



COURT MARTIAL

Citation: *R. v. Maze*, 2014 CM 4015

Date: 20141205

Docket: 201415

Standing Court Martial

Canadian Forces Base Winnipeg
Winnipeg, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Corporal M.F. Maze, Accused

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Corporal Maze stands charged with two counts under the Code of Service Discipline in relation to events on 8 October 2013, when, then at the rank of Private, he called in sick and did not report to his place of duty at the 17 Wing Construction Engineering Mechanical Shop at Canadian Forces Base (CFB) Winnipeg and subsequently did not attend the Medical Inspection Room (MIR) after having been ordered to do so by his immediate superior.

[2] Two charges were laid as a result of the incident, the first under s. 83 of the *National Defence Act* for Disobedience of a Lawful Command and the second under s. 90 of the *National Defence Act* for Absence without leave (AWOL).

THE EVIDENCE

[3] The prosecution called three witnesses in this trial: Master Corporal Hall, the immediate supervisor of Corporal Maze and all other refrigeration technicians at the Mechanical Shop; Warrant Officer Delamere who, in October 2013, was the Mechanical Shop 2IC and supervisor of Master Corporal Hall and Master Corporal Dewald and, finally, Mr Paul Robins who, also in October 2013, was the Acting Shop Supervisor, and civilian supervisor of Warrant Officer Delamere. The defence called Master Corporal Dewald, supervisor of the plumbing technicians in the Mechanical Shop; Mr Steven Hartwig and Corporal Maxwell who, in 2013, were colleagues of Corporal Maze as refrigeration technician working for Master Corporal Hall. Defence also called Captain Mockford to explain the procedures applicable to the sick parade and the MIR at CFB Winnipeg. Finally, the defence also called Corporal Maze who testified in his own defence.

[4] In addition to these witnesses, the court admitted a number of documents as exhibits and took judicial notice of the matters contained in Military Rule of Evidence 15.

THE FACTS

[5] Most of the facts material to this decision are not contested and the relevant factual backdrop is not overly complex. It can be briefly summarized as follows:

Corporal Maze's duty commenced at 0730 hours at the Mechanical Shop on 8 October 2013. At 0624 hours, Corporal Maze left a voice mail at the phone extension shared by all of the supervisors at his place of work. In that message, he indicated that he would not be coming in that day, because he was sick. Master Corporal Hall spoke to Corporal Maze by phone at 0800 hours and told him "You will go to the MIR and come back to the unit with a sick chit" or words to that effect. During that brief conversation, Master Corporal Hall also offered Corporal Maze transportation from his home to the MIR, an offer that Corporal Maze declined. For over three hours afterwards, Corporal Maze stayed at home. He testified that he was sick and incapacitated, an assertion that was challenged by the prosecution on cross-examination. In any event, it is not contested that around 1120 hours, Corporal Maze sent a text message to Master Corporal Hall, stating that, after all, he would need a ride to attend the MIR. At that point, no transportation could be made available. Master Corporal Hall texted back, to the effect that Corporal Maze was to stay home and report to him and Warrant Officer Delamere in the afternoon the next day, 9 October 2013 upon returning from a range session. Corporal Maze stayed at home for the rest of the day on 8 October and reported as ordered in the afternoon of 9 October.

THE FIRST CHARGE: DISOBEDIENCE OF A LAWFUL COMMAND

Turning now to the first charge under s. 83 of *the National Defence Act* for Disobedience of a lawful command.

Issues

[6] Most of the elements of that offence were beyond dispute and not in issue. The identity of Corporal Maze as the offender and the date and place of that offence, on 8 October 2013 at Corporal Maze's home in St-Adolphe, Manitoba, are not contested. Also, the facts that an order "to report to the Medical Inspection Room" as particularized in the charge, was given by a superior officer, known to the accused as a superior officer, and was received and known by the accused, are not disputed. Also, the defence conceded, and the court agrees, that the order was lawful.

[7] What is at issue is the non-compliance by the accused with the order, i.e., the disobedience, which in this case impacts on the blameworthy state of mind of the accused as well.

Position of the parties

[8] The positions of the parties on this issue are as follows:

- (a) The prosecution argues that by refusing the offer for transportation for the MIR during the phone conversation with Master Corporal Hall at 0800 hours on 8 October, Corporal Maze manifested his intention not to follow the order given to him, an intention which materialized in non-compliance as the day progressed, given his ultimate failure to attend the MIR.
- (b) In reply, the defence argues that the order given to Corporal Maze did not specify a time for execution and could therefore be executed as late as 1600 hours, time at which the MIR ceased admitting patients. The defence submits that Corporal Maze intended to comply with the order to report to the MIR, an intention he manifested proactively by texting Master Corporal Hall at around 1120 hours to request transportation to the MIR. When Master Corporal Hall's text message came in reply however, that intention became irrelevant as the order had been rescinded and replaced by an order to stay at home. Consequently, the defence argues, Corporal Maze did not have a sufficient opportunity to comply with the initial order to attend the MIR.

Analysis

[9] In analysing the requirements attached to the element of non-compliance with the order at issue here, the court finds it useful to consider the Notes appended to article 103.16 of the *Queen's Regulations and Orders (QR&O)* which, although not binding, should be respected as doctrinal authorities based on past decisions of courts and on

principles and opinions developed over the years by experts in military law. These notes pertaining to the offence of disobedience of a lawful command are particularly extensive. Note D pertains directly to the issue of compliance with the order and is worth quoting here:

To establish an offence under this section it is necessary to prove non-compliance with a command, i.e., disobedience. 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. One who merely says "I will not do it" does not disobey a command if in fact he repents and carries it out when it is to be done, although he may be liable under section 129 of the *National Defence Act*.

[10] The court solicited and obtained input from counsel as to whether the order to report to the MIR was a command which required prompt and immediate obedience or a command which required compliance sometime in the future. Upon consideration of the submissions of counsel, the court concludes that given the nature of the actions required to obey the order and the absence of specific direction in the order as to timings to report to the MIR, this is a type of command which required compliance sometime in the future. This does not mean however that the order could be executed anytime. The uncontested evidence to the effect that Corporal Maze was to come back to the unit with a sick chit the same day reveals that the time to comply extended to a time in the afternoon which would have allowed Corporal Maze to attend the MIR, be seen and be released in time to drive the required two minutes to his place of work at building 77 and arrive for 1600 hours, the time at which the Mechanical Shop closes.

[11] The prosecution argues that in refusing the transport to the MIR offered to him, Corporal Maze had and failed to take the opportunity of carrying out the command. In my view however, even if in accepting the offer for a ride to the MIR Corporal Maze could have taken up an opportunity to comply with the order "to report to the MIR", the nature of the order, which did not include a specific timing, was such that there could be more than one opportunity to comply. Indeed, the offer of a vehicle was more an offer of a means of compliance than an opportunity. In hanging up the phone just after 0800 hours on 8 October, Master Corporal Hall implicitly accepted that Corporal Maze would drive himself instead of being driven to the MIR. Master Corporal Hall must have recognized that his order could have been complied with through different means. Otherwise, he would have simply ordered Corporal Maze to wait for transportation provided.

[12] The Note to *QR&O* 103.16 quoted above shows that even a stated refusal to comply is not disobedience if a person in fact repents and carries out the command when it is to be done. *A fortiori*, a stated acceptance to comply, coupled with a positive step taken by Corporal Maze to ask for a means to comply at 1120 hours, well within the time afforded to him to comply cannot, in itself, be equated with non-compliance.

[13] Arguments were submitted about the credibility of Corporal Maze and whether he should be believed when he testified to the effect that he was sick and incapacitated by nausea, diarrhea and vomiting in the morning of 8 October 2013. In analysing the accused's testimony, the court found no reason to find that the credibility of Corporal Maze is impeached in relation to being sick. Yet, the court does not need to believe Corporal Maze on that point to analyse the element of non-compliance. There is no dispute that at around 1120 hours, Corporal Maze proactively signalled his intent to comply with the order by requesting a ride to the MIR. At that time, there was still ample time for Corporal Maze to attend the MIR, be seen and report back to building 77 before 1600 hours, even if he had been told that transportation was no longer available. Corporal Maze could have asked someone else to drive him or drive himself. As it turned out, he was not told at that time to make it to the MIR anyway; he was told to stay home.

Conclusion

[14] The court concludes that in light of the specific order given "to report to the MIR" and the lack of timing accompanying that order, there was a valid opportunity for Corporal Maze to comply with the order in the afternoon of 8 October, an opportunity he could not take as the order was rescinded at around 1120 hours.

[15] The court must therefore find that the prosecution has failed to prove beyond a reasonable doubt the essential element of non-compliance by Corporal Maze with the order given by Master Corporal Hall. In light of that finding, the court does not need to comment on the blameworthy state of mind of the accused in order to arrive at a finding of not guilty on the charge of disobedience of a lawful command.

THE SECOND CHARGE: ABSENCE WITHOUT LEAVE

[16] Turning now to the second charge of Absence without leave contrary to s. 90 of the *National Defence Act*.

The place of duty

[17] The court believes it is essential to begin its analysis by commenting on the particulars of the charge of Absence without leave which are quite unique in this case as they do not disclose a specific place of duty. Indeed, Corporal Maze is charged for absenting himself without leave "In that he, at 0730 hours on 8 October 2013, at or near CFB Winnipeg, Winnipeg, Manitoba, without authority was absent from his place of duty, and remained absent until 1140 hours, 8 October 2013."

[18] Based mainly on the testimony of Master Corporal Hall, the prosecution submits that the "place of duty" that's particularized in the charge shifted throughout the morning of 8 October 2013. It commenced at CFB Winnipeg at 0730 hours, when Corporal Maze was supposed to be at work at the Mechanical Shop in building 77. At 0800 hours, once Master Corporal Hall had delivered his order by phone to Corporal

Maze to report to the MIR, the place of duty would have shifted to the MIR, until around 1120 hours, when Master Corporal Hall rescinded his order and asked Corporal Maze to stay home, at which time Corporal Maze was present where he was ordered to be, for the first time in the day.

[19] This submission cannot be accepted for two reasons. First, to sustain a charge of AWOL within a single day as we have here, the prosecution must prove the elements of date, place and time of duty or name a specific parade. Clearly, the prosecution is unable to do this in relation to the MIR as a place of duty on 8 October 2013, given that the evidence presented, as discussed before in relation to the offence of disobedience, reveals that Master Corporal Hall did not provide Corporal Maze with a specific time to be at the MIR. Secondly, a superior cannot, by issuing an order to attend a specific place, make a subordinate instantly AWOL for a failure to be at that place at the time the order is given. This is not to suggest that Master Corporal Hall wanted to trick Corporal Maze in being AWOL by virtue of his order; he certainly understood that it would take some time for Corporal Maze to get dressed and drive from his home in St-Adolphe to the MIR. I accept from his evidence that he expected Corporal Maze to proceed immediately to the MIR. Yet, this is not a charge of failing to meet expectations, it is a charge of AWOL and time of duty is an essential element of such a charge in the circumstances of this case. There cannot be a viable charge for being absent from the MIR without that element of time, absent here.

The possibility of a special finding

[20] That being decided, there is an element of date, time and place of duty which has been proven in relation to the duty on Corporal Maze to attend the Mechanical Shop at CFB Winnipeg at 0730 hours on 8 October 2013. The element of absence is also present. I find that the court could make a special finding that Corporal Maze was absent from CFB Winnipeg between 0730 hours and 0800 hours under s. 138 of the *National Defence Act* because the difference between the facts proven relating to an absence from 0730 to 0800 hours and those particularized in the charge, namely between 0730 and 1140 hours have not prejudiced the defence, which very aptly fought the charge of AWOL, period by period, including the portion between 0730 and 0800 hours.

Elements to be proven

[21] There remain two elements to be proven beyond reasonable doubt by the prosecution to obtain a guilty finding for failing to attend the Mechanical Shop at 0730 hours on 8 October 2013: first, that the accused knew or should have known where and when the duty took place and second, that the absence was not authorized.

[22] As for the element of knowledge, it is admitted that the normal time and place of duty was known by Corporal Maze, which is sufficient in the opinion of the prosecution. What the defence submits, however, is that this was not a normal day; it was a day when Corporal Maze had informed his superiors that he was sick and would

not come in. Having done that, the defence argues that he could not have known that his duty was to attend at 0730 hours at the Mechanical Shop.

[23] As for the element of absence of authorization, the evidence of both prosecution and defence witnesses unquestionably establish that a practice existed at the Mechanical Shop, to the effect that military personnel who felt sick could call before 0730 hours to obtain the authorization or approval for them to stay home for the day. Such a practice which excuses sick personnel from showing up for work is not unusual in any workplace.

[24] Where both sides diverge though is on the exact procedure that had to be followed for this authorization to operate. The prosecution argues that Corporal Maze had been given specific instructions to reach and talk to his immediate supervisor on his private cell phone or home phone before 0730 hours to obtain the required authorization not to be present at work when sick. It is not contested that he did not do that. Consequently, the prosecution's position is that the authorization did not operate and by failing to be at work at 0730 hours he was AWOL. Indeed, the prosecution conceded that if Corporal Maze had complied with these instructions, he would not have been AWOL. The defence contends that the procedure applicable to Corporal Maze and everyone at the Mechanical Shop to obtain sick leave for one day allowed for a military member calling the shop supervisor's extension before 0730 hours to leave a voice message stating he was sick, which then authorized the member not to proceed to work unless directed otherwise. As this is what Corporal Maze did, he cannot, in the submission of the defence, be AWOL.

[25] Despite the defence's efforts to prove that Corporal Maze acted in accordance with the procedure applicable at the Mechanical Shop, it is worth remembering that it is not for the defence to prove that Corporal Maze had an authorization to be absent at 0730 hours on 8 October 2013; the burden is on the prosecution to prove beyond reasonable doubt the absence of such an authorization.

[26] In addition, to establish the element of knowledge of the duty in a case such as this one where that element is directly linked with the existence of an authority to be absent, the prosecution will need to prove an element of knowledge on the part of the accused that he did not have the authorization to be absent. If Corporal Maze knew or should have known that he did not have an authorization to be absent, then he should have known that he was required for duty at the Mechanical Shop at 0730 hours on 8 October 2013.

Issue

[27] What needs to be decided, therefore, is whether the prosecution established beyond a reasonable doubt that the procedure which applied to Corporal Maze required him to call and speak to his supervisor directly to be authorized to be away from duty and whether Corporal Maze knew or should have known about that procedure. Otherwise, Corporal Maze must be found not guilty.

Evidence

[28] With respect to the evidence heard on the procedure applicable for calling in sick at the Mechanical Shop, each of the three prosecution witnesses described three different procedures for those military members who need to call in sick.

[29] Master Corporal Hall, supervisor of Corporal Maze and of all other refrigeration technicians at the Mechanical Shop, said that his subordinates were required to phone, before 0730 hours, the Mechanical Shop supervisor's extension (local 2006), AND him as military supervisor directly or, if he is unavailable, to call another military co-worker who could pass on the information to him.

[30] For his part, Warrant Officer Delamere testified that the procedure for military personnel who could not show up for work was for them to call their military supervisor before 0730 hours, or himself if their supervisor was not available. There was no requirement for military members to call the shop supervisor's extension, as he agreed it would be improper to involve the civilian shop supervisor in military leave.

[31] Mr. Paul Robins, who was the Mechanical Shop Supervisor in October 2013, testified that the procedure for military members who had to call in sick was to phone up the shop supervisors' extension OR text their bosses. He explained that the shop supervisor's phone is accessible and answered by any of the supervisors present in that office, which in 2013 was shared by himself, Warrant Officer Delamere, Master Corporal Hall and Master Corporal Dewald. When listening to the voice mails first thing in the morning, he would know if a military member had called in sick and would pass the information over to one of the military supervisors. On 8 October 2013 however, Mr Robins said that he neglected to listen to the voice mails upon arriving at about 0715 hours as he was busy with an urgent task. He checked the messages after having been asked by military supervisors whether Corporal Maze had called. He heard the voice message from Corporal Maze and stated that Corporal Maze did not sound too good. He said he passed the information on to military supervisors.

[32] Three defence witnesses, in addition to the accused, provided evidence of a different procedure for calling in sick.

[33] Master Corporal Dewald, a supervisor at the same level as Master Corporal Hall and the longest serving military member employed at the Mechanical Shop with over eight years of experience since 2002, said that the procedure for calling in sick for a first day was to call the shop supervisor extension before 0730 hours and either leave a voicemail or talk to whomever would respond to explain the absence. He mentioned that the phone and voice mail could be accessed by all occupants of the shop supervisor's office, including himself, Mr Robins, Warrant Officer Delamere and Master Corporal Hall. He said he was not aware of any requirement to call anyone else. He also said that although Master Corporal Hall could promulgate a different procedure for his people, he would have known if it had been the case.

[34] Mr Steven Hartwig was serving as a refrigeration technician in the Mechanical Shop in October 2013, under the supervision of Master Corporal Hall. He testified that if a refrigeration technician felt too sick to come in to work in a morning, he was to call the shop supervisor phone before 0730 hours and leave a message stating the reason for the absence. There was no requirement to call anyone else. He said that he himself called in sick on at least ten occasions over the ten years he worked at the Mechanical Shop by leaving a message on the shop's supervisor phone.

[35] Corporal Maxwell testified that he has been a refrigeration technician in the Mechanical Shop with Corporal Maze under the supervision of Master Corporal Hall for about six years. He explained that in October 2013, the procedure for calling in sick was to call in to the shop and leave a message before the time to show up. He stated there was no requirement to call anyone else, in addition to the shop supervisor's extension. He added that supervisors checking the voice mails could call the member back to require attendance at the MIR, as this occurred to him on one occasion.

[36] Finally, Corporal Maze said during his direct examination that he was not told to call Master Corporal Hall directly but rather told by the shop supervisor when he arrived in Winnipeg in 2012 that he was to call the shop supervisor's extension. Specifically with regards to 8 October 2013, he said that he called in at 0624 hours to leave a message as a means to ensure the message is received and recorded, thereby ensuring that proper action be taken. He said that he did not call Master Corporal Hall directly as it was unnecessary, given that he would be getting the message upon arriving at the shop in the morning. Concerning his knowledge of a specific procedure applicable to him, he said that the Personnel Development Review (PDR) discussion he had with Warrant Officer Delamere was limited to what was included in the PDR documentation, namely that he was to let his supervisor know of his whereabouts.

Analysis

[37] In determining whether the prosecution established beyond a reasonable doubt that the procedure which applied to Corporal Maze required him to call and speak to his supervisor directly to be authorized to be away from duty, the court is left with significant contradictory evidence. The prosecution warned the court not to place any weight on general procedure as it is the procedure that was passed specifically to Corporal Maze that matters. Yet, the three prosecution witnesses described procedures which applied generally at the Mechanical Shop, including to Corporal Maze. Master Corporal Hall said that all his subordinates, including Corporal Maze, were required to call him AND leave a message on the shop's supervisor phone. Warrant Officer Delamere said that personnel, including Corporal Maze, should ONLY have called their supervisors and not the shop's supervisor extension. Mr Robins said military personnel could have phoned the shop supervisor's extension OR text their military bosses. In addition, defense witnesses all provided a fourth option: Only calling and leaving a message on the shop supervisor's voice mail would suffice.

Conclusion

[38] This evidence is simply too contradictory to provide the necessary foundation to find beyond reasonable doubt that Corporal Maze had to speak to his supervisor before 0730 hours to be authorized to stay home on 8 October 2013, unless or until ordered otherwise. In other words, the authorization alleged by Corporal Maze to be away from his usual place of duty at 0730 hours on 8 October 2013 has not been disproven.

[39] This conclusion is sufficient to dispose of the matter and it is not necessary to discuss the requirement of knowledge by Corporal Maze of the procedure requiring him to call his superior directly. Suffice to say that the four different views expressed by witnesses as to the exact procedure to be followed cast some doubts about whether the one procedure requiring Corporal Maze to call and talk to his military supervisors was as widely known and understood as it was claimed to be. At the end of the day though, the evidence establishes that the requirement imposed on Corporal Maze was to keep his superiors informed of his whereabouts. He chose to do that by calling and leaving a message on an extension and voice mail to which all of his four supervisors, military and civilian, had direct and exclusive access. He did so in time for them to know of his whereabouts as they came in to work, first thing in the morning. The evidence reveals that if Mr Robins had checked the voice messages upon coming in at 0715 hours as per his usual routine, Master Corporal Hall would have been informed of Corporal Maze's absence before 0730 hours. Even if exceptionally Master Corporal Hall ended up looking for Corporal Maze that morning, he was quickly apprised of the message that had been left and was speaking with Corporal Maze as early as 0800 hours. I do not see in Corporal Maze's actions any attempt to keep superiors in the dark or to run away from his chain of command, as the prosecution's thesis suggested. Simply said, the facts of this case cannot support any finding of blameworthy criminal or penal wrongdoing.

[40] This is not to say that Corporal Maze may not need to do better in some areas to fully meet expectations of his superiors and make an optimal contribution to the Canadian Forces. This is not my role to deal with those issues. A court martial is convened to address the charges before it, and only that. The two charges before the court could not result in guilty findings today.

FOR THESE REASONS, THE COURT

[41] Finds the accused, Corporal Maze, not guilty of the two charges of disobedience of a lawful command and absence without leave on the charge sheet.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Service, Counsel for Her Majesty the Queen

Captain A. Watson, Articling student, Assistant counsel for Her Majesty the Queen

Major S. Collins, Directorate of Defence Counsel Services, Counsel for Corporal Maze

Captain S. O'Blanes, Deputy Judge Advocate Gagetown, Assistant counsel for Corporal Maze