Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140918

Docket: CMAC-559

Citation: 2014 CMAC 9

CORAM: **BENNETT J.A.**
HANSEN J.A.
WEBB J.A.

BETWEEN:

LIEUTENANT D.W. WATTS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Calgary, Alberta, on April 4, 2014.

Judgment delivered at Ottawa, Ontario, on September 18, 2014.

REASONS FOR JUDGMENT BY: BENNETT J.A.

CONCURRED IN BY: HANSEN J.A.
WEBB J.A.

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REASONS FOR JUDGMENT

BENNETT J.A.

[1] Major D. Watts was convicted in a general court martial, by a panel, of three offences arising from an incident on February 12, 2010, in Afghanistan. He was acquitted of three other charges. His sentence was a severe reprimand and a reduction in rank to Lieutenant. He appeals these convictions and sentence. The Crown appeals the sentence.

[2] I would allow the appeal against conviction and set aside the verdicts on Charges 4, 5 and 6. I would order a new trial on Charges 4 and 5 and enter an acquittal on Charge 6. Therefore, it is not necessary to address the sentence appeals.

I. Background

[3] At the time of the incident, Major Watts held the rank of Captain. I will refer to him as Captain in these reasons to clearly mark the different ranks of those involved at the time of the incident. Captain Watts was a reservist in Calgary, Alberta, and also worked full-time as a firefighter. He was placed on active service, and from 2009 to 2010, was commanding 2 Platoon, Stabilization Company A ("Stab A").

[4] Captain Watts was under the command of Major Lunney. Major Lunney was serving as the officer commanding of Stab A. Stab A was a subunit of the Kandahar Provincial Reconstruction Team, Task Force 3-09, and was based at Camp Nathan Smith in Kandahar, Afghanistan. Warrant Officer MacGillivray was the second in command of 2 Platoon. 2 Platoon was involved in transporting individuals, including civilians, around Kandahar.

[5] Captain Watts and others had participated in pre-deployment training under Major Lunney in Canada. Training was not provided for the use of the C19, an antipersonnel mine sometimes referred to as a Claymore mine.

[6] On December 30, 2009, a 2 Platoon vehicle struck an improvised explosive device, resulting in mass casualties. Five people were killed, and Warrant Officer MacGillivray was severely injured. Warrant Officer Ravensdale replaced Warrant Officer MacGillivray as the second in command. The Acting Company Sergeant Major was Warrant Officer Smith.

[7] In February, Warrant Officer Ravensdale was going to lead 2 Platoon on an overnight mission into District 9, which was considered a dangerous area, and he wanted to deploy the C19. Captain Watts and Warrant Officer Ravensdale went to Major Lunney to obtain permission to conduct training with the C19 on a range. Major Lunney was aware that Captain Watts had not used the C19, and was aware that Warrant Officer Ravensdale was qualified to use the C19 (albeit he overestimated Warrant Officer Ravensdale's training).

[8] In Major Lunney's view, Warrant Officer Ravensdale was more than capable of setting up the range. He believed that Warrant Officer Ravensdale was the most experienced person in 2 Platoon with the C19. In addition to Warrant Officer Ravensdale, there were four other people who were qualified to be the Officer In Charge on the range: Major Lunney, Warrant Officer Smith (the Acting Company Sergeant Major), Sergeant Collins, and Sergeant McKay. Captain Watts was not qualified to be the Officer In Charge of a C19 range on February 12, 2010.

[9] On February 12, 2010, 2 Platoon conducted a range practice at Kan Kala, Afghanistan (located in the desert northeast of Kandahar City).

[10] Four ranges were set up using the following weapons: the general purpose machine gun 7.62 mm C6; the rifle 5.56 mm C7; the carbine 5.56 mm C8; the light machine gun 5.56 mm C9; the 9 mm pistol; the rocket, high explosive, 66 mm, NM 72 E5 (M72); the M203 grenade launcher; and the 76 mm smoke grenade. Sergeant McKay was in charge of the small arms, Sergeant Collins was in charge of the rocket launchers, Captain Watts was in charge of the light armoured vehicles ("LAV"), and Major Lunney was in charge of two vehicles he had brought to range practice.

[11] Warrant Officer Ravensdale was running the C19 range, which operated after the other four practices were completed. The C19's were set up under the supervision of Warrant Officer Ravensdale. According to the witnesses, he checked each set-up. Warrant Officer Ravensdale did not testify at the court martial.

[12] The first five C19's fired according to plan. The sixth misfired, the payload was projected backwards, and the pellets struck several soldiers. Corporal Baker was killed, and several others were severely injured. The cause of the misfire was never determined.

[13] At the time of the accident, there were five soldiers present in the immediate area who all had advanced training on the C19 and were capable of instructing on it. These were: Major Lunney, Warrant Officer Smith (who was the most qualified), Warrant Officer

Ravensdale, Sergeant McKay, and Sergeant Collins. Captain Watts was not qualified on the C19, nor was he capable of being an Officer In Charge of a C19 range.

[14] During the first two firings of the C19, Captain Watts was in his LAV attending to duties. They were in an active theatre of war, and had to travel back to the camp so Captain Watts was ensuring that the LAV's were battle ready for the return trip. Prior to the third round of firing, Captain Watts met with Warrant Officer Ravensdale to inquire about the practice, and was told that everything was fine. Warrant Officer Ravensdale suggested that Captain Watts receive a lesson from one of the corporals on how to load and fire a C19. That is what he was engaged in when the misfiring occurred.

[15] The safety pamphlet for the C19 describes the "Lethal Zone" as an area forward of the C19 by 50 m with an arc of about 45 degrees. In other words, in the direction the C19 is supposed to fire. The "Prohibited Zone" is an area within the radius of 16 m immediately surrounding the C19 itself. The "Danger Area" is the area forward and to the sides of the C19 by 300 m and to the rear by 100 m. This rear area is described as an area where "light casualties" are possible due to blow back from stones or debris (assuming no misfire). This is the area where the casualties occurred.

[16] Some of the soldiers heard Warrant Officer Ravensdale tell them to take cover, but obviously, others did not.

II. Issues on Appeal

[17] Captain Watts raises the following issues:

1. The learned trial judge erred in failing to provide the panel with an instruction pursuant to the decision in *R. v. W.D.*, [1991] 1 S.C.R. 742;
2. The learned trial judge erred in failing to instruct the panel on the relevance of Captain Watts' lack of experience or training on the issue of the reasonable person;
3. The learned trial judge erred in failing to instruct the panel that Major Lunney designated another soldier to be in charge of the range that excluded Captain Watts from responsibility for the accident that occurred with the C19;
4. The verdict is unreasonable and not supported by the evidence; and
5. The learned trial judge erred in not directing an acquittal on the basis that there was no proof of a "military duty" as a required element of the offence.

[18] I prefer to address the issues in a different order than noted above.

III. Discussion

A. *Legal Parameters*

[19] Captain Watts was convicted of three offences: unlawfully causing bodily harm, as a result of the combined application of s. 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 (*NDA*) and s. 269 of the *Criminal Code*, R.S.C. 1985, c. C-46 (*Code)* and two counts

of negligent performance of duty contrary to the *NDA*. Below are the applicable statutory sections:

Negligent performance of duties	Négligence dans l'exécution des tâches
124. Every person who negligently performs a military duty imposed on that person is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.	124. L'exécution négligente d'une tâche ou mission militaire constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.
…	…
130. (1) An act or omission	130. (1) Constitue une infraction à la présente section tout acte ou omission :
(a) that takes place in Canada and is punishable under Part VII, the *Criminal Code* or any other Act of Parliament, or	*a)* survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale;
(b) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the *Criminal Code* or any other Act of Parliament,	*b)* survenu à l'étranger mais qui serait punissable, au Canada, sous le régime de la partie VII de la présente loi, du *Code criminel* ou de toute autre loi fédérale.
is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).	Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).

Criminal Code of Canada

Unlawfully causing bodily harm	Lésions corporelles
269. Every one who	269. Quiconque cause

unlawfully causes bodily harm to any person is guilty of	illégalement des lésions corporelles à une personne est coupable :
(a) an indictable offence and liable to imprisonment for a term not exceeding ten years; or	*a)* soit d'un acte criminel et passible d'un emprisonnement maximal de dix ans;
(b) an offence punishable on summary conviction and liable to imprisonment for a term not exceeding eighteen months	*b)* soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire et passible d'un emprisonnement maximal de dix-huit mois.

[20] Unlawfully causing bodily harm requires an underlying unlawful act. Here, the Crown argued that the negligent performance of duty (Charge 5) was sufficient to amount to an unlawful act for the purpose of a conviction under s. 269 of the *Code*.

B. *Section 124 and Military Duty*

[21] What constitutes a "military duty" is discussed in *R. v. Brocklebank*, 5 C.M.A.R. 390, [1996] C.M.A.J. No. 4. In this case, the offence under s. 124 of the *NDA* has two components: i) a military duty imposed on the accused and ii) negligent performance by the accused of that duty. The Court carefully analyzed the legislation and case law, and concluded that a military duty comprises the following, at para 42:

> [42] The conclusion, in my view, is inescapable: a military duty, for the purposes of section 124, will not arise absent an obligation which is created either by statute, regulation, order from a superior, or rule emanating from the government or Chief of Defence Staff. Although this casts a fairly wide net, I believe that it is nonetheless necessary to ground the offence in a concrete obligation which arises in relation to the discharge of a particular duty, in order to distinguish the charge from general negligence in the performance of military duty *per se*, which, upon a plain interpretation of

section 124, it was clearly not Parliament's intention to sanction by that section.

[22] The Charge Sheet sets out the relevant offences in the following manner:

FOURTH CHARGE Section 130 *N.D.A.*

AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, THAT IS TO SAY, UNLAWFULLY CAUSING BODILY HARM CONTRARY TO SECTION 269 OF THE *CRIMINAL CODE*

Particulars: In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst commanding 2 Platoon, Stabilisation Company A, did unlawfully cause bodily harm to Sergeant Mark McKay, Master Corporal William Pylypow, Corporal Wolfgang Brettner and Bombardier Daniel Scott.

FIFTH CHARGE Section 124 *N.D.A.*

NEGLIGENTLY PERFORMED A MILITARY DUTY IMPOSED ON HIM

Particulars: In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst commanding 2 Platoon, Stabilisation Company A, and whilst present during a range practice being conducted by his subordinates, failed to order a stop to the live firing of the Defensive Command Detonated Weapon C19, as it was his duty to do, until all of his subordinates were either under cover or withdrawn from the danger area.

SIXTH CHARGE Section 124 *N.D.A.*

NEGLIGENTLY PERFORMED A MILITARY DUTY IMPOSED ON HIM

Particulars: In that he, on or about 12 February 2010, at or near Kan Kala, Afghanistan, whilst commanding 2 Platoon, Stabilisation Company A, permitted his subordinates to train on the live Defensive Command Detonated Weapon C19 without ensuring, as it was his duty to do, that training on inert or practice weapons systems had first been successfully completed.

[23] Charges 5 and 6 each define the duty alleged to have been negligently performed. Only Charge 5 was relied on as an unlawful act for the underlying offence required for the offence of unlawfully causing bodily harm. The military judge, after reciting Charge 5, however, instructed the panel as follows:

> Consequently, the essential elements of this charge, each of which the prosecution must prove beyond a reasonable doubt, are: (1) the identity of Major Watts as the offender; (2) the date and place of the offence as particularized; (3) a military duty imposed upon Major Watts; (4) knowledge of the duty; that is, that Major Watts was aware of the duty imposed upon him; (5) that in the manner of discharging or execution of the duty the accused acted negligently, that is to say, (i) there is a standard of conduct expected of a reasonable person of the rank and in all the circumstances of the accused at the time and place of the alleged offence; and (ii) the accused failed to order a cease-fire until his subordinates on the ranges were undercover or withdrawn and his failure to do so constituted a marked departure from that standard of conduct; and (6) that the accused had the mental capacity to appreciate the risk flowing from his conduct.
>
> …
>
> As to the third element, a military duty, there is evidence before you as to a military duty imposed upon Major Watts at the time of the Kan Kala range on 12 February. You will recall the evidence of then Major, now Captain Lunney, who testified that as the Company Commander of Stabilization Company A he directed the platoon commanders under his command to run live fire weapons range for their soldiers while in theatre in Afghanistan in order to maintain their skills. He testified that he gave these orders regularly, both in writing and verbally. Major Watts also gave evidence in re-examination that he and others were to try to get the soldiers onto the range periodically. If you accept the evidence of Captain Lunney and Major Watts on this point then you may well find that as one of the platoon commanders at the time, Major Watts was under a military duty to train his soldiers periodically on the weapons range. But these are questions for you to decide.
>
> As to the fourth element, you must consider the state of mind of Major Watts at the time of the range on 12 February. Did he know of the duty given to him and the other platoon commanders by Captain Lunney to train his soldiers on the weapons range? Captain Lunney gave evidence of the circumstances in which he

> gave these orders, and Major Watts seems to agree that such orders were given to him and to others. But unless you are satisfied beyond a reasonable doubt that Major Watts had a military duty to train his soldiers on the weapons range, and that he was aware of this duty on 12 February, you must find him not guilty of the charge in charge No. 5. On the other hand, if you are satisfied beyond a reasonable doubt both that Major Watts had a military duty to train his soldiers on the weapons range and that Major Watts was aware of this duty on 12 February, you must go on to consider the fifth essential element.
>
> [Emphasis added.]

[24] Similar instructions were given with respect to Charge 6.

[25] In this case the duty in Charge 5 is defined in the Charge Sheet as "failing to stop the live firing," and in Charge 6, "failing to ensure that his subordinates had practiced on inert or practice weapons." Neither charge alleges the duty to "train his soldiers periodically on the weapons range." In my respectful view, based on the manner these charges are framed, and the definition of military duty, the military judge incorrectly identified the military duty that needed to be proved beyond a reasonable doubt. The military duty, as alleged for Charge 5, in the Charge Sheet, was the failure to stop the live firing. Similarly, the military duty alleged for Charge 6 was not the duty to "train his soldiers periodically in the range," but "permitted his subordinates to train on the live Defensive Command Detonated Weapon C19 without ensuring, as it was his duty to do, that training on inert or practice weapons systems had first been successfully completed."

[26] In my respectful view, this instruction created a fatal error to the charge to the panel on all three counts.

C. *Failing to Instruct the Panel on the effect of the designation of Warrant Officer Ravensdale as the Officer In Charge of the C19 range*

[27] The military duty as alleged in the charging sheet on Charge 5 was that it was Captain Watts' duty to order a cease fire until everyone was under cover. The military judge concluded that it was not appropriate to instruct the panel to consider the evidence that Captain Watts had advised Major Lunney of his inexperience with respect to the use of C19's, that Major Lunney had allowed the range to proceed under the command of Warrant Officer Ravensdale, and that Major Lunney was aware that Captain Watts was not permitted to be the Officer In Charge on a C19 range. In my respectful view, this evidence was key to determining if Captain Watts had the defined military duty imposed on him as required by s. 124 of the *NDA*. If the panel accepted that Major Lunney had designated Warrant Officer Ravensdale as the Officer In Charge, then there would not be evidence to support that Captain Watts had a military duty as defined in the Charge Sheet.

[28] Thus, while this evidence may not have been relevant to determining whether the conduct was a "marked departure" from the norm, as discussed below, it was relevant to the issue of proof of the military duty.

[29] The military judge erred in his instruction to the panel on this point as well.

D. *Instruction on marked departure and the "reasonable person"*

[30] Captain Watts submits that there is a conflict in judgments in this Court, between *Brocklebank* and *R. v. Day*, 2011 CMAC 3. I do not think, however, there is in fact a conflict in the decisions, and as such, do not think the learned military judge erred in his instructions on this point.

[31] In *R. v. Mathieu*, 5 C.M.A.R. 363, [1995] C.M.A.J. No. 12, this Court reversed the acquittal of the accused on a charge of negligent performance of duty under s. 124 of the *NDA*, because the judge advocate instructed the panel that a subjective *mens rea* was applicable. This Court, in applying the reasons for judgment of McLachlin J. (as she then was) in *R. v. Creighton*, [1993] 3 S.C.R. 3, said this at pp. 373-374:

> In my view, there is no doubt that this direction is fundamentally in error. It is now clearly established that, for penal negligence offences, the applicable standard of liability is an objective standard based on the court's assessment of what a reasonable person would have done in the circumstances. Except where the accused claims incapacity, which is not the case here, this standard applies to establish both the *actus reus* and the *mens rea*. Since the standard is objective, it is the act itself that must be assessed; the actor's intention, will and alleged good faith are simply irrelevant.
>
> In *R. v. Creighton*, McLachlin J., speaking for the majority of the Supreme Court of Canada, stated the following:
>
> > The foregoing analysis suggests the following line of inquiry in cases of penal negligence. The first question is whether *actus reus* is established. This requires that the negligence constitute a marked departure from the standards of the reasonable person in all the circumstances of the case. This may consist in carrying out the activity in a dangerous fashion, or in embarking on the activity when in all the circumstances it is dangerous to do so.

> The next question is whether the *mens rea* is established. As is the case with crimes of subjective *mens rea*, the *mens rea* for objective foresight of risking harm is normally inferred from the facts. The standard is that of the reasonable person in the circumstances of the accused. If a person has committed a manifestly dangerous act, it is reasonable, absent indications to the contrary, to infer that he or she failed to direct his or her mind to the risk and the need to take care. However, the normal inference may be negated by evidence raising a reasonable doubt as to lack of capacity to appreciate the risk. Thus, if a *prima facie* case for *actus reus* and *mens rea* are made out, it is necessary to ask a further question: did the accused possess the requisite capacity to appreciate the risk flowing from his conduct? If this further question is answered in the affirmative, the necessary moral fault is established and the accused is properly convicted. If not, the accused must be acquitted.
>
> I believe the approach I have proposed to rest on sound principles of criminal law. Properly applied, it will enable the conviction and punishment of those guilty of dangerous or unlawful acts which kill others. It will permit Parliament to set a minimum standard of care which all those engaged in such activities must observe. And it will uphold the fundamental principle of justice that criminal liability must not be imposed in the absence of moral fault.
>
> I conclude that the legal standard of care for all crimes of negligence is that of the reasonable person. Personal factors are not relevant, except on the question of whether the accused possessed the necessary capacity to appreciate the risk. [at 73-74]

In *R. v. Gosset*, which was decided concurrently, McLachlin J., again speaking for the majority, expressed the same idea in even more concise terms:

> I agree with the Chief Justice that it was open to the jury to find that the conduct of the police officer constituted a marked departure from the standard of care of a reasonably prudent person in the circumstances. This was sufficient to permit a

> finding of the necessary *actus reus* and *mens rea*, absent evidence of incapacity to appreciate the risk involved in the conduct. [at 102]

[32] Later, in *Brocklebank*, above, arising from the same circumstances in Somalia as *Mathieu*, this Court again considered the question of the standard of care applicable to negligent performance of a military duty. This Court said this, after considering *Creighton*, *R. v. Gosset*, [1993] 3 S.C.R. 76 and *Mathieu*:

> [18] In summary, the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation. An emergency, or the heightened state of apprehension or urgency caused by threats to the security of Canadian Armed Forces personnel or their materiel might mandate a more flexible standard than that expected in relatively non-threatening scenarios. Furthermore, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to the same exacting standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer.

[33] The Court concluded at para 20:

> [20] As I read the Judge Advocate's comments he did nothing but inform the panel that in deciding whether the respondent had met the appropriate standard of care in the performance of the duty imposed upon him, the panel could consider the rank, status and training of the respondent as these were characteristics which the panel would otherwise ascribe to the reasonable person in the circumstances of the respondent. This accords with the principles set down by this Court in *Mathieu*.

[34] However, these comments must be read in the further context of the next paragraph:

> [21] Furthermore, this is precisely how the panel understood the summation in that regard. After several days of deliberating, the panel came back with a question which demonstrates that it had understood the test to be an objective one:
>
> > "Our notes show that essential element six concerns the establishment of a standard of care that would be required in the discharge of the duty to safeguard the prisoner. In determining the standard of care, must we determine the standard within the strict context of the circumstances in Somalia?, or must we determine the standard within the context of the average Canadian soldier within the Canadian Forces as a whole? In other words does the standard of care to which we will subsequently compare Private Brocklebank's conduct to be determined within the circumstances and conduct ... context of the situation in Somalia at the time of the alleged offence according to the evidence presented?, or is the standard of care to which we will subsequently compare Private Brocklebank's conduct to be determined within the broader context of the average Canadian soldier within the Canadian Forces?" [A.B., vol. 7 at 1109-1110]
>
> and in his response to the question put to him, the Judge Advocate clearly instructed the panel that they should adopt an objective test having regard to the particular circumstances of the respondent and the event, when he told the panel:
>
> > I would therefore conclude my response to your question, Mr President and Members, with this: The standard of performance or the standard of discharge of a duty is that manner of discharging the duty in question which would be adopted by a reasonably capable and careful private in Private Brocklebank's position in the Service under circumstances similar to those in evidence. [A.B., vol. 7 at 1120]

[35] Thus, it appears that, at the end of the day and after a question on point, the panel was instructed that the objective standard was applicable: what would the reasonable and careful private do under the same circumstances.

[36] That decision was reconsidered by this Court in *Day*. In *Day* at paras 11-12, the military trial judge found that, based on *Brocklebank*, the Crown had an obligation to lead evidence of the accused's rank, status, and training in order to prove the objective standard of care on a charge of negligent performance of duty. This Court held that was an error, and said:

> [11] The prosecution submits that the military judge recognized that the standard of care was an objective one, namely, that of a reasonable person in all the circumstances of the case, but that the approach adopted by the military judge personalized the test. He erred in requiring the prosecution to lead evidence of Captain Day's knowledge, training and experience. This, the prosecution submits, was rejected by the Supreme Court of Canada in *R. v. Creighton*, [1993] 3 S.C.R. 3.
>
> [12] I agree with this submission. In *Creighton* at pages 41, 58, 60 and 73, the Supreme Court held that for an offence based on negligence, the standard is a "marked departure" from the conduct of a reasonable person in all the circumstances of the case. The Supreme Court recognized that some activities may impose a higher *de facto* standard than others. This flows from the circumstances of the activity, not from the expertise of the actor. It is a uniform standard regardless of the background, education, or psychological disposition of the actor. The Supreme Court expressly rejected the argument that the standard of care in crimes of negligence would vary with the degree of experience, education, and other personal characteristics of the accused. Creighton was applied by this court in the military context in *R. v. Mathieu* (1995), 5 C.M.A.R. 363, at pp. 373-374.

[37] Captain Watts argues the reasonable person test in *Creighton*, should not apply to situations that are ordered, rather than voluntary. He points out that in *Creighton*, above, McLachlin J., writing for the majority, said the following at paras 129-130:

> [129] To summarize, the fundamental premises upon which our criminal law rests mandate that personal characteristics not directly relevant to an element of the offence serve as excuses only at the point where they establish incapacity, whether the incapacity be the ability to appreciate the nature and quality of one's conduct in the context of intentional [page66] crimes, or the incapacity to appreciate the risk involved in one's conduct in the context of crimes of manslaughter or penal negligence. The principle that we eschew conviction of the morally innocent requires no more.
>
> [130] This test I believe to flow from the fundamental premises of our system of criminal justice. But drawing the line of criminal responsibility for negligent conduct at incapacity is also socially justifiable. In a society which licenses people, expressly or impliedly, to engage in a wide range of dangerous activities posing risk to the safety of other, it is reasonable to require that those choosing to undertake such activities and possessing the basic capacity to understand their danger take the trouble to exercise that capacity (see R. v. Hundal, supra). Not only does the absence of such care connote moral fault, but the sanction of the criminal law is justifiably invoked to deter others who choose to undertake such activities from proceeding without the requisite caution. Even those who lack the advantages of age, experience and education may properly be held to this standard as a condition of choosing to engage in activities which may maim or kill other innocent people.
>
> [Emphasis added]

[38] Captain Watts submits the analysis with respect to the reasonable person in *Creighton* is limited, or defined to, "those who choose to undertake such activities from proceeding without the requisite caution." He submits that as he was "ordered" to do certain things, then his rank, status and training should be taken into account.

[39] While this is an interesting argument, I do not need to decide it in this case. I have concluded that the circumstances surrounding the assignment of Warrant Officer Ravensdale under the command of Major Lunney are relevant circumstances in relation to whether he breached his military duty given the manner in which the charge was framed.

E. *Reasonableness of the verdict and failing to direct a verdict of acquittal*

[40] Dealing with Charge 6, the military duty as alleged in the Charge Sheet is that Captain Watts "permitted his subordinates to train on the live Defensive Command Detonated Weapon C19 without ensuring, as it was his duty to do, that training on inert or practice weapons systems had first been successfully completed." Major Lunney authorized the range with the C19's on the basis that Warrant Officer Ravensdale and the soldiers were about to engage in a dangerous overnight mission, and the C19 would offer them better defences and protection. The evidence is that there were no inert or practice weapons on the base because it was considered dangerous to personnel to have inert weapons that might be confused with real weapons, causing risk of death or injury in the field. Indeed the panel was instructed that they could take into account the fact that there were no inert or practice weapons. As noted above, the military judge erred in instructing the panel with respect to the military duty.

[41] In my respectful view, impossibility cannot support a finding that there was a military duty. There cannot be an offence that carries significant penalties, of negligently performed duty, that is impossible to perform. This offence, as charged, is not supported by the evidence, and an acquittal must result.

[42] In my respectful view, however, the panel could find that Captain Watts violated Charge 5, and therefore Charge 4, depending on their findings of fact. Thus, there is a possible route to conviction on this charge, depending on the factual findings of the panel.

[43] However, the instructions to the panel would need to include the proper instruction on what constitutes the military duty in this case, along with the instruction relating to whether Major Lunney placed that duty on someone other than Captain Watts.

F. *Instruction on R. v. W.D.*

[44] Captain Watts submits that there should have been an instruction along the lines suggested in *R. v. W.D.*, [1991] 1 S.C.R. 742, at pp. 757-758:

> Ideally, appropriate instructions on the issue of credibility should be given, not only during the main charge, but on any recharge. A trial judge might well instruct the jury on the question of credibility along these lines:
>
> > 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.

[45] The Crown at trial agreed that such an instruction should be given, but the military judge concluded that it should not. He was of the view that it did not apply.

[46] The military judge concluded that this was a situation where the panel could believe what Captain Watts said, but still find him guilty, as his evidence did not provide a complete defence. Thus, the standard *W.D.* instruction had no application. However, in such a case, a modified instruction with respect to *W.D.* can be given to the panel where the credibility of the accused person is engaged.

[47] In my view, there should have been a modified instruction pursuant to *W.D.*, above. The credibility of Captain Watts was challenged by the Crown, and the instruction should have been given. I have already concluded a new trial must be ordered, therefore, I need not say anything else about this ground of appeal.

G. *Conclusion*

[48] I would allow the appeal, set aside the finding of guilty and direct a new trial by court martial on Charge 4 (unlawfully causing bodily harm) and Charge 5 (Negligent performance of duty). I would set aside the finding of guilty and enter a finding of not guilty on Charge 6 (Negligent performance of duty). It is not necessary to address the appeals against the sentences.

"Elizabeth A. Bennett"
J.A.

"I agree.
Dolores M. Hansen A.C.J."

"I agree.
"Wyman W. Webb J.A"

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-559
STYLE OF CAUSE:	LIEUTENANT D.W. WATTS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF HEARING:	APRIL 4, 2014
REASONS FOR JUDGMENT BY:	BENNETT J.A.
CONCURRED IN BY:	HANSEN J.A. WEBB J.A.
DATED:	SEPTEMBER 18, 2014

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