Date: 20090505

Docket: CMAC-513

Citation: 2009 CMAC 4

CORAM: **BLANCHARD C.J.**
RICHARD J.A.
LUTFY J.A.

BETWEEN:

LCOL. SZCZERBANIWICZ, G.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on January 16, 2009

Judgment delivered at Ottawa, Ontario, on May 5, 2009.

REASONS FOR JUDGMENT BY: BLANCHARD C.J.
CONCURRED IN BY: RICHARD J.A.
DISSENTING REASONS BY: LUTFY J.A.

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REASONS FOR JUDGMENT

I. Introduction

[1] This is an appeal of the conviction, by a Standing Court Martial (judge alone) at Canadian Forces College Toronto on April 7, 2008, of Lieutenant-Colonel Szczerbaniwicz (the Appellant) for common assault contrary to paragraph 130(1)(*b*) of the *National Defence Act*, R.S.C. 1985, c. N-5 and section 266 of the *Criminal Code of Canada* (CCC).

[2] The Appellant was found not guilty of the charge of assault causing bodily harm. However, he was found guilty of the lesser and included offence of assault on the Complainant, his spouse, from whom he had separated but not yet divorced.

II. Facts

[3] The events giving rise to this case took place on August 16, 2006 in Belgium where the Appellant was then posted. The marriage of the Appellant and the Complainant had broken down and they had been separated for approximately two months. The Complainant was visiting (mainly to spend time with her daughter) and arrived in Belgium on the evening of August 15, 2006. The Appellant testified that, when the Complainant's arrangements for accommodations fell through, he offered that she stay at his residence.

[4] Since the Complainant and the Appellant gave differing versions of the ensuing events, what exactly happened the following morning is somewhat unclear. The Military Judge (trial judge) presiding at the Standing Court Martial, summarized several important facts in his decision of April 7, 2008. The facts pertinent to this appeal are reproduced below.

> … The following morning [the Complainant] awoke and was on the telephone to Canada when the accused [now the Appellant] awoke. They had a conversation about moving personal effects from storage in Winnipeg to their home in British Columbia that [the Complainant] was then occupying with their son. The conversation apparently became heated, at least from [the Complainant]'s side, on the issue of who would pack up [the Complainant]'s effects.
>
> [The Complainant testified that] [s]he followed [the Appellant] up the stairs in the residence. She took a mounted diploma off the wall at the stairs and threw it to the floor. At that point, [the Appellant] raised his fist in her direction and yelled that he was going to get her. He came down the stairs and turned her around and pushed or

> shoved her up the stairs. She fell backwards and landed on the floor on her elbow. …
>
> …
>
> …[The Appellant] testified that he was heading upstairs to shave and shower, and [the Complainant] was yelling at him. When he turned to say something from the top of the stairs, she pulled the diploma off the wall, threw it on the ground, and started jumping on it when it didn't break. He went down the stairs and grabbed her by the clothing in her neck area and swung her around to get her off the diploma. She kicked the diploma down the stairs, and as he went to retrieve it, he was hit in the head when she threw another picture from the wall at him. He forced her back up the stairs and into a bedroom by yelling at her and tried to close the door while she resisted the door closing. He denies showing his fist to her; denies taking hold of her, other than by the clothing; and denies that she fell as a result of him swinging her around.

[5] The Appellant and the Complainant's versions of the short period of time during which the Appellant physically handled the Complainant are very different.

[6] What is clear is that the incident occurred on the first landing of the staircase, connecting two flights of stairs at right angles to one another, measuring approximately three (3) feet by three (3) feet. It is also clear that both the Complainant and the Appellant are full-grown adults weighing approximately 160 pounds each.

[7] Following the incident, the Appellant was interrogated by the Military Police Officer MWO Girard. In this interview, the Appellant describes his physical touching of the Complainant as "swinging" about 45 degrees, as "pulling", as "moving" and as "pushing". At all times, he maintains that he grabbed hold of her by her sweatshirt. In his testimony, the Appellant describes

the physical contact as “moving”. The Complainant, in her testimony, describes the physical contact as “turning and pushing” and “turning and shoving”.

[8] The Appellant stated that he “only used sufficient force to move her off the diploma”. He pointed out, that the force was so minimal that he did not succeed in completely freeing the diploma from under her feet. The Complainant, however, maintains that she fell as a result of the Appellant’s actions.

[9] During the interrogation, the Appellant admits to having lost control. This admission is clarified in his testimony. The Appellant testified that his normal reaction to heated situations is to remove himself and that, in as much as he did not remove himself this time, this amounted to losing control.

III. The Trial Judge’s Finding

[10] At trial, the defence conceded that the Appellant intentionally applied force to the Complainant without her consent, and that he knew she was not consenting. Therefore, as indicated by the trial judge, all the elements of the offence of assault are established.

[11] Although the learned trial judge found both witnesses to be credible and attributed the discrepancies in their testimonies to the heightened state of emotions that were in play on the morning of August 16, 2006, he preferred the Complainant’s description of the assault.

[12] The learned trial judge found an air of reality to the defence of defence with claim of right under subsection 39(1) of the CCC and determined that the defence was engaged. He found that the Appellant was in possession of the diploma and that his actions were motivated by his desire to protect his personal property; however, he found that the Appellant's use of force was excessive.

[13] In so finding, the trial judge wrote:

> …I have considered several factors, including the nature of the property in question; its value, including its sentimental value to the accused; the risk of harm to which the property was exposed by the actions of the complainant; the alternative courses of action open to the accused at the time; and the consequences for the complainant of the action the accused took. With respect to the matter of the action taken by the accused, I accept the uncontradicted evidence of the complainant that she suffered the bruising she described in her evidence to her back, her legs, and her elbow. I find, therefore, that she did indeed fall as a result of the pushing or shoving by the accused in the manner she described in her testimony. I do not accept the evidence of the accused in which he denies that the complainant fell. On his version of events, there is no explanation as to how the bruising occurred. This objective fact of the bruising is consistent with the evidence of the complainant on this point, and inconsistent with the version of events given by Lieutenant-Colonel Szczerbaniwicz.
>
> I accept the evidence of Lieutenant-Colonel Szczerbaniwicz that the diploma was very important to him as it signified a major achievement for him in his professional development. But there is no evidence before me that the diploma was in fact damaged to any significant degree as a result of being thrown to the floor, and perhaps jumped on. Even if there were damage, the item in question is a document that might be replaced if necessary. In his statement to the investigators, the accused was specifically asked whether he had gone a bit too far, and replied in reference to the diploma, "It is hard to say. When I think of it in retrospect, it is just a piece of paper, but it meant a lot to me. It was the anger of the moment. If I had been even a little bit – I should have just said, I can replace that, if she breaks that. But I didn't. That is in retrospect."

> I am urged by counsel to consider this statement as simply an expression of regret and not as an admission that the force used was excessive. But in my view, this evidence, taken in the context of the evidence as a whole, supports the conclusion that as a result of his angry state of mind, Lieutenant-Colonel Szczerbaniwicz lost his self-control for a short period of time, during which he physically manhandled his spouse, causing her to fall and suffer the bruising injury I have described.
>
> On all the circumstances I am persuaded that the accused used excessive force against the complainant in the purported defence of his personal property; that is, that he used more force than was necessary, and therefore the defence under subsection 39(1) does not serve to justify his actions (Appeal Book, pg. 142-143). [My emphasis.]

[14] The Complainant testified that her finger was broken as a result of the altercation with the Appellant, but the learned trial judge had a reasonable doubt as to whether or not this injury was the result of the Appellant's use of force against the Complainant. For this reason, the trial judge acquitted the Appellant of the offence of assault causing bodily harm.

IV. The applicable provisions of the *Criminal Code*

[15] Section 266 of the CCC provides:

Assault 266. Every one who commits an assault is guilty of	Voies de fait 266. Quiconque commet des voies de fait est coupable :
(a) an indictable offence and is liable to imprisonment for a term not exceeding five years; or	a) soit d'un acte criminel et passible d'un emprisonnement maximal de cinq ans;
(b) an offence punishable on summary conviction.	b) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

[16] Subsection 39(1) of the CCC provides :

Defence with Claim of Right	Défense en vertu d'un droit invoqué
39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.	39. (1) Quiconque est en possession paisible d'un bien meuble en vertu d'un droit invoqué, de même que celui qui agit sous son autorité, est à l'abri de toute responsabilité pénale en défendant cette possession, même contre une personne qui légalement a droit à la possession du bien en question, s'il n'emploie que la force nécessaire.
(2) Every one who is in peaceable possession of personal property, but does not claim it as of right or does not act under the authority of a person who claims it as of right, is not justified or protected from criminal responsibility for defending his possession against a person who is entitled by law to possession of it.	(2) Quiconque est en possession paisible d'un bien meuble, mais ne le réclame pas de droit ou n'agit pas sous l'autorité de quiconque prétend y avoir droit, n'est ni justifié ni à l'abri de responsabilité pénale s'il défend sa possession contre une personne qui a légalement droit à la possession de ce bien.

[17] Section 4(3) of the CCC:

Possession	Possession
(3) For the purposes of this Act,	(3) Pour l'application de la présente loi:
(*a*) a person has anything in possession when he has it in his personal possession or knowingly	*a*) une personne est en possession d'une chose lorsqu'elle l'a en sa possession personnelle ou que, sciemment :
(i) has it in the actual possession or custody of another person, or	(i) ou bien elle l'a en la possession ou garde réelle d'une autre personne,
(ii) has it in any place, whether or not that place	(ii) ou bien elle l'a en un lieu qui lui appartient ou non ou qu'elle

belongs to or is occupied by him, for the use or benefit of himself or of another person; and	occupe ou non, pour son propre usage ou avantage ou celui d'une autre personne;
(*b*) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.	*b*) lorsqu'une de deux ou plusieurs personnes, au su et avec le consentement de l'autre ou des autres, a une chose en sa garde ou possession, cette chose est censée en la garde et possession de toutes ces personnes et de chacune d'elles.

V. Grounds of appeal

[18] The Appellant raises the following grounds of appeal:

1. The trial judge improperly curtailed the cross-examination of the Complainant on the facts relating to the split of assets and the ongoing separation/divorce proceedings.
2. The trial judge placed on the Appellant the burden of explaining the manner in which the Complainant was bruised.
3. The trial judge misconstrued the law and facts related to the defence of property pursuant to subsection 39(1) of the *Criminal Code*.

VI. Role of the Appellate Court

[19] The role of an appellate court sitting on appeal of a guilty verdict, where the legality of any or all of the findings of the trial judge are challenged, was set out as follows by this Court in *R v. Nystrom,* 2005 CMAC 7 at paragraph 51:

> … However, when an accused alleges that the conviction imposed on him is unreasonable, the Court of Appeal 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: see *Cournoyer* and *Ouimet*, *Code criminel annoté 2003* (Cowansville: Éditions Yvon Blais), page 1066, citing *R. v. François*, [1994] 2 S.C.R. 827 (S.C.C.); *R. v. Molodowic*, [2000] 1 S.C.R. 420 (S.C.C.).

[20] This test is equally applicable to a verdict rendered by a judge sitting at trial without a jury (*R. v. Biniaris*, 2000 SCC 15, at paragraph 37).

[21] In *R. v. W.(R.)*, [1992] 2 S.C.R. 122, Madam Justice McLachlin writing for the Supreme Court expressed the following view at page 131 of her reasons:

> It is thus clear that a court of appeal, in determining whether the trier of fact could reasonably have reached the conclusion that the accused is guilty beyond a reasonable doubt, must re-examine, and to some extent at least, reweigh and consider the effect of the evidence.

[22] An appellate court must take into account the reasonableness of the verdict and do so on consideration of all of the evidence. Justice Charron in *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, stated that errors in an analysis by a judge do not necessarily render a verdict unreasonable. She wrote at paragraph 58 of her reasons:

> …In every case, it is the *conclusion* that is reviewed, not the process followed to reach it. I agree that, as Arbour J. explained in the passage quoted above, errors or a faulty thought process in a judge's reasons can sometimes explain an unreasonable conclusion reached by the judge. But a verdict is not necessarily unreasonable because the judge has made errors in his or her analysis. The review must go further than that. In every case, the court must determine whether the *verdict* is unreasonable and, to do so, it must consider all the evidence.

VII. Analysis

[23] In my view, there is no merit to the first two grounds raised by the Appellant.

[24] With respect to the first ground of appeal, while the scope of cross-examination by the accused is very broad, the trial judge has the discretion to intervene when irrelevant questions are asked of a witness. In this case, the trial judge did not prohibit all questions related to the breakdown of the marriage; he only questioned the relevancy of asking the Complainant why she had not signed a settlement agreement given to her more than one year after August 16, 2006. Accordingly, I find that the trial judge did not err in this respect.

[25] With respect to the second ground of appeal, I do not find that the trial judge placed a burden on the accused to explain how the Complainant had been bruised. Instead, the trial judge was simply explaining his reason for disbelieving the evidence of the accused that the Complainant had not fallen. That is, the fact of the bruising was consistent with the evidence of the Complainant that she had fallen.

[26] The final ground of appeal concerns whether the trial judge erred in finding that the Appellant used excessive force in defending his personal property, such that he could not avail himself of the subsection 39(1) defence.

[27] The burden is on the Crown to prove all elements of the offence beyond a reasonable doubt. In this case, there is no question that the Appellant applied force to the Complainant. He took hold

of her with the stated intention of removing her from where she was standing in order to free his diploma. Nor is there any dispute that he did so intentionally and without the Complainant's consent. It follows therefore that all of the elements of the offence of assault are established. This case turns on whether subsection 39(1), defence with claim of right, was properly made out.

[28] Subsection 39(1) is an affirmative defence which requires the Crown to disprove it as part of its burden of proving guilt beyond a reasonable doubt, as long as the accused has overcome the threshold evidential burden or "air of reality" test (*R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627 at paragraph 32; *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3 at paragraph 52). Once the trial judge found that the defence had an air of reality, the burden returned to the Crown.

[29] For the defence to apply: (1) the Appellant must have been in peaceable possession of the personal property under a claim of right, (2) the act undertaken by the Appellant must have been made for the purpose of defending that possession, and (3) the Appellant must have used no more force than was necessary to defend his personal property.

[30] The trial judge was satisfied that the first two of the three elements of the defence were met. He found that the Appellant was in peaceable possession of the personal property and was motivated by his desire to protect his diploma. The issue on this appeal relates to the third element: whether the Appellant used no more force than is necessary to defend his property.

[31] In considering whether or not the Appellant used more force than was necessary, the trial judge states that he considered the following factors: the nature of the property; its value, including

its sentimental value to the Appellant; the risk of harm to which the property was exposed by the actions of the Complainant; the alternative courses of action open to the Appellant at the time; and the consequences for the Complainant of the Appellant's action.

[32] The trial judge never expressly addresses the alternative courses of action open to the Appellant. As to the consequences for the Complainant, he found that as a result of the shoving and pushing by the Appellant the Complainant suffered bruising.

[33] The trial judge states that he also considered the Appellant's angry state of mind. In so doing, he considered the Appellant's admission that he was angry at the time of the incident, and physically manhandled his spouse as a result. He found that for a short period of time the Appellant lost his self-control during which time he physically manhandled the Complainant causing her to fall and suffer bruising.

[34] The Appellant submits that the judge erred in considering whether or not the diploma was in fact damaged, since it would defeat the purpose of the defence if one were required to wait until his or her property is damaged or destroyed before intervening.

[35] The Appellant further submits that whether or not the document can be easily replaced is of no significance, as allowing the defence to succeed only where the property cannot be replaced reads into subsection 39(1) of the CCC a requirement of uniqueness which does not exist.

[36] The Appellant also argues that his anger is irrelevant to the analysis of excessive force given that subsection 39(1) of the CCC expressly permits the use of force in this limited circumstance, and nowhere does it require that the use of force be applied without anger or passion.

[37] In response to the Appellant's arguments, the Respondent simply reiterates that the issue of whether or not the Appellant used excessive force in defending his property is a finding of fact which can only be overturned for "some palpable and overriding error which affected [the trial judge's] assessment of the facts".

[38] There is limited jurisprudence interpreting the phrase "no more force than is necessary" in the context of subsection 39(1). However, the Courts have interpreted the same phrase in subsection 41(1). Both subsections 39(1) and 41(1) are found in the section of the *Criminal Code* entitled "Defence of Property". I reproduce subsection 41(1) below:

41. (1) Every one who is in peaceable possession of a dwelling-house or real property, and every one lawfully assisting him or acting under his authority, is justified in using force to prevent any person from trespassing on the dwelling-house or real property, or to remove a trespasser therefrom, if he uses no more force than is necessary.	**41.** (1) Quiconque est en possession paisible d'une maison d'habitation ou d'un bien immeuble, comme celui qui lui prête légalement main-forte ou agit sous son autorité, est fondé à employer la force pour en empêcher l'intrusion par qui que ce soit, ou pour en éloigner un intrus, s'il ne fait usage que de la force nécessaire.

[39] The Alberta Court of Appeal in *R. v. Born With A Tooth (Alta. C.A.)* (1992), 131 A.R. 193, held that the test in assessing the necessity of the force, the last element of subsection 41(1), which it described as the reasonableness of the force, is not just subjective but also involves an objective component. At paragraph 36 of its reasons for decision, the Court stated:

> As regards the first two elements, and the factual content of the third element, the defence of mistake is also available. That defence requires the honest belief by the accused in a set of facts which, if true, would afford a defence. See *R. v. Pappajohn*, [1980] 2 S.C.R. 120. An accused might, honestly but mistakenly, believe that he has a measure of control over the lands, or that his supposed control is unchallenged, or he might believe in a set of facts which, if true, makes the victim a trespasser. <u>But honest mistake of fact appears not to be enough for the last element, because that requires that the reasonableness of the force meet an objective, not just a subjective, test.</u> See *R. v. Scopelliti*, (1981) 63 C.C.C. (2d) 481. [Emphasis added.]

[40] Relying on a similar interpretation of subsection 41(1), the Ontario Superior Court in *R. v. Garvie*, [2004] O.J. No. 1635 at para. 12 (QL) explained that the proper inquiry involves both an objective and subjective test.

> With the "necessity" of the force involving both a subjective and objective component, if the Crown establishes beyond a reasonable doubt the accused either did not believe the force he used was necessary or that the force objectively was excessive or unreasonable in the circumstances, the s. 41 defence fails.

[41] In *R. v. Gunning*, 2005 SCC 27, [2005] 1 S.C.R. 627, the Supreme Court adopted similar reasoning in the context of subsection 41(1) and found that the assessment of the force must take into account all of the circumstances. Madam Justice Charron writing for the Court interpreted the

fourth element of the offence "no more force than is necessary" to mean that "the force used […] must have been reasonable in all the circumstances" (at paragraph 25).

[42] In my view, the above analyses regarding the phrase "no more force than is necessary" also finds application in the context of subsection 39(1).

[43] Guidance is also found in the case law regarding the factors to be considered in where the defence of property is invoked. In *R. v. George* (2000), 49 O.R. (3d) 144 (C.A.) at paragraph 38, the Ontario Court of Appeal quoted the following passage from its decision in *R. v. Baxter* (1975), 27 C.C.C. (2d) 96 at page 113, in which the following factors are suggested to be considered with respect to all provisions in the *Criminal Code* dealing with the defence of persons or property:

> The sections of the Code authorizing the use of force in defence of a person or property, to prevent crime, and to apprehend offenders, in general, express in greater detail the great principle of the common law that the use of force in such circumstances is subject to the restriction that the force used is necessary; that is, that the harm sought to be prevented could not be prevented by less violent means and that the injury or harm done by, or which might reasonably be anticipated from the force used, is not disproportionate to the injury or harm it is intended to prevent.
>
> (*George* at paragraph 49 and see also *R. c. Lamoureux***,** 2006 QCCQ 2079 (C.Q. crim. & pén.) at paragraph 21)

[44] The inquiry therefore requires that the trial judge consider all of the circumstances including the Appellant's state of mind and his belief that the force used was necessary. Other factors such as those considered by the trial judge, and set out in paragraph 31 above, are appropriate considerations.

[45] I reject the Appellant's arguments set out in paragraphs 34 to 36 above. In my view, it was open to the trial judge to objectively consider the nature and value of the property at issue. Further, it was also appropriate to consider that the Appellant was angry at the time of the incident.

[46] The Appellant argued that the trial judge reasoned backwards from the extent of the injuries sustained by the Complainant in order to determine that the force was excessive. In my opinion, the trial judge did not simply reason backwards from the bruising suffered by the Complainant. The trial judge properly considered both the nature of the force applied by the accused and the circumstances surrounding the use of force.

[47] The trial judge did not find that the Appellant must have used excessive force because the Complainant suffered bruising; rather he found that the Appellant "push[ed] or shov[ed]" the Complainant up the stairs with sufficient force to cause her to fall (Minutes of Proceedings of Standing Court Martial, Appeal Book, at page 142). This analysis is in accordance with the following statement of the law by Johnson J. in *R. v. Oakoak*, 2008 NUCJ 16:

> While it is improper to look at the nature of the injuries and then work backwards to conclude that the force had to be excessive, it is proper to look at the where the victim ended up to assist in determining the degree of force used.
>
> (at paragraph 55; see also *R. v. Brown*, 2005 CanLII 24762 (Ont. S.C.J.), at paragraph 18)

[48] Having considered the factors discussed above, including the Appellant's anger at the time of the incident, the trial judge concluded that in "all the circumstances I am persuaded that the accused used excessive force against the complainant in the purported defence of his personal property; that is, that he used more force than was necessary, and therefore the defence under subsection 39(1) does not serve to justify his actions". In my opinion, this conclusion is based on findings that were reasonably open to the trial judge in assessing the reasonableness of the force used by the Appellant.

[49] Finally, as noted above, the trial judge concluded that in all of the circumstances he was "persuaded that the accused used excessive force against the complainant in the purported defence of his personal property." The use of the word "persuaded" is unfortunate since the trial judge must be satisfied beyond a reasonable doubt that the Appellant used excessive force. Notwithstanding the use of this language, I am satisfied that the trial judge had turned his mind to the proper test to be applied. In his decision he stated that he must weigh the evidence, "… bearing in mind that the burden is upon the prosecution to establish beyond a reasonable doubt that the defence does not serve to justify the conduct of the accused."

[50] In my view, the trial judge did not make a palpable and overriding error in determining that the accused used more force than was necessary to defend his diploma. The verdict rendered is one that a properly instructed jury, acting judicially, could reasonably have returned.

VIII. Conclusion

[51] Accordingly, I would dismiss the appeal.

"Edmond P. Blanchard"
Chief Justice

I agree:

"J. Richard"
J.A.

LUTFY J.A. (Dissenting Reasons)

[52] The central issues in this appeal are twofold: (a) did the military judge err in law by failing to apply properly *R. v. W. (D.),* [1991] 1 S.C.R. 742?; and (b) did the military judge fail to address the relevant facts concerning the statutory defence available to the appellant, pursuant to s.39(1) of the *Criminal Code*?

The Facts

[53] The appellant acknowledges that he "pushed or shoved" his spouse, intentionally and without her consent, during a domestic dispute in the last days of their 30-year marriage. He was convicted of simple assault.

[54] In a videotaped voluntary statement made to military investigators some two weeks after the incident, the appellant admitted that he acted in "the anger of the moment" and that he "had done wrong". The appellant's defence has nothing to do with the justification, in human terms, of his "pushing or shoving" his spouse. That was wrong at the moment it occurred and it remains wrong today.

[55] The complainant's version of the events is summarized by the military judge in these words:

> … The conversation apparently became heated, at least from Mrs Szczerbaniwicz's side, on the issue of who would pack up Mrs Szczerbaniwicz's effects.
>
> She followed him up the stairs in the residence. She took a mounted diploma off the wall at the stairs and threw it to the floor. At that point, the accused raised his fist in her direction and yelled

> that he was going to get her. He came down the stairs and turned her around and pushed or shoved her up the stairs. She fell backwards and landed on the floor on her elbow. She was shocked by this, and went into the spare bedroom and closed the door. The accused came in, slamming the door, offered abusive language to her, and demanded that she leave the house today. (Appeal Book, pp. 139-40)

The diploma represented the appellant's masters degree in leadership and training which he received in June 2006, some two months prior to the incident.

[56] The military judge also summarized the appellant's testimony at trial and his voluntary statement to the military investigators:

> … He testified that he was heading upstairs to shave and shower, and Mrs Szczerbaniwicz was yelling at him. When he turned to say something from the top of the stairs, she pulled the diploma off the wall, threw it on the ground, and started jumping on it when it didn't break. He went down the stairs and grabbed her by the clothing in her neck area and swung her around to get her off the diploma. She kicked the diploma down the stairs, and as he went to retrieve it, he was hit in the head when she threw another picture from the wall at him.
>
> … [He] denies that she fell as a result of him swinging her around. (Appeal Book, p. 140)

Analysis

(a) Did the military judge err in law by failing to apply properly R. v. W. (D.), [1991] 1 S.C.R. 742?

[57] The military judge appreciated that "…the evidence discloses different versions of the important facts that bear directly on the issues." The principal discrepancy between the two versions was whether the complainant fell during the spousal altercation.

[58] The military judge approached the issue as follows:

> With respect to the matter of the action taken by the accused, I accept the uncontradicted evidence of the complainant that she suffered the bruising she described in her evidence to her back, her legs, and her elbow. I find, therefore, that she did indeed fall as a result of the pushing or shoving by the accused in the manner she described in her testimony. I do not accept the evidence of the accused in which he denies that the complainant fell. (Appeal Book, p. 142) [Emphasis added]

[59] This analysis of the military judge is premised on whether the complainant fell. He accepted her version on this issue because of the evidence of bruising. He then appears to have reasoned that if she fell, the force used must have been excessive. Had he concluded there was no fall, again on his rationale, the force used would necessarily have been found to be reasonable. This reasoning cannot sustain the conviction.

[60] Having disbelieved the appellant's testimony that the complainant did not fall, the military judge was required to continue with the analysis set out by Justice Cory in the often cited decision of the Supreme Court of Canada in *R. v. W. (D.)*, [1991] 1 S.C.R. 742 at ¶ 28:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[61] The *W. (D.)* instructions do not require a formalistic recitation. They do, however, demand that the judge demonstrate a reasoning process consistent with the *W. (D.)* requirements.

[62] The military judge understood that he was not confined to preferring the version of one witness over the other and was at liberty to "…accept all of what a witness says as the truth, or none of what a witness says, or the court may accept parts of the evidence of a witness as truthful and accurate."

[63] In my respectful view, however, the judge did not undertake the required *W. (D.)* analysis. He failed to consider whether the appellant's disbelieved evidence raised a reasonable doubt, the second step in the *W.(D.)* analysis. On this basis alone, the appeal must be allowed.

(b) Did the military judge fail to address the relevant facts concerning the statutory defence available to the appellant, pursuant to s.39(1) of the Criminal Code?

[64] The issue here is whether the military judge properly considered the appellant's defence that he used no more force than was necessary to defend his personal property.

[65] Section 39(1) of the *Criminal Code* reads as follows:

Defence with claim of right	Défense en vertu d'un droit invoqué
39. (1) Every one who is in peaceable	39. (1) Quiconque est en possession

possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.	paisible d'un bien meuble en vertu d'un droit invoqué, de même que celui qui agit sous son autorité, est à l'abri de toute responsabilité pénale en défendant cette possession, même contre une personne qui légalement a droit à la possession du bien en question, s'il n'emploie que la force nécessaire.

In my view, the military judge did not properly consider this defence.

[66] The military judge understood that there were three components to the section 39 defence: (a) the accused must be in peaceable possession of personal property under a claim of right; (b) the force used by the accused must be to defend that possession; and (c) the accused may use no more force than is necessary.

[67] The military judge was satisfied that the appellant had established the first two of the three elements of the defence:

> … I am satisfied that the accused was in peaceable possession of the diploma and that his actions in assaulting his spouse were motivated by his desire to protect his personal property. To my mind, the real issue here is whether in so doing, he used no more force than was necessary to defend his possession. (Appeal Book, p. 142)

[68] The military judge did not explain how the pushing or shoving was itself an excessive amount of force, either objectively or subjectively. Rather, he appears to have considered, in his words, "the consequences for the complainant of the action the accused took" as the basis for his conclusion that the force was excessive.

[69] Reasoning backwards from the injuries sustained in determining whether force is excessive has been held to constitute a reviewable error: *R v. Matson*, [1971] B.C.J. No. 574, at ¶¶ 28 and 32 (C.A.)(QL); *R. v. Spence*, [1995] S.J. No. 428, at ¶ 5 (C.A.)(QL); *R. v. C.J.O.*, [2005] O.J. No. 5006, at ¶ 27 (S.C.J.)(QL), *per* Tulloch J.: "when conducting the analysis of whether the force was reasonable in the circumstances, reasoning backward from the nature of the injuries is an error. . ."; *R. v. Brown*, [2005] O.J. No. 2951, at ¶ 17 (S.C.J.)(QL), *per* Durno J.: ". . . it would have been wrong for the trial judge to look at the consequences or the injuries he accepted the complainant received, and reason back that the force was excessive. . . ."; and *R. v. Oakoak*, 2008 NUCJ 16, at ¶ 49 *per* Johnson J.: ". . . it is improper to determine the degree of force used by looking at the end result and then reasoning backwards."

[70] The relevant inquiry under s. 39(1) is whether or not an accused used more force than he on reasonable grounds believed was necessary: *R. v. Weare*, [1983] N.S.J. No. 361, at ¶¶ 16-18 (C.A.)(QL). The trial judge focused on the alternative courses of action open to the appellant, the extent of the damage to his diploma and whether it could be replaced. While these objective factors can be relevant, the primary focus must be whether the accused, in the circumstances of the moment, reacted with more force that he on reasonable grounds believed was necessary: *R v. Little*, [1998] O.J. No. 165, at ¶ 14 (C.A.)(QL).

[71] There were other discrepancies in the evidence. The military judge makes no findings concerning the spouses' clothing, their weight, their consumption of alcohol in the ten hours they were together prior to the dispute and their relative state of anger. Nor does he refer to the

appellant's statements concerning the force he used. Absent the appropriate analysis by the military judge, one has no way of knowing which evidence was or was not accepted.

[72] Nor did the military judge focus on the extent of the bruising. The evidence of bruising was limited. Photographs of the bruising were given to the military investigators. Neither these photographs nor the complainant's hospital records were produced at trial. Independent witnesses who would have seen the bruising did not testify at trial. Nor was the court afforded the assistance of expert evidence.

[73] To repeat, it was open to the military judge not to believe the appellant's testimony that the complainant did not fall. However, because he failed to assess other evidence, including in particular that of the appellant concerning his description of the force he used, it cannot be said that he turned his mind to the relevant inquiry under section 39. The military judge's failure to conduct the analysis of the other evidence is a material error of law which renders the verdict unreasonable.

Conclusion

[74] My colleagues rely on *R. v. Beaudry*, 2007 SCC 5, [2007] 1 S.C.R. 190, where Justice Charron emphasized that ". . . a verdict is not *necessarily* unreasonable because the judge has made errors in his or her analysis." [Emphasis added.] She did not say that such errors will never render a verdict unreasonable. The import of the error in the reasoning process will govern the result. In this case, in my respectful view, the errors were fundamental to the outcome.

[75] For the above reasons, I would allow the appeal, set aside the decision of the Standing Court Martial and, pursuant to section 238 of the *National Defence Act*, order a new trial on a charge of assault before a Court Martial presided by a different judge.

"Allan Lutfy"

J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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