



COURT MARTIAL

Citation: *R. v. Edmunds*, 2017 CM 3012

Date: 20170117

Docket: 201450

General Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Master Corporal N.S. Edmunds, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

DECISION ON NO PRIMA FACIE

(Orally)

[1] Master Corporal Edmunds is charged with 11 service offences punishable under paragraph 130(1)(a) of the *National Defence Act*. Six of them are for an offence for breach of trust by a public officer contrary to section 122 of the *Criminal Code* and five others are for fraud contrary to section 380 of the *Criminal Code*.

[2] It is alleged that those offences would have been committed at or near Petawawa, province of Ontario, during the month of March, April, June 2011 and September 2012 while the accused performed the duty of pharmacy technician.

[3] As set out in the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), at the close of the prosecution's case, the defence is entitled to move for a non-guilty verdict on the basis that the prosecution has not presented a prima facie case, i.e., a case containing evidence on all essential points of a charge that, if believed by the trier of fact and unanswered, would warrant a conviction.

[4] Then on 19 January 2017, at the close of the prosecution's case and pursuant to QR&O paragraph 112.05(13), the accused presented a motion of non prima facie with regard to all charges on the charge sheet on the basis that the prosecution had failed to introduce, before this General Court Martial, any evidence concerning one essential element of the offences of fraud and of breach of trust.

[5] The statement of the offence and the particulars of the first charge, read as follows:

“AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, FRAUD, CONTRARY TO SECTION 380 OF THE CRIMINAL CODE OF CANADA

Particulars: In that he, on or about 31 March 2011, at or near Petawawa, Ontario, did by deceit, falsehood or other fraudulent means defraud Her Majesty the Queen of \$9,029.26 by causing the production of a cheque made payable to Tactical First Response, a company owned by him.”

[6] The third, fifth, seventh and fifteenth charges are also fraud charges, worded in the same manner as the first charge; only the date and amount are different.

[7] The statement of the offence and the particulars of the second charge read as follows:

“AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, BREACH OF TRUST BY A PUBLIC OFFICER, CONTRARY TO SECTION 122 OF THE CRIMINAL CODE OF CANADA

Particulars: In that he, on or about 31 March 2011, at or near Petawawa, Ontario, being an official pharmacy technician of the Canadian Forces, did commit a breach of trust in connection with the duties of his office by failing to report a conflict of interest.”

[8] The fourth, sixth, eighth, sixteenth and seventeenth charges are also breach of trust charges worded in the same manner; only the date is different.

[9] The evidence introduced by the prosecution before this court martial is composed essentially of the testimony of 10 witnesses and of 37 exhibits. The Court also specifically took judicial notice of article 19.39 of the QR&O about dealings with contractors, pursuant to article 15 of the *Military Rules of Evidence*.

[10] This type of motion, at the close of the prosecution's case, is different from a request for an acquittal based on reasonable doubt. The latter agreement is that there may be some evidence upon which a jury properly instructed might convict, but that it

is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt is not called into play until all the evidence is in, reasonable doubt cannot be considered unless the accused has either elected not to call or has completed his evidence.

[11] The governing test for a directed verdict was set out by Ritchie J. in the *United States of America v. Shephard*, [1977] 2 S.C.R. 1067. Some subsequent decisions such as *R. v. Charemski*, [1998] 1 S.C.R. 679 and *R. v. Fontaine*, 2004 SCC 27 provided some clarification about that test.

[12] The court may not take into account the quality of the evidence in determining whether there is some evidence offered by the prosecution on each essential element of each charge, so that the properly instructed jury could reasonably decide on the issue, not that would or should, but simply could.

[13] At the end of the day, the test to be applied is the one mentioned by Fish J., who delivered the decision for the court in *Fontaine* at paragraph 53, and I quote:

Accordingly, as McLachlin J. explained in *Charemski*, *supra*, the case against the accused cannot go to the jury unless there is evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty beyond a reasonable doubt. [Emphasis in original.]

[14] The burden of proof rests on the accused to demonstrate on the balance of probabilities that this test is not met. The test is the same whether the evidence is direct or circumstantial. The application of this test varies according to the type of evidence in the prosecution's case. Where the prosecution's case is based entirely on direct evidence, application of the test is straightforward. If the judge determines that prosecution has presented direct evidence as to every element of each offence, the application must be denied.

[15] The only issue will be whether the evidence is true and that is for the trier of fact to decide. Where proof of an essential element depends on circumstantial evidence, the issue at trial is not simply whether the evidence is true. Rather, if the evidence is accepted as true, is the inference proposed by the prosecution the correct one? The judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the prosecution.

[16] The judge neither asks whether he would draw those inferences or assesses credibility. The only issue is whether the evidence, if believed, could reasonably support an inference of guilt.

[17] The offence of fraud is enunciated at section 380 of the *Criminal Code* and reads in part as follows:

380(1) Every one who, by deceit, falsehood or other fraudulent means, whether or not it is a false pretence within the meaning of this Act, defrauds the public or any person, whether ascertained or not, of any property, money or valuable security or any service,

(a) is guilty of an indictable offence and liable to a term of imprisonment not exceeding fourteen years, where the subject-matter of the offence is a testamentary instrument or the value of the subject-matter of the offence exceeds five thousand dollars.

[18] So with regard to the five charges of fraud, in addition to establishing, beyond a reasonable doubt, that Master Corporal Edmunds is the author of the alleged offence on the date and the place, as described in the particulars of the charge, the essential elements of the offence are: that Master Corporal Edmunds deprived somebody of something of value; Master Corporal Edmunds' deceit, falsehood or other fraudulent means, caused the deprivation; and Master Corporal Edmunds intended to defraud.

[19] The offence of breach of trust is enunciated at section 122 of the *Criminal Code* and reads as follows:

122 Every official who, in connection with the duties of his office, commits fraud or a breach of trust is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years, whether or not the fraud or breach of trust would be an offence if it were committed in relation to a private person.

[20] With regard to the six charges of breach of trust, in addition to establishing, beyond a reasonable doubt, that Master Corporal Edmunds is the author of the alleged offence, on the date and at the place described in the particulars of the charge, the essential elements of the offence are: Master Corporal Edmunds was an official; Master Corporal Edmunds was acting in connection with the duties of his office; Master Corporal Edmunds breached the standard of responsibility and conduct demanded of him by the nature of the office; the conduct of Master Corporal Edmunds represented a serious and marked departure from the standards expected of an individual and the accused's position of public trust; Master Corporal Edmunds acted with the intention to use his public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose.

[21] The position of the applicant, the accused in this matter, is that the prosecution has not adduced any evidence on every charge of fraud on the essential element about the accused having deprived somebody of something of value and on every charge of breach of trust, on the essential element concerning the accused having breached the standard of responsibility and conduct demanded of him by the nature of his office. Concerning the other essential elements of this offence, nothing has been mentioned by the applicant and I take it as meaning that there's no concern raised about them.

[22] The prosecution submitted to the Court that it offered some evidence through witnesses and exhibits before the Court on each essential element of each charge of fraud and breach of trust, so that the properly instructed jury could reasonably decide on the issue. In order to make a determination on the issue put before me by the applicant about all charges of fraud, I must determine if the applicant demonstrated, on the balance of probabilities that there is no evidence at the time of the commission of the

alleged offence, to the effect that Master Corporal Edmunds deprived Her Majesty the Queen of something of value.

[23] The notion of deprivation includes but does not require that Her Majesty the Queen suffer actual financial loss. It is enough that Her Majesty the Queen is induced to act to her detriment by Master Corporal Edmunds' conduct. Her Majesty the Queen's financial interest must be at risk. But Her Majesty the Queen does not have to lose any money or anything of value as a result of Master Corporal Edmunds' conduct.

[24] The prosecution put some evidence to the effect that, Master Corporal Edmunds was responsible for the procurement of medical supplies at the Brigade Pharmacy and that he had the necessary authorities to initiate the process of requesting the necessary goods and to proceed to their payment: Master Corporal Edmunds, as the sole owner of Tactical First Response, ensured that this company would be recognized as a legal contractor within the Canadian Armed Forces (CAF) financial system; Tactical First Response was required to provide goods to Master Corporal Edmunds as a pharmacy technician; an invoice was submitted by the company and he ensured that payment was made and deposited to the company's bank account; and as the sole owner of Tactical First Response, he got a personal benefit by having an exclusive access and withdrawing money from the bank account of the company.

[25] Defence counsel submitted to the Court that there is no evidence whatsoever that the goods identified in the invoices, for which payment was made, were never delivered, and accordingly, there is no evidence that Her Majesty the Queen was deprived of anything. Essentially payment was made and there is nothing proving that goods were not delivered. The prosecution responded that there is evidence that Tactical First Response was unable to get the goods identified in the invoices, which would mean that it was unable to deliver it.

[26] The Court would say that reasonable inferences can be made to the effect that, as suggested by defence counsel, it would be logical to think that Tactical First Response could have bought those goods from any other source and it constitutes a reasonable possibility that such thing may have happened. However, the Court is of the opinion that there is evidence that Her Majesty's financial interests were at risk.

[27] Clearly, there is evidence that Master Corporal Edmunds wore two hats; one as the person responsible for procurement on behalf the CAF and one as the contractor dealing with the CAF. In addition, there is some evidence that Her Majesty the Queen was induced to act at her detriment by being asked to pay for goods requested and provided by the same person who tried to hide this situation by using a corporation to proceed with the transaction.

[28] By reason of Master Corporal Edmunds' conduct coming from the evidence adduced by the prosecution, there is some evidence reasonably capable of supporting the inferences proposed by the prosecution, to the effect that Her Majesty's financial interests were at risk.

[29] It is my conclusion that the accused failed to demonstrate on the balance of probabilities that the prosecution did not present a prima facie case on all charges of fraud.

[30] Defence counsel also submitted that on the charges of breach of trust, there is no evidence that Master Corporal Edmunds breached the standard of responsibility and conduct demanded of him by the nature of his office. More precisely, he suggested that there is no evidence whatsoever of the obligation of Master Corporal Edmunds to report a conflict of interest, as he was performing the duties of pharmacy technician at the Brigade Pharmacy. And if it is not the case, that there's no evidence adduced by the prosecution that Master Corporal Edmunds did not report such conflict of interest.

[31] The prosecution argued that the wording of article 19.39 of the *QR&O* reflects an implicit obligation for Master Corporal Edmunds to report any conflict of interest and clearly, through his actions, he did not do such things. Alternatively, the prosecution submitted that there's no obligation for it to prove that the accused failed to report a conflict of interest, because the particulars referring to this obligation in the particulars of the charge are surplusage in proving the offence of breach of trust.

[32] I would say that article 19.39 of the *QR&O* cannot find application in this case in order to support the approach and argument made by the prosecution. Clearly this provision applies to dealings by a non-commissioned member with contractors. Here, the evidence is to the effect that the accused engaged, as the sole owner of Tactical First Response, in an undertaking that is or likely to be detrimental to the interest of the CAF. I would suggest that it is something more of the nature of what it is covered by article 19.43 of the *QR&O*.

[33] There is some evidence that the accused got benefits from a situation where he engaged through, not with, a contractor. There is no implicit or explicit obligation arising from article 19.39 of the *QR&O* to report a conflict of interest, as suggested by the prosecution. As such, there is no evidence of the standard of responsibility and conduct demanded of the accused by the nature of the office. There is no evidence of such standard of responsibility. As suggested by defence counsel, there is no evidence of an obligation for the accused to report a conflict of interest.

[34] In addition, the prosecution chose to particularize all charges of breach of trust by stipulating the method by which the breach of trust was committed, that is, by failing to report a conflict of interest. It does not constitute surplusage, as suggested by the prosecution, but rather a specific standard of responsibility to refer to, in order to appreciate if the offence was really committed. It is my conclusion that the accused succeeded in demonstrating, on a balance of probabilities, that the prosecution did not present a prima facie case on all charges of breach of trust. The application on the basis that the prosecution has not presented a prima facie case is, accordingly, granted in part.

[35] I would remind the prosecution that in the Supreme Court of Canada decision of *R. v. Boulanger*, 2006 SCC 32, the Court took the time at paragraph 48 to point out the nature of the offence of breach of trust in Canadian law as being one of misfeasance in public office and not neglect of an official duty.

FOR ALL THESE REASONS, THE COURT:

[36] **DISMISSES** the application regarding the first, third, fifth, seventh and fifteenth charges.

[37] **GRANTS** the application regarding the second, fourth, sixth, eighth, sixteenth and seventeenth charges.

[38] **FINDS** Master Corporal Edmunds not guilty of the second, fourth, sixth, eighth, sixteenth and seventeenth charges for breach of trust by a public officer contrary to section 122 of the Criminal Code.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for the Applicant,
Master Corporal N.S. Edmunds

The Director of Military Prosecutions as represented by Captain L. Langlois and
Captain M.L.P. P. Germain, for the Respondent