Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20100803

Docket: CMAC-530

Citation: 2010 CMAC 6

CORAM: **de MONTIGNY J.A.**
HUGHES J.A.
MAINVILLE J.A.

BETWEEN:

CORPORAL A. E. LIWYJ

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on May 28, 2010.

Judgment delivered at Ottawa, Ontario, on August 3, 2010.

REASONS FOR JUDGMENT BY: YVES DE MONTIGNY J.A.

CONCURRED IN BY: ROGER T. HUGHES J.A.
ROBERT MAINVILLE J.A.

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REASONS FOR JUDGMENT

de MONTIGNY J.A.

[1] This is an appeal of a decision rendered on June 4, 2009 by the Military Judge Lieutenant Colonel L.-V. d'Auteuil of the Standing Court Martial at Canadian Forces Base in Shilo. The Appellant was convicted of three charges of disobedience to a lawful command of a superior officer pursuant to section 83 of the *National Defence Act*, R.S.C. 1985, c. N-5 (the "*NDA"*). He was sentenced to a reprimand and a fine of $750. The Appellant challenges the Military Judge's determination that the disobeyed orders were lawful and, in the alternative, claims that he made an

honest mistake of fact. In the further alternative, he appeals his sentence based on the principle of proportionality and parity.

I. Facts

[2] The Appellant served as a vehicle technician in the Army Reserve for many years before enrolling in the Regular Force in 2003. Corporal Liwyj has recognized experience and qualifications as a vehicle technician and as an instructor at the Canadian Forces School for Electrical and Mechanical Engineering ("CFSEME"). Since 2003, the Appellant has been serving at the Canadian Forces Base in Shilo, Manitoba, as a vehicle technician.

[3] On October 5, 2006, Corporal Liwyj was assigned to perform a mechanical inspection of a Craig Model TA-15 Beavertail trailer (the "trailer"). After performing a routine inspection on the trailer, the Appellant reported some issues to his supervisor, Sergeant Rose, who is also a vehicle technician. Upon examination of the faults presented to him, Sergeant Rose directed Corporal Liwyj to commence the repairs with a brake adjustment.

[4] Upon being told to perform that task, Corporal Liwyj indicated to Sergeant Rose that he was going to find some caging bolts to perform the brake adjustment. Sergeant Rose explained to the Appellant that it is sufficient to use air pressure alone, without caging bolts, to fix the brakes. A discussion followed between the two men and, confronted with the Appellant's reticence to carry the repair without caging bolts, Sergeant Rose gave the Appellant a direct order to perform the brake adjustment using air pressure only. Expressing some safety concerns, the Appellant refused

to perform the adjustment in the ordered manner unless provided with a written order. The trailer brakes were not adjusted by the Appellant and, as a consequence, the unit could not bring that piece of equipment on its upcoming military training exercise during the Thanksgiving long weekend.

[5] On the morning of Tuesday October 10, 2006, Sergeant Rose repeated his order to the Appellant, who once again refused to comply.

[6] Later on that same morning, a meeting was held between the Appellant, Sergeant Rose, Sergeant Lotocki and Unit Equipment Technical Sergeant Major, Master Warrant Officer (MWO) Hansen. The part of the Canadian Forces Technical Orders (CFTO) dealing with air pressure brakes adjustment was read to the Appellant. He reiterated that he had safety concerns about this procedure, but did not explain why it was unsafe. At the end of the meeting, MWO Hansen made Sergeant Rose's order his own, and directed the Appellant to carry out the repair using air pressure only, as indicated in the CFTO.

[7] After this meeting, the Appellant went home for lunch during which he phoned the CFSEME where an unnamed person confirmed to him that a caging bolt was still recommended when adjusting brakes of a Beavertail trailer.

[8] Upon the Appellant's return, another meeting was held at 1 p.m., with Sergeants Rose and Lotocki and with MWO Hansen. When questioned about the progress of the brake adjustment, Corporal Liwyj informed the persons present that someone at the CFSEME was also of the view

that caging bolts are necessary for a safe brake adjustment. For the last time, the Appellant was ordered to carry out the repair without the caging bolts and, once more, he refused to do so. As a result, the repairs were eventually performed by two other technicians using the air pressure method.

[9] The Appellant was charged on February 22, 2007 with three counts of disobedience to a lawful command of a superior officer, pursuant to s. 83 of the *NDA*.

II. Decision of the military judge

[10] The Military Judge started by indicating that the prosecution had to prove the following essential elements beyond a reasonable doubt in order to establish the Appellant's guilt under s. 83 of the *NDA*: 1) the identity of the accused and the date and place as alleged in the charged sheet; 2) the fact that an order was given to Corporal Liwyj; 3) that it was a lawful order; 4) that the accused received or knew the order; 5) the fact that the order was given by a superior officer, and that Corporal Liwyj was aware of that officer's status; 6) that the accused did not comply with the order; and finally 7) the blameworthy state of mind of the accused. The Military Judge found that elements 1, 2, 4, 5 and 6 were not in dispute and that they were agreed on by counsel for the defence. Accordingly, the Court was left to determine the two remaining elements, namely whether the order given was lawful and whether the Appellant had the requisite blameworthy state of mind when he did not obey the order.

[11] The Military judge first determined that the prosecution had proven beyond a reasonable doubt, for the three charges, that the order related to a military duty, which is to repair a piece of equipment belonging to the Canadian Forces and required for military training. He then referred to *R. v. Matusheskie,* 2009 CMAC 3 and *R. v. Finta*, [1994] 1 S.C.R. 701 with respect to the test to be applied in assessing whether an order is manifestly unlawful. Applying the standard elaborated in *Finta*, he asked himself whether the orders received by Corporal Liwyj were manifestly unlawful, and came to the conclusion that they were not. He noted that the Appellant only relied on his own opinion as to when it is appropriate or not to use a caging bolt to perform a brake adjustment, an opinion that was disputed by two other vehicle technicians who testified before the Court. He then stated:

> Reality is that Corporal Liwyj passed to his superior, Sergeant Rose, his issues further to the inspection he made of the trailer. Sergeant Rose made an assessment of the situation and concluded that the brakes adjustment could be made by using air pressure only, which is the manner described in the CFTO. Corporal Liwyj reached a different conclusion and he decided that he could not assume the risk associated to the task he was ordered to perform, considering his personal assessment of the matter. Was there really a risk? Maybe there was one, but it is not obvious for the court. However, it is clear for the court that the prosecution has proved beyond a reasonable doubt that the way Sergeant Rose wanted Corporal Liwyj to proceed was not obviously, patently and flagrantly wrong.

[12] Turning to the second issue, that of the Appellant's blameworthy state of mind, the Military Judge considered the defence of mistake of fact raised by his counsel but concluded that it had no "air of reality". Applying the decision of the Supreme Court of Canada in *R.* v. *Osolin*, [1993] 4 S.C.R. 595, which explained the burden of proof to establish an air of reality for a defence of mistake of fact, the Military Judge concluded that the Appellant's perception of the facts that the

orders were manifestly unlawful were not reasonable and could not therefore ground a defence of mistake of fact. His findings are captured in the following paragraph of his reasons:

> Did Corporal Liwyj think that he was doing anything wrong because of his belief in certain facts; this is, did he honestly but mistakenly believe the order was unlawful even if that was not the case? In court, he clearly stated that he refused to obey the order each time because he had safety concerns based on his personal observations of the brakes and his personal assessment of the situation. Additionally, he was confronted with the reference, the CFTO, supporting the order. There is no air of reality to this defence because the evidence put forward is not related to the existence or not of facts supporting his belief, but instead it is related to the personal interpretation he made of those facts. Then, the evidence is such that, if believed, a reasonable jury properly charged could not have acquitted.

[13] Finally, the Military Judge considered the circumstances surrounding the commission of the offences, the applicable principles of sentencing, and the representations made by counsel in order to determine the appropriate sentence. In arriving at what he considered a fair and appropriate sentence, he considered both mitigating and aggravating factors. As for the latter, he mentioned the objective and subjective seriousness of the offence, the repetition of the offence and the fact that his decision to disobey the orders had a clear impact on the operations of the unit and placed an additional burden on his fellow soldiers. Conversely, the Military Judge found that the following circumstances are mitigating: the fact that the Appellant did not have a criminal record, that he is a very competent and knowledgeable vehicle technician, that his conduct did not have an impact on discipline in his organization, that he had already received an administrative warning in relation to this incident that will remain in his file, that facing the court martial already had some deterrent effect, and that the two and half year delay in bringing this case to court makes the punishment less relevant and efficient on the morale and the cohesion of the unit members.

[14] In the end, the Military Judge found that a fine only, whatever its amount, would not be sufficient and that a reprimand was called for in the circumstances of this case, as "[i]t reflects that there is some reasons to have doubts about somebody's commitment at the time of the offence, and it reflects consideration given to the seriousness of the offence committed, but it also means that there is good hope for rehabilitation". He also invited the Appellant to be more trustful of his superiors, and to obey their lawful orders even if he disagrees.

III. Issues

[15] The issues raised in the present appeal are the following:

- Did the Military Judge err by finding that the Appellant failed to obey the lawful command of a superior?
- Did the Military Judge err by concluding that the Appellant's defence of mistake of fact had no air of reality?
- Did the Military Judge commit an error in imposing a demonstrably unfit sentence?

IV. Analysis

A. Standard of Review

[16] The first ground of appeal raised by the Appellant challenges the verdict itself. Verdicts in criminal law are subject to review on appeal only if they are unreasonable. The jurisprudence is to the effect that convictions are legal issues that involve an assessment of evidence: *R.* v. *Biniaris*, 2000 SCC 15, at paras. 19-27. That being the case, significant deference must be given to the

Military Judge's finding that the orders were lawful commands. In reviewing a verdict, as stated by this Court in *R.* v. *Nystrom*, 2005 CMAC 7, an appellate court "must examine the evidence, not in order to substitute its own assessment, but in order to determine whether the verdict is one that a properly instructed jury, acting judicially, could reasonably have returned" (at para. 51).

[17] The second ground of appeal pertains to the application by the trial judge of the "air of reality" test in deciding whether or not to consider the defence of mistake of fact put forward by the Appellant. Such an issue has repeatedly being held to be a question of law:

> In order for the appellant to succeed on this ground of appeal, he must establish two things. First, that the trial judge failed to consider the defence, and second, that there was an air of reality to the defence. Failure of a trial judge to consider the defence when there is an air of reality to it, whether sitting alone or with a jury, is an error of law.
>
> *R.* v. *Davis*, [1999] 3 S.C.R. 759, at para. 77. See also *R.* v. *Cinous*, [2002] 2 S.C.R. 3, at para. 55

[18] As such, this ground of appeal must be reviewed against the standard of correctness. There is no room for error when the interpretation of such an important legal issue is at stake. Indeed, this is the standard that was recently applied by the Manitoba Court of Appeal in *R.* v. *Côté*, 2008 MBCA 70 (at paras. 9-10).

[19] Lastly, it is settled law that the standard of review applicable to a sentencing order is that of reasonableness. Writing for a unanimous court in *R.* v. *Shropshire*, [1995] 4 S.C.R. 227, Justice

Iacobucci stressed that a deferential approach must be adopted by appellate courts when reviewing a sentencing judge's order:

> [46] An appellate court should not be given free reign to modify a sentencing order simply because it feels that a different order ought to have been made. The formulation of a sentencing order is a profoundly subjective process; the trial judge has the advantage of having seen and heard all of the witnesses whereas the appellate court can only base itself upon a written record. A variation in the sentence should only be made if the court of appeal is convinced it is not fit. That is to say, that it has found the sentence to be clearly unreasonable.

[20] Chief Justice Lamer reiterated this view a year later in *R* v. *C.A.M.*, [1996] 1 S.C.R. 500. Also writing on behalf of all of his colleagues, he wrote the following:

> [90] Put simply, absent an error in principle, failure to consider a relevant factor, or an overemphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[21] These two decisions were endorsed by this Court in the context of military law: see *R.* v. *St. Jean*, (2000) 45 W.C.B. (2d) 383, [2000] C.M.A.J. No. 2, at paras. 16-19 and *R.* v. *Forsyth*, 2003 CMAC 9. This standard of review was indeed reiterated in many subsequent decisions: *R.* v. *Tupper*, 2009 CMAC 5, at para. 13; *R.* v. *Taylor*, 2008 CMAC 1, at para. 17; *R.* v. *Dixon*, 2005 CMAC 2, at paras. 18-19; *R.* v. *Lui*, 2005 CMAC 3, at paras. 13-14.

B. The Lawfulness of the Command

[22] The offence set out in section 83 of the *NDA* is particular to the military world and reflects the fact that obedience to orders is the fundamental rule of military life. A corollary of that rule is

that he who gives the command must bear responsibility for it. As the Supreme Court stated in this regard:

> The absolute necessity for the military to rely upon subordinates carrying out orders has, through the centuries, let to the concept that acts done in obedience to military orders will exonerate those who carry them out. The same recognition of the need for soldiers to obey the orders of their commanders has led to the principle that it is the commander who gives the orders who must accept responsibility for the consequences that flow from the carrying out of his or her orders.
>
> *Finta*, above, at para. 228.

[23] It appears, therefore, that this duty to obey a superior's order discharges the soldier who complies from possible liability resulting from the execution of that order. But that is not the end of the matter. After reviewing the literature about the regrettable consequences of this duty throughout history and the transfer of liability that it creates, the Supreme Court endorsed the internationally recognized exception that an order is not to be obeyed if it is "manifestly unlawful". In such a situation, it is the obedience to a manifestly unlawful command that makes the soldier who carried it out liable. The lawfulness of a command and the duty to obey it unless it is manifestly unlawful are two sides of the same coin. Accordingly, the lawfulness element of the *actus reus* must be proven by the prosecution beyond a reasonable doubt. In other words, the prosecution has to prove beyond a reasonable doubt that the order was not manifestly unlawful in order to meet its burden of proof regarding lawfulness.

[24] An order that is not related to military duty would obviously not meet the necessary threshold of lawfulness. In other words, a command that has no clear military purpose will be

considered manifestly unlawful: see *R.* v. *Scott*, 2004 CMAC 2, at para. 11; *Canada* v. *Spence*, [1952] 2 S.C.R. 517.

[25] Because blind submission to an order has led to dire consequences in certain circumstances, the Supreme Court expanded the definition of a "manifestly unlawful" command in *Finta* and came up with an expanded notion of that concept:

> The manifest illegality test has received a wide measure of international acceptance. Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong.
>
> *Finta*, above, at para. 239.

[26] Even more telling is this excerpt from a decision of the Israel District Military court in the case of *Ofer* v. *Chief Military Prosecutor*, quoted by the Supreme Court in that same paragraph of its *Finta* decision as a "very helpful discussion" of the manifestly unlawful concept:

> The identifying mark of a "manifestly unlawful" order must wave like a black flag above the order given, as a warning saying: "forbidden". It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of "manifest" illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions.

[27] This language indicates that the threshold is high and that it should be assessed objectively. Were it otherwise, the very foundation of the military would be at risk of collapse. This threshold was adopted in the Queen's Regulations and Orders for the Canadian Forces (QR&O) at section 19.015:

> 19.015 – LAWFUL COMMANDS AND ORDERS
>
> Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer.
>
> NOTES
> (…)
> (B) Usually there will be no doubt as to whether a command or order is lawful or unlawful. In a situation, however, where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful.
>
> (C) An officer or non-commissioned member is not justified in obeying a command or order that is manifestly unlawful. In other words, if a subordinate commits a crime in complying with a command that is manifestly unlawful, he is liable to be punished for the crime by a civil or military court. A manifestly unlawful command or order is one that would appear to a person of ordinary sense and understanding to be clearly illegal; for example, a command by an officer or non-commissioned member to shoot a member for only having used disrespectful words or a command to shoot an unarmed child.

[28] In the case at bar, the Military Judge determined that the prosecution had proven beyond a reasonable doubt, for the three charges, that the order was related to a military duty. He then relied on the above quoted excerpt from *Finta* as well as on the decision of this Court in *Matusheskie*, *supra* to conclude that the order was not a manifestly unlawful command.

[29] The Appellant does not object to the Military Judge's conclusion of fact that the order was related to a military duty. Nor does he dispute that a lawful command must be obeyed. The Appellant rather argues that the Military Judge should have concluded in the existence of a reasonable doubt that the order was lawful. What the Appellant attempted to argue in his submissions on this matter is that there were two procedures available to fix the brakes, and that the caging method that he wanted to use was safer given the condition of the brakes. This line of argument, however, is deficient for two reasons.

[30] First of all, this Court is loath to disturb findings of fact made by a trial judge. It was put in evidence before the Military Judge that the caging bolt method and the air pressure method could both safely be used to perform the adjustment and that the adjustment could be successfully accomplished using either method. It was further shown that the air pressure method was the fastest and was the only approved method in the CFTO for the Beavertail trailer. At trial, the Military Judge was provided by the Appellant with a complete in-Court demonstration of the braking system with the use of a pair of training aid air brake systems. The Appellant also presented and commented on a PowerPoint slide show he had prepared to further explain the components of the air brake system for the Beavertail trailer and the use of a caging bolt to perform a brake adjustment. The Appellant claimed that it was safer to use a caging bolt to perform the brake adjustment, but could not substantiate this with any Canadian Forces approved or civilian publications or references of any kind and solely based his argument on his personal views and a phone conversation with an unnamed person. Moreover, two of his supervisors, who were also vehicle technicians, did not perceive any risks. It is on that basis that the Military Judge made a finding of fact that the safety

issue was not obvious. The Appellant has failed to convince this Court that such a finding is unreasonable, on the basis of the evidence that was before the Military Judge.

[31] The Appellant relied on his superiors' failure to inspect the brakes, the failure to provide him with a written order, the absence of urgent operational need to conduct the repairs, the absence of detailed explanations as to the air pressure method in the CFTO, his due diligence to demonstrate the unlawfulness of the order and the unreasonableness of the Military Judge's finding. Having carefully reviewed these arguments, I fail to see how any of these elements would tend to demonstrate that the air pressure method was obviously creating a serious safety risk. Some of these arguments were appropriately taken into account by the Military Judge when he considered the *mens rea*, but they could not affect the lawfulness of the order.

[32] Even if the Court were to agree with the Appellant that the caging bolt method was the safest method and that in the circumstances described by the Appellant the air pressure method was not as safe, the orders given to the Appellant to perform the brake adjustment using the air pressure method would still be lawful commands. Clearly, such orders did not meet the high threshold required to be found "manifestly illegal"; they do not "offend the conscience of every reasonable, right-thinking persons", and they are not "obviously and flagrantly wrong", to use the words of the Supreme Court of Canada in *Finta*, above. If courts were to start second-guessing the opinion of military officers as to the proper procedure to be used in repairing a vehicle, it would dangerously lower the threshold to declare an order manifestly unlawful. This is not a case where conscience is shocked by the blatant disregard of military officers for the life or security of others. It is, at best, an

instance of disagreement between fair-minded persons as to the method best suited to get a job done in a particular set of circumstances. This is a far cry from the examples found in the case law of an order that would be considered "manifestly illegal".

[33] Finally, the Appellant submitted that he was faced with a choice between following the order of his immediate superior or following the dictates of the Commanding Officer's Safety Directive. This policy stated, *inter alia*, that "[a]ll soldiers are empowered to ensure a safe environment exists within 1 RCHA", that "[l]eaders are to encourage soldiers to take responsibility for their actions and to care for their own and others' well-being", and that "[a]ny unsafe act that is about to be committed must be stopped and corrected before that activity can continue" (Appeal Book, vol. 3, p. 513).

[34] I would venture the following two comments with respect to this argument. First, the Safety Directive is only a policy, and is not a binding rule of law, while obedience to a lawful order is a legal duty pursuant to section 83 of the *NDA*. Second, even if I were to assume that the Safety Directive is the equivalent of an order, the law is clearly to the effect that the duty to obey a command remains even in the case of a previous conflicting order. This is clearly stated in the Queen's Regulations and Orders for the Canadian Forces (QR&O) at section 19.02:

> 19.02 – CONFLICTING LAWFUL COMMANDS AND ORDERS
>
> (1) If an officer or non-commissioned member receives a lawful command or order that he considers to be in conflict with a previous lawful command or order received by him, he shall orally point out the conflict to the superior officer who gave the later command or order.

> (2) If the superior officer still directs the officer or non-commissioned member to obey the later command or order, he shall do so.
>
> See also *Matusheskie*, above, at para. 15.

C. Air of Reality Test/Mistake of Fact

[35] It is well established that for a defence to be considered, it must have an evidentiary basis. As stated by the Supreme Court in *Cinous,* above (at para. 51), this basic principle gives rise to two corresponding principles:

> First, a trial judge must put to the jury all defences that arise on the facts, whether or not thy have been specifically raised by an accused. Where there is an air of reality to a defence, it should go to the jury. Second, a trial judge has a positive duty to keep from the jury defences lacking an evidential foundation. A defence that lacks an air of reality should be kept from the jury.

[36] A defence possesses an "air of reality" if a properly instructed jury, acting reasonably, could acquit the accused on the basis of the defence that he put forward: see *Cinous*, above, at para. 2; *Osolin*, above, at para.198. In the case at bar, the defence that the Appellant presented to the trial judge was the mistake of fact. To succeed in this defence, the Appellant had to demonstrate that he had an honest belief that the order was manifestly unlawful, that is to say that the Appellant had a reasonable belief that his superiors' orders were of the nature of a manifestly unlawful order as defined by the Supreme Court of Canada in *Finta*, above. Such a defence, if accepted, would annihilate the infractions' *mens rea*.

[37] For the Appellant to submit that he had a reasonable belief that he could disobey a lawful order simply because he personally considered it to be unsafe would constitute a mistake of law.

Mistake of law is not a defence when it relates to obeying a manifestly unlawful command and it should not be when it relates to disobedience of a lawful command: see *Finta*, above, at paras. 265-266. This Court expanded on the difference between a mistake of fact and a mistake of law in the following terms:

> As a general rule, a mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter. By contrast, a mistake of law exists when the mistake relates not to the actual facts but rather to their legal effect: see *R.* v. *Jones*, [1991] 3 S.C.R. 110. Mistake of law also includes ignorance of the law, which exists when the accused is ignorant as to the existence, meaning, scope or interpretation of the law: *R.* v. *Molis*, [1980] 2 S.C.R. 356.
>
> R. v. *Latouche*, (2000) 147 C.C.C.(3d) 420, [2000] C.M.A.J. No. 3, at para. 35.

[38] In his reasons, the Military Judge quoted this passage and then considered the whole of the evidence to determine if the defence presented by the Appellant had an air of reality. He further applied the decision of the Supreme Court in *Osolin*, above, (at paras. 208-209) which explained the burden of proof to establish an air of reality for a defence of mistake of fact:

> The question that arises is whether this means that in order for the defence to be put to the jury there must be some evidence of mistaken belief in consent emanating from a source other than the accused. In my view, this proposition cannot be correct. There is no requirement that there be evidence independent of the accused in order to have the defence put to the jury. However, the mere assertion by the accused that "I believed she was consenting" will not be sufficient. What is required is that the defence of mistaken belief be supported by evidence beyond the mere assertion of a mistaken belief. In the words of the Lord Morris of Borth-y-gest, there must be more than a "facile mouthing of some easy phrase of excuse" (Bratty, supra, at p. 417).

> In order to have the defence put to the jury the same requirement must be satisfied as for all other defences. Just as a defence of provocation will not be put to the jury on the basis of the bare assertion of the accused that "I was provoked" (…), so too the bare assertion of the accused that "I thought she was consenting" will not warrant putting the defence of mistaken belief in consent to the jury. The requisite evidence may come from the detailed testimony of the accused alone, on this issue or from the testimony of the accused coupled with evidence from other sources. For example, the complainant's testimony may supply the requisite evidence.

[39] Having properly instructed himself on the concept of mistake of fact and on the requirement that a defence has an air of reality, the Military Judge found that the defence put forward by the Appellant had no foundation. In reaching that decision, the Military Judge was correct in law and his findings of fact were supported by the evidence.

[40] The Appellant's argument is that he honestly but mistakenly believed that the task was unsafe, and that he refused to obey the order because he had legitimate concerns about the safety of the procedure. For a reasonably held mistake of fact to provide a complete defence, however, it must be based on the Appellant's reasonable perception of the facts. Here, the Appellant's perception of the facts that the orders were manifestly unlawful – as defined in *Finta* – was not reasonable, as already demonstrated. The Appellant's view on the safety of the air pressure method was based exclusively on his own perception and on a conversation with an unnamed person of whose credentials we know nothing.

[41] Even if the facts which the accused believed were true, they would not vitiate his criminal responsibility. In other words, even if using air pressure would be an unsafe method to adjust the

brake, it would not mean that the order to perform the brake adjustment with that method would be manifestly unlawful. Otherwise, it would amount to saying that "unsafe" equates "manifestly unlawful". This cannot be.

[42] It must be remembered that the lawfulness of a command is defined by an objective standard: orders must be obeyed unless they are manifestly unlawful in the eyes of a reasonable person put in the same circumstances. An honest belief that an order is manifestly unlawful will therefore amount to a mistake of law, and not of fact, when it is found that a reasonable person would come to the opposite conclusion. Indeed, accepting the Appellant's submission would be tantamount to substituting one's own interpretation of the manifestly unlawful threshold for the objective standard that has so far been developed in applying section 83 of the *NDA*.

[43] This is to be distinguished from a real mistake pertaining to an underlying fact. This would be the case, for example, where the accused was mistaken as to the actual content of the order or as to the identity of the person giving the order. Such a mistake is much different from a mistake as to the lawfulness of the order, because such an element constitutes a legal interpretation of the facts as opposed to a fact as such. This latter kind of mistake cannot negate the *mens rea* of the Appellant.

D. Sentencing

[44] Subsection 230(a) of the *NDA* provides that a sentence can only be appealed with leave. Accordingly, this Court grants Corporal Liwyj leave to appeal his sentence.

[45] Section 240.1 of the *NDA* establishes that the Court Martial Appeal Court shall consider the fitness of a sentence on the hearing of an appeal respecting the severity of such sentence. In.*R. v. Dixon,* 2005 CMAC 2, Mr. Justice Létourneau offered some guidance as to the powers of this Court to vary a sentence:

> [18] This Court in *R.* v. *St-Jean*, [2000] C.M.A.J. No. 2, and more recently in *R.* v. *Forsyth*,, [2003] C.M.A.J. No. 9, reasserted the principle enunciated by Lamer C.J. in *R.* v. *M. (C.A.)*, [1996] 1 S.C.R. 500 that a court of appeal should only intervene if the sentence is illegal or demonstrably unfit. At page 565, the learned Chief Justice wrote:
>
> > Put simply, absent an error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[46] Additional guidance with respect to what is meant by an "error in principle" can be derived from the Ontario Court of Appeal. In *R.* v. *Rezaie* (1996), 96 O.A.C. 268 (at para. 20), the Court stated:

> These two decisions [R. v. Shropshire, [1995] 4 S.C.R. 227 and R. v. M.(C.A.), [1996] 1 S.C.R. 500] demonstrate that an appellate court may interfere with a trial judge's sentencing discretion in only two kinds of cases. First, an appellate court may interfere if the sentencing judge commits an "error in principle". Error in principle is a familiar basis for reviewing the exercise of judicial discretion. It connotes, at least, failing to take into account a relevant factor, taking into account an irrelevant factor, failing to give sufficient weight to relevant factors, overemphasizing relevant factors and, more generally, it includes an error of law [case citations deleted]. If the sentencing judge commits an error in principle, the sentence imposed is no longer entitled to deference and an appellate court may impose the sentence it thinks fit.

[47] To gauge the fitness of a sentence, guidance can be found in sections 718.1 and 718.2 of the *Criminal Code*, R.S. 1985, c. C-46, which respectively provides that the "sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender" and that it "should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender".

[48] In the case at bar, the Military Judge correctly identified the sentencing principles and objectives that must be followed by a trial court:

> Firstly, the protection of the public, and this, of course, includes the Canadian Forces;
>
> Secondly, the punishment and the denunciation of the unlawful conduct;
>
> Thirdly, the deterrence of the offender and any other persons from committing similar offences;
>
> Fourthly, the rehabilitation of offenders;
>
> Fifthly, the proportionality to the gravity of the offence and the degree of responsibility of the offender;
>
> Sixthly, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; and
>
> Finally, the court shall consider any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[49] Counsel for the Appellant drew the Court's attention to two mitigating factors that he believes wee not taken into account by the Military Judge. First, he submitted that the delay to bring this matter to trial was very significant, as it took close to three years for this matter to come to

trial. The trial judge agreed that it was a mitigating factor, but counsel argued that he clearly diminished the importance of that factor by stating that the delay had little impact as this case was brought "in the turmoil of some important legal debate about the military justice system because of different and inherent circumstances". Second, counsel submitted that the sentencing judge should have considered the fact that the Appellant honestly believed that the safety policy emanating from the Commanding Officer was to take precedence over his superior's command.

[50] In general, unreasonable delay is addressed through a Charter application alleging a breach of s. 11(b) and/or s. 7, and seeking a remedy under s. 24(1): see, for example, *R.* v. *Askov*, [1990] 2 S.C.R. 1199 and *R.* v. *Morin*, [1992] 1 S.C.R. 771. In both of these cases, the Supreme Court came to the conclusion that excessive delay may justify a stay of proceedings, and that administrative and institutional delays are to be attributed to the Crown.

[51] In the present case, the Appellant did not plead the Charter. He simply submitted that the delay, although listed by the Military Judge as a mitigating factor, was not actually truly taken into account in assessing the sentence. The Supreme Court has recently held, in *R.* v. *Nasogaluak*, 2010 SCC 6, that state conduct not rising to the level of a Charter breach can be properly considered as a mitigating factor in sentencing:

> [3] As we shall see, the sentencing regime provides some scope for sentencing judges to consider not only the actions of the offender, but also those of state actors. Where the state misconduct in question relates to the circumstances of the offence or the offender, the sentencing judge may properly take the relevant facts into account in crafting a fit sentence, without having to resort to s. 24(10 of the *Charter*. Indeed, state misconduct which does not amount to a

> *Charter* breach but which impacts the offender may also be a relevant factor in crafting a fit sentence.

[52] As noted in *Nasogaluak*, above, excessive delay has been accepted as a mitigating factor by Canadian courts without the need to prove a *Charter* breach. In *R.* v. *Bosley* (1992), 18 C.R.(4^{th}) 347, the Ontario Court of Appeal stated (at p. 350):

> Before leaving this issue, I would add that excessive delay which causes prolonged uncertainty for the appellant but does not reach constitutional limits can be taken into consideration as a factor in mitigation of sentence: R. v. Cooper (No. 2) (1977), 35 C.C.C.(2d) 35, 4 C.R.(3d) S-10 (Ont. C.A.). The trial judge expressly held that the delay occasioned in this case served as a mitigating factor in his determination of the appropriate sentence. The sentence he imposed reflected that mitigation.

[53] In the present case, the Military Judge erred in two respects. First, he failed to give any consideration to the serious consequences caused by the delay on the Appellant's life, including the breakdown of his marriage. Despite compelling evidence submitted by the Appellant in this respect, the Military Judge failed to address it except by simply stating that facing a court martial had a deterrent effect on the Appellant and on others. In doing so, I believe the Military Judge failed to meaningfully take into consideration the delay and the particular circumstances of the Appellant.

[54] Second, the Military Judge failed to perform any analysis as to whom the delay should be attributed to. He simply stated that "[t]he court does not want to blame anybody in this case". This is a fundamental misunderstanding of the purpose of attributing the delay to the accused or to the Crown. It has been expressly stated by the Supreme Court of Canada in *Morin*, above (at paras. 44-

46), that the purpose is not to assign blame, but to determine whether the delay should be taken into consideration to reduce the sentence or not. Yet, the Military Judge simply listed the long delay to bring this matter to trial among the mitigating factors, and cancelled the impact it could have on the sentence by stating that he considered the delay "to be of little impact in these particular circumstances". While part of the delay was attributable to the fallout of this Court's decision in *R.* v. *J.S.K.T.* , 2008 CMAC 3 (the "Trépanier" decision"), other significant periods were completely unexplained and could only be accounted for as a result of a lack of resources and of administrative deficiencies. The Appellant should not have been made to pay for this, and the Military Judge should have factored these unnecessary delays more clearly as part of the mitigating factors, just as it was done in *R* v. *McRae*, 2007 CM 4006. In that case, Master Corporal McRae was found guilty of the same offence as the Appellant but was sentenced to a $200 fine essentially as a result of the delay in bringing the charge to trial and its effect on the accused's personal life.

[55] Finally, I am also of the view that the Military Judge erred in not taking into account the Appellant's honest belief as one of the mitigating factors. As previously mentioned, the Appellant's conviction that he was doing the right thing in refusing to adjust the brakes with air pressure was clearly mistaken and amounted to a mistake of law, not to a mistake of fact. Such a kind of mistake, however, has been considered in the past as a mitigating factor in sentencing; the underlying rationale being that an honest belief by an offender that his action or behaviour is not unlawful does not negate his or her criminal responsibility but may certainly lower it. In this regard, the Manitoba Court of Appeal in *R.* v. *Everton*, [1980] M.J. No. 83 explained that "[w]hile ignorance of the law is not an excuse it may be a mitigating factor in sentencing" (at para. 4); see also *R.* v. *Barrow* (2001)

54 O.R. (3d) 417 (C.A.) and *R.* v. *Scheper*, [1986] Q.J. No. 1806 (C.A.). A mistake of law should be considered as a mitigating factor, as "[h]onest action is not treated as severely as deliberate disregard of the law": *Pearlman* v. *R.*, [2005] Q.J. No. 15 (Sup. Ct.). A failure to consider this mitigating factor has resulted in a sentence that was disproportionate to "the degree of responsibility of the offender" and therefore unfit. As such, it was an error in principle that warrants this Court's intervention and the reduction of the sentence.

[56] Considering the Appellant's honest mistake of law and the Military Judge's failure to consider the effect of the delay on the Appellant, the imposition of a reprimand in addition to the fine is unreasonable in the very specific circumstances of this case.

"Yves de Montigny"
Yves de Montigny J.A.

I agree

_"Roger T. Hughes"_____
Roger T. Hughes J.A.

I agree

_"Robert Mainville"_____
Robert Mainville J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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