ORDER PROHIBITING PUBLICATION OF [80] TO [92] (INCLUDING FOOTNOTES) OF THE JUDGMENT IN NEWS MEDIA OR THE INTERNET OR OTHER PUBLICLY AVAILABLE DATABASE UNTIL FINAL DISPOSITION OF CHARGES AGAINST A THIRD PARTY ARISING OUT OF MATTERS DISCUSSED IN THOSE PARAGRAPHS OR UNTIL FURTHER ORDER OF THE COURT. IF NO ORDER OF THE COURT HAS BEEN MADE AT THE TIME OF FINAL DISPOSITION OF THE CHARGES, THIS ORDER WILL AUTOMATICALLY LAPSE. PUBLICATION IN LAW REPORT OR LAW DIGEST IS PERMITTED.

NOTE: THE THIRD PARTY HAS NAME SUPPRESSION IN RESPECT OF THE CHARGES PURSUANT TO AN ORDER MADE ON 13 JUNE 2014 BY THE DISCIPLINARY OFFICER OF THE NEW ZEALAND DEFENCE FORCE FOR THOSE CHARGES.

ORDER PROHIBITING THE PUBLICATION OF THE IDENTITY AND ANY PARTICULARS THAT COULD IDENTIFY ANY MEMBER OF THE SPECIAL OPERATIONS FORCES OR THEIR OPERATIONS.

IN THE COURT MARTIAL APPEAL COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2013-485-10617
[2014] NZHC 1345

UNDER	the Court Martial Appeals Act 1953
IN THE MATTER OF	an appeal by S
BETWEEN	S Appellant
AND	THE QUEEN Respondent

Hearing:	1 May 2014
Court:	Mallon J Judge J Billington QC Judge D McGregor
Counsel:	M Mason and A Henderson for the Appellant Major J Derbyshire and Captain M Mercer for the Respondent
Judgment:	17 June 2014

JUDGMENT OF THE COURT

A. The appeal is allowed in part.

B. The convictions on counts 1, 5, 7 and 10 are quashed.

C. The order to pay a fine of $4,700 is set aside.

D. The proceeding is referred back to the Court Martial for determination of what, if any, action is to be taken in respect of count 12.

REASONS OF THE COURT

(Given by Mallon J)

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Introduction

[1] S is a Trooper of the 1st New Zealand Special Air Service Regiment (the NZSAS). He was charged with a number of offences under the Armed Forces Discipline Act 1971 (the Act). He pleaded guilty to an offence of failing to comply with a written order.[1] He was tried by the Court Martial on the other charges and

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[1] Section 39(a).

convicted of three offences of stealing service property[2] and one offence of unlawful possession of service property.[3] He was sentenced to a fine of $4,700.

[2] S appeals against his convictions on the stealing and unlawful possession charges on the grounds that the verdicts of guilt were not reasonably open on the evidence. He also contends that a search which led to the charges of unlawful possession and failing to comply with a written order was conducted unlawfully and that the convictions on these charges should be overturned.

[3] S has name suppression as do other members of the NZSAS who gave evidence at the Court Martial. Evidence as to NZSAS operational matters is also suppressed.[4]

Background

[4] S enlisted with the army in June 2001. He was posted to the NZSAS from January 2009. He was deployed to Afghanistan on two occasions. The charges against S arise out of his actions after his return from Afghanistan. S was seeking to sell military equipment to Serious Shooters (which is a recreational firearms store). Further military items were found in a subsequent search of his barracks at the Papakura military camp and a garage which he leased within the camp.

[5] S first approached Serious Shooters on 7 April 2013 by a text sent to Mr Lee Newman who was a sales assistant at that store. The text asked if Mr Newman knew of anyone interested in purchasing AR accessories.[5] Mr Newman replied asking S to send an email of the items he intended to sell. On 9 April 2013 Mr Newman received an email from S which set out a list of 29 weapon accessories and items for sale. In the email S said that the equipment was "legit" and that he "used to horde from the USA while i was overseas". Later that day S came into the store with a white storage container containing the items. These included night vision goggles, various magazines, a number of weapon flashlights, three J Point sights, a charging

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2 Section 57(1)(a).
3 Section 59(a).
4 Court Martial Act 2007, s 39(2)(b).
5 "AR" refers to Armalite Rifle.

handle, a Bianchi green holster and another green holster. Mr Newman said he would have a look at them and see whether Serious Shooters would sell them or not.

[6] On looking at them Mr Newman became concerned that some of the items might be New Zealand Defence Force (NZDF) property. He was aware that J Points could not be bought on the general market and were generally a NZDF product only. He was therefore concerned that the three J Points that S was looking to sell were NZDF property.

[7] Serious Shooters' practice is to check with the NZDF if equipment it is asked to sell looks like NZDF equipment. It does this because it does not want to harm its relationship with the NZDF. Mr Newman therefore telephoned C, a person attached to the NZSAS. C came to the store and looked at the items in the container. He considered that quite a few of them looked like NZDF equipment. He asked Mr Newman to put them aside. Mr Newman sealed the container.

[8] Shortly after that Sergeant Robert Burt, of the Royal New Zealand Military Police, arrived at the store. He recognised a number of items as associated with the NZDF. In particular his attention was drawn to the Bianchi pistol holster (which appeared to be brand new and had a Serco label on it) and the charging handle (which also appeared to be brand new and had a Lockheed Martin label on the packaging). He seized the container and the 29 items it contained.

[9] On 29 April 2013 Sergeant Burt was directed to carry out a search of S's barrack room, his car, and a garage which he leased within the military camp grounds. A firearm was located under the couch in S's room. In the garage a 200 g block of semtex was in a blanket sitting on the top of a trunk. A number of small rounds were located on the inside of a trunk. Inside a green Army trunk was an ammunition tin. In the ammunition tin were 11 thunderflashes. Other loose ammunition items were also found in separate boxes.

[10] S was charged with 13 offences. These included charges in relation to four of the 29 items taken to Serious Shooters. The charges were for stealing service property, namely a charging handle (count 1), a pistol holster (count 3) and two J

Points (counts 5 and 7), contrary to s 57(1)(a) of the Act. There were alternative counts of unlawful possession in relation to each of these items (counts 2, 4, 6 and 8). In relation to the items found in the garage S was charged with being in unlawful possession of service property, namely semtex, thunderflashes and ball rounds (counts 9, 10 and 11), contrary to s 59(a) of the Act. In relation to the firearm found in his barracks (count 12) and the live rounds found in the garage (count 13) S was charged with failing to comply with written orders, contrary to s 39(a) of the Act.

[11] S was tried on those charges before the Court Martial on 11 December 2013. The Court Martial comprised Chief Judge Hodson QC and three military members (a Major, a Lieutenant and a Warrant Officer). At the commencement of the trial S pleaded guilty to charge 12. He pleaded not guilty to the other charges. Charge 13 was withdrawn during the prosecution case on the basis that the prosecution could not prove that the garage was "service accommodation" as prescribed in the written order.

[12] S's defence in relation to the items he took to Serious Shooters (charges 1 to 8) was that he believed at that time that all the items were his. He took the items to Serious Shooters because he was having a big clean out. This was on the advice of a psychologist to clear some issues after a relationship breakdown and post traumatic stress from tours of duty to Afghanistan. S believed he had purchased the J Points and the charging handle in Afghanistan. He believed he had been given permission to take the Bianchi holster from a crate of surplus items which were for disposal.

[13] In relation to the items in the garage, S's defence was that he did not have exclusive possession of the garage. He did not keep the garage locked and others used the garage from time to time. S said the ammunition may have been his, left over from a training exercise which he had forgotten about. He did not recall having the thunderflashes and did not know why they were in the trunk. He did not know anything about the semtex.

[14] The military members returned verdicts of guilty on counts 1, 5, 7 and 10 (that is, on the charges of stealing the charging handle, the J Points and the thunderflashes). No verdicts were required on counts 2, 6 and 8 (the alternative

counts). Verdicts of not guilty were returned on counts 3, 4, 9 and 11 (that is, on the charges relating to the pistol holster, the semtex and the ball rounds). Convictions were accordingly entered on counts 1, 5, 7 and 10, and on count 12 to which S had pleaded guilty.

The charges of stealing service property

What needed to be proved

[15] Section 57 of the Act provides that every person subject to the Act commits an offence who "steals" any "service property". "Service property" is defined as meaning property belonging to the Crown and including property "used by or in the possession or under the control of the Armed Forces ...".[6] "Stealing" is given the meaning assigned to that term by s 219 of the Crimes Act 1961.[7]

[16] Section 219 of the Crimes Act 1961 provides that "theft or stealing" is the act of "dishonestly and without claim of right, taking any property with intent to deprive any owner permanently of that property or of any interest in that property."[8] For the purposes of s 219:

(a) "dishonestly" is defined as meaning an "act ... done ... without a belief that there was express or implied consent to, or authority for, the act ... from a person entitled to give such consent or authority";[9]

(b) "claim of right" is defined as meaning a "belief ... in a proprietary or possessory right in [the] property ... although the belief may be based on ignorance or mistake of fact or of any matter of law ...";[10]

(c) "taking" is defined as moving the property or causing it to be moved;[11]

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6 Section 2(1).
7 Section 2(1).
8 Crimes Act 1961, s 219(1)(a). Subsection (1)(b) provides a further definition which is not relevant for present purposes.
9 Section 217.
10 Section 2(1) of the Act provides that the definition of "claim of right" in s 2(1) of the Crimes Act 1961 applies.
11 Crimes Act 1961, s 219(4)

(d) an "intent to deprive any owner permanently of property" includes dealing with the property in a such a manner that the property cannot be returned to the owner in the same condition or that is likely to permanently deprive the owner of the property or any interest in it.[12]

[17] To be guilty of a charge of stealing service property, therefore, the prosecution was required to prove beyond reasonable doubt that:

(a) the item was service property;

(b) S took the item;

(c) S did so dishonestly, in that he knew that it was service property and that he had no authority to, nor consent from the NZDF, to sell it;

(d) S took the property without claim of right, in that he did not have a belief (based on ignorance or mistake of fact or of any matter of law) that the act was lawful (that is, that he had a possessory or proprietary right in the property); and

(e) S intended to permanently deprive the service of the property.

[18] Once the prosecution proved that the items were service property, the crucial factual question was whether S believed the items were his personal property. At the hearing before us there was some discussion as to whether this was relevant to the element of "dishonesty" or the element of "claim of right". Counsel for S contended the latter.

[19] In this kind of case there is an overlap between "dishonesty" and "claim of right". If S believed the property was his then in taking the property he was not acting dishonestly in its natural and ordinary meaning. In terms of the statutory definition of dishonesty, if S believed the property was his, then he had a belief that there was authority (his own authority) to take the property. He was therefore not acting dishonestly. It can also be said that if S believed he owned the property he

[12] Section 219(2).

had a belief (based on a mistake of fact) that he had a proprietary interest in the property. It can therefore be said that he had a claim of right to take the property. Regardless of which way it is viewed, the important point was that the charge would not be made out if the military members of the Court Martial accepted it was a reasonable possibility that S believed the property was his own. If they were sure of that then S was acting dishonestly and without claim of right, and it would follow that S intended to permanently deprive the NZDF of the items when he took them to Serious Shooters for sale.[13]

Appellate review

[20] This Court must allow an appeal against conviction if it considers that the finding of the Court Martial "is unreasonable or cannot be supported having regard to the evidence."[14] This is the same wording as that which applies to an appeal against conviction under the Crimes Act 1961.[15] The scope of that ground was considered by the Supreme Court in *Owen v R.*[16] As explained in that case a verdict is unreasonable if, having regard to all the evidence, the jury could not reasonably have been satisfied to the required standard that the defendant was guilty.[17]

[21] In applying that test the Court is performing a review function, not substituting its own view of the evidence; it must give appropriate weight to the advantages the military members had; the weight to be given to individual pieces of evidence is essentially a jury function; reasonable minds may disagree on matters of fact; and appellate courts should not lightly interfere in this area.[18] The assessment of honesty and reliability of witnesses is regarded as a classic example where the

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13 We note for completeness that a claim of right might have arisen in a different way. It would have arisen if S's evidence had been that he knew the items were service property, but he thought he had a right to sell those items because he had returned equivalent property to the NZDF. However S's evidence was that, if he had known the items were NZDF property, then he would have returned them.

14 Court Martial Appeals Act 1953, s 9A(1)(a). There are other grounds which are not relevant for present purposes.

15 Crimes Act 1961, s 385(1)(a).

16 *Owen v R* [2007] NZSC 102, [2008] 2 NZLR 37.

17 At [5]. At [12], the Court noted that even if there is some evidence to support the verdict it may be still be unreasonable if the evidence is insufficient. A verdict cannot be supported by the evidence where there is no evidence capable of supporting it. It is an unreasonable verdict at the outer end of the continuum. Therefore the "or cannot be supported having regard to the evidence" limb of the grounds for appeal has no practical significance.

18 At [13], endorsing *R v Munro* [2007] NZCA 510, [2008] 2 NZLR 87.

trier of fact will have an advantage over the appellate court.[19] In the context of an appeal from a court martial, an appellate court should also give weight to the advantage the Court Martial has in matters of military service practice and conventions.

[22] When an appeal relies on this ground, the appellant is required to articulate in what respects the verdicts are said to be unreasonable.[20] In this case the verdicts on the charges of stealing the charging handle and the J Points are said to be unreasonable because of the unchallenged evidence that S had personally purchased a charging handle and J Points identical to the ones issued by the NZDF and there were no NZDF J Points or charging handles that were missing.

The evidence about the J Points

[23] J Points are reflective sights that are placed on firearms. Looking through the sight gives a dot pointed towards an image. It is a backup sight normally used in conjunction with another sight. J Points have serial numbers by which they can be identified. The serial number is underneath the battery. The J Points must be dismantled to see the serial number. Once the battery is removed and put back the J Point has to be "re-zero'd" which is a painstaking process.

[24] LE & M Distributors supplied J Points to the NZDF. In 2006 two samples were supplied to the NZDF. From 2009 a further 151 were supplied. The evidence from Mr Powell, the managing director of LE & M Distributors, was that the serial numbers of two of the three J Points in the container taken to Serious Shooters were J Points that were supplied to the NZDF. They were, therefore, "service" property. These two J Points were the subject of the charges. The third J Point in the container was not supplied to the NZDF by LE & M Distributors. There was no charge brought in respect of that J Point.

[25] The NZSAS issued J Points to S. It was not, however, possible to say whether the two NZDF J Points that were the subject of the charges were those which were supplied to S. The usual procedure is for the serial numbers of NZDF

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19 At [13].
20 At [13](f).

equipment to be recorded in Trentham. In this case, however, J Points were purchased by the NZSAS and went straight into "theatre" (that is, they were shipped directly from the United States into Afghanistan). This meant that Trentham did not record the number that were purchased and their serial numbers at the time they were purchased and it was not possible to say which J Points were issued to S.[21]

[26] The J Points were withdrawn from service on 31 July 2012. This meant that J Points not already returned as personnel returned from overseas needed to be handed back in order to receive the replacement sights. S said that he handed back J Points at the appropriate time and that he had procured spare J Points when he was deployed in Afghanistan in 2010. He believed that he owned the ones he had left in his possession. There were a number of matters that were relevant to assessing that claim.

[27] The first relevant matter is that it was not possible to say by simply looking at the J Points that they were NZDF property. None of the J Points in the container were in identifying packaging. There was evidence from Sergeant K, for example, that he could not tell one J Point from another. Sergeant Burt considered the J Points were NZDF property but that this could only be confirmed by the serial numbers. The most that could be said by anyone looking at the J Points, without knowledge of the serial numbers that were issued to the NZDF, was that they were identical to the NZDF issued J Points. The evidence identifying the two J Points as NZDF property came from the manufacturer who could check the serial numbers of the J Points against those recorded as having been supplied to the NZDF. There was no evidence to suggest that S knew the serial numbers of the NZDF issued J Points.

[28] The second relevant matter was whether S could have acquired spare J Points as he claimed. He gave evidence that when he was deployed in Afghanistan he acquired at least three J Points of his own. He said J Points are prone to fault and require a lot of replacement. He said that some of the other Special Forces units in

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[21] There was evidence that as service members returned from offshore they were to return the J Points to the NZDF and the serial numbers were recorded at that time. 70 J Points were returned in this way, compared with the 25 J Points for which the NZDF had records. So in the meantime there were a number of J Points in use for which Trentham did not have records. In so far as the NZDF had records of the J Points it had purchased they were all accounted for.

Afghanistan used J Points and that they ordered them in their thousands. He "definitely traded for a couple" but did not know if he still had them. He also got J Point sights, identical to the ones issued by the NZSAS, from the American disposal bin in Afghanistan. He did not personally take items from the bin. He said that someone would sign ahead and the store guys would go and pick boxes of stuff and bring it back for the "boys [to] help themselves." He also said he might have got a J Point from one of his Australian counterparts between tours.

[29] There was evidence from one prosecution witness about the American disposal bin in Afghanistan. Staff Sergeant M gave evidence that she was in Afghanistan from November 2010 until April 2011. She confirmed that the Americans had items for disposal. These items were surplus to their requirements and it was not financially viable to return them to the United States. These items did not include weapons. However there were all sorts of other items such as sights for weapons, washing machines, and trucks. Some of the items were brand new. They had a list of approved countries to which they would sell these items, with New Zealand being one of those countries. She said that to acquire the items you needed to be an authorised signatory. When she was in Afghanistan, she was one of only three people in the New Zealand detachment with authorisation. She acquired some A-point sights and a couple of holographic sights which were distributed to New Zealand forces. She did not see any J Points available at this time.

[30] The defence called evidence from a number of witnesses which supported S's evidence of being able to acquire spare J Points in Afghanistan as S claimed. Staff Sergeant R, who was S's Troop Sergeant[22] on S's first tour to Afghanistan, confirmed that military accessories could be purchased from other armies and soldiers, from the internet and from the American disposal bin. He said that he purchased some items himself. He said that they had a representative from their Squadron go to the disposal bin and that "some guys went there themselves". He said that they got weapon sights, magnifiers and various bits of equipment from the disposal bin. He recalled getting a magnifier type sight. He said that the J Points would possibly also be available from the disposal bin.

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[22] In this role Staff Sergeant R was one up from S's immediate supervisor and one below Troop Commander.

[31] Major W was S's Troop Commander between the end of 2010 and April 2011 during S's first deployment to Afghanistan. He confirmed that a number of people within the troop were obtaining items from the American disposal bin including weapon sights. Sergeant K, the Squadron Storeman while S was at A Squadron and who was deployed with S in Afghanistan on S's second deployment there, confirmed that NZ soldiers personally bought military items in Afghanistan. He confirmed that you could get anything you wanted from the American disposal bin (there was even a Chinook helicopter there at one stage). He said that you could get J Points in this way. He said that he knew "the Kiwis who could sign us in" and that "normally they'd give me the authorisation to sign for stuff for the fellows"

[32] There was also evidence that this type of equipment could be purchased over the internet in Afghanistan. Staff Sergeant M confirmed that there is an American postal address available to New Zealand soldiers in Afghanistan that allowed them to shop on the internet as Americans. Mr Leroux, the equipment manager for all weapon systems for the New Zealand Army, agreed that you could probably purchase a J Point on eBay in the United States. Mr Powell, the managing director of LE & M Distributors, confirmed that J Points could be purchased in the United States and probably elsewhere as well. Staff Sergeant R said that J Points could definitely be purchased off the internet. Major W confirmed that individuals were purchasing military accessories on the internet. Sergeant K said that one of his main jobs in Afghanistan was to go to Bamyan Air Force Base and uplift all the internet orders. He could not see what the items were but could see that they were from America and Britain. He said the types of things that would be bought were charging handles, hand grips, butts for the M4s, clothing and other items.

[33] There was therefore evidence from a number of sources which corroborated that S could have acquired spare J Points as he claimed. There was no evidence to suggest that S might be lying about this. It was not put to him in cross-examination that he was lying. There was no contrary evidence to suggest that S could not have acquired J Points as he claimed. Although Staff Sergeant M's evidence was that you needed to be an authorised signatory to obtain items from the American disposal bin, the evidence of Staff Sergeant R and Sergeant K indicated that this was not a barrier to individuals obtaining items such as J Points from this source.

[34] The third relevant matter is that S did in fact have spare J Points. In particular the third J Point in the container that went to Serious Shooters was not an NZDF issued J Point. Moreover S claimed to have already returned J Points to the NZDF. That was supported by the absence of any evidence that the NZDF generally, or the NZSAS specifically, were missing any J Points.

[35] It was also supported by Sergeant K. It was part of his job to check the kits of the A Squadron (that is, the NZSAS). He carried out a weekly weapons check, and a serialised check of all sights and other items at least once a month. He confirmed that, as a member of A Squadron, S's kit was subject to these checks and that he had never found anything to be missing from his kit. He said that he assessed S's kit when he was moved out of the Squadron (about three to four months prior to the court martial hearing). Sergeant K said that S's kit included all the sights that Sergeant K had given him. By this time the NZDF had replaced the J Points with an RMO6. Sergeant K said that to get the RMO6, S would have had to hand in J Points issued to him.

[36] This evidence was also supported by Sergeant Burt who gave evidence that after the search a complete stocktake was carried out of S's Special Operations Peculiar Modification (SOPMOD) issue. He said that they took SOPMOD issue check sheets and compared them against all his weapons, accessories and equipment. He said it was a "full inspection" which included going through serial numbers for identification and all of S's issued items were present.

[37] In summary the unchallenged evidence was that the NZDF had no record of any missing J Points, S's kit was all accounted for, J Points of this kind could have been purchased in Afghanistan, S had in fact acquired spare J Points, and it was not possible to tell from looking at the J Points taken to Serious Shooters whether they were NZDF acquired J Points. Additionally, there was general evidence that S was of good character (and by implication not the type of person who would dishonestly sell NZDF equipment). Staff Sergeant R described S as trustworthy and a good soldier. Sergeant K described S as a loyal, trustworthy and "good round bloke". Major W said that S was a very good soldier, that S had given him no reason to doubt or question his integrity, that he did not consider S to be a thief and shortly

before the present matters arose he had endorsed a recommendation for S's promotion.

[38] Faced with all of this evidence, the closing submission for the prosecution was simply that S's claims were not plausible. It was said "there can be no doubt that they're service property. And they could not have been acquired in Afghanistan." There was no doubt that the two J Points were service property and that those particular items could not have been purchased in Afghanistan. That, however, was not the point. The military members needed to be sure that S did not have a belief that the two J Points in his possession were ones that he had personally acquired in Afghanistan. On this issue, in light of the evidence, there had to have been a reasonable doubt.

The evidence about the charging handle

[39] A charging handle is a piece of equipment that is attached to a firearm to pull back the bolt to load it. The particular charging handle replaced an older version, which did not work well for ambidextrous shooters or when gloves were used, and which blew gas into the shooter's eyes. The transition to the new charging handles took place at the end of 2010/early 2011. At this time Lockheed Martin was the supplier to the NZDF (replacing SPEL). Ninety-four of the new charging handles were supplied by Lockheed Martin. They went from Trentham to the Papakura military camp on 2 August 2012. The NZDF is not aware of any that went missing at that time.

[40] The charging handle in the container taken to Serious Shooters (which was the subject of the charge) was inside an unsealed plastic bag. There were two labels affixed to that bag, one on each side. The larger label described the type of equipment and that it was made in the USA. There were other details, numbers and logos on that label. The smaller label described the item as a "charging handle" and had other details, namely "RCR: 0000", "01-Aug-12", "Lockheed Martin", "QTY:1". It also included two bar codes and a serial number.

[41] From the serial number on the smaller label Mr Leroux identified the charging handle as one that Lockheed Martin supplied to the NZDF. Unless there

was evidence that a different charging handle had been placed inside the plastic bag, it could be inferred that the charging handle was service property.

[42] The key question was again whether it was proven that S knew the charging handle was service property at the time he took it to Serious Shooters. S said he did not. He said that he had purchased two charging handles when he was in Afghanistan. He recalled selling one charging handle while he was overseas or shortly afterwards. He said that when he was doing a clear out of his gear (leading to the enquiry he made of Serious Shooters) he saw that he had a spare charging handle. He checked that his two weapons had charging handles on them. He therefore thought that the one he put with the items to sell was one of his spares and that it was his to sell.

[43] There are a number of matters relevant to the credibility of that claim. The first matter concerns the label on the packaging of the charging handle. The evidence was that NZDF equipment was supplied in the same packaging and label as the packaging and label for the charging handle taken to Serious Shooters. However the prosecution needed to prove that S knew that. S said that he did not recognise the packaging as identifying it as a NZDF issued item. He said that all packaging was "much of a muchness", that he did not read "barcodes and things", and that he "was not a storeman". He said that weapon accessories he purchased while he was in Afghanistan looked exactly like this.

[44] The date of 1 August 2012, if noticed by S, potentially might have raised the possibility in S's mind as to whether this could have been a charging handle personally acquired by him in Afghanistan. The cross-examination on this topic was as follows:

Major Brock:	And you heard the evidence earlier in this trial from Mr Leroux about that item coming to the unit in August 2012?
S:	Yes, correct.
Major Brock:	How do you explain that?
S:	Well, what explanation do you require? I've got no idea. If some of them were already on weapons, like I said

> earlier, some weren't. I know there was an upgrade that happened so all the weapons got them. I bought my own. I have no access to parts like this in New Zealand in plastic bags.

[45] It was not put to S that he must have read the label, that he must have seen the date of 1 August 2012, and that from that date he must have known that the charging handle in the bag could not have been one of the items he personally acquired in Afghanistan. If the prosecution were to rely on this label, and the date in particular, as identifying to S that the charging handle was NZDF equipment this needed to be directly put to him. S was clearing out 29 military items for sale. Almost all of those items were his own personal property. He had checked that his weapons had their charging handles on them. All packaging looked the same to him.

[46] Some witnesses did recognise the label. Sergeant Burt said that he did. He knew that Lockheed Martin supplied items to the NZDF and he was familiar with the label that came with issued equipment. Similarly Mr Leroux, the equipment manager at Trentham, recognised the label as being how NZDF items are issued. Sergeant K, the storeman, also said that the label told him that the item of property belonged to the NZDF. All these witnesses were in positions where a familiarity with how NZDF equipment was issued could be expected.

[47] Other evidence on this topic was less definite. Although Staff Sergeant R said that he did not think items purchased from the internet had barcodes on them, he did not recognise the barcode on the charging handle to be a NZDF barcode. He was aware that Lockheed Martin did things for the military but was not aware of the specifics so would not identify the charging handle as belonging to the NZDF from that. He said he was not an expert on that and "I only sort of shoot it". Mr Newman recognised the item as being a military product. However, to confirm that it was NZDF property, he contacted C. Mr Newman was not able to say from the labels on the plastic bag that it was an NZDF charging handle.

[48] There was also evidence from Staff Sergeant M that the NZSAS does not always acquire items through the Army system. She said that the NZSAS would order from private vendors where the item was not available through the Army system or when the lead times were too great. There was no evidence as to how

NZSAS items acquired separately from the NZDF purchasing system were packaged and labelled when issued.

[49] The second relevant matter was whether it was credible that S could have acquired identical charging handles as he claimed. S said that he purchased two charging handles in Afghanistan. He said that when he first arrived in Afghanistan in September 2010 neither of his rifles had the upgraded charging handle model. S said that he decided that he would buy two of the upgraded model rather than wait for the system to provide him with one. They cost around USD 70 each, which he regarded as a small price to pay to keep his eyesight and to keep control of his weapon.

[50] S said that at this time he was buying other gear anyway. He said that as an up and coming soldier he was "mad keen on gear and getting amongst it". He said he was back and forth on the internet daily buying stuff. He said he spent over USD 15,000 of his own money on tactical equipment, protective equipment and safety and weapon modifications. He produced visa statements for the period between September 2010 and April 2012 showing a number of transactions to American internet sites consistent with this evidence.

[51] S's account of buying charging handles in Afghanistan was not directly challenged in cross examination. It was not put to him that it was not possible to have acquired charging handles in this way or that he was lying about this. His claim that he did acquire charging handles in this way was supported by other evidence. In particular Staff Sergeant R confirmed that military accessories could be purchased from the internet, that charging handles were amongst the kinds of accessories that could "definitely" be purchased on the internet, and that one of his main jobs in Afghanistan was to uplift the items that had been purchased on the internet and that this included charging handles. Major W confirmed that purchases of military accessories were made on the internet by individuals in Afghanistan. Staff Sergeant M confirmed that New Zealand soldiers in Afghanistan had American addresses which enabled them to purchase items from American internet sites.

[52] The third relevant matter was that the NZDF was not missing any charging handles. Sergeant Burt referred to the full inspection of S's kit after the search of his

barracks and the garage. Sergeant K said that when he assessed S's kit after S left the Squadron his weapon had the Army issued charging handle on it which was the same model as the one before the Court Martial.

[53] In summary NZDF did not produce evidence that any charging handles were missing, S's kit was not missing any charging handles, S could have purchased identical charging handles in Afghanistan as he claimed, the charging handle taken to Serious Shooters was identifiable as an NZDF charging handle only from the smaller label on the plastic bag, and only if S knew that this label identified it as an NZDF item. There was no clear evidence that he did.

[54] In the light of this evidence the closing submission for the prosecution was simply that S could not have purchased this particular charging handle from Afghanistan and that he must have known from the packaging that this charging handle was NZDF property. The first part of that submission is correct. The item was an NZDF charging handle supplied to Papakura on 1 August 2012. As such it could not have been one of the charging handles which S says he obtained in Afghanistan. But the key question was knowledge. The prosecution did not address why S must have known that the charging handle was not one of the items he personally acquired in Afghanistan despite his evidence that he did not know that.

[55] In these circumstances the guilty verdict on this count was not reasonable. There was a reasonable possibility that S believed that all his NZDF/NZSAS issued equipment was accounted for and the charging handle was one of the spares that he had personally acquired. We are mindful that the military members had the advantage of seeing and hearing S give his evidence. However they could not call on their own military experience as to how NZSAS equipment was issued. The only evidence to support an inference that S must have known from the label that the charging handle was NZDF property came from personnel with specialist knowledge. There was nothing to suggest that S had that specialist knowledge. An inference that S must have known from the label that it was NZDF equipment, despite the evidence to support his claim that he did not, was unsafe.

Summing up

[56] Although the appeal was not brought on the basis of errors in the summing up, there was some discussion about it during the appeal hearing and we consider that an aspect of it may have led to confusion. Chief Judge Hodson's summing up on the charges of stealing the J Points and the charging handle was as follows:

> I'll take the elements in a slightly different order to the prosecution, simply because it seems to be more convenient and perhaps more logical in the way you go about it. And I deal first with the four charges of stealing. The first ingredient is that he took the property without consent of his unit and intended to deprive the owner of it. Now, there's no actual issue here. He took the items to Serious Shooters with the intention of selling them and he had not obtained permission to do so from anyone.
>
> The next, and difficult, issue is the element that he was acting dishonestly. That is, he knew that he was not entitled to sell the items. You've heard his explanation. I remind you what I just said about that. If you accept his explanation, you acquit. If you're in doubt, you acquit. If neither of these applies, you consider what the Crown has proved. And I repeat, that you must consider, particularly so in this case, the explanations and the evidence in relation to each of these items and each charge separately.
>
> If you decide that he was acting honestly, then you can stop at that point. If you think he wasn't acting honestly, then you go on to the point of considering whether or not these items were in fact service property.
>
> Each of those items has different evidence. The first item, the charging handle, there would appear to be little doubt that at some stage it was service property. Mr Leroux was clear on that. He could identify it from the packaging and the labelling, and it had been in the Lockheed Martin system.
>
> The accused says he didn't know that. The labelling meant nothing to him. He had bought some and he believed that one, the one that he was trying to sell, to be the one that he was entitled to sell. The evidence of Sergeant [K] is relevant there. He says that, to his knowledge, the accused was issued with an Army item, that Army charging handle, and he returned the charging handle. And as defence said to you, there's no charging handle missing. And the only suggestion that could be offered by Sergeant [K] was that the accused might have swapped. That's a matter for you entirely, but it is relevant to your consideration of what his state of mind was on the facts relating to the history of the charging handle and the practice of persons to buy them individually and privately. To convict him, you must be sure that he knew he had no right to sell that charging handle.
>
> Essentially the same applies with respect to the J-Point sights. Again, you heard from Mr Powell. No question. Those two sights were sold to NZDF specifically to NZSAS. It seems quite clear, from Sergeant [K]'s evidence again, that the accused had returned at least one of the sites [sic] with which he had been issued. But there seems to be no record of the issuing or disposal by serial number of each of those sights, which you might find to be understandable, it's a matter for you, given the rate at which those sights

> deteriorated and the constant flow of replacements which were found to be necessary in Afghanistan.
>
> Once again, it is for the prosecution to have proved to you that he knew, the accused knew, he had no right to sell those sights. There's quite a lot of evidence about it. You'll have the opportunity as you deliberate on it to think about that. One of the factors which occurred to me, and it's a matter for you entirely, is that it's a matter of some difficulty to determine whether there is a New Zealand Defence Force serial number because, as I understand it, you have to take the battery out and recalibrate and so on to find it.

[57] It can be seen that the Judge made it clear that the key issue was whether S was acting dishonestly. He correctly explained that if the military members were in doubt about S's explanation they were to acquit and that if they decided he was acting honestly that was the end of the matter. He referred to some of the evidence which supported S's defence. All of that was fair from the defence perspective and correctly put matters for the military members' consideration.

[58] However, in relation to the charging handles he went on to say that "[t]o convict him, you must be sure that he knew he had no right to sell that charging handle". In relation to the J Points he said that it was for the prosecution to prove that S knew "he had no right to sell those sights". This appears to have been a direction in relation to claim of right. There was a danger that this direction may have caused confusion, in light of the prosecution's closing submissions. It was not enough that S knew he was not allowed to sell NZDF items and that these were in fact NZDF items. The military members needed to not only be sure that the items were NZDF property, but also that, at the time of seeking to sell the charging handle and J Points, S knew that they were in fact NZDF issued property and not items of property that he had personally acquired in Afghanistan. This distinction needed to be emphasised to the military members.

[59] We mention this because it may help explain an outcome where unreasonable verdicts were reached. It has become almost standard practice in the criminal courts for juries to be given issue sheets which set out the elements of the offence which must be proven and which remind the jury that each of those elements must be proven to the beyond reasonable doubt standard. This practice was not adopted in this Court Martial. The Court Martial may find it a helpful practice to adopt. It

helps to ensure that the fact finders are focussed on the elements that must be proven and that they must be sure that they are proven to the required standard.

Unlawful possession of the thunderflashes

What needed to be proved

[60] Section 59(a) of the Act provides that a person commits an offence who "without authority or other lawful excuse, is in possession of ... any service property." The effect of s 3(2) of the Act is that the burden of proving authority or a lawful excuse is on the defendant. The prosecution is required to prove beyond reasonable doubt that:

(a) the thunderflashes in the garage were service property; and

(b) S was in possession of the thunderflashes.

[61] Possession is not defined in the Act. In respect of similar offences in the Arms Act 1983 possession has its ordinary meaning of knowingly having the property in one's custody or control.[23] It has been held that, even though knowledge of possession may have existed at an earlier time, that knowledge may have been extinguished at the time of the offence.[24] The Act does not have an equivalent provision to that in the Arms Act 1983 pursuant to which a person in occupation of any land, building or vehicle in which a firearm or explosive (amongst other things) is found is deemed to be in possession of that item unless the person proves that it was not their property or that it was in the possession of some other person.[25]

Appellate review

[62] As with the stealing charges counsel for S submits that the verdict on the charge of unlawful possession of the thunderflashes was not supported by the evidence. She submits that it was also inconsistent with the verdicts on the charges of unlawful possession of the semtex and the ammunition. As discussed above the

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23 Arms Act 1983, ss 45, 49A, 50 and 51.

24 Bruce Robertson (ed) *Adams on Criminal Law* (looseleaf ed, Brookers) at [CA20.21] in the context of possession of a pistol and possession of cannabis.

25 Arms Act 1983, s 66.

relevant ground of appeal is that the verdict was not a reasonable one on the evidence. The test is as set out above.[26]

[63] Counsel says that the evidence did not establish that S knew he had any of these items in the garage because he did not have exclusive possession of the garage, he did not recall that the thunderflashes were there, he did not accept that the thunderflashes were his, and there was no other evidence to identify the thunderflashes as his. The military members must have accepted this evidence in relation to the semtex and the ammunition and should have reached the same conclusion in relation to the thunderflashes.

The issues

[64] The search of the garage located a 200 g block of semtex (which is a plastic explosive), 11 thunderflashes (which is a pyrotechnic, like a large firecracker, that simulates battle noise) and ammunition.[27] Ammunition, explosives and pyrotechnics purchased by the NZDF are inspected and recorded into its system. The evidence established that each of these items was NZDF property. NZDF units to whom these items were distributed were required to return them to the depot when they were no longer required by the unit. They would then be inspected and put back into the system to allow use by other units. If they were unserviceable then they were to be destroyed under a disposal plan.

[65] Therefore the evidence established that the items were service property and that, in the absence of evidence otherwise, S did not have authority or lawful excuse to be in possession of them. The key issue was whether S knew that they were in his garage. If he did know that then he would have possession of them as the person with custody or control over the garage. Two matters were potentially relevant to whether he did know they were in his garage: first, whether others had access to the

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[26] See para [20]. See also *B v R* [2013] NZSC 151, [2014] 1 NZLR 261, at [69] and [105], where it was held that on an appeal on the basis that verdicts are inconsistent, the question is not whether the acquittal was reasonable, but whether the conviction was not.

[27] Five 5.56 rounds of ammunition were the subject of charge 11. Other ammunition was the subject of charge 13 which was withdrawn.

garage such that the items might belong to them; and secondly, whether, even if the items were put there by S, he no longer had any memory of them being there.[28]

The evidence about the garage

[66] The garage was located within the Papakura military camp. The garage faced a car park and was close to the gymnasium and the barracks. Everyone walked past the garage going to or from the gym each day as did anyone parking their car and going to the barracks. It was a thoroughfare.

[67] S began leasing the garage from around the middle of 2009. The tenancy agreement for the garage was in S's name. The photos of the garage taken at the time of the search show a reasonable number of items in the garage, mostly inside green army trunks or other storage containers. There are other items such as a table, a bicycle and a tennis racquet shown in the photos. S also had a motorbike which was kept in the garage. S said that he found it handy to have a little bit of extra storage at the camp given that he was not from the area. He also lived in the garage temporarily when he was between accommodation.

[68] S said that before the camp built 30 new facilities it used to be the case that if you had a garage everyone wanted to use it. He said he let others store items in the garage. For example he let mates store things in there when they were moving houses. He said that when guys went overseas they would ask to store things and S would say yes. He said that he would have had around six friends store big amounts of gear in there and besides that "loads of others chuck their bikes in there or say can you look after my bed while I'm on a course … things of that nature". S also said that most of the garages at the camp were kept unlocked and he did not lock his garage.

[69] There was therefore evidence that other people stored things in S's garage. There was also evidence that others had access to his garage and therefore would be

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[28] We note that *Adams on Criminal Law*, above n 24, at [CA 20.21] suggests that it is not clear in New Zealand whether 'forgotten knowledge' can be a defence to a charge of possession. *Adams* notes that in England it is not a defence. However we proceed on the basis that knowledge must exist at the time the items are found as that was the basis on which the Chief Judge directed the military members.

able to put items in there if they wished to do so. S was not directly challenged on this evidence. Nor was contrary evidence adduced. The prosecution witnesses were only able to say that at the time of the search the garage door was initially closed but opened to enable S to move his motorbike out of the garage before the search got underway. None of them were able to say whether the garage was locked or unlocked when the search commenced. Major W, who was called by the defence, said that he was present during the entire search and he remembered that the garage was not locked.

Evidence about the items found

[70] In relation to the semtex the evidence was:

(a) The semtex was found when the right hand side of the garage was being searched. It was sitting on top of a trunk and fell when a blanket on top of the trunk was lifted during the search.

(b) S commented at the time it was found that he did not know it was there and that this was the last time he left his garage unlocked.

(c) The semtex was sent to the police for finger-print analysis. S's fingerprints were not on the semtex.

(d) Semtex was widely used within the NZDF by engineer regiments, 1 SAS Regiment, and the EOD Squadron. The block found was received by the NZDF in 2007. It was withdrawn from service around February 2012.

(e) S accepted that he did use semtex during demolition courses in May 2009 and that he might have used around 1000 blocks of semtex at this time. Major W said that it would not be possible to take a block of semtex away from this course because participants are thoroughly searched at the end of it.

(f) S's evidence was that he was baffled by the semtex being found in the garage. He said that he had no use for it.

(g) S said that he puts things away in cupboards and labelled boxes.

(h) S said that the blanket which was found on top of the semtex was likely to have been his and he thought it may have been the blanket which was covering his motorcycle which he moved out of the garage before the search started.

[71] In relation to the five 5.56 rounds of ammunition the evidence was:

(a) The ammunition was loose and found inside an unsecured box in a green trunk. It was about halfway down on the right hand side of the garage.

(b) One of the five rounds had a dent in it and so was effectively useless.

(c) The 5.56 ammunition was used within the NZDF up until late 2009. The supplier did not sell this ammunition to anyone else in New Zealand.

(d) S said that he could not confirm that it was his. He said that he did not remember how the ammunition had came to be in his garage but he handled millions of rounds of ammunition and used ammunition of this kind almost daily. He had no use for this ammunition as it was old issue.

(e) S said that the green trunk had been moved from his house to the garage. He could not confirm that it was his green trunk because others had lived with him at the house. He could not say what else was inside the green trunk.

(f) There was evidence that at the end of a shooting exercise, empty and live shells are picked up for return to the depot and members of other

regular army units always had their pockets checked for ammunition before they left the practice range.

(g) S's evidence was that it appeared that the ammunition may have been used on a practice range at some point and been gathered up. He said that sometimes they would be clearing up at night time, in which case it was not practical to hand back the expended ammunition at that time, and that it then could be overlooked. He said that "the nature of the beast is that we're carrying it all the time, all day, there's going to be a few strays."

(h) Staff Sergeant R confirmed that it can happen that used ammunition is not handed in after a day on the practice range. He said that the uniforms had a lot of pouches and you can forget to hand in loose rounds that you have put in your pocket.

[72] In relation to the thunderflashes the evidence was:

(a) Eleven thunderflashes were found in an ammunition tin (which did not have a top on it) insider a large green trunk. Ten of the eleven thunderflashes looked relatively old.

(b) S said that the search was the first time he had seen inside that trunk.

(c) The NZDF purchased thunderflashes from a UK manufacturer. The supplier did not supply any other person in New Zealand. The manufacturer's initials marked on the thunderflashes were those of the manufacturer who supplied the NZDF.

(d) From the lot numbers, some of the thunderflashes were identified as being part of a lot received by the NZDF on 27 February 2002. The rest were identified as being part of a lot received by the NZDF in November 2005.

(e) Nearly every unit in the New Zealand Army would receive thunderflashes because they are used in lots of training. The NZSAS did not generally use thunderflashes but one of the batches had been used by sub units of the NZSAS. The information about this was limited.

(f) S said it was possible that either he or someone else from other units within the regular army had stored the thunderflashes in the garage. He said that he had never seen thunderflashes used in the NZSAS. He had seen it used by other units of the regular army. He had used it in his regiment prior to joining the NZSAS.

(g) Staff Sergeant M was able to identify the exercises for which these thunderflashes had been issued. One was an occasion when S was deployed in Afghanistan. The second time was when S was on leave.

[73] In summary S's evidence was that he did not know that the semtex, thunderflashes and ammunition were in the garage. He did not acknowledge that any of those items were his and those conducting the search did not ask if everything in the garage was his. Apart from the fact that the items were in the garage which he leased and in which he stored his motorbike, there was nothing which directly suggested these items were put there by S (for example, other personal items belonging to S were not identified alongside these items). S was unlikely to have had access to the semtex. He may have had the rounds, but they were useless and something easily forgotten. When S was in the NZSAS he did not use thunderflashes and he was not present when units used the lots to which these thunderflashes could be identified.

[74] The prosecution's closing address on the thunderflashes was as follows:

> What about the thunderflashes. No doubt that they're service property. He has possession of it. Where he got it from is not something we have to prove. But there's opportunity. Been in the army a long time. Been in another unit other than this unit where thunderflashes are used. I suggest to you there's opportunity there to perhaps acquire them.

[75] This submission did not address the question of whether S was in knowing possession of the thunderflashes. It simply asserts that S had possession of the thunderflashes. It did not address the issue of why the military members could be sure that S knew the thunderflashes were there when others used and had access to the garage and in light of the above matters. These matters were important and if not made clear to the military members there was a risk as non-lawyers that they would accept that if something is in a garage which a person leases that means the person has possession of it.

[76] The Judge's summing up on these items addressed these matters as follows:

> The next three charges are also of unlawful possession, and they're the items in the garage. A lawyer might argue that because they were in the garage which he leased, they were in his possession. But the prosecution, as I said to you earlier, has set out to prove that at the time of the search he knew that they were there, that he was not entitled to have them in his possession. You've heard him say he's forgotten if he ever knew of the bullets. He said -- it seems clear that it is possible that the bullets came into his possession. Everyone has talked about the events which occur on range practises and you've heard in that context his Troop Sergeant say that it is not unknown for people to walk away from SAS range practises with unexpended rounds in their pockets which they are expected to, but may not necessarily, have handed in shortly afterwards. All that is a matter for you and for your military knowledge. And again, as I say, if you think he might be telling the truth, that he had forgotten, that he had really honestly forgotten that they were there and that he would have handed them in if he ever remembered, then you acquit him.
>
> The Semtex is a little different because we had, just at the close of play this afternoon, the evidence that -- sorry, the thunderflashes are a little different. It was originally put that the thunderflashes could have been acquired by him in the course of exercises he was on. It's now, as I understand it, accepted by the prosecution that he was not on the exercises where those thunderflashes were used, so that the origin of those thunderflashes is a mystery and the accused says that to him it's a mystery and if he knew about it, he had forgotten.
>
> The Semtex. The Semtex was there. The access he had to Semtex was on his cycle. It was Sergeant [R], not Major [K], with respect to defence counsel, who said that given what happens on cycle, it was unlikely that he would be able to pocket any and take it off. Couldn't say it was impossible, he just said it was unlikely. As against that, accused says my garage was open for months if not years on end and I was away so often I simply had no knowledge of the Semtex. And that again is a matter for you to assess what you make of him and his evidence and what the prosecution has proved.
>
> I think it's important to stress again that you must consider each charge separately. It does not follow that if he knew of the Semtex he must have

known of the thunderflashes or the bullets. Each issue must be taken separately in your minds.

[77] The military members asked a question in the course of their deliberations. The record of that question and the answer given is as follows:

> **Chief Judge Hodson:** We are reconvened in open Court because the Military Members have a question as to the law. The question that they have formulated is whether the fact of one of the items being found in the garage is sufficient for the conviction to be entered in the context of what is the law relating to knowledge.
>
> I directed you that the prosecution must prove that on the day named in the charge he knew that the items were in the garage. And I put that in the context of his statements and what the prosecution has to prove. So we start on the basis that he said he didn't know. If you actually accept that, that's the end of the matter. He didn't know. Knowledge is an essential ingredient. If you are unsure at the end of the day whether he knew or not, you acquit.
>
> On the other hand, if the prosecution evidence leads you to be sure that you can draw the inference that he knew or must have known, then the element of knowledge has been made out.
>
> So if you're in doubt, you acquit. If you are sure that there is an inference that the only conclusion to which the evidence leads you is that he must have known, then you can convict.
>
> Does that answer your question?
>
> **Major McMillan:** Your Honour, it does, thank you.

[78] It is not suggested that there was any error in the directions. The question the military members asked is somewhat unclear. The Judge understood it to be a question about knowledge and directed the members that knowledge of the items in the garage was an essential ingredient.

[79] The military members returned verdicts of not guilty on the semtex and ammunition charges and a guilty verdict on the thunderflashes charge. It might be said that there was a distinction between the ammunition and the thunderflashes in that the ammunition was small and useless and could be easily forgotten. But even if the military members thought that thunderflashes were less likely to be forgotten (although why that would be so is not clear), they still needed to be sure on the evidence that S knew they were there. If S put them there then he has somehow gained access to thunderflashes used on exercises when he was not present. If someone else put the thunderflashes in the garage there is no reason why he would

know that. The only thing that linked S to the thunderflashes was that it was in a trunk in a garage that he leased. In light of the uncontested evidence that others did and could gain access to the garage that link was not a sufficient basis on which the military members could be sure that S knew the thunderflashes were there. The military members must have considered that there was a reasonable possibility that the semtex was not put there by S and he did not know it was there. Just as that was a reasonable possibility in relation to the semtex, it must also have been a reasonable possibility in relation to the thunderflashes. The verdict of guilty was not a reasonable one on the evidence.

The search

Result

[93] The appeal against conviction is allowed in part. For the reasons set out above,[32] the guilty verdicts on counts 1, 5, 7 and 10 were not reasonable verdicts on the evidence. The convictions on those counts are quashed. We do not quash the conviction on count 12 which was entered on the basis of S's guilty plea. The sentence was imposed in respect of the convictions on counts 1, 5, 7, 10 and 12. It follows that if S is to be subject to any penalty in respect of count 12 the proceeding will need to be referred back to the Court Martial for that purpose. However we do raise for consideration by the Court Martial whether, in light of the history of this matter, the proper course would be to take no further action on that minor charge. Indeed S may not even have been charged at all if the only matter was that he had improperly stored a firearm for reasons which he explained at the time.

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[32] See paras [53] to [55] (count 1), paras [37] to [38] (counts 5 and 7) and paras [73] and [79] (count 10).