**COURT MARTIAL**

**Citation:** *R. v. Britz*, 2014 CM 3015

**Date:** 20140910
**Docket:** 201385

General Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Corporal J.M. Britz, Accused**

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

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**NO *PRIMA FACIE* APPLICATION ON THE FIRST CHARGE BROUGHT BY DEFENCE COUNSEL**

(Orally)

[1] Corporal Britz is charged with three offences for disobeying a lawful command of a superior officer contrary to section 83 of the *National Defence Act* and one offence punishable under section 85 of the *National Defence Act* for behaving with contempt toward a superior officer. Essentially it is alleged that in August and September 2012, Corporal Britz did not perform a daily duty to conduct a data pull at Brigade Headquarters and bring the saved data to the analyst at his unit as ordered to do so, and that he behaved with contempt towards one of those who gave him such an order.

[2] As set out in the *Queen Regulations & Orders of Canada* (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.

[3] Then, on 9 September 2014, at the close of the prosecution's case, and pursuant to QR&O 112.05(13), the accused presented a motion of non *prima facie* with regard to the first charge 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 offence laid under section 83 of the *National Defence Act*.

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

> **DISOBEYED A LAWFUL COMMAND OF A SUPERIOR OFFICER**
>
> *Particulars*: In that he, on or about 16 August 2012, at or near CFB Petawawa, Ontario, refused to conduct the classified data pull from CSNI located at Z101 between 21 August 2012 and 5 September 2012 as ordered to by PO1 Poirier.

[5] The evidence before this court martial is composed essentially of the following facts:

(a) the testimony of Dr Davenport, Petty Officer 1st Class Poirier, and Master Corporal McIvor;

(b) Exhibit 4, a copy of a Canadian Forces Health Services Chit concerning Corporal Britz and dated 18 May 2012;

(c) Exhibit 5, a copy of a Canadian Forces Health Services Chit concerning Corporal Britz and dated 13 August 2012;

(d) Exhibit 6, a copy of medical notes taken by Dr Davenport concerning Corporal Britz and dated 10 August 2012;

(e) Exhibit 7, a copy of medical notes taken by Dr Davenport concerning Corporal Britz and dated 31 August 2012;

(f) Exhibit 8, a copy of a Change of Medical Employment Limitation Form concerning Corporal Britz and dated 2 November 2012;

(g) Exhibit 9, a copy of article 19.02 of the *Queen's Regulations and Orders for the Canadian Forces*;

(h) admissions made by Corporal Britz in accordance with paragraph 37(*b*) of the Military Rules of Evidence, for the purpose of dispensing with proof any fact the prosecutor must prove, and more specifically:

(i) his identity in regards of the four charges before the court;

(ii)a superior officer was involved and he knew the status of the superior officer concerning the four charges before the court; and

(i) the judicial notice taken by the court of the facts in issues under Rule 15 of the Military Rules of Evidence, and more specifically concerning article 19.02 of the QR&O.

[6] 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 have either elected, not to call evidence or have completed their evidence.

[7] The governing test for a directed verdict was set out by Judge Ritchie in *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.

[8] 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 a properly instructed jury could reasonably decide on the issue; not "would" or "should," but simply "could."

[9] At the end of the day, the test to be applied is the one mentioned by Judge Fish, who delivered the decision for the court in *Fontaine* at paragraph 53:

> 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.

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

[11] 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 each 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.

[12] Section 83 of the *National Defence Act* reads as follows:

> Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

[13] The essential elements of the offence under section 83 of the *National Defence Act* are:

(a) the identity of the accused as the offender;

(b) the date and place of the offence;

(c) the order, which means that:

(i) an order was given to Corporal Britz;

(ii) the order was lawful;

(iii) the order was received or known by Corporal Britz;

(d) the order was given to Corporal Britz by a superior officer, which means that:

(i) in fact, it was a superior officer who gave the order;

(ii) the status of the superior officer was known by Corporal Britz.

(e) Corporal Britz did not comply with the order; and

(f) the blameworthy state of mind of Corporal Britz.

[14] The position of the applicant is that the prosecution has not adduced any evidence that Corporal Britz did not comply with the order on 16 August 2012.

[15] Concerning the other essential elements of this offence, nothing has been mentioned by the applicant, and I take it as meaning that there is no concern raised about them.

[16] The prosecution submitted to the court that it offered some evidence on each essential element of this charge so that a properly instructed jury could reasonably decide on the issue. More specifically, he suggested that there is some evidence through

one witness, Petty Officer 1st Class Poirier that Corporal Britz did not comply with the order given.

[17] Then, in that context, the only question I have to answer is the following one: Is there evidence in the record upon which a properly instructed panel could rationally conclude that the accused is guilty beyond a reasonable doubt, especially regarding the essential element of the offence that Corporal Britz did not comply with the order?

[18] To establish disobedience it is essential to prove that an accused did not act with a command. So there must be some evidence that an accused has to do something and that he failed to do it. As mentioned at note D of article 103.16 of the QR&O:

> The disobedience must relate to the time when the command is to be obeyed and may arise from the failure to comply at once with a command which requires prompt and immediate obedience or a failure to take a proper opportunity to carry out a command which requires compliance sometime in the future. A person must therefore have and fail to take the opportunity of carrying out a command before it is an offence under this section.

[19] In order to make a determination on the issue put before me by the applicant, I must determine if he demonstrated, on a balance of probabilities, that there is no evidence at the time of the commission of the alleged offence that Corporal Britz did not comply with the order given by Petty Officer 1st Class Poirier.

[20] The testimony of the latter disclosed the following fact:

(a) On 16 August 2012, he informed Corporal Britz that he was doing the duty Intel position for 24 August to 4 September 2012;

(b) This duty involved the fact that Corporal Britz would have to go from the unit building to the Brigade Headquarters building located at a distance of 800 metres in order to conduct a CSNI data pull, to save that data on a disc, to bring it back at the unit, and to give it to the analyst;

(c) It was a daily tasking to be performed by a member of the section at around 9:30 AM;

(d) Petty Officer 1st Class Poirier, being aware of the injured knee condition of Corporal Britz through medical chits he saw previously, and knowing that Corporal Britz did not have a personal car, he did a favour to him by offering to use a military vehicle to perform the duty;

(e) Corporal Britz then raised that he could not drive a military vehicle as per doctor's instructions; and

(f) Petty Officer 1st Class Poirier took that answer as Corporal Britz refusing to perform the duty and he gave him the opportunity to get

> doctor's instruction in writing. Essentially Corporal Britz was asked to get a medical employment limitation stating that he could not drive a military vehicle. That would have put the issue to a rest; it would have gone away.

[21] There is evidence that on 16 August 2012, Corporal Britz was told that he would have to act in accordance with a command at a later date. However, there is no evidence whatsoever that he had to comply with that order on that specific day. There is evidence that he clearly announced that he considered himself in a position that he could not comply with the order when the time would come to execute it at a later date, and there is evidence that he was given an opportunity to consider to comply with it at the time he would have to do it, considering the matter he raised.

[22] It is also my conclusion that the evidence adduced by the prosecution is not reasonably capable of supporting the inference proposed by the prosecution, which is that Corporal Blitz failed to comply with the order on 16 August 2012.

[23] Having concluded to the absence of any evidence concerning the order for which Corporal Britz would have to comply with on that specific date, I have to conclude that there is no evidence on another essential element, which is the order itself. The evidence adduced by the prosecution is to the effect that the date of the issuance of the order is not the same as the date the accused would have had to comply with it. This last element is essential to be proven in order to create an obligation on the accused to act in accordance with a command, which means to establish disobedience.

[24] The accused was clearly directed that he would have to perform a daily duty, starting eight days later, for a period of two weeks. There is no evidence whatsoever that he had to perform that task on the day he was told. If there is no order to comply with on or about the day he was told as indicated in the particulars of the charge, then it could make it impossible for a properly instructed panel to rationally conclude that the accused is guilty beyond a reasonable doubt of disobedience to a lawful command of a superior officer.

[25] In the absence of any evidence that Corporal Britz had to comply with an order on or about 16 August 2012, then consequently there is no evidence that he did not comply with such an order on that same day.

[26] Then, I conclude that there is no evidence about the essential element that Corporal Britz did not comply with the order. I also conclude that there is no evidence of an order to be complied with on the day specified in the particulars of the charge.

[27] It is my conclusion that Corporal Britz, as the applicant in this matter, demonstrated on a balance of probabilities that there is no evidence at the time of the commission of the alleged offence about the existence of an order and that he did not comply with such an order.

[28] Considering all the essential elements of the offence for the first charge, it is my conclusion there is no evidence in the record upon which a properly instructed panel could rationally conclude that the accused is guilty beyond a reasonable doubt of disobedience to a lawful command of a superior officer contrary to section 83 of the *National Defence Ac*t.

[29] It is my decision that a *prima facie* case has not been made out against you on the first charge on the charge sheet.

**FOR THESE REASONS, THEN THE COURT:**

[30] **GRANTS** your application.

[31] **FINDS** you not guilty of the first charge.

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**Counsel:**

The Director of Military Prosecutions as represented by Major J.E. Carrier

Major C.E. Thomas, Defence Counsel Services, Counsel for Corporal J.M. Britz