Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20120904

Docket: CMAC-545

Citation: 2012 CMAC 3

CORAM: **SIMPSON J.A.**
WATT J.A.
MOSLEY J.A.

BETWEEN:

CAPTAIN LISA MARIE CLARK

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on February 24, 2012.

Judgment delivered at Ottawa, Ontario, on July 30, 2012.

Reasons for Judgment issued at Ottawa, Ontario, on September 4, 2012

REASONS FOR JUDGMENT BY: WATT J.A.

CONCURRED IN BY: SIMPSON J.A.
MOSLEY J.A.

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REASONS FOR JUDGMENT

WATT J.A.

[1] Confidentiality is crucial to the proper functioning of unit Merit Boards in the Canadian Forces. This case involves allegations that Captain Lisa Marie Clark (the Appellant) as a member of a unit Merit Board breached an order of confidentiality, then lied about it to her superiors when questioned.

[2] The Appellant was tried and convicted by Standing Court Martial on one count of disobeying the lawful command of a superior officer pursuant to section 83 of *National Defence*

Act, RSC.1985, c N-5 (the Act) and two counts of conduct prejudicial to good order and discipline contrary to section 129 of the Act. She was acquitted on two further counts under s 129. The Appellant was sentenced to a reprimand and a $1,000 fine. The Appellant appeals her convictions.

[3] The Appellant says that the findings of guilt were unreasonable and fatally flawed by legal errors in the manner in which the Military Judge reached his conclusions of guilt.

[4] These reasons explain why I conclude that the findings of guilt should be set aside and a new trial ordered.

THE BACKGROUND FACTS

[5] The circumstances that underpin this prosecution are uncomplicated. They involve four principals, a hearing, allegations of improper disclosure, both before and after the hearing, and denials of any impropriety.

[6] The Appellant was the Platoon Commander of 2MP Platoon at CFB Petawawa. She was a member of the unit Merit Board.

[7] John George Galway was the Warrant Officer (WO), later the acting Sergeant Major, in the Appellants' platoon. He was a candidate at the unit Merit Board.

[8] Master Warrant Officer (MWO) Nicole Elizabeth Bélanger presided as the Chair of the unit Merit Board.

[9] Major Nathan Flight was the Commanding Officer of the Military Police unit of which the Appellant and WO Galway were members.

[10] Neither WO Galway nor Major Flight remain members of the Canadian Forces.

The Hearing

[11] As the unit Merit Board (the Board) convened for a three-day hearing (the Hearing), MWO Bélanger reminded the participants about the need for confidentiality in the Board's deliberations and in the rankings assigned to candidates. Major Flight made MWO Bélanger's reminder a formal order: no information about the Board's business was to leave the hearing room (the Order).

[12] The parties occupy common ground that, included in the confidentiality envelope, were

i. the rankings of the candidates who appeared before the Board; and

ii. the Personnel Evaluation Report (PER) on each candidate.

The Disclosure

[13] Galway testified that before the Hearing the Appellant offered to show him his draft PER. He insisted that she not do so because the document was to be confidential. However, the Appellant

persisted. She told Galway that it was the first PER that she had ever prepared and she wanted to ensure that it had been done properly.

[14] Galway also gave evidence that the Appellant told him his ranking at the Board shortly after the Board had concluded its Hearing. Galway, she said, finished second.

The Revised PER

[15] Major Flight reviewed the draft PER the Appellant had prepared on Galway. He told the Appellant that he had "some issues" with her draft and asked her to rewrite the PER. The Appellant did so. Major Flight approved the rewrite and signed the PER as the Commanding Officer of the unit.

Galway's Reaction and his Evidence

[16] The revised PER was less favourable of Galway than the original draft the Appellant had prepared. Galway was not pleased when it was presented to him by the Appellant. He refused to sign the PER because, as he told the Appellant, he had seen her earlier more positive draft. He began grievance proceedings because he thought Major Flight had it in for him.

[17] About three months after the conclusion of the Hearing, MWO Bélanger spoke to Galway. He told MWO Bélanger that he knew that he had initially placed second in the rankings at the Board and that he had been downgraded by Major Flight who didn't like him. Galway also told MWO Bélanger that he had been shown and had a copy of his draft PER. However, he refused to tell

MWO Bélanger how he saw and got possession of the draft or learned about his ranking at the Board.

[18] About two weeks later, Galway and MWO Bélanger spoke again. Galway then told MWO Bélanger that the Appellant had shown him a copy of the draft PER she had prepared about two days before the Hearing. He explained that about 10 minutes after the Hearing had concluded, the Appellant had told him that he had placed second among the candidates.

[19] In his evidence, Galway claimed that when he told the Appellant that he would not sign his PER and would grieve his placement because she had shown him the draft PER, the Appellant said she would claim no recollection of having shown Galway the draft PER or of having told him about his ranking.

[20] Galway testified that he had found a copy of his draft PER "all balled up" in a trash can in an open area of the building before the Hearing began. He didn't tell anyone precisely where he had found the document. However, the copy of the draft he attached to his grievance contained no indication of having been "all balled up" previously. Galway later told the prosecutor, about a year after having said the contrary, that the Appellant never gave him a copy of the draft PER.

The Appellant's Denials

[21] MWO Bélanger spoke to the Appellant after Galway told her (Bélanger) about the Appellant's disclosures. The Appellant denied showing or giving a copy of the draft PER to Galway

and repudiated Galway's claim that she had told him his ranking at the Board. MWO Bélanger believed the Appellant. She did not believe Galway.

[22] After her second conversation with Galway, in which he said the Appellant would claim no recollection of either incident, MWO Bélanger initiated an investigation.

[23] Major Flight recalled having received a message from the Appellant about a discussion with Galway who claimed he had a copy of his draft PER. The Appellant denied providing a copy of the draft to Galway. Major Flight made no notes about this conversation.

[24] The Appellant did not testify at trial.

THE DECISION OF THE MILITARY JUDGE

[25] The Military Judge (the Judge) found the Appellant guilty of i) a count of revealing to Galway his ranking at the Board, thus disobeying Major Flight's Order, and ii) two counts of lying to MWO Bélanger by telling her that she (the Appellant) had not revealed to Galway his ranking on the Merit Board and had not disclosed the draft PER to Galway.

[26] The Appellant was found not guilty on two charges of lying to Major Flight about the same disclosures.

THE GROUNDS OF APPEAL

[27] Counsel for the Appellant advances four grounds of appeal. Three grounds allege legal errors in the reasoning process followed by the Judge in reaching his conclusions of guilt. The fourth ground seeks the entry of acquittals on the basis that the convictions are unreasonable and cannot be supported by the evidence adduced at the court martial.

[28] The specific errors identified in the Judge's reasoning include mistakes in:

i. the manner in which the Judge approached his assessment of the credibility of the witnesses and the reliability of their evidence;

ii. shifting the onus of proof to the Appellant to provide a response to Galway's allegations; and

iii. failing to apply an appropriate level of scrutiny to Galway's evidence.

Ground #1: Alleged Error in Credibility Assessment

[29] The Appellant's first complaint focuses on a passage in the Judge's reasons that the Appellant says reflects legal error in the assessment of credibility.

[30] It is helpful to begin an examination of this ground with a brief reference to the evidence to which the complaint relates before turning to the Judge's reasons, the positions of the parties and the governing legal principles.

The Relevant Evidence

[31] The crucial evidence upon which the Appellant's convictions were founded was the testimony of Galway and MWO Bélanger. And of those two witnesses, Galway was the more crucial. No Galway. No case.

[32] The record is rife with concerns about Galway's credibility and the reliability of his evidence. His testimony contradicted what he had initially told investigators and the information he gave them was inconsistent. Many of his answers were evasive. Others were internally inconsistent. His second conversation with MWO Bélanger involved a recantation of his initial claim that he had a copy of his draft PER. His account of finding a copy of his PER "all balled up" in a waste container seems contrived and is inconsistent with the condition of the document he attached to his grievance.

The Reasons

[33] Two passages in the Judge's reasons are of signal importance in connection with this ground of appeal.

[34] The first passage describes the Judge's approach to the acceptance of testimony (the First Passage):

> The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason, rather, to disbelieve it.

[35] In the second passage, the Judge explains his acceptance of the testimony of Galway (the Second Passage):

> Although Warrant Officer Galway often stated he could not remember exact dates or the exact words he used when communicating with Master Warrant Officer Bélanger and with Captain Clark, his testimony on the principal events at the heart of this trial is consistent and is not contradicted by other evidence. While his testimony was generally vague, his demeanour and his manner of answering questions were consistent throughout his testimony. Although the court believes that Warrant Officer Galway does not want to reveal all the information as to how he obtained a copy of the draft PER, the court has not been presented with any evidence that contradicts Warrant Officer Galway's evidence on how he first saw his draft PER, and how he learned his ranking on the merit board. No evidence demonstrates that that evidence is false or incorrect. His testimony has not been impeached during his cross-examination. Therefore, Warrant Officer Galway is deemed credible and reliable.

The Positions of the Parties

[36] The Appellant says that, when read as a whole, the reasons demonstrate that the Judge treated credibility as an all or nothing determination. It is commonplace, as juries are routinely instructed in civilian courts, that triers of fact may accept some, all or none of what any witness says. And, more importantly, a trier of fact is under no obligation to accept the testimony of any witness simply because that testimony is uncontradicted by other evidence.

[37] The Appellant points out that Galway's testimony on material issues was contrary to what he had told MWO Bélanger and investigators about the same things. The presiding Judge was

required to consider these inconsistencies and explain why he accepted Galway's evidence despite them. His failure to do so reflects error and requires a new trial.

[38] The Respondent takes a contrary position. Reviewing courts must accord substantial deference to findings of credibility made in trial courts. In some instances, as here, it is open to a trial judge to treat credibility as an all or nothing proposition. The Judge was there. We were not. In any event, the Respondent says, when the reasons are read as a whole, they reveal no error of law or palpable and overriding errors of fact. This ground of appeal should fail.

The Governing Principles

[39] Several basic principles inform my decision on this ground of appeal.

[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 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.

[43] Fourth, reviewing courts should take a functional, context-specific approach to the adequacy of reasons. The reasons, in a case such as this, must be sufficient to fulfill their purpose of explaining why the person accused was convicted, providing accountability for the decision, and permitting effective appellate review. In considering the sufficiency of the reasons, we should read them as a whole, in the context of the evidence adduced and the arguments advanced at trial, and of the trial itself: *R. v R.E.M.*, 2008 SCC 51, [2008] 3 SCR 3, at paras 15-16.

[44] Fifth, reasons fulfill their purposes if, read in context, they show why the judge made his or her decision. By reasons the judge tries to tell the parties *what* she or he has decided and *why* she or he made that decision. The reasons must reveal a logical connection between the "what" (the decision) and the "why" (the basis for the decision): *R.E.M.*, at para. 17.

[45] Sixth, where a case turns largely on credibility, a reviewing court must consider the sufficiency of reasons in light of the deference afforded to trial judges on credibility findings. It is rare that deficiencies in the trial judge's credibility analysis, as expressed in the reasons for

judgment, will merit intervention on appeal: *R. v Dinardo*, 2008 SCC 24, [2008] 1 SCR 788, at para 26. On the hand, a failure to sufficiently articulate how credibility concerns were resolved, or a legal error evident in their resolution may constitute reversible error: *Dinardo*, at para 26; *R. v Braich*, 2002 SCC 27, [2002] 1 SCR 903, at para 23: and *R. v Gagnon*, 2006 SCC 17, [2006] 1 SCR 621, at paras 20-21.

The Principles Applied

[46] For reasons developed below, I will give effect to this ground of appeal.

[47] First, the First Passage which is the Judge's initial statement about the acceptance of testimony is underinclusive, thus legally wrong. The statement:

> The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason, rather, to disbelieve it.

refers to a finding of credibility as dispositive of the acceptance of a witness' testimony. A finding that a witness is credible does not require a trier of fact to accept the witness' testimony without qualification. Credibility is not co-extensive with proof. To treat credibility, without more, as dispositive of proof is legally wrong.

[48] Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as the witness believes it to be. In a word, credibility. Accuracy concerns have to do with the actual accuracy of the witness' account. This is

reliability. The testimony of a credible, in other words an honest witness, may nonetheless be unreliable: *R. v Morrissey* (1995), 97 CCC (3d) 193 (Ont CA), at p 205.

[49] Second, leaving to one side the question of whether it impliedly shifts the onus of proof, the absence of contradiction referred to in the Second Passage does *not* require the trier of fact to accept as true a witness' testimony. No principle deems a witness credible or the witness' evidence reliable, let alone proof of its subject-matter, simply because the record is barren of any contradictory evidence: *Aguilera*, at para 39; *RKL*, at paras 9-11. Such a principle of proof absent contraction brushes uncomfortably close to the creation of a presumption of once credible, always reliable, which is at odds with principle and reality.

[50] Third, the reference to the lack of any contradictory evidence, which in this case could only have come from the Appellant, comes perilously close to imposing an onus of disproof on the person charged, thus subtlety shifting the burden of proof and failing to pay heed to the third principle in *R. v W. (D.)*, [1991] 1 SCR 742, at para 28.

[51] Finally, in the Second Passage, the Judge appears to have assigned a place of prominence in his assessment of credibility to Galway's demeanour. Several authorities have cautioned against over-reliance on demeanour as a factor in assessing the credibility of witnesses and the reliability of their evidence: *R. v G. (M.)* (1994), 93 CCC (3d) 347 (Ont CA), at pp 355-356; *Faryna v Chorny*, [1952] 2 DLR 354 (BC CA), at pp 356-357; and *R. v G.(J.)* (1997), 115 CCC (3d) 1 (Ont CA), at pp 6-8.

[52] Consideration of the effect of these errors on the validity of the convictions recorded at trial can await examination of the other grounds of appeal.

Ground #2: Shifting the Onus of Proof

[53] The second ground of appeal aims at the same passages in the reasons that attracted the Appellant's first complaint. This time, however, the focus is on what is said to be a compromise of the onus of proof and reliance on the Appellant's failure to testify as a piece of evidence.

[54] Once again, a brief reference to some features of the evidence, followed by a review of the positions of counsel and a recital of the controlling legal principles will inform the decision that follows.

The Evidentiary Background

[55] Galway was the only witness who, if believed, could establish that the Appellant

i. showed or gave him a copy of the draft PER; and

ii. told him his ranking on the Merit Board

thus that she disobeyed the Order given by Major Flight. Further, this same evidence was the only evidence capable of establishing the falsity of the Appellant's denials of disclosure to MWO Bélanger, thus that she was guilty of an act to the prejudice of good order and discipline contrary to s. 129 of the *National Defence Act*.

[56] The discussions that Galway recounted that disclose the breach of Major Flight's Order involved two persons. Galway was one. The Appellant was the other. The only person who could provide contradictory evidence was the Appellant.

[57] The Appellant did not testify.

The Arguments on Appeal

[58] The Appellant says that the Judge was wrong when he "deemed" Galway credible and his evidence reliable because no evidence had been called to contradict Galway's version of events. By reasoning in this way, the Appellant says, the Judge used the failure of the Appellant to testify as a piece of evidence to shore up the prosecution's case and to establish the Appellant's guilt. The Appellant contends further that, although the Judge did refer to the principles of *W. (D.)*, he failed to apply those principles properly because he did not consider whether Galway's evidence was sufficient to meet the standard of proof beyond a reasonable doubt.

[59] The Respondent takes the position that the Judge instructed himself properly on the onus and standard of proof and did not betray those principles in reaching his conclusion of guilt. The Judge did not shift or reverse the onus of proof nor did he treat the failure of the Appellant to testify as an item of evidence supportive of guilt. The Judge's comment about the evidence being uncontradicted was only an observation on the state of the evidence, not a shift in the onus of proof.

The Governing Principles

[60] In any criminal case, the ultimate issue for the trier of fact to decide is whether the prosecution has established the essential elements of the offence charged beyond a reasonable doubt. Where exculpatory evidence is introduced before the trier of fact, judges routinely instruct themselves or juries, in terms or in substance, in accordance with the regime proposed by Cory J. in *W. (D.)*. In cases in which no exculpatory evidence has been introduced, it may be open to question whether any reference to the substance of the *W. (D.)* formula is necessary, provided the jury or self-instruction on the onus and standard of proof and their application are correct.

[61] Second, the right to silence and the presumption of innocence preclude the trier of fact from using an accused's silence in arriving at its belief in guilt beyond a reasonable doubt. In other words, the trier of fact is not entitled to place independent weight on an accused's failure to testify in deciding that an accused's guilt has been proven beyond a reasonable doubt: *R. v Noble*, [1997] 1 SCR 874, at para 53. The failure of an accused to testify is not an independent item of evidence in the prosecution's case supportive of an accused's guilt.

[62] On the other hand, the silence of an accused means that the prosecution's evidence is uncontradicted. This means, in turn, that the trier of fact must evaluate the prosecution's evidence on this basis without regard for any explanation of those facts that does not arise from the facts themselves: *Noble*, at paras 79 and 82. A trier of fact may conclude from an accused's failure to testify that there is no unspoken, innocent explanation about which the trier of fact must speculate in deciding whether guilt has been proven beyond a reasonable doubt. However, the trier of fact must

not use silence to strengthen a case that otherwise falls short of proving guilt beyond a reasonable doubt: *Noble*, at para 87, *R. v Lepage*, [1995] 1 SCR 654, at para 29; and *R. v Wang* (2001), 153 CCC (3d) 321 (Ont CA), at para 44.

The Principles Applied

[63] On this issue, I regard this case as falling very close to the line that divides permissible observation about an unspoken, innocent explanation from impermissible use of silence to strengthen a case that otherwise falls short of the criminal standard of proof. On its own, this ground of appeal may not be adequate to require this Court's intervention. That said, it provides context for an overall assessment of the impact of other errors in the evaluation of the adequacy of the prosecution's proof of guilt.

[64] The Judge's reasons could be read as simply pointing out that Galway's evidence about the disclosures was uncontradicted, thereby removing an alternative explanation, a denial of disclosure, from consideration. This interpretation would not reflect error.

[65] On the other hand, the same passage could be read as implicitly imposing a burden of explanation on the Appellant, requiring her to adduce evidence of a denial, and concluding from her failure to do so that Galway was credible, his evidence reliable, and the Appellant's guilt proven beyond reasonable doubt. This interpretation would reflect error.

[66] Where a passage in a trial judge's reasons is open to two interpretations, one consistent with the judge's presumed knowledge of relevant legal principles and the other suggestive of a misapprehension or misapplication of those principles, I ought to prefer the former over the latter: *Morrissey*, at pp. 203-204.

[67] In this case, I have already found that the impugned passages reflect error in another and related respect. In light of that error, it may be questionable whether I should accord the same reasons the benevolent interpretation to which they would otherwise be entitled.

Ground #3: The Scrutiny of Galway's Evidence

[68] The next ground of appeal contests the adequacy of the Judge's scrutiny of Galway's evidence as reflected in his reasons for judgment.

The Evidentiary Background

[69] Galway's evidence was essential to the prosecution's proof of the Appellant's guilt. The Judge described Galway's testimony as "generally vague" and characterized Galway as a witness who did not "want to reveal all the information as to how he obtained a copy of the draft PER".

[70] MWO Bélanger described Galway as evasive when she pressed him for details about his knowledge of the contents of the draft PER. He initially claimed that he had a copy of the draft document, then resiled from such a claim. His ultimate version, that he found a copy "all balled up"

in a trash can, emerged somewhat later, seems inherently implausible, and is inconsistent with the state of the document that he attached to his grievance.

The Arguments on Appeal

[71] The Appellant assails the adequacy of the Judge's reasons in his assessment of Galway's evidence. The reasons, she submits, fail to address the frailties in Galway's evidence and do not come to grips with the inadequacies of the investigation that followed Galway's allegations. No statements were taken. No notes were made of interviews. The Judge failed to adequately explain his unqualified acceptance of Galway's uncorroborated account of an implausible series of events: that an officer of undoubted integrity, who had no personal relationship to Galway, would contravene a direct order of her superior shortly after it was made. The reasons, according to the Appellant, were not responsive to the real issues in the case and never analyzed the critical inconsistencies and improbabilities in Galway's account.

[72] The Respondent sees it differently. The reasons, he submits, are adequate to permit meaningful appellate review. The Judge was *not* required to itemize each piece of evidence he considered or to record every discrete finding of fact he made. The Judge's reasons responded to the live issues in the case. Galway's evidence contained no significant inconsistencies and the Judge was not required to consider alleged inadequacies in the investigation in resolving the adequacy of the prosecution's proof.

The Governing Principles

[73] The crux of this ground of appeal concerns the adequacy of the Judge's reasons for accepting and relying upon Galway's evidence in recording the convictions of the Appellant. Several principles govern my decision.

[74] First, it is essential that I consider the Judge's reasons on this issue as a whole to determine whether they are sufficient to permit adequate appellate review. I am disentitled to parse the individual linguistic components of the Judge's reasons, rather I am assigned the task of assessing their overall, common sense meaning: *Gagnon*, at para. 19.

[75] Second, deficiencies in a trial judge's credibility analysis, as expressed in the reasons for judgment, will rarely merit appellate intervention. Yet a failure to sufficiently articulate how credibility concerns have been resolved may constitute reviewable error: *Dinardo*, at paras 26-27; *Braich*, at para. 23. The degree of detail required to explain credibility findings may also vary with the evidentiary record and the dynamics of the trial involved: *R.E.M.*, at para. 51.

[76] Third, what is required is that the reasons of the Judge, read as a whole in the context of the record and the submissions on the live issues in the case, demonstrate that the trial judge has seized the substance of the case *R.E.M.*, at para. 43.

The Principles Applied

[77] I would not give effect to this ground of appeal, although I do not wish to be taken as suggesting that the reasons represent the ideal.

[78] First, this was a simple case. For all practical purposes, the full burden of the prosecution's case fell on Galway. It was not, as in many instances where the first two steps of *W. (D.)* are engaged, a case of oath pitted against oath. The resolution of this case came down to findings of fact about Galway's credibility and the reliability of his evidence, and an assessment of whether that evidence met the stringent standard of proof required in a criminal case.

[79] Second, rarely will deficiencies in the analysis of the credibility of witnesses warrant appellate intervention, although a failure to articulate how credibility, and I would add, reliability concerns have been involved may constitute error: *Dinardo*, at para 26; *Braich*, at para 23.

[80] Third, despite the somewhat conclusory, even formulaic nature of portions of the reasons, I am not satisfied that the deficiencies rise to the level required to warrant my intervention. That said, it is worthy of reminder that reasons should explain how significant inconsistencies have been treated and concerns about reliability addressed and resolved.

[81] Fourth, I am satisfied from a review of the reasons as a whole, that the trial judge seized the substance of the case and appreciated the need for careful scrutiny of Galway's evidence. That he might have expressed himself better affords me no authority to interfere.

Ground #4: Unreasonable Verdict

[82] The final ground of appeal alleges that the convictions are unreasonable and cannot be supported by the evidence. The evidentiary underpinnings upon which the convictions are founded have been canvassed in connection with the previous grounds of appeal and need not be repeated.

The Arguments on Appeal

[83] The Appellant contends that the convictions are unreasonable. Galway's evidence, that the Appellant showed him the draft PER despite his warnings against doing so and disclosed his ranking at the Board, contrary to Major Flight's Order, is inherently improbable. His account is riddled with inconsistencies, incompatible with objective facts, and, self-evidently, fashioned of whole cloth.

[84] The Respondent takes a contrary position. Whether findings are reasonable requires an examination of the totality of the evidence adduced at trial. In this case, a relevant factor to consider in the assessment is the absence of any evidence contradictory of Galway's account. The Appellant, the only person who could have provided that evidence, did not testify. The Respondent points out further that the Appellant does not suggest that the verdict is unreasonable because the Judge reached it irrationally or illogically or misapprehended the evidence in coming to his conclusions.

The Governing Principles

[85] Section 686(1)(*a*)(i) of the *Criminal Code* permits an appellate court to set aside a verdict on the ground that the verdict is unreasonable or that it cannot be supported by the evidence adduced at trial. This provision and the jurisprudence that interprets it controls my decision on this ground of appeal. Several principles emerge.

[86] First, a verdict is not unreasonable simply because we, individually or together, would have decided the case differently than did the Judge. The test or standard by which we are to adjudge whether the verdict is unreasonable is whether the verdict rendered is one that a properly instructed jury, acting judicially, could reasonably have rendered: *R. v Biniaris*, 2000 SCC 15, [2000] 1 SCR 381, at para 36; *R. v Yebes*, [1987] 2 SCR 168, at p 185; and *R. v Corbett*, [1975] 2 SCR 275, at p 282.

[87] Second, application of this statutory standard involves an assessment of the court martial record that is at once objective and subjective. A reviewing court must determine what verdict a reasonable jury, properly instructed, could reach and, in doing so, review, analyze and, within the limits of appellate disadvantage, reweigh the evidence properly admitted at trial: *Biniaris*, at para 36.

[88] Third, in cases like this tried by a judge sitting without a jury, a reviewing court may identify a flaw in the evaluation of the evidence or in the judge's analysis that will serve to explain the unreasonable conclusion and warrant reversal: *Biniaris*, at para 37.

[89] Fourth, in a judge alone trial, a misapprehension about the substance of the evidence on a material issue essential to the judge's reasoning may result in an unreasonable verdict and require a new trial: *R. v Lohrer*, 2004 SCC 80, [2004] 3 SCR 732, at para 2; and *R. v Sinclair*, 2011 SCC 40, [2011] 3 SCR 3, at para 3.

[90] Finally, a verdict in a trial before a judge sitting alone may also be unreasonable if the trial judge makes findings of fact essential to the verdict that are plainly contradicted by evidence relied upon for that purpose by the trial judge, or demonstrably incompatible with evidence that is not contradicted or rejected by the trial judge: *Sinclair*, at paras 16 and 19; *R. v Beaudry*, 2007 SCC 5, [2007] 1 SCR 190, at para 79.

The Principles Applied

[91] I will not accede to this ground of appeal for three reasons that I will develop briefly.

[92] First, it simply cannot be said that the trial record is barren of any evidence upon which a properly instructed trier of fact, acting judicially, could reasonably have found the Appellant's guilt proven. Despite credibility concerns about Galway and the reliability of his evidence, his testimony, on its own, could found a conviction of the disclosure offence and, together with the testimony of Bélanger, establish the essential elements of the other charges.

[93] Second, the Appellant has not pointed to any misapprehension of the substance of any evidence adduced at trial on a material issue that was essential to the Judge's reasoning process on route to his finding of guilt. It follows that the conclusions of guilt cannot be considered unreasonable on this basis: *Lohrer*, at para. 2; *Sinclair*, at para. 3

[94] Third, the convictions are not unreasonable because any finding of fact essential to the verdicts is plainly contradicted by evidence relied upon by the Judge for that purpose, or demonstrably incompatible with uncontradicted evidence or evidence rejected by the Judge: *Sinclair*, at paras 16 and 19; *Beaudry*, at para 79.

CONCLUSION

[95] The credibility of Galway and the reliability of his evidence was crucial to the Judge's conclusions of guilt. The manner in which the Judge approached both issues was seriously flawed. The reasons also come uncomfortably close to shifting the onus of proof and using the Appellant's failure to testify as an item of evidence supportive of the prosecution's case. In the result, it is my view that the convictions cannot stand.

[96] For these reasons, judgment was issued allowing the appeal, setting aside the convictions, and ordering a new trial on the charges of which the Appellant was convicted.

"David Watt"
J.A.

"I concur"

"Sandra J. Simpson"
J.A.

"I concur"

"Richard G. Mosley"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	February 24, 2012
REASONS FOR JUDGMENT BY:	WATT J.A.
CONCURRED IN BY:	SIMPSON J.A. MOSLEY J.A.
DATED:	September 4, 2012

APPEARANCES:

David J. Bright, Q.C. 902-469-9500	FOR THE APPELLANT
Lieutenant-Colonel J.A.M. Léveillée 613-995-2684	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Boyne Clarke LLP Dartmouth, NS	FOR THE APPELLANT
Canadian Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENT