



COURT MARTIAL

Citation: *R. v. Murphy*, 2014 CM 3021

Date: 20141118

Docket: 201412

Standing Court Martial

Lieutenant Colonel D.V. Currie, VC, Armoury
Moose Jaw, Saskatchewan, Canada

Between:

Her Majesty the Queen

- and -

Corporal J. J. Murphy, Accused

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

REASONS FOR FINDING

(Orally)

[1] Corporal Murphy is charged with one service offence under the *National Defence Act* concerning an incident that allegedly occurred on 13 April 2013 at the Junior Ranks Mess of Lieutenant Colonel D.V. Currie, VC, Armoury in Moose Jaw, Saskatchewan.

[2] More specifically, the count on the charge sheet refers to an offence laid under section 95 of the *National Defence Act* for striking a person who by reason of rank was subordinate to him.

[3] The evidence presented to the Court is mainly *viva voce* evidence and the witnesses heard, in order of appearance before the Court, are Trooper Morin, the complainant in this matter, Master Corporal Buckmaster, Corporal Murphy, the accused before this Court, Mr Folk, Corporal England and Mr Daniel Murphy.

[4] In addition, the Court took judicial notice of the matters enumerated at article 15 of the Military Rules of Evidence.

[5] According to the evidence adduced by the prosecution, Trooper Morin was at the Junior Ranks Mess at Lieutenant Colonel D.V. Currie, VC, Armoury in Moose Jaw, Saskatchewan on the evening of 13 April 2013, which is a Saturday. He was sitting on the couch, having a drink and watching the Super Bowl on television. He heard his name called by Mr Daniel Murphy, Corporal Murphy's brother. He also heard some laughing and shortly after, somebody struck him twice with his hand from behind on the right side of his face and once with a closed fist in the back of his head. He did not know why such thing happened. He finished his drink and left the mess.

[6] Master Corporal Buckmaster was at the mess on that night, and he saw Corporal Murphy's brother engaging in a conversation at the back of the television, both in a standing position. He then saw Corporal Murphy approaching Trooper Morin, got his attention and as soon as Trooper Morin turned around, Corporal Murphy gave a slap against the head of Trooper Morin. He heard nothing about the conversation prior to that moment; he did not notice any incident before or after this event between those two persons. According to him, there was no altercation, no arguments, no anger, and no dispute that occurred between both individuals after the incident and he has no idea concerning the reasons that led up to Corporal Murphy doing such thing to Trooper Morin. He saw Trooper Morin leaving the mess some time later.

[7] As stated by witnesses called by the defence, including Corporal Murphy, the latter carpooled with one of his friends and his brother to go to the mess to watch the Ultimate Fighting Championship (UFC) on television. Shortly after they arrived, Corporal Murphy and his brother met with Trooper Morin, who appeared, according to them, drunk. He could not walk straight, his speech was slower, he had several drinks before and he was still drinking a double rum and coke he had just ordered.

[8] Trooper Morin was later sitting on the couch to watch UFC on television, while Corporal Murphy and his brother started to play pool at the table located just behind that couch. At some point, Corporal Murphy's brother started to call out Trooper Morin who seemed not responsive because he was leaning on the couch. It looked like Trooper Morin was passing out. Concerned by the fact that he was not reacting, Corporal Murphy approached Trooper Morin by the back and tapped him, with no real force, several times on the left side of his face with his left hand, asking him if he was okay. He did not get any answer.

[9] Trooper Morin sat. He seemed perturbed and upset, did not say anything for a while and finally got up and left. Corporal Murphy's brother talked to him briefly while he was getting his coat and Trooper Morin left the mess.

[10] Before this Court provides its legal analysis, it's appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with the principle fundamental to all criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[11] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[12] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person. There is no burden on Corporal Murphy to prove that he is innocent. He does not have to prove anything.

[13] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R v Lifchus* [1997] 3 SCR 320 the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts' subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case. The fact that a person has been charged is no way indicative of his or her guilt and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before a court.

[14] In *R v Starr* [2000] 2 SCR 144, at paragraph 242, the Supreme Court held that:

... an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

[15] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case, Corporal Murphy, beyond a reasonable doubt. To put it in perspective, if the Court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[16] What is evidence? Evidence may include testimony under oath or solemn affirmation before the Court by witnesses about what they observed or what they did; it could be documents, photographs, maps or other items introduced by witnesses; the

testimony of expert witnesses; formal admissions of facts by either the prosecution or the defence; and matters of which the Court takes judicial notice.

[17] It is not unusual that some evidence presented before the Court may be contradictory. Often witnesses may have different recollections of events. The Court has to determine what evidence it finds credible.

[18] Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness' opportunity to observe; a witness' reasons to remember, like, were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[19] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers or evasive, hesitant or argumentative? Finally, was the witness' testimony consistent with itself and with the uncontradicted facts?

[20] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and it may well taint a witness' entire testimony.

[21] The Court is not required to accept the testimony of any witness except to the extent that it has impressed the Court as credible. However, a court will accept evidence as trustworthy unless there is a reason, rather, to disbelieve it.

[22] As the rule of reasonable doubt applies to the issue of credibility, the Court is required to definitely decide in this case first on the credibility of the accused, and to believe or disbelieve his evidence. It is true that this case raises some important credibility issues and it is one of those cases where the approach on the assessment of credibility and reliability expressed by the Supreme Court of Canada in *R. v. W. (D.)* must be applied, because the accused, Corporal Murphy, testified.

[23] As established in that decision at page 758, the test goes as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[24] This test was enunciated mainly to avoid for the trier of facts, to proceed by establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word by word as some sort of incantation (see *R. v. S. (W.D.)*, [1994] 3 SCR 521, at page 533).

[25] The pitfall that this Court must avoid is to be in a situation appearing to or in reality to choose between two versions in its analysis. As recently established by the Supreme Court of Canada in its decision of *R. v. Vuradin*, 2013 SCC 38, at paragraph 21:

The paramount question in a criminal case is whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused: *W.(D.)*, at p. 758. The order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration. A verdict of guilt must not be based on a choice between the accused's evidence and the Crown's evidence: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 6-8. However, trial judges are not required to explain in detail the process they followed to reach a verdict: see *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, at para. 29.

[26] The essential elements that the prosecution had to prove beyond a reasonable doubt in order to support a finding of guilt by the Court concerning Corporal Murphy on the offence of striking Trooper Morin who by reason of rank was subordinate to him are:

- (a) the identity of Corporal Murphy as the author of the alleged offence;
- (b) the date of the offence;
- (c) the place of the offence;
- (d) that Corporal Murphy struck Trooper Morin;
- (e) that Trooper Morin was subordinate to Corporal Murphy by reason of his rank; and
- (f) the blameworthy state of mind of Corporal Murphy.

[27] As a matter of fact, both parties presented evidence that required this Court to decide only on one issue, which is about the blameworthy state of mind of Corporal Murphy.

[28] In fact, Corporal Murphy admitted in his own testimony as being the author of the alleged offence and that the alleged offence took place on 13 April 2013 at the

Junior Ranks Mess of Lieutenant Colonel D.V. Currie, VC, Armoury in Moose Jaw, Saskatchewan. His evidence was confirmed by all other witnesses called by both parties.

[29] Then, the Court is satisfied that the prosecution has discharged its burden of proof beyond a reasonable doubt regarding the essential elements on the identity, date and place concerning the offence.

[30] About the essential element regarding Trooper Morin as a subordinate to Corporal Murphy by reason of his rank, evidence demonstrates that at the time of the alleged incident, both Trooper Morin and Corporal Murphy were holding those ranks. Trooper is the equivalent of Private in the Canadian Forces armoured fighting vehicles units, such as the Saskatchewan Dragoons, to which both individuals belonged at the time of the incident.

[31] Then, the Court is satisfied that the prosecution has discharged its burden of proof beyond a reasonable doubt regarding this essential element.

[32] Now, concerning the essential element of the offence about Corporal Murphy striking Trooper Morin, the Court is also satisfied that the prosecution has discharged its burden of proof beyond a reasonable doubt on this specific essential element of the offence.

[33] As mentioned at article 1.04 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), words shall be construed according to the common approved meaning given in the Concise Oxford Dictionary. As a matter of fact, the word "strike" is defined in that dictionary as meaning "deliver a blow to". "Blow" in the same dictionary is described as "a powerful stroke with a hand or weapon". Meaning of "powerful" is "having physical strength or force" and the word "stroke" means "an act of hitting".

[34] So essentially, in the context of the reading of section 95 of the *National Defence Act*, the term "strike" would have the meaning of delivering with physical strength or force an act of hitting with a hand or weapon.

[35] Without giving any specific weight to it, the Court notes that Note B of article 103.28 of the *Queen's Regulations and Orders* indicates about the same meaning of the verb "strike" by stating the following:

"Strikes" means that a blow is struck with the hand or fist or something which is held in the hand.

[36] Prosecution's witnesses described the incident as Corporal Murphy striking or slapping Trooper Morin on the head or on the side of the face. Slapping, according to the Oxford Concise Dictionary, is a word describing more precisely the same action of striking, because it means "hit or strike with the palm of one's hand".

[37] Evidence adduced by Corporal Murphy described his action on Trooper Morin at the time of the incident as "tapping" on the side of the face of Corporal Morin to make sure that the latter was not passing out, considering the quantity of alcohol he consumed on that evening. The verb "tap" is defined in the Concise Oxford Dictionary as "striking or knocking with a quick light blow or blows".

[38] It is clear for the Court that, despite the fact that the incident was reported by different witnesses as Corporal Murphy striking, slapping or tapping on the face of Trooper Morin, and giving the full meaning to those words used by them, the end result is that Trooper Morin was struck by Corporal Murphy, no matter how forceful he was. It appears to the Court that the evidence adduced indicates clearly that it was more than a simple touch.

[39] Consequently, the Court is also satisfied that the prosecution has discharged its burden of proof beyond a reasonable doubt regarding this essential element.

[40] Then, it brings the Court to discuss the last but not the least essential element of this offence, which is the blameworthy state of mind of Corporal Murphy.

[41] In *R. v. Latouche*, CMAC-431, Judge Ewaschuk, on behalf of the Court, made a thorough analysis of what is *mens rea* in general (see paragraph 13 to 27). At paragraph 20, he described the *mens rea* as referring "to the blameworthy state of mind required for the commission of the particular crime charged, as prescribed by the definitional elements of the crime."

[42] At paragraph 27 of that decision, he concluded his analysis in the following terms:

In the end, *mens rea* is the mental fault required by the definitional essential elements of the crime charged, regardless of the accused's intent, or lack thereof, to contravene the law, and regardless of his knowledge of the law, his moral blameworthiness, or his motivation for his conduct.

[43] So, what is the mental fault required by the definitional essential element of section 95 of the *National Defence Act*, which is the offence of striking a person who by reason of rank was subordinate to him?

[44] Section 95 of the *National Defence Act* reads as follows:

Every person who strikes or otherwise ill-treats any person who by reason of rank or appointment is subordinate to him is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[45] It must be noted that title of section 95 of the *National Defence Act* is "Abuse of subordinates". It appears to the Court that Parliament enacted such provision in order to prevent any abusive behaviour by Canadian Forces members in position of authority

which would result in striking or using any other kind of violence toward any subordinate by reason of the existence of a ranking system in a military context.

[46] The two essential elements which characterized this specific offence are:

First, the fact to strike or ill-treat another person; and

Second, the existence of a subordinate relationship based on rank or appointment between the author of the offence and the alleged victim.

[47] It appears to the Court that this offence is, in some way, the counterpart of the one at section 84 of the *National Defence Act* concerning the use of violence or threat toward authority, which is identified as the offence concerning striking or offering violence to a superior officer.

[48] The Court concludes from the reading of the Code of Service Discipline, and more specifically from the reading of section 95 of the *National Defence Act*, and from the interpretation of the definitional essential elements of that specific offence that the prosecution must prove beyond a reasonable doubt the intent of Corporal Murphy to abuse his authority or to use violence toward a subordinate because of the existence of such hierarchical relationship.

[49] In order to provide its analysis, the Court is now applying the test enunciated in the Supreme Court decision of *R. v. W. (D.)*, in order to determine if it can find any reason in the evidence considered as a whole to disbelieve the accused in his testimony on the issue of intent.

[50] All four witnesses who testified on behalf of the accused, including Corporal Murphy, testified in a straightforward and calm manner. They were clear when they provided their answers and did not hesitate to ask counsel to repeat a question if they did not understand the meaning of it.

[51] It appears to the Court that this incident became notorious to all witnesses when it became known that there would be a charge laid. All witnesses had an excellent recollection of the event. They were not in a position to provide every detail of it, considering the time elapsed since the incident, which appeared as something normal to the Court.

[52] Obviously, there were some minor discrepancies in their recollection of the incident, which is normal considering the time passed. However, their account of their story was very coherent and logic. The sequence of events reported was the same, while the timings may have differed but not enough to raise any concern.

[53] The Court had no concern with the testimony of Mr Murphy and Mr Folk as being in a way or another closely related to Corporal Murphy. From what they said and how they testified, the Court saw no concern about their interest in the outcome of the

trial. The way they both testified did not indicate to the Court in any way that they would try to make things fit in order to lead the Court to acquit Corporal Murphy.

[54] From the Court's perspective, the testimony of Corporal Murphy and the evidence provided by other witnesses he called are credible and reliable.

[55] Corporal Murphy's evidence revealed that when he approached Trooper Morin, he did that with a clear intent to help, being concerned about the well-being of his friend. The context described by the evidence adduced by the accused established clearly that Trooper Morin was drunk, about to pass out and that Corporal Murphy was concerned about him.

[56] Corporal Murphy approached Trooper Morin as a human being trying to help another one. There was no hierarchical issue when he approached him and he clearly did not want to abuse his authority or to use violence against Trooper Morin in such a context. Clearly, the evidence of Corporal Murphy raised a reasonable doubt on this issue.

[57] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of striking a person who by reason of rank was subordinate to him.

[58] That being said, I would also say that if I would have come to the conclusion that the evidence of Corporal Murphy would not have raised a reasonable doubt, then despite that, the Court would have acquitted the accused at the second stage of the test enunciated in *R. v. W. (D.)*, because his evidence, even not believed, would have left the Court with a reasonable doubt.

[59] Finally, I would add that the Court would not have been convinced beyond a reasonable doubt at the third stage of the test enunciated in *R. v. W. (D.)* because it would not have accepted the evidence adduced by the prosecution concerning the identity and the requisite intent.

[60] As a matter of fact, Trooper Morin was unable to identify who struck him on the side of the face and on the back of his head, while Master Corporal Buckmaster described a quite different context in which Corporal Murphy would have struck Trooper Morin. Also, none of those two witnesses called by the prosecution provided any reason or context for which Corporal Murphy would have acted in that way. Reality is that they had no clue to be in a position to explain the reasons behind such alleged behaviour by Corporal Murphy.

[61] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of striking a person who by reason of rank was subordinate to him.

FOR THESE REASONS, THE COURT:

[62] **FINDS** Corporal Murphy not guilty of the first and only charge on the charge sheet.

Counsel:

Major R.J. Rooney, Canadian Military Prosecution Service, Counsel for Her Majesty the Queen

Lieutenant-Commander B. Walden, Directorate of Defence Counsel Services, Counsel for Corporal Murphy