witness testified to that effect, that is, that there was a third police officer involved in the interactions with Master Corporal Laflamme. In an email to the prosecution in September 2012, defence counsel stated that it had information about a third police officer and that it had a witness in that regard. So, nevertheless, defence counsel—and defence counsel also mentioned, while discussing the third police officer, mentioned collusion—if I understood the term collusion correctly—
>
> DEFENCE COUNSEL: Possibility.
>
> MILITARY JUDGE: —possibility of collusion, OK, thank you—in argument on this issue this afternoon. So, nevertheless, defence

> counsel asked Corporal Ryan and Corporal Bains practically all questions except whether there was a third police officer on the scene and the fact that witnesses could present proof that there was a third police officer on the scene.
>
> My initial decision regarding the rule set out in *Browne v. Dunn* shall remain unchanged. That is, that the Court finds that defence counsel did not respect that rule. However, the prosecution was aware of the defence's position. The prosecution was aware that the defence had evidence or could present evidence regarding a third police officer. Even though Major Carrier, the current prosecutor, claims that he was not personally aware at the time, the prosecution was aware. It was the prosecution's duty to ensure that counsel holding the position of prosecutor during the trial be aware of each important element in this case. Had Major Carrier had that knowledge, he likely, possibly, could have cross-examined in re-examination on that aspect. I cannot—the Court cannot confirm that that is what he would have done, but he would have been fully aware of the questions asked and of the significance of the questions that were asked by defence counsel. He could have then rehabilitated his witness or—which he did not do, which he did not do because he did not have the information to do so.
>
> So even if the Court finds that defence counsel did not follow the rule set out in *Browne v. Dunn* as stated by law, there was misconduct by the prosecutors as well. Therefore, at this time, instead of simply—instead of finding that my assessment of the evidence submitted by the defence would be influenced by the breach of the rule set out in *Browne v. Dunn*, the impact will be neutral. There will be no negative impact on the assessment of the defence evidence with respect to the breach of that rule.
>
> [Emphasis added.]

[37] I agree with the military judge that, in the circumstances, he should not be making a negative finding in the assessment of the evidence submitted by the appellant. However, that is not what he did in his judgment.

[38] I again reproduce the relevant passages of the trial judgment:

> [67] Master Corporal Laflamme and Mr. Vivian told the court that another male police officer was present during the arrest of Master Corporal Laflamme. Corporal Ryan and Bains testified that they were the only police officers on the scene. It appears that Mr. Vivian, wanting to inform his chain of command that he had observed troubling events the night of February 5, had spoken about this briefly with Master Corporal Laflamme in the days following. Master Corporal Laflamme apparently told him not to speak to him about it, but to speak to his lawyer in the near future. Mr. Vivian therefore made no complaint or any official statement. The court has difficulty in understanding why Master Corporal Laflamme did not tell Mr. Vivian to give an official statement when he learned that a witness could describe how he was allegedly mistreated by the police officers. The court does not believe this evidence.
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> [68] Given the decision of the court on the application of the rule in *Browne v Dunn*, the court gives little weight to this testimony. The court considers that Corporals Ryan and Bains are credible.
>
> [Emphasis added.]

[39] In my view, that decision directly contradicts the military judge's previous decision that the impact of the rule set out in *Browne v. Dunn* would be neutral in the circumstances and would have no negative effect on the assessment of the defence evidence. That suffices to allow the appeal.

[40] But there is more. In fact, in my opinion, given the specific circumstances of this case, the prosecution was also required to make inquiries into the participation of a third police officer.

[41] In fact, even if the issue was not addressed in this light by the parties before the military judge, regard must be had to the prosecution's fundamental duty to inquire when information that questions the honesty or reliability of its witnesses is brought to its attention.

[42] That duty was analyzed by the Supreme Court of Canada in *R. v. McNeil*[19] in the context of the prosecution's disclosure obligations.

[43] The prosecution's duty to inquire is described as follows by Justice Charron:

> [49] The Crown is not an ordinary litigant. As a minister of justice, the Crown's undivided loyalty is to the proper administration of justice. As such, Crown counsel who is put on notice of the existence of relevant information cannot simply disregard the matter. Unless the notice appears unfounded, Crown counsel will not be able to fully assess the merits of the case and fulfill its duty as an officer of the court without inquiring further and obtaining the information if it is reasonably feasible to do so. Ryan J.A. in *R. v. Arsenault* (1994), 153 N.B.R. (2d) 81 (C.A.), aptly described the Crown's obligation to make reasonable inquiries of other Crown agencies or departments. He stated as follows:
>
> > When disclosure is demanded or requested, Crown counsel have a duty to make reasonable inquiries of other Crown agencies or departments that could reasonably be considered to be in possession of evidence. Counsel cannot be excused for any failure to make reasonable inquiries when to the knowledge of the prosecutor or the police there has been another Crown agency involved in the investigation. Relevancy cannot be left to be determined by the uninitiated. If Crown counsel is denied access to another agency's file, then this should be disclosed to the defence so that the defence may pursue whatever course is deemed to be in the best interests of the accused. This also applies to cases where the accused or defendant, as the case may be, is unrepresented . . . . [para. 15]

[19] [2009] 1 S.C.R. 66, 2009 SCC 3.

> [50] The same duty to inquire applies when the Crown is informed of potentially relevant evidence pertaining to the credibility or reliability of the witnesses in a case. As the *amicus curiae* rightly states, "[t]he Crown and the defence are not adverse in interest in discovering the existence of an unreliable or unethical police officer" (factum, at para. 62). . . .
>
> [Emphasis added.]

[44] In accordance with that duty, the prosecution had to make inquiries into the information that was communicated to it by counsel for the appellant in September 2012 with respect to the events in February 2012.

[45] The prosecution was required to determine whether the allegation brought to its attention was founded. Contrary to the respondent's apparent position in her memorandum, the prosecution was required to make a certain number of inquiries. The prosecution could and should have first made inquiries, including with its police witnesses, into the number of police officers present and the force used by the police officers, and then determined whether any of the military police officers who could have been on duty the evening of the events matched the description that was provided by the witness, Mr. Vivian.

[46] According to the submissions of the parties before the military judge, it is not clear whether the prosecution even acted upon the information provided. However, the prosecution was obligated to do so. It must be noted that "[t]he course of an investigation, and the factors

which influence it, are matters which are likely to be within the peculiar knowledge of the Crown".[20]

[47] Furthermore, contrary to the respondent's claim, I believe that those inquiries could have been made in accordance with the prosecutor's ethical and professional obligations while avoiding influencing the witnesses.[21]

[48] In light of the prosecution's duty to inquire, it was fundamentally unfair for the military judge to make, in his judgment, a negative finding with respect to the defence, regarding an issue in respect of which the prosecution had such a duty, and given the fact that the prosecution had been informed of it.

[49] Even if the rule set out in *Browne v. Dunn* is one of fairness towards witnesses, in this case, it was necessary for the military judge to take the prosecution's duty into account in the application of that rule. Here, that rule required a contextual adaptation. For that reason, the military judge was limited to his initial decision because it was the only possible fair conclusion under the circumstances.

[50] Having been informed of the appellant's disclosure to the prosecution in September 2012, the military judge could not draw any unfavourable conclusion under the circumstances.

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[20] *R. v. S.(R.J.)*, [1995] 1 S.C.R. 451, at p. 566 (Justice Iacobucci). See also *R. v. Bartle*, [1994] 3 S.C.R. 173, at p. 210.

[21] Commission on Proceedings Involving Guy Paul Morin, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin (Kaufman Report)* (Toronto, Ont.) Ministry of the Attorney General of Ontario, 1998, Recommendation #107; G. MacKenzie, *Lawyers and Ethics: Professionnal Responsibility and Discipline*, 5th ed. (Toronto: Carswell, 2009) at pp. 4-26.2(1) to 4-31; Alan W. Mewett and Peter J. Sankoff, *Witnesses*, vol. 1 (Toronto: Carswell, 1991) loose-leaf, updated 2012, at pp. 6-2 to 6-9; Bennett L. Gershman, "Witness Coaching by Prosecutors" (2002), 23 Cardozo Law Review 829.

[51] In fact, even if an analogy between the situation in this case and the alibi defence is imperfect,[22] the prosecution had enough time to make inquiries into the information communicated by counsel for the appellant, and the information was precise enough to make it possible for the authorities to verify it in a timely fashion.[23] Therefore, it was not open to military judge to make a negative finding.[24]

[52] Furthermore, once the military judge informed the parties that the impact would be neutral, he deprived the appellant of the opportunity to ask witnesses to be recalled. The appellant had no reason to suspect that, following that decision, the military judge would make a negative finding with respect to his evidence and in favour of the prosecution because of the alleged breach of the rule set out in *Browne v. Dunn*. That breach, under the circumstances, was no longer a breach.

[53] In my opinion, the failure to do a more extensive and detailed cross-examination of the defence no longer constituted a breach of the rule set out in *Browne v. Dunn* because of the prosecution's existing obligations in such a situation. Nonetheless, even if that was considered the case, that breach was minor and did not justify a negative finding.

[54] Moreover, I believe that the military judge also erred by making a negative finding because the appellant purportedly did not encourage the witness, Mr. Vivian, to make a statement to the authorities.

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22 *R. v. Taylor*, [2013] 1 S.C.R. 465, 2013 SCC 10, upholding the dissent of Justice Hoegg of the Newfoundland and Labrador Court of Appeal (2012), 288 C.C.C. (3d) 268, para. 32.

23 *R. v. Cleghorn*, [1995] 3 S.C.R. 175, para. 3.

24 *R. v. Wright* (2009), 247 C.C.C. (3d) 1, para. 20 (Ont. C.A.); *R. v. Dexter*, 2013 ONCA 744, para. 37.

[55] First, there was no legal obligation in that sense, but that issue is moot and irrelevant given that the information was communicated to the prosecution several months before the trial.

[56] Second, the context must be considered. The witness, Mr. Vivian, described the tense atmosphere that existed in the unit following the events involving the appellant. He also explained that he had discussed this with the appellant, who asked him if he was willing to speak to his lawyer and provide a written statement.

[57] Eventually, counsel for the appellant contacted him and then the prosecution. Prior to that, there had been no improper conduct and nothing justifying a negative finding. The conduct of counsel for the appellant in this case was beyond reproach, fair, professional and consistent with the highest standards of professional courtesy. He did exactly what he was required to do.

[58] Furthermore, the Supreme Court of Canada recognized in *R. v. Taylor*[25] that despite the absence of an obligation of a witness or the defence to inform the authorities of the content of anticipated testimony, the trial judge may, in certain circumstances, make a negative finding with respect to a testimony when the circumstances warrant a finding of recent fabrication.

[59] That was certainly not the case here because of the disclosure of information in a timely fashion to the prosecution. That is especially true given the prosecution's duty to inquire. The basis of the rule justifying the very possibility of a negative finding was absent.[26]

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[25] [2013] 1 S.C.R. 465, 2013 SCC 10, upholding the dissent of Justice Hoegg of the Newfoundland and Labrador Court of Appeal (2012), 288 C.C.C. (3d) 268, paras. 31-33.

[26] *R. v. Wright* (2009), 247 C.C.C. (3d) 1, paras. 20 and 23 (Ont. C.A.).

[60] Finally, even if the military judge, in his judgment, referred to the principles set out in *R. v. W.(D.)*,[27] he does not seem to have applied the concept of reasonable doubt in assessing the credibility of the witness, which is essential.[28] He stated that he believes the police officers and does not believe the appellant and the witness, Mr. Vivian, but he did not determine whether that evidence raises a reasonable doubt in his mind or whether all of the evidence raises a reasonable doubt.[29] One must never lose sight of the fact that ". . . lack of credibility on the part of the accused does not equate to proof of his or her guilt beyond a reasonable doubt".[30]

[61] Certainly, in many cases, findings similar to those of the military judge with respect to the credibility of witnesses may be sufficient, but in the circumstances described above and for the reasons noted above, we cannot rely here on the military judge's sweeping statement that the police witnesses are credible.

[62] The credibility of the witnesses of the prosecution and the defence was central to this case with respect to the outcome of the trial. It cannot be said that the verdict would have been the same if a different finding had been made by the judge regarding the testimony of the police officers. If the evidence of prosecution witnesses was misjudged because improper principles were applied in determining the weight to be given to it, the applicable criteria may have been something other than the test of reasonable doubt.[31]

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27 [1991] 1 S.C.R. 742.

28 *R. v. E.(F.E.)* (2011), 282 C.C.C. (3d) 552, para. 104 (Ont. C.A.); *R. v. D.(B.)* (2011), 266 C.C.C. (3d) 197, para. 114 (Ont. C.A.); *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30, para. 8.

29 *R. v. J.W.*, 2014 ONCA 322, paras. 25-27; *R. v. Rodriguez*, 2014 ABCA 190, paras. 8-12.

30 *R. v. J.H.S.*, [2008] 2 S.C.R. 152, 2008 SCC 30. para. 13.

31 See the principles set out in that respect by Justice Major in his dissent in *R. v. Cleghorn*, [1995] 3 S.C.R. 175, paras. 39-41.

[63] The only reasonable and fair choice is to order a new trial where the evidence will be assessed in light of the appropriate principles. To the extent that the trial judge may accept some, all or none of a witness's evidence,[32] it is impossible to state that the verdict would have been the same if the evidence had been assessed according to the appropriate legal principles.

[64] For these reasons, and pursuant to subsection 238(1) of the *National Defence Act*, I propose to allow the appeal, to set aside the guilty verdicts with respect to the two charges, and to order a new trial on the two charges by court martial.

"Guy Cournoyer"
J.A.

"I concur.
Robert Mainville, J.A."

"I concur.
Jocelyne Gagné, J.A."

Certified true translation
Janine Anderson, Translator

[32] *R. v. Clark*, 2012 CMAC 3, para. 42; *R. v. J.M.H.*, [2011] 3 S.C.R. 197, 2011 SCC 45, para. 25.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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