

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Cawthorne, 2016 SCC 32, [2016] 1 S.C.R. 983 | **Appeals heard:** April 25, 2016  **Judgment rendered:** July 22, 2016  **Dockets:** 36466, 36844 |

Between:

Her Majesty The Queen

Appellant

and

Ordinary Seaman Cawthorne

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario,

Attorney General of Quebec, Attorney General of British Columbia and

Director of Criminal and Penal Prosecutions of Quebec

Interveners

**And Between:**

Her Majesty The Queen

Appellant

and

Warrant Officer J.G.A. Gagnon

Respondent

**And:**

Her Majesty The Queen

Appellant

and

Corporal A.J.R. Thibault

Respondent

- and -

Attorney General of Canada, Attorney General of Ontario,

Attorney General of Quebec and Attorney General of British Columbia

Interveners

**Coram:** McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

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| **Reasons for Judgment:**  (paras. 1 to 44) | McLachlin C.J. (Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ. concurring) |

R. *v.* Cawthorne, 2016 SCC 32, [2016] 1 S.C.R. 983

Her Majesty The Queen Appellant

v.

Ordinary Seaman Cawthorne Respondent

and

Attorney General of Canada,

Attorney General of Ontario,

Attorney General of Quebec,

Attorney General of British Columbia and

Director of Criminal and Penal Prosecutions of Quebec Interveners

‑ and ‑

Her Majesty The Queen Appellant

v.

Warrant Officer J.G.A. Gagnon Respondent

and

Her Majesty The Queen Appellant

v.

Corporal A.J.R. Thibault Respondent

and

Attorney General of Canada,

Attorney General of Ontario,

Attorney General of Quebec and

Attorney General of British Columbia Interveners

**Indexed as: R. *v.* Cawthorne**

2016 SCC 32

File Nos.: 36466, 36844.

2016: April 25; 2016: July 22.

Present: McLachlin C.J. and Abella, Cromwell, Moldaver, Karakatsanis, Wagner, Gascon, Côté and Brown JJ.

on appeal from the court martial appeal court of canada

*Constitutional law — Charter of Rights — Fundamental justice — Armed forces — Prosecutorial independence — Right to trial by independent tribunal — Members of Canadian Forces charged with criminal offences — Sections 230.1 and 245(2) of National Defence Act, R.S.C. 1985, c. N‑5, giving Minister of National Defence authority to appeal from decisions of court martial or Court Martial Appeal Court — Whether these provisions violate ss. 7 and 11(d) of the Canadian Charter of Rights and Freedoms.*

*Criminal law — Trial — Evidence — Mistrial — Accused bringing motion for mistrial on basis of prejudice arising from inadmissible re‑examination evidence — Whether military judge erred in declining to grant mistrial.*

C was charged with two child pornography offences. At trial, defence counsel objected to re‑examination evidence given by C’s former girlfriend. The military judge ruled that it was inadmissible and advised the jury panel to disregard it, but C brought a motion for a mistrial on the basis of the prejudice arising from it. The military judge dismissed the motion and gave a further limiting instruction to the panel. C was found guilty. On appeal, a majority of the Court Martial Appeal Court found that the mistrial ought to have been granted and ordered a new trial. The Minister of National Defence (“Minister”) appeals as of right to this Court, pursuant to s. 245(2) of the *National Defence Act*, arguing that the military judge made no error in declining to grant a mistrial. C brings a motion to quash the Minister’s appeal, on the basis that s. 245(2), which gives the Minister the authority to appeal to this Court, violates ss. 7 and 11(*d*) of the *Charter*.

G and T were each charged with sexual assault. G was acquitted and the Minister appealed, seeking a new trial. T presented a plea in bar of trial, on the basis that the matter was not under military jurisdiction because of an insufficient nexus with military service. The military judge allowed the plea and the Minister appealed. G and T brought motions to quash the Minister’s appeals on the basis that s. 230.1 of the *National Defence Act*, which gives the Minister the authority to appeal to the Court Martial Appeal Court, violates s. 7 of the *Charter*. The Court Martial Appeal Court dismissed the motions to quash but agreed that s. 230.1 should be invalidated, as it violates the right to an independent prosecutor. The Minister appeals to this Court.

*Held*: The motion to quash should be dismissed and the appeals should be allowed. Sections 230.1 and 245(2) of the *National Defence Act* are constitutional.

The power that ss. 230.1 and 245(2) of the *National Defence Act* confer on the Minister — that is, to initiate an appeal — may effect a deprivation of liberty. Therefore, s. 7 of the *Charter* is engaged. The law recognizes as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system, and it satisfies the criteria to be considered a principle of fundamental justice. A prosecutor — whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function — has a constitutional obligation to act independently of partisan concerns and other improper motives.

The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister’s membership in Cabinet does not displace that presumption. The law presumes that the Attorney General, also a member of Cabinet, can and does set aside partisan duties in exercising prosecutorial responsibilities, and there is no compelling reason to treat the Minister differently in this regard. Accordingly, Parliament’s conferral of authority over appeals in the military justice system on the Minister does not violate s. 7 of the *Charter*. As to the argument that the impugned provisions violate the right to an independent tribunal guaranteed by s. 11(*d*) of the *Charter*, it cannot succeed.

The military judge in C’s case did not err in declining to grant a mistrial. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial. The decision of whether to grant a mistrial falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised. That discretion is not absolute, but its exercise must not be routinely second‑guessed by the court of appeal.

**Cases Cited**

**Referred to:** *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372; *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339; *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297; *R. v. Power*, [1994] 1 S.C.R. 601; *R. v. Jewitt*, [1985] 2 S.C.R. 128; *R. v. O’Connor*, [1995] 4 S.C.R. 411; *R. v. Malmo‑Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571; *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76; *R. v. Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823.

**Statutes and Regulations Cited**

*Canadian Charter of Rights and Freedoms*, ss. 1, 7, 11(*d*).

*Criminal Code*, R.S.C. 1985, c. C‑46, s. 686(1)(b)(iii).

*National Defence Act*, R.S.C. 1985, c. N‑5, ss. 130, 230.1, 245(2).

**Authors Cited**

Rosenberg, Marc. “The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen’s L.J.* 813.

Scott, Ian. “Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s” (1989), 39 *U.T.L.J.* 109.

Sterling, Lori, and Heather Mackay. “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003), 20 *S.C.L.R.* (2d) 169.

MOTION to quash the appeal from a judgment of the Court Martial Appeal Court of Canada (Veit, Zinn and Abra JJ.A.), 2015 CMAC 1, 472 N.R. 47, [2015] C.M.A.J. No. 1 (QL), 2015 CarswellNat 1361 (WL Can.), setting aside the accused’s convictions for possession of child pornography and accessing child pornography and ordering a new trial. Motion to quash dismissed. Appeal allowed.

APPEAL from a judgment of the Court Martial Appeal Court of Canada (Bell C.J. and Deschênes and Cournoyer JJ.A.), 2015 CMAC 2, [2015] C.M.A.J. No. 2 (QL), 2015 CarswellNat 7156 (WL Can.), declaring invalid s. 230.1 of the *National Defence Act*. Appeal allowed.

*David Antonyshyn*, *Dylan Kerr* and *B. W. MacGregor*, for the appellant.

*Mark Létourneau* and *Jean‑Bruno Cloutier*, for the respondents.

*François Lacasse* and *Ginette Gobeil*, for the intervener the Attorney General of Canada.

*Patrick J. Monahan* and *Jamie Klukach*, for the intervener the Attorney General of Ontario.

*Sylvain Leboeuf*, for the intervener the Attorney General of Quebec.

*Joyce DeWitt‑Van Oosten*, *Q.C.*, for the intervener the Attorney General of British Columbia.

*Joanne Marceau* and *Patrick Michel*, for the intervener the Director of Criminal and Penal Prosecutions of Quebec.

The judgment of the Court was delivered by

The Chief Justice —

1. Introduction
2. These appeals present two issues. First, do provisions of the *National Defence Act*, R.S.C. 1985, c. N-5,giving the Minister of National Defence (“Minister”) the authority to appeal from decisions of a court martial or the Court Martial Appeal Court violate ss. 7 or 11(*d*) of the *Canadian Charter of Rights and Freedoms*? Second, did the military judge in the Cawthorne matter err in declining to grant a mistrial?
3. Background
   1. Ordinary Seaman Cawthorne
4. In July 2012, Ordinary Seaman Cawthorne was on exercise near Hawaii. On July 20, an able seaman found an iPhone on board the ship. To determine the owner of the phone, the seaman swiped the screen. He saw an image of a man having sex with a child. The seaman took the phone to a superior. The phone belongs to O.S. Cawthorne.
5. O.S. Cawthorne was charged with two child pornography offences under s. 130 of the *National Defence Act*. O.S. Cawthorne did not contest ownership of the phone, nor did he deny accessing and possessing pornographic images of teenage girls. He testified, however, that his practice was to download an entire thread of pornographic images, without reviewing each image individually. He claimed that his download of the child pornography was inadvertent, and that he had not knowingly possessed or accessed child pornography.
6. O.S. Cawthorne’s former girlfriend testified for the prosecution at trial. During her examination-in-chief, she testified about several conversations she had with him. She stated that he told her that he had been arrested “for having inappropriate images on his phone”. She also asked him what types of images were on his phone. When asked if she recalled his answer, her response was the following: “He said they were children and I believe that he said they were both male and female.”
7. In brief cross-examination, she was asked whether her conversations with O.S. Cawthorne amounted to his merely advising her of the allegations against him (i.e., as opposed to his admitting culpability). She agreed.
8. In re-examination, she was asked, “During any of those conversations, do you recall him saying that he did in fact do these things?” She said: “Yes.”
9. Defence counsel objected, and the military judge ruled that her evidence on re-examination was inadmissible because it did not arise from cross-examination. The military judge advised the jury panel to disregard the question and answer.
10. The defence then brought a motion for a mistrial on the basis of the prejudice arising from the inadmissible re-examination evidence. The military judge dismissed the motion and gave a further limiting instruction to the panel:

. . . I further instruct you that you shall not draw any inference against the accused . . . from that inadmissible evidence because it is both unreliable and prejudicial. I therefore instruct you to completely and absolutely ignore the inadmissible evidence and that you shall evacuate from your mind anything about it.

1. The panel returned a verdict of guilty on both counts charged.
2. A majority of the Court Martial Appeal Court found that the mistrial ought to have been granted. The court allowed O.S. Cawthorne’s appeal and ordered a new trial (2015 CMAC 1, 472 N.R. 47).
3. The Minister appeals as of right to this Court, pursuant to s. 245(2)(a) of the *National Defence Act*. The Minister argues that the military judge made no error in declining to grant a mistrial. O.S. Cawthorne seeks to quash the Minister’s appeal on the basis that s. 245(2) violates ss. 7 and 11(*d*) of the *Charter*.
   1. Warrant Officer Gagnon and Corporal Thibault
4. Warrant Officer Gagnon and Corporal Thibault were each charged with sexual assault.
5. Warrant Officer Gagnon was acquitted. The Minister appealed to seek a new trial, on the basis that the military judge erred by putting the defence of honest but mistaken belief in consent to the panel.
6. Corporal Thibault presented a plea in bar of trial, claiming that the matter was not under military jurisdiction because of an insufficient nexus with military service. The military judge allowed the plea (2015 CM 1001). The Minister appealed.
7. Warrant Officer Gagnon and Corporal Thibault brought motions to quash the Minister’s appeals on the basis that s. 230.1 of the *National Defence Act*, which gives the Minister the authority to appeal to the Court Martial Appeal Court, violates s. 7 of the *Charter*.
8. The Court Martial Appeal Court dismissed the motions to quash but agreed that s. 230.1 of the *National Defence Act* should be invalidated. It found that the law’s conferral of the authority to appeal on the Minister violates the right to an independent prosecutor, which it held is a principle of fundamental justice under s. 7 of the *Charter* (2015 CMAC 2).
9. The Challenged Legislation
10. Sections 230.1 and 245(2) of the *National Defence Act* provide the following:

230.1 The Minister, or counsel instructed by the Minister for that purpose, has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:

(a) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;

(a.1) the decision not to make an order under subsection 745.51(1) of the Criminal Code;

(b) the legality of any finding of not guilty;

(c) the legality of the whole or any part of the sentence;

(d) the legality of a decision of a court martial that terminates proceedings on a charge or that in any manner refuses or fails to exercise jurisdiction in respect of a charge;

(e) the legality of a finding of unfit to stand trial or not responsible on account of mental disorder;

(f) the legality of a disposition made under section 201, 202 or 202.16;

(f.1) the legality of an order for a stay of proceedings made under subsection 202.121(7);

(g) the legality of a decision made under any of subsections 196.14(1) to (3); or

(h) the legality of a decision made under subsection 227.01(2).

* **245** . . .
* **(2)** The Minister, or counsel instructed by the Minister for that purpose, may appeal to the Supreme Court of Canada against a decision of the Court Martial Appeal Court

**(a)** on any question of law on which a judge of the Court Martial Appeal Court dissents; or

**(b)** on any question of law, if leave to appeal is granted by the Supreme Court of Canada.

1. Analysis
   1. Is the Conferral of the Authority to Appeal on the Minister of National Defence Unconstitutional?
2. The main question on these appeals is whether provisions of the *National Defence Act* that give the Minister the authority to appeal from decisions of a court martial or Court Martial Appeal Court infringe the right to liberty under s. 7 of the *Charter*, and if so, whether the limitation is justified under s. 1 of the *Charter*.It is also argued that the law infringes the right to trial by an independent tribunal under s. 11(*d*) of the *Charter*.
3. Section 7 of the *Charter* provides:

**7.** Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

1. The power that ss. 230.1 and 245(2) of the *National Defence Act* confer on the Minister — that is, to initiate an appeal — may effect a deprivation of liberty. Section 7 is engaged.
2. The next question is whether the deprivation of liberty conforms to the principles of fundamental justice. If it does not, the law violates s. 7.
3. The answer is found in this Court’s jurisprudence on prosecutorial independence and abuse of process. It establishes, as a matter of constitutional law, that partisan or other improper considerations must not influence prosecutorial decisions.
4. Our cases on prosecutorial independence tend to discuss this principle in the context of the role of the Attorney General. In *Krieger v. Law Society of Alberta*, 2002 SCC 65, [2002] 3 S.C.R. 372, Iacobucci and Major JJ., writing for the Court, noted that there is a “constitutional principle in this country that the Attorney General must act independently of partisan concerns when supervising prosecutorial decisions”: para. 30. Charron J. reiterated this point in *Miazga v. Kvello Estate*, 2009 SCC 51, [2009] 3 S.C.R. 339, describing the independence of the Attorney General as a “constitutionally entrenched” principle that “requires that the Attorney General act independently of political pressures from government”: para. 46. But the logic of these statements clearly extends to Crown prosecutors and other public officials exercising a prosecutorial function. Indeed, both *Krieger* and *Miazga* cited with approval Binnie J.’s reasons (dissenting on another point) in *R. v. Regan*, 2002 SCC 12, [2002] 1 S.C.R. 297, at para. 157, where he remarked that a Crown Attorney’s duty “to respect his or her ‘Minister of Justice’ obligations of objectivity and independence” easily met the criteria for a principle of fundamental justice under s. 7 of the *Charter*.
5. These cases establish that a prosecutor — whether it be an Attorney General, a Crown prosecutor, or some other public official exercising a prosecutorial function — has a constitutional obligation to act independently of partisan concerns and other improper motives: see generally L. Sterling and H. Mackay, “Constitutional Recognition of the Role of the Attorney General in Criminal Prosecutions: *Krieger v. Law Society of Alberta*” (2003), 20 *S.C.L.R.* (2d) 169, at p. 170; see also M. Rosenberg, “The Attorney General and the Administration of Criminal Justice” (2009), 34 *Queen’s L.J.* 813, at pp. 832-36.
6. This principle is also reflected in this Court’s abuse of process jurisprudence. We have long recognized that the Crown’s unfair or oppressive treatment of an accused can rise to the level of an abuse of the court’s process and warrant judicial intervention: see *R. v. Power*, [1994] 1 S.C.R. 601, at pp. 612-15. Both the common law and s. 7 of the *Charter* empower a court to stay proceedings

where compelling an accused to stand trial would violate those fundamental principles of justice which underlie the community’s sense of fair play and decency and to prevent the abuse of a court’s process through oppressive or vexatious proceedings.

(*R. v. Jewitt*, [1985] 2 S.C.R. 128, at pp. 136-37, quoted in *R. v. O’Connor*, [1995] 4 S.C.R. 411, at p. 455.)

Those principles of justice may be violated where there is “conspicuous evidence of improper motives or of bad faith” on the Crown’s part: *Power*, at p. 616.

1. I conclude that the law recognizes as constitutional the principle that prosecutors must not act for improper purposes, such as purely partisan motives. This principle is a basic tenet of our legal system. It safeguards the rights of the individual and the integrity of the justice system. And it satisfies the criteria for a principle of fundamental justice identified in *R. v. Malmo‑Levine*, 2003 SCC 74, [2003] 3 S.C.R. 571, at para. 113, and *Canadian Foundation for Children, Youth and the Law v. Canada (Attorney General)*, 2004 SCC 4, [2004] 1 S.C.R. 76, at para. 8. This principle is, accordingly, a principle of fundamental justice under s. 7 of the *Charter*.
2. I emphasize that the scope of “partisan” in this context is narrow. “Partisan” is not broadly synonymous with “political”. An Attorney General — like other public officials exercising a prosecutorial function — is a “protector of the public interest”: Sterling and Mackay, at p. 179. As L’Heureux-Dubé J. explained in *Power*, at p. 616:

. . . the Attorney General is a member of the executive and as such reflects, through his or her prosecutorial function, the interest of the community to see that justice is properly done. The Attorney General’s role in this regard is not only to protect the public, but also to honour and express the community’s sense of justice. Accordingly, courts should be careful before they attempt to “second-guess” the prosecutor’s motives when he or she makes a decision.

1. Decisions to prosecute (or to not prosecute) can have broad social repercussions, and regard for those repercussions properly informs prosecutorial discretion: Sterling and Mackay, at p. 179; Rosenberg, at pp. 821-22, fn. 24. It is not open to a court to scrutinize this exercise of discretion, or to question a prosecutor’s particular conception of the public interest. A government policy of strict prosecution of certain offences, if motivated by concerns for the public interest, does not offend s. 7. It is only when the considerations underlying a prosecution are partisan — that is, when a prosecutor acts not for the public good, but “for the good of the government of the day” — that a court’s intervention is warranted: Sterling and Mackay, at p. 179, citing I. Scott, “Law, Policy, and the Role of the Attorney General: Constancy and Change in the 1980s” (1989), 39 *U.T.L.J.* 109, at p. 121.
2. Whether a prosecutor’s purposes are “improper” will depend on the facts of the case. It would be impossible to exhaustively define all considerations that are improper in the context of a prosecution, but our abuse of process decisions provide some guidance on that issue. These decisions indicate that, whatever the circumstances of the particular case, the bar for finding that a prosecutor’s conduct was prompted by an improper motive is rightly very high.
3. Recognition of this principle as one of fundamental justice does not affect the existing and well-developed doctrine of abuse of process; indeed, the two are integrally related. Claims of improper prosecutorial conduct, including partisan-motivated conduct, will continue to be brought and assessed under the doctrine of abuse of process, which determines the standard for improper conduct and the appropriate remedy: see *Power*, at pp. 615-16; *O’Connor*, at pp. 465-68.
4. There is no evidence of any improper prosecutorial conduct in the cases before us. But the respondents say such evidence is unnecessary. In their view, the principle of prosecutorial independence requires both that a prosecutor be independent *and* that a reasonable person perceive him or her as independent. The Minister, they say, is independent neither in fact nor in appearance. They emphasize that the Minister is a member of Cabinet not bound by the conventions of independence that apply to the Attorney General, and that the Minister’s “quasi-judicial” role is incompatible with his control and administration of the Canadian Forces. Accordingly, the respondents argue that the law’s conferral on the Minister of authority over appeals in the military justice system violates s. 7 of the *Charter*.
5. I cannot agree. The Minister, like the Attorney General or other public officials with a prosecutorial function, is entitled to a strong presumption that he exercises prosecutorial discretion independently of partisan concerns. The mere fact of the Minister’s membership in Cabinet does not displace that presumption. Indeed, the law presumes that the Attorney General — also a member of Cabinet — can and does set aside partisan duties in exercising prosecutorial responsibilities. There is no compelling reason to treat the Minister differently in this regard.
6. It follows that Parliament’s conferral of authority over appeals in the military justice system on the Minister does not violate s. 7 of the *Charter*.
7. It is conceivable that a statute could create a prosecutorial framework that genuinely casts doubt on a prosecutor’s independence, for example, by requiring the prosecutor to take partisan or other improper considerations into account in the exercise of prosecutorial discretion. But short of such a statutory regime, and in the absence of “conspicuous evidence” of partisan conduct in a particular case, there is no violation of s. 7 of the *Charter*.
8. The respondents did not press the argument that the law violates s. 11(*d*) of the *Charter*, except to suggest that an abusive prosecution may taint the entire judicial process. In my view, the argument that the law violates the right to an independent tribunal cannot succeed.
9. I conclude, accordingly, that the impugned provisions of the *National Defence Act* do not violate s. 7 or s. 11(*d*) of the *Charter*.
   1. Did the Military Judge in the Cawthorne Matter Err in Declining to Grant a Mistrial?
10. The Crown says that the Court Martial Appeal Court should not have disturbed the military judge’s considered decision to not grant a mistrial. It argues that the evidence of O.S. Cawthorne’s former girlfriend was not inadmissible, but that even if it was, the military judge correctly applied the proper law. The respondent says that the inadmissibility of the evidence is not properly before this Court, and further that the military judge erred in dismissing the motion for a mistrial.
11. I would give effect to this ground of appeal. Even if the evidence in question was inadmissible, of which I am not convinced, the military judge did not err in declining to grant a mistrial.
12. The legal principles on the granting of a mistrial were discussed by LeBel J. in his reasons in *R. v.* *Khan*, 2001 SCC 86, [2001] 3 S.C.R. 823. Once an error has occurred at trial, a trial judge may, in deciding whether to grant a mistrial, consider whether the error has been or can be remedied at trial: para. 79. The decision of whether to grant a mistrial “falls within the discretion of the judge, who must assess whether there is a real danger that trial fairness has been compromised”: *ibid.* That discretion is not absolute, but “its exercise must not be routinely second-guessed by the court of appeal”: *ibid.*
13. The majority of the Court Martial Appeal Court did not ask itself whether the judge had erred in declining to grant a mistrial, but instead focused on the curative proviso of s. 686(1)(b)(iii) of the *Criminal Code*, R.S.C. 1985, c. C-46. The curative proviso applies only when an error has been established. The issue on appeal is the following: Did the military judge commit a reviewable error in declining to grant a mistrial? Only if the answer to that question is yes do we turn to the curative proviso. The Court Martial Appeal Court erred in failing to ask itself the right question: see *Khan*, at para. 19, per Arbour J.
14. In my view, the military judge did not err in declining to grant the motion for a mistrial. As LeBel J. stated in *Khan*, at paras. 80-82:

A decision on whether an incident has affected trial fairness in a way which would warrant declaring a mistrial must take into account any corrective measure which has been brought, or could be brought, by the judge to remedy the irregularity . . . .

Thus, when a trial judge realizes that an error has occurred but decides not to order a mistrial, the court should consider the remedy selected by the judge, if any, as one of the elements in its assessment of whether the trial has been or has appeared unfair. If the remedy chosen by the judge consisted of a warning to the jury on what they should or should not consider in reaching their verdict, the ability of a jury to follow instructions must be recognized, although this reality is obviously subject to its own limits. . . .

Thus, we should not presume that jurors are incapable of following instructions given by the judge. On the contrary, when the judge issues a clear and forceful warning about the use of some information, we are entitled to presume that it diminishes the danger that the jury will misuse this information when rendering its verdict. [Emphasis added.]

1. Here, the decision not to grant a mistrial was within the military judge’s discretion. He made a reasonable attempt to remedy the error through two instructions, one immediate and another mid-trial. In his mid-trial instruction, he instructed the panel to disregard the evidence because it was both “unreliable and prejudicial”. Nothing suggested to the judge that the panel was unwilling or unlikely to follow his instruction. I would not interfere with his decision.
2. Conclusion
3. In the Cawthorne matter, I would dismiss O.S. Cawthorne’s motion to quash the appeal. Section 245(2) of the *National Defence Act* is constitutional. The Minister’s appeal is allowed and the convictions entered at trial against O.S. Cawthorne are reinstated.
4. In the Gagnon and Thibault matter, I would allow the Minister’s appeal. Section 230.1 of the *National Defence Act* is constitutional. The matter is remitted to the Court Martial Appeal Court for the hearing of the appeals on the merits.

*Motion to quash appeal dismissed. Appeals allowed.*

Solicitor for the appellant: Canadian Military Prosecution Service, Ottawa.

Solicitor for the respondents: Defence Counsel Services, Gatineau.

Solicitor for the intervener the Attorney General of Canada: Attorney General of Canada, Ottawa.

Solicitor for the intervener the Attorney General of Ontario: Attorney General of Ontario, Toronto.

Solicitor for the intervener the Attorney General of Quebec: Attorney General of Quebec, Québec.

Solicitor for the intervener the Attorney General of British Columbia: Attorney General of British Columbia, Victoria.

Solicitor for the intervener the Director of Criminal and Penal Prosecutions of Quebec: Director of Criminal and Penal Prosecutions of Quebec, Québec.