



COURT MARTIAL

Citation: *R. v. Nicholle*, 2016 CM 3013

Date: 20160926

Docket: 201540

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.T. Nicholle, Accused

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

<p>NOTE: Personal data identifiers and other information connected to the individual have been redacted to ensure that their identity is protected, in accordance with the Canadian Judicial Council's "<i>Use of Personal Information in Judgments and Recommended Protocol</i>".</p>
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REASONS FOR FINDING

(Orally)

[1] Corporal Nicholle is charged with stealing in relation with the disappearance of a snowblower from his unit in January 2012, contrary to section 114 of the *National Defence Act (NDA)*, and he is also charged with the unlawful possession of it further to its recovery by military authorities in November 2013 for receiving, contrary to section 115 of the *National Defence Act*, and for possession of it as a property obtained by crime, contrary to subsection 354(1) of the *Criminal Code*.

[2] The court heard the following witnesses during the main trial: Corporal Morden, Corporal Randall, Corporal Pacheco and Master Warrant Officer Heard. In addition, with the agreement of both parties, the testimony of Corporal Pacheco, Sergeant Lagler and

the accused, Corporal Nicholle, provided during the first *voir dire* on the admissibility of an unofficial confession made by the accused were transferred in the main trial.

[3] Some documents were also introduced:

- (a) Exhibit 3, a DVD of the audio video recorded interview of Corporal Nicholle made by Corporal Pacheco on 16 November 2013;
- (b) Exhibit 4, the Legal Rights and Cautions form about the interview of Corporal Nicholle conducted by Corporal Pacheco, dated 16 November 2013;
- (c) Exhibit 5, a DVD of the audio video recorded interview of Corporal Nicholle made by Warrant Officer Rose on 20 January 2014; and
- (d) Exhibit 6, a letter of apology from Corporal Nicholle, dated 20 January 2014.

[4] Finally, the court took judicial notice of the matters enumerated at article 15 of the *Military Rules of Evidence*.

[5] In January 2012, Corporal Nicholle was a member of a small team for shoveling and blowing snow at 2 Service Battalion's buildings in Petawawa. When required, he would have to show up early in the morning with some other members of his unit to do so. He would then have in his possession keys that would provide him access to the necessary tools, such as shovels and a snowblower, to perform the work.

[6] On one evening in January 2012, while performing an oil change on his own personal car at the unit, Corporal Nicholle saw Corporal Morden. Corporal Morden asked him if he could help him put a snowblower in the back of his jeep because he wanted to use it at his house. While he helped him, Corporal Nicholle learned from Corporal Morden that he had the intent to bring it back the morning after.

[7] As a matter of coincidence, a snowblower went missing in early 2012 at the unit. As a fact, the serial numbers of the snowblowers bought by the unit were not kept in any register, which made it difficult to track them.

[8] Sometime after it was reported missing at the unit, Corporal Nicholle noticed the presence of a snowblower in the back of his yard and he asked his neighbour if it was put there by him, but it was not. He then asked Corporal Morden if he returned the one he took previously. The latter told him that he put it in the backyard of Corporal Nicholle's house. He heard people saying after that that the snowblower claimed as missing from the unit was found and he started to doubt that it was the same one. Afterwards, Corporal Nicholle realized that the one at the back of his house was the one belonging to the unit. Fearing he would get in trouble for not bringing the snowblower back right away, Corporal Nicholle never reported to anybody that he had it.

[9] In August 2013, two separate sources reported to the military police that the missing snowblower was at the house of Corporal Nicholle:

- (a) In early August 2013, Corporal Morden reported to the military police that after going to Corporal Nicholle's house to help him move his washer and dryer, he noticed that a snowblower, similar to the one reported missing at the unit, was in the backyard.
- (b) In August 2013, a member of the unit told Master Warrant Officer Heard that the missing snowblower was at Corporal Nicholle's house. He then went to the house and saw what he considered what could be the missing snowblower and he took some pictures of it. He then reported the information to his chain of command.

[10] The snowblower was described by witnesses as being green with distinctive marks painted in pencil letters specific to 1 Canadian Field Hospital, using the following abbreviated name "1 CF Hosp." Those marks were visible despite seeming to have been spray painted and they were located at the same place as on other snowblowers belonging to the unit.

[11] On 16 November 2013, Corporal Nicholle was interviewed by the military police. He did not say anything regarding the snowblower; however, he agreed with the military police that he thought the snowblower being seized was the one missing. On that same day, the snowblower was retrieved from Corporal Nicholle's backyard by the military police and brought to the compound at the Military Police Detachment.

[12] The military police requested a member of the unit to identify the snowblower. Corporal Randall, a supply technician working at the company quartermaster warehouse of 2 Service Battalion, came and checked the snowblower. He told the court that he had a pretty good feeling at that time that it was the missing snowblower because it was similar.

[13] On 20 January 2014, Corporal Nicholle took a polygraph examination. Further to it, he was interviewed by the polygraph examiner who then acted as an investigator. At that time, Corporal Nicholle confessed that the snowblower missing at the unit was the one in his backyard and he wrote a letter of apology to the unit.

[14] Later, charges were laid. A charge sheet was signed on 19 June 2015 and charges were preferred on 23 June 2015. The convening order was signed on 7 January 2016 and the trial commenced on 22 February 2016; the hearing of the evidence lasted four days.

[15] Before this Court provides its legal analysis, it is 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 Code of Service Discipline and criminal trials. These principles, of course, are well known to counsel, but some people in this courtroom may well be less familiar with them.

[16] The first and most important principle of law applicable to every Code of Service Discipline and criminal law case is the presumption of innocence. Corporal Nicholle enters the proceedings presumed to be innocent and the presumption of innocence remains throughout the case unless the prosecution, on the evidence put before the court, satisfies it beyond a reasonable doubt that he is guilty.

[17] Two rules flow from the presumption of innocence: one is that the prosecution bears the burden of proving guilt and the other is that guilt must be proved beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[18] The burden of proof rests with the prosecution and never shifts. There is no burden on Corporal Nicholle to prove that he is innocent. He does not have to prove anything.

[19] Now, what does the expression “beyond a reasonable doubt” mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from the absence of evidence.

[20] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The court must not find Corporal Nicholle guilty unless it is sure he is guilty. Even if the court believes that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, the court must give the benefit of the doubt to Corporal Nicholle and then find him not guilty because the prosecution has failed to satisfy the court of his guilt beyond a reasonable doubt.

[21] The important point for the court is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. The court must decide, looking at the evidence as a whole, whether the prosecution has proved Corporal Nicholle’s guilt beyond a reasonable doubt.

[22] Reasonable doubt applies to the issue of credibility. On any given point, the court may believe a witness, disbelieve a witness, or not be able to decide. The court need not fully believe or disbelieve one witness or a group of witnesses. If this Court has a reasonable doubt about Corporal Nicholle’s guilt arising from the credibility of the witnesses, then it must find him not guilty.

[23] About the evidence, it is important to say that the court must consider only the one presented in the courtroom. Evidence is the testimony of witnesses and things entered as exhibits, including pictures and documents. It may also consist of admissions. The evidence includes what each witness says in response to questions asked. Only the

answers are evidence. The questions are not evidence unless the witness agrees that what is asked is correct.

[24] Corporal Nicholle is charged with stealing. Section 114 of the *National Defence Act* reads as follows:

(1) Every person who steals is guilty of an offence and on conviction, if by reason of the person's rank, appointment or employment or as a result of any lawful command the person, at the time of the commission of the offence, was entrusted with the custody, control or distribution of the thing stolen, is liable to imprisonment for a term not exceeding fourteen years or to less punishment and, in any other case, is liable to imprisonment for a term not exceeding seven years or to less punishment.

(2) For the purposes of this section,

(a) stealing is the act of fraudulently and without colour of right taking, or fraudulently and without colour of right converting to the use of any person, any thing capable of being stolen, with intent

(i) to deprive, temporarily or absolutely, the owner of it or a person who has a special property or interest in it, of the thing or of that property or interest,

(ii) to pledge it or deposit it as security,

(iii) to part with it under a condition with respect to its return that the person who parts with it may be unable to perform, or

(iv) to deal with it in such a manner that it cannot be restored in the condition in which it was at the time when it was taken and converted;

(b) stealing is committed when the offender moves the thing or causes it to move or to be moved, or begins to cause it to become movable, with intent to steal it;

(c) the taking or conversion may be fraudulent, although effected without secrecy or attempt at concealment; and

(d) it is immaterial whether the thing converted was taken for the purpose of conversion, or whether it was, at the time of the conversion, in the lawful possession of the person who converts it.

(3) Every inanimate thing that is the property of any person and that either is or may be made movable is capable of being stolen as soon as it becomes movable, although it is made movable in order that it may be stolen.

[25] In addition to identity, the date and place of the offence, the prosecution had to prove beyond a reasonable doubt that:

(a) Corporal Nicholle took the item listed;

(b) Corporal Nicholle had no right to the items listed;

(c) the deprivation was made fraudulently and without colour of right;

- (d) Corporal Nicholle took temporarily or absolutely the item listed; and
- (e) the ownership of the item listed.

[26] Considering the admission of the accused about the fact that the snowblower found in his backyard was the same as the one missing at the unit, it is clear for the court that the prosecution proved beyond a reasonable doubt the ownership of the snowblower, that he had no right to this item, that the deprivation was made fraudulently and without colour of right, and that he took it absolutely.

[27] About the fact that Corporal Nicholle took the snowblower, the prosecution relies, essentially, on the statement made by the accused to the police, which is to the effect that he helped Corporal Morden put it in the back of his jeep.

[28] Taking is essentially defined in the provision as the physical act of moving anything with intent to steal.

[29] The evidence about the fact that Corporal Nicholle took the snowblower is very minimal and in some ways confusing. Mainly, while being at the unit for a personal purpose, he was asked by someone else to help put a snowblower in the back of a jeep. At that point, he did not appear as the accused who was aiding Corporal Morden to commit the offence of stealing.

[30] Corporal Morden testified before the court and was never asked by both parties about the circumstances where the snowblower was presumably taken from the unit with the intent to steal it.

[31] In addition, if the court understands well the account provided by the accused, the latter was under the impression that Corporal Morden was borrowing the snowblower for a very short period of time. There is no evidence that he was not authorized to do so. In fact, as Corporal Morden answered during his cross-examination by defence counsel, there was no clear practice or policy for members of the unit in order to borrow tools. Depending on the nature of the item considered, sometimes a verbal authorization would be sufficient. In other circumstances, it would appear that a member would just let know that he takes a small item with the intent to return it later. For larger items, such as a vehicle, borrowing it would not have even been considered.

[32] When the snowblower was put in the back of the jeep, there is no evidence that would allow the court to conclude that Corporal Morden was not authorized to borrow the snowblower for the night.

[33] The prosecution suggested to the court to rely on 72(1)(b) of the *National Defence Act* to conclude that Corporal Nicholle was a party to and guilty of the offence of stealing because he would have done anything in the circumstances to help Corporal Morden to commit that offence.

[34] I have to disagree with the prosecution that such a conclusion could be reached. In order to rely on such a provision, it belongs to the prosecution to prove the intent and knowledge of Corporal Nicholle about the fact that the snowblower was stolen by Corporal Morden. The explanation provided to the police by Corporal Nicholle to explain how the snowblower taken from the unit was found in his backyard left me with a doubt on the fact that he knew and had the intent at the point the snowblower was stolen.

[35] It is possible that he knew that the snowblower was stolen by Corporal Morden as it was also possible that he really thought that Corporal Morden was only borrowing it, in the circumstances provided to the court. Reality is that there is no other evidence, including the version of Corporal Morden who appeared before the court, to help the court in deciding one way or the other.

[36] Essentially, the court is unable to conclude beyond a reasonable doubt that Corporal Nicholle was assisting Corporal Morden in stealing the snowblower on the basis of the evidence put by the prosecution before the court.

[37] Then, it is the conclusion of the Court, considering the evidence as a whole that the prosecution failed to prove beyond a reasonable doubt that Corporal Nicholle took the snowblower.

[38] 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 stealing.

[39] Corporal Nicholle is also charged with retaining in his possession the snowblower obtained by the commission of a service offence, knowing that it has been so obtained, contrary to section 115 of the *National Defence Act*. Section 115 of the *National Defence Act* reads as follows:

Every person who receives or retains in his possession any property obtained by the commission of any service offence, knowing the property to have been so obtained, is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding seven years or to less punishment.

[40] In addition to identity, the date and place of the offence, the prosecution had to prove beyond a reasonable doubt that:

- (a) Corporal Nicholle retained property;
- (b) the property was obtained by the commission of a service offence; and
- (c) Corporal Nicholle knew that the property had been obtained by the commission of a service offence.

[41] The offence of receiving and the one of retaining are distinct and mutually exclusive. In the case of receiving, the initial possession was gained with the knowledge

that the goods were stolen, whereas in the case of retaining, the initial possession was gained honestly and their character as stolen goods was only learned subsequently.

[42] Based on the evidence put before the court, the following inferences could be made:

- (a) Corporal Nicholle knew on 16 November 2013, and admitted later that the snowblower he found in his backyard of his residence at XXXX, Petawawa, Ontario, sometime after he helped Corporal Morden in January 2012 to put a similar one in his jeep was the one reported as being missing at his unit.
- (b) Corporal Nicholle inquired about who put it in his backyard and found out that it was Corporal Morden who did it. Corporal Nicholle then could conclude that it was taken away from the unit with no intent to return it, which is, basically, to steal it from his unit, which is, at the same time, a service offence and a criminal offence.
- (c) Corporal Nicholle, being part of a small team for shoveling and blowing snow at building at 2 Service Battalion in Petawawa, was very aware that such a distinctive item being marked as belonging to 1 Canadian Field Hospital should be returned promptly, but he deliberately decided not to make any further inquiries about the origin of that good, despite that he knew it was stolen. He clearly demonstrated willful blindness.
- (d) Corporal Nicholle consciously kept possession of the snowblower for a bit less than two years without taking any steps, at any point, to take it back or make his own unit aware of the circumstances. It is only once the situation was reported by two different outside sources that the good was taken back by the military police with his consent.

[43] In those circumstances, the Court concludes that the prosecution proved beyond a reasonable doubt, regarding the evidence as a whole, all essential elements of the offence of receiving.

[44] Corporal Nicholle was finally charged with possession of property obtained by crime, contrary to paragraph 354(1)(a) of the *Criminal Code*. The provision reads as follows:

Every one commits an offence who has in his possession any property or thing or any proceeds of any property or thing knowing that all or part of the property or thing or of the proceeds was obtained by or derived directly or indirectly from

- (a) the commission in Canada of an offence punishable by indictment . . .

[45] In addition to identity, the date and place of the offence, the prosecution had to prove beyond a reasonable doubt that:

- (a) Corporal Nicholle was in possession of property;
- (b) the property was obtained by or derived from crime; and
- (c) Corporal Nicholle knew that the property was obtained by or derived from crime.

[46] Based on the same set of circumstances enumerated for the second charge of receiving, the Court is able to conclude the following:

- (a) Corporal Nicholle had physical control and then possessed on 16 November 2013 at his residence, a snowblower;
- (b) Considering the circumstances, Corporal Nicholle knew that the snowblower was obtained irregularly, being stolen from his unit. He also knew that the snowblower was the one reported missing at his unit; and
- (c) Corporal Nicholle was aware of the situation and never reported it, leaving the circumstances as they were, willingly not inquiring about what could be done to return the snowblower to his unit. He had more than reasonable time to correct the situation, but he never did.

[47] Then, as for the second charge, it is the conclusion of the Court that the prosecution proved beyond a reasonable doubt, regarding the evidence as a whole, all essential elements of the offence of possession of property obtained by crime.

FOR THESE REASONS, THE COURT:

[48] **FINDS** Corporal Nicholle not guilty of the first charge and guilty of the second and third charges on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Major A.-C. Samson and Captain M.L.P.P. Germain

Major D. Hodson, Defence Counsel Services, Counsel for Corporal D.T. Nicholle