



COURT MARTIAL

Citation: *R v Weldam-Lemire*, 2011 CM 4018

Date: 20110622

Docket: 201107

Standing Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Ex-Ordinary Seaman S. Weldam-Lemire, Accused

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR THE FINDING

[1] The accused, Ex-Ordinary Seaman Weldam-Lemire, is charged of having disobeyed a lawful command of a superior officer and of being absent without leave. The prosecution argues the evidence demonstrates that Ex-Ordinary Seaman Weldam-Lemire was aware that he had to be onboard HMCS CALGARY as of 0730 hours on 12 December 2010 and that he had no lawful excuse to be absent from his place of duty on that day. The prosecution also argues the evidence proves beyond a reasonable doubt that Chief Petty Officer 1st Class Price had the authority to order Ex-Ordinary Seaman Weldam-Lemire to be present at his office at 1130 hours on 11 January 2011 and that Ex-Ordinary Seaman Weldam-Lemire did not present himself as ordered to do so and that he was absent without leave until he was arrested by the military police on 13 January 2011. Defence Counsel admits that most of the essential elements of the 1st offence had been adequately proven by the prosecution but argues the duty imposed on Ex-Ordinary Seaman Weldam-Lemire has not been proven beyond a reasonable doubt. Defence Counsel also argues the order to report to Chief Petty Officer 1st Class Price's office on 11 January 2011 was not lawful because it did not relate to a military duty. He also argues that since there was no duty to be present at the ship coxswain's office at

1130 hours on 11 January, the alleged period of absence without leave for charge No. 2 cannot start at 1130 hours.

THE APPLICABLE LAW

[2] Before this court provides its analysis of the evidence and of the charges, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[3] The presumption of innocence is most likely the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as with cases dealt with under Canadian criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[4] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[5] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term, "beyond a reasonable doubt", has been used for a very long time. It is part of our history and traditions of justice.

[6] In *R v Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice, it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is not way indicative of his or her guilt.

[7] In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, the Supreme Court of Canada held that:

... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case, Ex-Ordinary Seaman Weldam-Lemire, beyond a reasonable doubt. To put it in perspective, if the court is convinced, or would have been convinced, that the accused is probably or likely guilty, then the accused would be acquitted since proof of probably or likely guilt is not proof of guilt beyond a reasonable doubt.

[8] Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did. It could be documents, photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

[9] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[10] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe, a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably, more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where the accused chooses to testify.

[11] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well tint a witness's entire testimony.

[12] 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.

[13] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R v W.(D.)*, [1991] 1 SCR 742. The test goes as follows:

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.

In *R v J.H.S.*, 2008 SCC 30 at paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R v H.(C.W.)* (1991) 68 CCC (3d) 146 (BCCA) where Wood J.A. suggested the additional instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely: "if, after careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[14] No testimonial evidence was presented by defence counsel. Therefore, the court must focus immediately on the third step of the *W.(D.)* test; that is to say, whether on the basis of the evidence which the court accepts, the court is convinced beyond a reasonable doubt by that evidence of the guilt of Ex-Ordinary Seaman Weldam-Lemire.

[15] The evidence before this court martial is composed essentially of the following: judicial notice, exhibits and the testimony of witnesses. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. The witnesses heard in the order of their appearance before the court are Chief Petty Officer 1st Class Price, Master Seaman Hussey, Petty Officer 2nd Class Guitare, Lieutenant(N) Erickson, Petty Officer 2nd Class Hopkinson, Warrant Officer Kelcey, Leading Seaman Schlauch and Corporal Gagnon. The prosecution presented two exhibits and the defence counsel presented three exhibits.

[16] Firstly, I will review the evidence that is not disputed in this trial. Ex-Ordinary Seaman Weldam-Lemire was a member of HMCS CALGARY at the time of the alleged offences. HMCS CALGARY was alongside in refit at CFB Esquimalt, British Columbia at the time of the alleged offences. On 12 December 2010, Petty Officer 2nd Class Guitare was the duty coxswain aboard HMCS CALGARY. Ex-Ordinary Seaman Weldam-Lemire reported to her for duty at approximately 1245 hours on 12 December 2010. He was sober and shaven and ready for duty watch.

[17] Chief Petty Officer 1st Class Price was advised of this situation and he conducted a disciplinary investigation. He laid one charge of absence without leave from 0730 hours on 12 December 2010 until approximately 1245 hours on 12 December 2010 against Ex-Ordinary Seaman Weldam-Lemire on 10 January 2011. On that day, he informed Ex-Ordinary Seaman Weldam-Lemire of his right to elect to be tried by court martial at 1100 hours.

[18] At 0730 hours on 11 January 2011, Ex-Ordinary Seaman Weldam-Lemire was on duty aboard HMCS CALGARY and he asked the duty coxswain, Petty Officer 2nd Class Hopkinson permission to go to sick parade. Petty Officer 2nd Class Hopkinson

told him to go to sick parade and to return to the ship and report back to him with his medical chit. Ex-Ordinary Seaman Weldam-Lemire went to the base clinic but did not return to the ship. The CO of HMCS CALGARY issued a warrant for the arrest of Ex-Ordinary Seaman Weldam-Lemire on 11 January 2011. Ex-Ordinary Seaman Weldam-Lemire was arrested by Corporal Gagnon, a member of the CFB Esquimalt Military Police Detachment, at 1040 hours on 13 January 2011 at 945 Portage Rd, Esquimalt, British Columbia.¹

[19] As in most trials, the assessment of the credibility of the witnesses is a fundamental aspect of this trial. An assessment of credibility involves the evaluation of the honesty of a witness but also the reliability of the evidence of that witness. Credibility is a function of the veracity of the witness and reliability pertains to the accuracy of the evidence. The assessment of credibility may not be a purely intellectual exercise. Numerous factors are involved. Some factors may defy verbalization². A trial judge may assess evidence "through the lens of common sense and everyday experience, in the same manner as juries are instructed to do so by trial judges."³ Lieutenant(N) Erickson, Chief Petty Officer 1st Class Price, Warrant Officer Kelcey, Petty Officer 2nd Class Guitare, Petty Officer 2nd Class Hopkinson and Master Seaman Hussey are deemed credible and reliable witnesses.

[20] The particulars of the 1st charge read as follows:

In that he, at 0730 hours, on 12 December 2010, without authority was absent from HMCS CALGARY, CFB Esquimalt, British Columbia, and remained absent until approximately 1245 hours, 12 December 2010.

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the Charge Sheet;
- (b) that Ex-Ordinary Seaman Weldam-Lemire had a duty to be in a given place at a specific time;
- (c) that Ex-Ordinary Seaman Weldam-Lemire failed to be there;
- (d) that Ex-Ordinary Seaman Weldam-Lemire did not have authority for failing to be there; and
- (e) that Ex-Ordinary Seaman Weldam-Lemire was aware of the duty which was imposed on him.

¹ See Exhibit 6

² See *R v R.E.M.* 2008 SCC 51, para 49

³ See *R v H.C.* 2009 ONCA 56, para 64

[21] Once these elements are proven by the prosecutor, it falls to the accused to provide a reasonable excuse or justification for failing to be in the required place at the required time or to establish that he or she exercised reasonable diligence in attempting to fulfill the duty.⁴

[22] Defence counsel only takes issue with the existence of a duty to report onboard ship at 0730 hours on 12 December 2010. He argues the court must find beyond a reasonable doubt that the routine orders were validly issued. He asserts that the uncertainty surrounding the signature found on the Routine Orders 042/10⁵ is enough to raise a reasonable doubt.

[23] It is clear from the undisputed evidence that Ex-Ordinary Seaman Weldam-Lemire is the accused. The identity of the accused is not an issue in these proceedings. There is no dispute regarding the date and place of the alleged offence.

[24] **Did Ex-Ordinary Seaman Weldam-Lemire have a duty to be in a given place at a specific time?** Exhibit 3 is the HMCS CALGARY Routine Orders for the period of 8 December to 15 December 2010. These routine orders set out the duty watches for the period of 8 December 2010 to 9 January 2011.

[25] Chief Petty Officer 1st Class Price was the coxswain of HMCS CALGARY at the time of the alleged offences. Routine orders would be drafted by him and his regulatory petty officer. They would receive input from different heads of department. He took responsibility for the assignment of duty watch. The commanding officer, CO, had delegated the task of reviewing the routine orders to the Executive Officer, XO. Chief Petty Officer 1st Class Price would present the routine orders to the XO for review and the orders would be signed by the CO or the XO or an officer designated by the CO if the CO was not available. The XO would usually sign the routine orders if the CO was not aboard HMCS CALGARY. The routine orders were then published by putting paper copies in each mess deck and one copy in the "main flats" by the coxswain's office. They were posted in each mess deck because every sailor has easy access to his or her mess deck as well as the main flats. The routine orders were also published electronically on the ship's "SPLASH" page. Chief Petty Officer 1st Class Price also stated that "a sailor is governed by watches" and that the routine orders is the official list for the place of duty for duty watch and that it was a common practice for sailors.

[26] He could not identify the signature of the person who had signed Routine Orders 042/10 for the commanding officer. He had brought the routine orders to the XO of the ship as was his practice but he could not remember who was acting as the XO since a few officers had been designated successively as XO following the appointment of Lieutenant-Commander Belair as the CO of HMCS CALGARY in December 2010. A memo signed by the CO and distributed to the heads of department and to the coxswain would designate an officer to act as XO on specific dates. The delegations of authority are specified in the ship's standing orders.

⁴ See *R v Gauthier* [1998] CMAJ No. 4, para 16

⁵ See Exhibit 3

[27] It is clear from the uncontradicted evidence that Chief Petty Officer 1st Class Price was responsible for the preparation of routine orders and that he followed the same procedure as he always did when preparing and publishing Routine Orders 042/10. Routine Orders 042/10 are signed. They were not signed by the CO, Lieutenant-Commander Belair, but were signed by a person for the CO. Chief Petty Officer 1st Class Price testified that he brought these routine orders to the XO as was his practice. Chief Petty Officer 1st Class Price does not recognize the signature and he does not remember who was the XO at that time. These routine orders do not appear out of the ordinary; thus it is not surprising that Chief Petty Officer 1st Class Price would not remember who exactly was acting as XO of the ship at that precise time.

[28] The court finds the evidence does prove beyond a reasonable doubt that Routine Orders 042/10 are valid orders. They were prepared, signed and published in accordance with HMCS CALGARY's standard procedure. These routine orders provide that Ex-Ordinary Seaman Weldam-Lemire was assigned as one of the brow watchkeepers on 12 December 2010. Chief Petty Officer 1st Class Price testified the duty started at 0730 hours on the day and ended at 0730 hours on the next day.

[29] Ex-Ordinary Seaman Weldam-Lemire had a duty. He had to be onboard HMCS CALGARY at 0730 hours on 12 December 2010 and act as a brow watchkeeper until 0730 hours the next day.

[30] **Did Ex-Ordinary Seaman Weldam-Lemire fail to be there?** Master Seaman Hussey was one of the brow watchkeepers on duty on 11 - 12 December. He did not see Ex-Ordinary Seaman Weldam-Lemire report at 0730 hours on 12 December and he had to stay on duty until he was relieved at approximately 0930 hours. He did not see Ex-Ordinary Seaman Weldam-Lemire that day. He knew he was on duty on 11 - 12 December because it was indicated in the routine orders. Petty Officer 2nd Class Guitare was the duty coxswain on 12 - 13 December 2010. As such, she represented the ship's coxswain and she managed the duty watch. She stated Ex-Ordinary Seaman Weldam-Lemire was supposed to be on duty that day as of 0730 hours but that he only reported at 1230. His department had replaced him when she had notified them he was absent.

[31] It is clear from the evidence that Ex-Ordinary Seaman Weldam-Lemire was not present at his duty watch onboard HMCS CALGARY from 0730 hours until 1230 hours on 12 December 2010.

[32] **Did Ex-Ordinary Seaman Weldam-Lemire have authority for failing to be there?** Lieutenant(N) Erickson, the officer of the day on 12 December, Petty Officer 2nd Class Guitare, the duty coxswain on 12 December, testified they did not grant leave to Ex-Ordinary Seaman Weldam-Lemire. Chief Petty Officer 1st Class Price also stated that he had spoken to Ex-Ordinary Seaman Weldam-Lemire's supervisor and to the CO and that Ex-Ordinary Seaman Weldam-Lemire had not been granted leave on 12 De-

cember. It is clear from the evidence before this court that Ex-Ordinary Seaman Weldam-Lemire had not been given any authority to be absent from his place of duty.

[33] **Was Ex-Ordinary Seaman Weldam-Lemire aware of the duty which was imposed on him?** The routine orders were published and accessible to Ex-Ordinary Seaman Weldam-Lemire. Article 19.01 of the Queen's Regulations and Orders provides that:

Every officer and non-commissioned member shall become acquainted with, obey and enforce:

(a) the *National Defence Act*;

(b) the *Security of Information Act*;

(c) QR&O; and

(d) all other regulations, rules, orders and instructions necessary for the performance of the member's duties.

The routine orders provide that Ex-Ordinary Seaman Weldam-Lemire was one of the duty brow watchkeepers on 9 and 12 December 2010. Ex-Ordinary Seaman Weldam-Lemire reported for duty at the prescribed time on 9 December. He reported to Petty Officer 2nd Class Guitare for duty on 12 December at 1230 hours. The court finds that Ex-Ordinary Seaman Weldam-Lemire was aware of his duty to be present on ship at 0730 hours on 12 December 2010 to perform his duty as brow watchkeeper.

[34] The court has not been provided any evidence that would provide Ex-Ordinary Seaman Weldam-Lemire a reasonable excuse or justification for failing to be in the required place at the required time or to establish that he exercised reasonable diligence in attempting to fulfill his duty.

[35] The court finds the evidence proves beyond a reasonable doubt that Ex-Ordinary Seaman Weldam-Lemire was absent without leave from HMCS CALGARY from 0730 hours until approximately 1245 hours on 12 December 2010.

[36] The court will now examine the 3rd charge. The particulars of this charge read as follows:

In that he, at 1130 hours, on 11 January 2011, failed to report to N82 236 104 Chief Petty Officer 1st Class Price onboard HMCS CALGARY, as ordered on 10 January 2011 by Chief Petty Officer 1st Class Price.

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

(a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;

- (b) that an order was given to Ex-Ordinary Seaman Weldam-Lemire;
- (c) that it was a lawful order;
- (d) that Ex-Ordinary Seaman Weldam-Lemire received or knew the order;
- (e) that the order was given by a superior officer;
- (f) that Ex-Ordinary Seaman Weldam-Lemire was aware of that officer's status;
- (g) that Ex-Ordinary Seaman Weldam-Lemire did not comply with the order;
and
- (h) the blameworthy state of mind of the accused.

[37] The identity of the accused is not an issue in these proceedings. Chief Petty Officer 1st Class Price summoned Ex-Ordinary Seaman Weldam-Lemire and his supervisor to his office on 10 January 2011 onboard HMCS CALGARY. He told Ex-Ordinary Seaman Weldam-Lemire to report to his office on 11 January 2011 at 1130 hours, not before, with his assisting officer to make his election for trial by court martial. The date and place as alleged are proven beyond a reasonable doubt. There is no doubt that Chief Petty Officer 1st Class Price gave an order to Ex-Ordinary Seaman Weldam-Lemire to report to his office at 1130 hours on 11 January 2011.

[38] **Was it a lawful order?** Defence counsel argues the order given to Ex-Ordinary Seaman Weldam-Lemire was not lawful because it did not relate to a military duty since Chief Petty Officer 1st Class Price was not the presiding officer and thus did not have the authority to order Ex-Ordinary Seaman Weldam-Lemire to return to his office to give him his election for trial by court martial. He also argues the 24-hour time period is a minimum period of time in which an accused may have to make an election. Defence counsel has also stated the prosecution has provided sufficient proof on the balance of the essential elements of this offence.

[39] Chief Petty Officer 1st Class Price testified that one of his responsibilities as the ship's coxswain was acting as the senior disciplinarian aboard ship. He laid the charge of absence without leave as found on the Record of Disciplinary Proceedings (RDP) prepared on 10 January 2011⁶. He signed Part 1 on 10 January 2011 and gave a copy of the RDP to the accused as can be understood from the X found in the box entitled "Copy to the accused". Ex-Ordinary Seaman Weldam-Lemire chose English as the language of trial. Chief Petty Officer 1st Class Price referred the charge to the commanding officer. In Part 3, Election to be tried by court martial, Ex-Ordinary Seaman Weldam-Lemire was informed at 1100 hours on 10 January that he had a right to be tried by court martial and that he had to make his decision known by 1130 hours on 11 January 2011. Chief Petty Officer 1st Class Price told Ex-Ordinary Seaman Weldam-Lemire to

⁶ See Exhibit 4

return to his office at 1130 hours with his assisting officer on 11 January 2011 to inform him of his decision.

[40] Paragraph 2 of article 108.17 of the Queen's Regulations and Orders provides that "Where the accused has the right to be tried by court martial, the officer exercising summary trial jurisdiction shall, before commencing a summary trial, cause the accused to be informed of that right and given a reasonable period of time, that shall be in any case not less than 24 hours, to" and I cease the citation here. The court was not provided with much evidence describing the actions of the different actors involved in the pre-summary trial proceedings. There was no evidence pertaining to any discussion between the commanding officer and Chief Petty Officer 1st Class Price concerning the election process. It would appear that a decision had been made to offer Ex-Ordinary Seaman Weldam-Lemire an election to be tried by court martial. The court was not presented with any evidence that indicates who made that decision. This decision would have to be made by the officer exercising summary trial jurisdiction⁷. The charge had been referred to the commanding officer; he was the officer exercising summary trial jurisdiction in this case. While the evidence is silent on this issue, this decision to offer an election to Ex-Ordinary Seaman Weldam-Lemire was advantageous to Ex-Ordinary Seaman Weldam-Lemire since it gave him the choice of type of trial.

[41] The regulation stipulates the officer exercising summary trial jurisdiction shall cause the accused to be informed of his right to be tried by court martial. It does not specify how this is to be done.

[42] While the evidence is not as clear as it could be, the facts are as follows. Chief Petty Officer 1st Class Price was the senior disciplinarian onboard HMCS CALGARY. He had spoken with the commanding officer concerning his disciplinary investigation of the incidents that are at the heart of the charge found on the RDP. The CO had been engaged in this disciplinary process since he had appointed Sub-Lieutenant Hawkins as the assisting officer to Ex-Ordinary Seaman Weldam-Lemire. A charge was laid by Chief Petty Officer 1st Class Price and the accused with his supervisor were brought before the person that laid the charge. Chief Petty Officer 1st Class Price gave a copy of the RDP to Ex-Ordinary Seaman Weldam-Lemire and he informed Ex-Ordinary Seaman Weldam-Lemire that he had to return to his office at 1130 hours on 11 January 2011 to inform him of his decision on his election for trial by court martial.

[43] The accused must be given a reasonable period of time that cannot be less than 24 hours to make his decision. The court has not been provided with any evidence demonstrating that Ex-Ordinary Seaman Weldam-Lemire would have needed more time to make his election. Chief Petty Officer 1st Class Price was not asked what he would have done in such a situation. The facts before this court indicate that the procedures found at article 108.17 were being followed. It is only at 1130 hours on 11 January 2011 that the issue of whether Ex-Ordinary Seaman Weldam-Lemire needed more time to make his decision could have been dealt with by Chief Petty Officer 1st Class Price.

⁷ See para 1 of art. 108.17 of QR&O

This did not occur because Ex-Ordinary Seaman Weldam-Lemire did not report to Chief Petty Officer 1st Class Price's office at that time.

[44] The court finds the provisions of article 108.17 were implemented correctly and that Chief Petty Officer 1st Class Price had the authority to order Ex-Ordinary Seaman Weldam-Lemire to report to his office at 1130 hours on 11 January 2011. It was a lawful order since it is clearly related to a military duty⁸.

[45] The court is satisfied beyond a reasonable doubt that Ex-Ordinary Seaman Weldam-Lemire heard that order when it was given by Chief Petty Officer 1st Class Price on 10 January 2011 and that he knew that Chief Petty Officer 1st Class Price was a superior officer.

[46] **Did Ex-Ordinary Seaman Weldam-Lemire comply with the order?** Ex-Ordinary Seaman Weldam-Lemire did not report to Chief Petty Officer 1st Class Price's office at 1130 hours on 11 January 2011. Petty Officer 2nd Class Hopkinson was the duty coxswain on 11 January 2011. Ex-Ordinary Seaman Weldam-Lemire was a member of the duty watch that day. At approximately 0730 hours, Ex-Ordinary Seaman Weldam-Lemire asked Petty Officer 2nd Class Hopkinson permission to report to the sick parade. Petty Officer 2nd Class Hopkinson told him to go to the base clinic and then report back to him with his sick chit. Ex-Ordinary Seaman Weldam-Lemire went to the base clinic and was examined by Warrant Officer Kelcey, a physician assistant. He described the symptoms he observed and he also stated he thought Ex-Ordinary Seaman Weldam-Lemire smelled of alcohol and assumed he had been drinking the previous night. He concluded Ex-Ordinary Seaman Weldam-Lemire might be suffering from a serious illness, explained the condition to Ex-Ordinary Seaman Weldam-Lemire and told him he had to get different blood and urine samples taken as well as X-rays. Ex-Ordinary Seaman Weldam-Lemire left momentarily, came back and asked for pain killers so he could go back home. Warrant Officer Kelcey told Ex-Ordinary Seaman Weldam-Lemire to get the laboratory work done and take a seat and wait.

[47] Some time later, he searched for Ex-Ordinary Seaman Weldam-Lemire but could not find him. He had not been to the laboratory or to the X-ray room. Warrant Officer Kelcey had a general announcement made throughout the clinic at approximately 1150 hours but Ex-Ordinary Seaman Weldam-Lemire did not respond.

[48] Ex-Ordinary Seaman Weldam-Lemire did not report to Petty Officer 2nd Class Hopkinson during the rest of the duty watch. Petty Officer 2nd Class Hopkinson called Ex-Ordinary Seaman Weldam-Lemire's chain of command to find him and they also made a general pipe on ship looking for Ex-Ordinary Seaman Weldam-Lemire. Chief Petty Officer 1st Class Price confirmed Ex-Ordinary Seaman Weldam-Lemire had not been granted leave on 11 January 2011. Chief Petty Officer 1st Class Price drafted a warrant for his arrest on 11 January 2011 and it was signed by the commanding officer⁹.

⁸ See 2010 CMAC 6 *Cpl A.E. Liwyj v H.M. The Queen*, Para 24

⁹ See Exhibit 5

Ex-Ordinary Seaman Weldam-Lemire was arrested by the military police on 13 January 2011.

[49] Ex-Ordinary Seaman Weldam-Lemire knew he had to report to Chief Petty Officer 1st Class Price's office at 1130 hours on 11 January 2011. It appears that he was sick on the morning of 11 January but he chose not to follow Warrant Officer Kelcey's instructions and instead he left the medical clinic sometime between 0730 hours and 1150 hours on 11 January and then he did not report to Petty Officer 2nd Class Hopkinson as he had been ordered to do so. Ex-Ordinary Seaman Weldam-Lemire might have been sick but he chose to do as he wished on the morning of 11 January 2011.

[50] Article 19.02 of QR&O provides that "If an officer or non-commissioned member receives a lawful command or order that he considers to be in conflict with a previous lawful command or order received by him, he shall orally point out the conflict to the superior officer who gave the later command or order". Ex-Ordinary Seaman Weldam-Lemire did not inform Petty Officer 2nd Class Hopkinson that he had to report to Chief Petty Officer 1st Class Price's office at 1130 hours that day. The court does not agree with defence counsel that the duty coxswain is the same legal entity as the ship's coxswain. Petty Officer 2nd Class Guitare testified she represented the ship's coxswain and that the duty coxswain managed the duty watch.

[51] Ex-Ordinary Seaman Weldam-Lemire made no effort to advise his superiors he might not be able to present himself to Chief Petty Officer 1st Class Price's office at 1130 hours on 11 January. He did not comply with Warrant Officer Kelcey's directions and he left the clinic and he did not return to his duty aboard ship and he did not return to present himself to Chief Petty Officer 1st Class Price at 1130 hours.

[52] **Did Ex-Ordinary Seaman Weldam-Lemire have a blameworthy state of mind?** Intent to commit an act is a state of mind. A person usually intends the natural and probable consequences of his or her voluntary actions. The court has to use common sense to infer from all the evidence what Ex-Ordinary Seaman Weldam-Lemire intended when he did not report to Chief Petty Officer 1st Class Price's office. Based on the evidence accepted by this court, the court finds that Ex-Ordinary Seaman Weldam-Lemire intentionally failed to report to Chief Petty Officer 1st Class Price's office.

[53] The court finds the evidence proves beyond a reasonable doubt that Ex-Ordinary Seaman Weldam-Lemire failed to comply with the order to report to Chief Petty Officer 1st Class Price's office at 1130 hours on 11 January 2011.

[54] The particulars of the 2nd charge read as follows:

In that he, at 1130 hours, on 11 January 2011, without authority was absent HMCS CALGARY, CFB Esquimalt, British Columbia, and remained absent until approximately 1040 hours, 13 January 2011.

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Ex-Ordinary Seaman Weldam-Lemire had a duty to be in a given place at a specific time;
- (c) that Ex-Ordinary Seaman Weldam-Lemire failed to be there;
- (d) that Ex-Ordinary Seaman Weldam-Lemire did not have authority for failing to be there: and
- (e) that Ex-Ordinary Seaman Weldam-Lemire was aware of the duty that was imposed on him.

[55] The identity of Ex-Ordinary Seaman Weldam-Lemire as the offender is not an issue in this trial.

[56] **Did Ex-Ordinary Seaman Weldam-Lemire have a duty to be in a given place at a specific time?** The court has found that Ex-Ordinary Seaman Weldam-Lemire had a duty to be present at Chief Petty Officer 1st Class Price's office onboard HMCS CALGARY at 1130 hours on 11 January 2011. The evidence before this court is that Ex-Ordinary Seaman Weldam-Lemire was a member of the duty watch onboard HMCS CALGARY from 0730 hours on 11 January until 0730 hours on 12 January 2011. The court has not been provided any evidence pertaining to Ex-Ordinary Seaman Weldam-Lemire having a duty to be onboard HMCS CALGARY from 0730 on 12 January until 1040 hours on 13 January 2011. The court finds Ex-Ordinary Seaman Weldam-Lemire had a duty to be onboard HMCS CALGARY from 0730 hours on 11 January until 0730 hours on 12 January 2011.

[57] **Did Ex-Ordinary Seaman Weldam-Lemire fail to be there?** The court has already found that Ex-Ordinary Seaman Weldam-Lemire did not report to Chief Petty Officer 1st Class Price's office at 1130 hours. He was also absent from his duty watch for the rest of the watch.

[58] **Did Ex-Ordinary Seaman Weldam-Lemire have authority for failing to be there?** The court has already found that Ex-Ordinary Seaman Weldam-Lemire did not have a valid reason not to report to Chief Petty Officer 1st Class Price's office. Chief Petty Officer 1st Class Price testified that Ex-Ordinary Seaman Weldam-Lemire had not been granted leave on 11 January 2011. The court finds Ex-Ordinary Seaman Weldam-Lemire did not have authority to be absent from his place of duty.

[59] **Was Ex-Ordinary Seaman Weldam-Lemire aware of the duty which was imposed on him?** Ex-Ordinary Seaman Weldam-Lemire knew he had to report to

Chief Petty Officer 1st Class Price's office and he had reported to his duty watch. Ex-Ordinary Seaman Weldam-Lemire was aware of the duty imposed on him.

[60] The court has not been provided any evidence that would provide Ex-Ordinary Seaman Weldam-Lemire a reasonable excuse or justification for failing to be in the required place at the required time or to establish that he exercised reasonable diligence in attempting to fulfil his duty.

FOR THESE REASONS, THE COURT:

[61] **FINDS** the accused guilty of charges 1 and 3.

[62] **FINDS** the accused guilty of charge 2 with the special finding that the period of absence without leave is 1130 hours on 11 January 2011 until 0730 hours on 12 January 2011.

Counsel:

Major G.T. Rippon, Canadian Military Prosecution Service
Respondent for Her Majesty the Queen

Major D. Bernstein, Directorate of Defence Counsel Services
Counsel for Ex-Ordinary Seaman S. Weldam-Lemire