Citation: *R. v. Bombardier T.P. Forrest*, 2007 CM 3015

Docket: 200721

STANDING COURT MARTIAL
CANADA
CANADIAN FORCES BASE PETAWAWA
ONTARIO

Date: 22 August 2007

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
v.
BOMBARDIER T.P. FORREST
(Applicant)

DECISION ON NO PRIMA FACIE MOTION
(Rendered Orally)

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[1] On 21 August 2007, at the close of the Prosecutor's case, and pursuant to QR&O article 112.05(13), the defence presented a motion of non *prima facie* with regard to the first and only charge on the charge sheet on the basis that the prosecution had failed to present any evidence on one essential element of the offence of an act to the prejudice of good order and discipline that he was charged with under section 129(2) of the *National Defence Act.*

[2] As set out in the QR&O, the defence, or the accused, 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.

[3] Bombardier Forrest is charged under section 129(2) of the *National Defence Act* for an act to the prejudice of good order and discipline because he allegedly proceeded with beyond Canada without authorization, between 27 May and 4 June 2006, while he was on leave contrary to QR&O article 16.04.

[4] The evidence introduced by the prosecutor before this court martial is composed essentially of the following facts:

a. The testimonies heard; in the order of their appearance before the court, the testimony of Master Warrant Officer Lawless, Ms. Joella Chamberland, Warrant Officer Rigby, Master Corporal Sherret, Captain Hicks, Captain Brassard and Major Sullivan.

b. Exhibit 4, the 2nd Regiment Royal Canadian Horse Artillery Routine Orders number 16/06 dated 5 May 2006. This document was entered in evidence by consent.

c. Exhibit 5, a Canadian Forces Leave Request form for Gunner T.P. Forrest dated 26 May 2006. This document was entered in evidence by consent.

d. Exhibit 6, a caution form for the interview of Gunner Forrest for the cautions administered to the latter by Lieutenant Hicks. This document was entered in evidence by consent.

e. The judicial notice taken by the court of the facts and issues under rule 15 of the Military Rules of Evidence.

[5] 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 argument 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 evidence or has completed its evidence.

[6] 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 the charge so that a reasonable jury, properly instructed, could convict: not "would" or "should", but simply "could".

[7] The governing test for a directed verdict is set out by Ritchie J. in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067 at p. 1080, as follows:

> ... whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

[8] Also, the burden of proof rests on the accused to demonstrate, on a balance of probabilities, that this test is met.

[9] 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 the Prosecution has presented direct evidence as to every element of the offence, the application must be denied. The only issue will be whether the evidence is true and that is for the trier of fact. 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 it the inference proposed by the prosecution the correct inference? The judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the prosecution. The judge neither asks whether he would draw those inferences, or assesses credibility. The issue is only whether the evidence, if believed, could reasonably support an inference of guilt.

[10] The essential elements of the offence under section 129(2) of the *National Defence Act* are:

> first, the identity of the accused;
>
> second, the date and place;
>
> third, the act alleges really occurred; and
>
> fourth, the prejudice to good order and discipline.

[11] In order to prove the prejudice to good order and discipline under section 129(2) of the *National Defence Act*, the prosecution has to adduce evidence:

> first, on the nature and the existence of the regulation;
>
> second, that the accused knew or ought to have known the standard of conduct required; and
>
> third, that the act of the accused amounted to a contravention of the regulation.

[12] The defence counsel admitted that there is some evidence before this court martial on the essential elements of the offence concerning the identity of the accused, the date and place and that the act alleged really occurred. However, he raised the fact that the prosecution failed to introduce any evidence in order to prove the prejudice to good order and discipline, and more specifically with regard to the publication and sufficiency of notification of article 16.04 of the QR&O.

[13] The defence counsel agreed with this court martial that there is some evidence of the nature and the existence of the regulation. In fact, the judicial notice taken by the court of the facts and issues under rule 15 of the Military Rules of Evidence served that purpose. Also, as mentioned above, the defence counsel admitted that there is some evidence before this court concerning the act allegedly committed by the accused in order to prove the contravention of the regulation. The accused statement reported by Captain Hicks during his testimony to the effect that Bombardier Forrest put his home address on his leave pass while he knew he was going out of the country and that he really went there does support this conclusion.

[14] Then, this court martial has to decide if the prosecution introduced some evidence before this court martial concerning the publication and the notification of the regulation to the accused.

[15] The main purpose of section 129(2) of the *National Defence Act* is to give effect to the regulation made by the civilian authorities concerning "the organization, training, discipline, efficiency, administration and good government of the Canadian Forces" as mentioned at section 12 of the *National Defence Act*.

[16] The regulation made under section 12 of the *National Defence Act* is exempted from registration in the Canada Gazette as specified at section 7(a) of the *Regulations Respecting the Examination, Publication and Scrutiny of Regulations and Other Statutory Instruments*. The effect of this exemption is that all the regulation is out of the public domain and unknown to the member of the CF members unless it is duly notified.

[17] It explains the existence of section 150 of the *National Defence Act*, which reads as follow:

> **150.** The fact that a person is ignorant of the provisions of the Act, or of any regulations or of any order or instruction duly notified under this Act, is no excuse for any offence committed by the person.

[18] One of the means available for the prosecution to prove that the accused had knowledge of the applicable regulation at the time of the offence is to put evidence before this court martial that Bombardier Forrest had a personal knowledge of it. In this case, the prosecution did not introduce any evidence of that sort.

[19] One other mean to prove that the accused had knowledge of the applicable regulation at the time of the offence is to comply with the requirements of QR&O articles 1.21 or 1.22, which were made by the Governor in Council pursuant to section 12 of the *National Defence Act*. Both articles create a legal presumption of the knowledge of the applicable regulation by an accused if all the conditions are respected.

[20] In the case before this court martial, the prosecution relies on QR&O article 1.22, which is effective since 1 January 2006, to prove its case. It reads as follow:

> **1.22 - ELECTRONIC PUBLICATION AND NOTIFICATION OF QR&O**
>
> (1) The definitions in this paragraph apply in this article.
>
> "defence web site" means a web site on the internal electronic network of the Department of National Defence and the Canadian Forces, also known as the "Defence Information Network" or "DIN", or a web site of the Department of National Defence or the Canadian Forces on the Internet.
>
> "PDF" means portable document format.
>
> (2) QR&O shall be held to be published and sufficiently notified to any person whom they may concern if
>
> (*a*) they are published electronically under the authority of the Chief of the Defence Staff in PDF on a defence web site; and
>
> (*b*) the commanding officer of the base, unit or element at which the person is serving notifies the person of the publication and takes such measures as may seem practical to ensure that the defence web site is made reasonably accessible to that person.
>
> (3) If a commanding officer considers that measures cannot be taken under subparagraph (2)(*b*), the commanding officer shall ensure that
>
> (*a*) all amendments made to QR&O on or after 1 January 2006 are printed on paper from the PDF published under subparagraph (2)(*a*); and
>
> (*b*) publication and notification of the amendments are provided under article 1.21 (*Notification by Receipt of Regulations, Orders and Instructions*).

[21] In order to prove that QR&O article 16.04 shall be held to be published at the time of the incident, or at any time between 1 January 2006 and the time of the incident, the prosecution had to prove that this article of the QR&O was published:

a. electronically;

b. under the authority of the Chief of Defence Staff;

c. in PDF, as defined at paragraph 1; and

d. on a defence web site, as also defined at paragraph 1.

[22] The evidence introduced by the prosecution does prove that the QR&Os were published electronically, according to the testimony of Master Warrant Officer Lawless. She mentioned, while talking about the 2 RCHA web site, that the QR&Os were available on it.

[23] However, there is no evidence whatsoever that the electronic version of the QR&Os was published under the authority of the Chief of the Defence Staff in PDF on a defence web site. Then, the accused has proved, on a balance of probabilities, that there was no evidence concerning the publication of QR&O article 16.04.

[24] Additionally, the court would have concluded that the commanding officer of 2 RCHA would have not taken such measures as may seem practical to ensure that the defence web site was made reasonably accessible to the accused, because the evidence disclosed that the accused was not at the unit when the Routine Orders (Exhibit 4) were put on the web site. Further to a question of the court in order to clarify the duration of the MAPLE GUARDIAN exercise on which was the accused, Warrant Officer Rigby told the court that four to six weeks prior to 27 May 2006, which is the day the accused started his leave, Bombardier Forrest was in Wainwright, in Alberta. The accused not being at the unit before the Routine Orders were issued up to the time he was sent on leave, how it could have been possible for the court to consider that Bombardier Forrest was sufficiently notified of the QR&O and that he had a reasonable access to the appropriate web site. The court does not have the answer because no evidence was introduced to that effect.

[25] QR&O article 1.22(3) can not be used in the actual circumstances because no evidence was presented by the prosecution to the court in order to meet the criteria listed. It is very important to remember that pursuant to article 15 of the Military Rules of Evidence, the court shall take judicial notice of the contents of the QR&Os, but not of the publication of sufficiency of notification of these QR&Os. It is necessary that the publication and notification be proven before this court.

[26] Then, I conclude that the accused proved on a balance of probabilities that there was no evidence upon which a reasonable jury properly instructed could return a verdict of guilty about the first and only charge on the charge sheet, and more specifically with regard to the electronic publication and notification to the accused of article 16.04 of the QR&O.

[27] Bombardier Forrest, please stand up. It is my decision that a *prima facie* case has not been made out against you on the first and only charge on the charge sheet and this court martial finds you not guilty of that charge.

LIEUTENANT-COLONEL L.V. D'AUTEUIL, M.J.

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