

Date: 20021126

Docket: CMAC-459

Neutral citation: 2002 CMAC 12

**CORAM: LINDEN J.A.
MALONE J.A.
SHARLOW J.A.**

BETWEEN:

MASTER CORPORAL SHERYL DOWNEY

Appellant

--and--

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario on November 26, 2002.

Judgment delivered from the Bench at Ottawa, Ontario on November 26, 2002.

REASONS FOR JUDGMENT OF THE COURT BY:

SHARLOW J.A.

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**REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario on November 26, 2002)**

SHARLOW J.A.

[1] It is undisputed that an essential element of the first charge, disobeying a lawful command, was that Master Corporal Downey was the Vice PMC of the mess at the time of the Christmas dinner on 8 December 2000. There was evidence that Master Corporal Downey believed that she did not hold that position at that time. The Military Judge found that Master Corporal Downey's belief was not reasonable because of her contradictory actions. However, the Military Judge did not expressly consider whether Master Corporal Downey's belief was honestly held, even if mistaken or unreasonable. We are all of the view that the failure to address

that question is fatal to the conviction on the first charge. Master Corporal Downey will be acquitted of that charge.

[2] We find no error with respect to the conviction on the second charge, absenting herself without leave. The dinner was Master Corporal Downey's place of duty and she left without leave. We cannot displace the Military Judge's finding of fact that Master Corporal Downey was not given the option to leave. The conviction on the second charge will stand.

[3] The Military Judge imposed a fine of \$1000 for both offences. We would substitute a fine of \$100 for the second offence only, as it was the less serious offence.

(s) "K. Sharlow
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET: CMAC-459

STYLE OF CAUSE: J
MASTER CORPORAL SHERYL DOWNEY
AND
HER MAJESTY THE QUEEN

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: NOVEMBER 26, 2002

REASONS FOR JUDGMENT OF THE COURT: Linden, Malone, Sharlow JJ.A.)

DELIVERED FROM THE BENCH BY: Sharlow J.A.

DATED: NOVEMBER 26

APPEARANCES:

Master Corporal Sheryl Downey REPRESENTING HERSELF

Lieutenant-Commander M. Pelletier FOR THE RESPONDENT

SOLICITORS OF RECORD:

Master Corporal Sheryl Downey REPRESENTING
Sydenham, Ontario HERSELF

Office of the Judge Advocate General FOR THE RESPONDENT
Ottawa, Ontario