



COURT MARTIAL

Citation: *R. v. Watson*, 2016 CM 3006

Date: 20160413

Docket: 201531

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal R.L. Watson, Accused

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

REASONS FOR FINDING

(Orally)

[1] Corporal Watson is charged with one service offence punishable pursuant to section 130 of the *National Defence Act* for the possession of an explosive substance, to wit a grenade, on or about 27 November 2014 at Canadian Forces Base (CFB) Petawawa, Ontario, contrary to subsection 82(1) of the *Criminal Code*.

[2] The court heard, in order of appearance before the court, the following witnesses: Mr Rosso, Warrant Officer Molloy, Master Corporal Dober, Master Corporal Mauricio, Major Rogerson, Master Corporal Briggs, Corporal Watson, the accused in this matter, Sergeant Reid and Corporal Lindsay.

[3] Also, some documents were introduced before the court: a three-page agreed statement of facts (Exhibit 3), a binder with five annexes to the agreed statement of facts (Exhibit 4), and the 1st Royal Canadian Regiment (RCR) Defaulters Daily Inspection Report Sheet concerning Corporal Watson and dated 27 November 2014.

[4] In accordance with paragraph 37(b) of the *Military Rules of Evidence*, the accused made some admissions through his counsel, for the purpose of dispensing with proof any fact the prosecutor must prove regarding the following essential elements of the charge on the charge sheet: the identity, the date, the place and that the grenade is an explosive substance, leaving the prosecution with the burden to prove beyond a reasonable doubt the very last essential element of this offence, which is possession.

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

[6] From 16 to 23 November 2014, 1st Royal Canadian Regiment (1 RCR) participated in Exercise (EX) SPARTAN BEAR 2014 which took place in the CFB Petawawa training area. Corporal Watson was a member of that unit at the time.

[7] This exercise was a 4.5 level range company offensive exercise which involved the use of live ammunition, including the C13 grenade, in a field firing setting, in both day and night conditions.

[8] Prior to participating in such exercise, 1 RCR completed a number of progressive range exercises and training in order to achieve the required individual and group qualifications to participate in a 4.5 level range at company level. This included training on the C13 grenade. Corporal Watson participated in this training and was qualified on the C13 grenade.

[9] On 21 November 2014, Corporal Watson was informed that the charges for which he elected to be tried by court martial on 19 August 2014, and that are different from those before this court martial, would be dealt with in a different manner. He was told that the matter was returned by the military prosecution services with the recommendation to proceed with only one charge by summary trial. He was then informed that the summary trial would take place shortly after the end of the exercise. He spent most of that day on the phone with his defence counsel to deal with this very unexpected situation.

[10] A number of C13 grenades from lot number CA 10M16-02 were issued to 1 RCR for field firing during the EX SPARTAN BEAR. On 22 November 2014, Corporal Watson participated, as an augmentee, in an offensive attack with the Dukes Company, 1 RCR. On the evening, prior to going to bed, he found on his bunk the ammunition distributed to him for the attack on the day after, which was seven to eight boxes of 5.56 millimeter rounds and a C13 grenade. He placed the grenade in his left grenade pouch of his tactical vest, filled his magazines and went to bed.

[11] The day after, on 23 November 2014, he participated in the attack with his section but did not use the grenade. In fact, at no point during the exercise, was he close to any authorized area where he could have used such a weapon. At the termination of the exercise, all section members returned the unused ammunition. According to Warrant Officer Molloy, the second-in-command (2IC) of the platoon, all the

ammunition would be gathered through the 2IC section and an inspection of the personal kit of each soldier was supposed to be done. The section commander of Corporal Watson, Master Corporal Dober, delegated that task to his own 2IC, Master Corporal Mauricio. The latter confirmed that he proceeded with a visual inspection of Corporal Watson's personal tactical vest but he did not proceed with a physical inspection of it. According to Corporal Watson, no inspection of his kit, including his tactical vest, was done on that day.

[12] The return of the unused ammunition by section members was done in an efficient and timely manner. The section had some timing to respect in order to get the helicopter on time to go back to the base and turn in their weapons to the vault. It was also the end of the exercise and people were, in some way, eager to go back home.

[13] Prior to leaving the range, Corporal Watson provided an ammunition declaration to his section commander, Master Corporal Dober. He said that he had no live rounds, empty casing, pyrotechnics and parts thereof in his possession. He told the court that after he had put the grenade in his pouch the night before, he had totally forgotten about it and that at the time he made his declaration, he was totally confident that he had nothing else on him nor in his kit, as a matter of live ammunition, which would include grenades.

[14] He went back to the base with his section, and placed his tactical vest in his personal locker at the unit. Upon completion of the exercise, 1 RCR personnel, including Corporal Watson, were granted two days of short leave, which was on 24 and 25 November 2014.

[15] On 27 November 2014, at approximately 10:30 a.m., Corporal Watson appeared before a summary trial presided by Major Rogerson, Officer in Command, C Company, 1 RCR. Corporal Watson was found guilty of the charge and the sentence he received included an award of confinement to barracks for seven days to be served immediately.

[16] As he was ordered, Corporal Watson retrieved the equipment and kit he required to commence the defaulter's component of this confinement to barracks punishment. Sergeant Reid proceeded with a pre-inspection of his kit, making sure of the state of it and that any required item would be available for the inspection. A number of deficiencies were noted, including a broken clip on the tactical vest, and Corporal Watson corrected them. He then left for supper.

[17] Later in the evening, while being officially inspected by Master Corporal Briggs in building Y101, CFB Petawawa, a C13 grenade bearing lot number CA 10M16-02 was discovered in the left pouch of his tactical vest. While Master Corporal Briggs was very reactive, acting promptly to this unexpected discovery, Corporal Watson did not say a word nor show any specific reaction. However, he said that it is at that moment that he recalled the grenade which he had totally forgotten about, and that he realized, at that very moment, that he made the biggest mistake of his career.

[18] Later in the evening, Corporal Fenner, 2 Military Police Regiment, attended at the scene and secured and transported the C13 grenade to a secure ammunition yard at CFB Petawawa, where it currently remains.

[19] 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 Code of Service Discipline and criminal trials. These principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[20] The first and most important principle of law applicable to every Code of Service Discipline and criminal case is the presumption of innocence. Corporal Watson 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.

[21] Two rules flow from the presumption of innocence. One is that the prosecution bears the burden of proving guilt. 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.

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

[23] 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 an absence of evidence.

[24] 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 Watson 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 Watson and find him not guilty because the prosecution has failed to satisfy the court of his guilt beyond a reasonable doubt.

[25] 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 Watson's guilt beyond a reasonable doubt.

[26] 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 group of witnesses. If this court has a reasonable doubt about Corporal Watson's guilt arising from the credibility of the witnesses, then it must find him not guilty.

[27] The court has heard Corporal Watson testify. When a person charged with an offence testifies, the court must assess that evidence as it would assess the testimony of any other witness, keeping in mind instructions mentioned earlier about the credibility of witnesses. The court may accept all, part, or none of Corporal Watson's evidence.

[28] This 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.)*, [1991] 1 S.C.R. 742 must be considered because Corporal Watson testified.

[29] Of course, if the court believes the testimony of Corporal Watson that he did not commit any offence charged, the court must find him not guilty of it.

[30] However, even if the court does not believe the testimony of Corporal Watson, if it leaves it with a reasonable doubt about an essential element of the offence charged, the court must find him not guilty of that offence.

[31] Even if the testimony of Corporal Watson does not raise a reasonable doubt about an essential element of the offence charged, if, after considering all the evidence, the court is not satisfied beyond a reasonable doubt of his guilt, he must be acquitted.

[32] About the evidence, it is important to say that the court must consider only what was 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.

[33] Corporal Watson is charged with possession of an explosive substance without lawful excuse. Subsection 82 (1) of the *Criminal Code* reads as follows:

82 (1) Every person who, without lawful excuse, the proof of which lies on the person, makes or has in the possession or under the care or control of the person any explosive substance is guilty of an indictable offence and liable to imprisonment for a term not exceeding five years.

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

- (a) the item was an explosive substance; and
- (b) Corporal Watson possessed that explosive substance.

[35] Once possession of an explosive substance has been proved beyond a reasonable doubt by the prosecution, the burden then shifts to the accused to show, on a balance of probabilities, that there was a lawful excuse for the possession of such a substance at the time and place in question. In other words, at that point it is up to the accused to show that he, more likely than not, had a lawful justification or excuse for the possession of an explosive substance.

[36] Considering the admissions made by the accused on most of the essential elements of the charges, it is clear for the court that the prosecution proved beyond a reasonable doubt the identity, the date, the place of the offence and that the item was an explosive substance.

[37] Then, the only essential element to be determined by this court at this stage is if the prosecution has proved beyond a reasonable doubt that Corporal Watson possessed that explosive substance.

[38] A person may have an explosive substance in his possession in a number of different ways. A person who has actual physical control of an explosive substance, as, for example, by holding it in his hand or keeping it in his pocket, has that substance in his possession as indicated in subsection 4(3) of the *Criminal Code*.

[39] Concerning the interpretation of this subsection, the Supreme Court of Canada said in *R. v. Morelli*, 2010 SCC 8, at paragraphs 15 and 16 of its decision:

[15] For the purposes of the *Criminal Code*, “possession” is defined in s. 4(3) to include *personal possession*, *constructive possession*, and *joint possession*. Of these three forms of culpable possession, only the first two are relevant here. It is undisputed that *knowledge* and *control* are essential elements common to both.

[16] On an allegation of *personal possession*, the requirement of knowledge comprises two elements: the accused must be aware that he or she has physical custody of the thing in question, and must be aware as well of what that thing is. Both elements must co-exist with an act of control (outside of public duty): *Beaver v. The Queen*, [1957] S.C.R. 531, at pp. 541-542.

[40] The prosecution took the position that from the time Corporal Watson put the grenade in the left pouch of his tactical vest to the time it was found there pursuant to an inspection, he was aware that he had physical custody of the grenade and the nature of it. Basically, at all times, the accused had possession of the grenade. The prosecution added the fact that it is only after Corporal Watson made his ammunition declaration that he became unlawfully in possession of that grenade.

[41] If the court disagrees with this approach, then the prosecution submitted that circumstantial evidence revealed during the pre-inspection conducted by Sergeant Reid on 27 November 2014 is enough for the court to infer the fact that the accused had such awareness.

[42] Finally, the prosecution suggested that at the time the grenade was discovered by Master Corporal Briggs during the inspection of Corporal Watson's tactical vest on 27 November 2014, the accused had then possession of the grenade because he recalled being in possession of it at that point in time.

[43] Defence counsel submitted that the concept of forgotten possession must raise a reasonable doubt in the mind of the court regarding the essential element of possession, and, consequently, his client must be acquitted. Essentially, defence counsel put to the court that because his client forgot that he had physical custody of the grenade, at the time of his ammunition declaration up to the time it was found later through the inspection of his tactical vest, he did not have the necessary awareness to possess it.

[44] Further to the reading of some case law on this issue, the legal concept of forgotten possession does not exist in law; however, the question of an accused forgetting about owning an item in order to negate the requisite *mens rea* for the offence of possession has been addressed by some courts but not in much detail.

[45] The review of the case law, such as *R. v. Corbett*, [1986] B.C.J. No. 84, *R. v. Hubley*, 3 N.B.R. (2d) 241 and *R. v. Balak*, 2016 ONCJ 44, made clear that forgetfulness may or may not be considered as circumstances where possession is not strictly criminal or morally blameworthy.

[46] As mentioned by Justice Greene of the Ontario Court of Justice in the decision of *Balak* at paragraph 101 and I adopt her position and quote her: "In my view the proper starting point is to remember that all criminal offences have both an *actus reus* and a *mens rea* and these two elements must coincide."

[47] Talking about considering forgetfulness, Justice Greene added in her decision of *Balak* at paragraphs 108 and 109:

[108] It is easy to consider many policy reasons for why forgetfulness should not negate the *mens rea* for the offence of possession. This is largely because at one point in the past the defendant would have clearly been in "possession" of the item in issue. Moreover, many possession offences relate to dangerous objects like narcotics, knives or firearms. People who intentionally possess dangerous items should not receive a benefit because they negligently put a dangerous item somewhere and then forgot about it. Finally, in some ways such a narrow view of possession defies common sense. If one possessed a diamond ring and put it in a locked box in their house for safekeeping and then, because it was never worn, forgot it was even there until it was stolen during a break in, no one would claim in these circumstances that the ring was not in the victim's possession such that it was not stolen. Common sense dictates that an item remains in one's possession (be it manual or constructive possession), until the owner decides to actively rid him/herself of the item.

[109] On the flip side, the criminal justice system only sanctions those that are morally culpable on the date articulated in the information or indictment. One who has forgotten that they are in possession of an unlawful object such that they could not voluntarily rid themselves of the item because it was no longer in their mind, is not morally culpable.

[48] What about the circumstances in this case? Corporal Watson testified in a clear, straightforward and calm manner. He never denied that the grenade was in the pouch of his tactical vest, but he clearly told the court that he forgot about it. He never hesitated to ask counsel to reformulate or clarify a question during interrogation. His account of the event appears logical to the court and supported by the evidence of both parties.

[49] Essentially, Corporal Watson was provided with a grenade at some point during the exercise. He lawfully possessed it at that moment. When he made his ammunition declaration, he sincerely thought that he had no ammunition and grenade with him or in his kit. On this point, the court does not see any reason to disbelieve him. Being tired and focused on other things, it is likely that he forgot about the grenade in his pouch. In addition, other witnesses called by prosecution and by defence clearly stated that at least once in their career they acted in the same way as the accused in very similar circumstances about ammunition and pyrotechnics, making more than very likely the version provided by the accused on forgetting about having ammunition with him.

[50] Corporal Watson then placed his tactical vest with the grenade in it in his locker for three full days. There is no evidence that he went back to recuperate it or move the grenade to another location or outside of the base. He clearly never did anything during that time frame regarding the grenade in order to keep it for his use or benefit, or for the use or benefit of anybody else. This evidence is consistent with the fact that he totally forgot about it and that he had no intent to possess it, as he said to the court.

[51] This situation remained up to the time where Master Corporal Briggs found the grenade during the inspection and is consistent and logical with that account of the accused.

[52] The failure to remember that the grenade stayed in his pouch revealed clearly to the court that Corporal Watson lacked the intention to possess the grenade at any given time between his ammunition declaration and the discovery of it. Essentially, the court does believe him when he said that he was unaware that he had physical custody of the grenade.

[53] The court disagrees with the prosecution that circumstantial evidence proven before the court regarding the pre-inspection conducted by Sergeant Reid would allow it to infer that the accused recalled having the grenade in his pouch. From what the court heard on this issue, it is clear that there was no requirement to specifically inspect this portion of his tactical vest and it is likely that, considering unnecessary to proceed with the inspection of it, the accused did not pay attention to it. As a matter of fact, even Sergeant Reid or Master Corporal Briggs did not notice anything until the pouch was opened.

[54] When the pouch was opened, the accused never had an opportunity to let anyone know about his own intent regarding possession. In fact, Master Corporal Briggs reacted promptly and never allowed the accused to do or say anything regarding the

matter. Reality is that Master Corporal Briggs took lawful possession of the grenade at the time of the discovery.

[55] It is the conclusion of the court that the evidence of Corporal Watson raised a reasonable doubt regarding the essential element of possession.

[56] 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 possessing, without lawful excuse, an explosive substance.

FOR THESE REASONS, THE COURT:

[57] **FINDS** Corporal Watson not guilty of possessing an explosive substance, to wit a grenade, on or about 27 November 2014 at CFB Petawawa, contrary to subsection 82(1) of the *Criminal Code*, which is the first and only charge on the charge sheet.

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh and Major M.E. Leblond

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Corporal R.L. Watson