



COURT MARTIAL

Citation: *R. v. Pear*, 2016 CM 3005

Date: 20160317

Docket: 201366

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer W.L. Pear, Accused

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

REASONS FOR FINDING

(Orally)

[1] Warrant Officer Pear is charged with one service offence punishable pursuant to section 97 of the *National Defence Act* for drunkenness while he was attending a mess dinner at Reichwald Senior Non Commissioned Officers' (NCO) Mess on Canadian Forces Base (CFB) Petawawa on 1 November 2012, and with two service offences punishable under section 85 of the *National Defence Act* for having used insulting language to a superior officer during that same event.

[2] The evidence presented to the court is mainly *viva voce* evidence and the witnesses heard, in order of appearance before the court, are, for the prosecution: Captain Decaire, who was at the time of the incident Lieutenant Worr; Captain Girvan, who was at the time Captain Power; Captain Bérubé; Captain Bye, who was at the time Lieutenant Sanche and Master Warrant Officer Scott.

[3] Those heard during the case presented by the accused are: Lieutenant Commander (Retired) Merriman, the padre at the mess dinner; Warrant Officer Pear,

the accused before this court; Captain Pierre, Captain Wong, Sergeant King, Sergeant White and Master Warrant Officer MacQueen. Also called by the accused as defence witnesses for a second appearance before the court: Captains Girvan, Decaire and Bérubé.

[4] The prosecution also introduced two documents before the court: the seating plan of the mess dinner (Exhibit 5) and five photos of people attending the same mess dinner (Exhibit 6).

[5] 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 three charges on the charge sheet: the identity, the date and the place. In addition, the court took judicial notice of the matters enumerated at article 15 of the *Military Rules of Evidence*.

[6] All witnesses heard by the court, including the accused in this matter, attended a mixed mess dinner of 2 Service Battalion, which included officers and senior NCOs of the unit, on 1 November 2012 at the Reichwald Senior NCOs' Mess at CFB Petawawa. The theme for this mess dinner was "Around the World."

[7] The idea of the mess dinner was to expose members of the unit to the variety of places and experiences where members would have been deployed in recent years. In order to achieve that, members were invited to taste beers and liquors that would be typical of these places and listen to speeches from some members who had been deployed. Those activities took place during the cocktail hour of the mess dinner.

[8] Most of the guests arrived at 6:30 p.m. for the cocktail hour, including Warrant Officer Pear. He was previously picked up by Sergeant King who already had Sergeant White with him. Sergeant King drove both the accused and Sergeant White to the mess. Both sergeants told the court that when they arrived at the mess the accused had a beer, but according to Warrant Officer Pear, he had had a Singapore Sling first that night.

[9] During the cocktail hour, Warrant Officer Pear would have interacted twice with Captain Decaire, who was at the time Lieutenant Worr, and once with Captain Bérubé that would have led to the charges for insubordination to be laid against him.

[10] Warrant Officer Pear approached Captain Decaire and he had a casual discussion with her. Some other members were around, but they did not hear anything specific between both individuals. Captain Wong said that both individuals had a heated exchange, but he did not know the nature of it.

[11] According to Captain Decaire, further to a comment she made in presence of some people including Warrant Officer Pear to the effect that because she did not have to go through physical training (PT) the next morning, she wouldn't lose any calories she consumed during the dinner. The accused would have then taken her by her right

arm, turned her back physically to him and would have said, "I like a girl with a little extra, anyways." She understood that he was referring to her butt. She tried to laugh it off, but in reality she was taken back and stunned by such a comment coming from a warrant officer, who is usually there to guide and teach junior officers.

[12] Warrant Officer Pear said that such an interaction occurred with Captain Decaire, but in a different manner. He said that he talked to her about his sister who had gained weight and he realized that Captain Decaire got upset because she thought he was calling her fat, which he immediately corrected by asking her to relax, saying to her that most guys, including himself, like "women with a little meat on their bones and a bit of junk in their trunk." He said that things stayed at that stage and that he did not touch her at all.

[13] Captain Decaire said that she had an exchange with the accused later at the bar that was set up to serve special beers and liquors while having a conversation with the bartender, Captain Bye, who was at the time Lieutenant Sanche. While seeing that she had red wine, Warrant Officer Pear would have suggested to her to try white wine, which she declined to do. He would have then called her a "loser" for not trying things outside of what she normally drank. She was irritated by his comment, but she did not respond in order to avoid a big scene.

[14] Warrant Officer Pear told the court that he saw Captain Decaire at the bar and suggested to her to try some liquor, knowing that she did not like beer. He denied calling her a "loser."

[15] Captain Bérubé acted as a bartender at the special bar set up for the cocktail hour. He knew Warrant Officer Pear well enough from having once been in trouble for associating with him. He also knew him through work as a former co-worker.

[16] He noticed that Warrant Officer Pear became inebriated because Warrant Officer Pear was more joyful and outspoken than usual. He then told the accused that he should serve him water or juice, to which Warrant Officer Pear replied, "What, are you a pussy?" Captain Bérubé laughed it off and served him more alcohol. Captain Bérubé found the situation slightly awkward, but thought it was normal. He did not feel personally insulted.

[17] According to Warrant Officer Pear, while speeches were going on just before the dinner, the bar was closed. He asked Captain Bérubé to give him another drink, to which the latter responded by suggesting he serve water or juice. The accused would have told him, "Don't be a pussy, give us another drink." Warrant Officer Pear said that he was joking and that he was messing around. He said that Captain Bérubé did not serve him anything.

[18] During the speeches, it appeared that Warrant Officer Pear acted in a way that disturbed and bothered people close to him by commenting on what was said. He was called to order by some people standing near him.

[19] Further to that, guests were asked to take their seat at the tables. While grace was said by the padre before the meal, Warrant Officer Pear repeated, loudly enough to be heard by people, some words said by the padre at the beginning or the end of the short prayer. Some people found this as interruptive, but others smiled at it. Warrant Officer Pear realized quickly that he was the only one starting to do this and he stopped immediately.

[20] At the table, Warrant Officer Pear was making noise with his utensils and he spilled wine.

[21] Previously, he got permission from the person presiding at the dinner to leave the table during it in order to go to the bathroom. When he did that, while he was away, his chair was taken and placed at the head table. On his return, he sat at the head table for a few minutes and then took his chair back to his usual place. He then said the word “jackass” while sitting at his place. This word was directed to those who moved his chair.

[22] Captain Girvan, who was assisting Colonel Horlock, a special guest at the head table, thought that Warrant Officer Pear used that word towards the colonel. She promptly stood up and reprimanded Warrant Officer Pear for acting in such a way. Master Warrant Officer Scott, who was sitting beside the accused, stopped Captain Girvan and told her that he would take care of it.

[23] Finally, Warrant Officer Pear’s behaviour changed drastically early in the dinner, between the soup and the main meal, to the point that he appeared to be falling asleep on his chair. Such situation was clearly noticed by people around him to the point that Master Warrant Officer MacQueen, who knows the accused well enough, got concerned and decided to stand up and go see what was going on. He tapped on Warrant Officer Pear’s shoulder and got from him that he was feeling sick. He invited Warrant Officer Pear to stand up and go outside with him, which Warrant Officer Pear did on his own. As soon as the accused went outside, he vomited.

[24] Warrant Officer Pear testified that after the soup course, he felt sick to his stomach. He stated that he became quiet and decided to close his eyes, and tried to recompose himself to feel better.

[25] Master Warrant Officer MacQueen checked to see if Warrant Officer Pear was well enough to go back home, which he was. He then gave the accused a taxi chit and sent him home. Master Warrant Officer MacQueen went back to the table and told people that the accused was sick and was sent home.

[26] At the end of the dinner, Captain Girvan spoke with the regimental sergeant major of the unit and complained about Warrant Officer Pear’s behaviour that night. The following day, an email was sent, asking those who had something to say regarding the accused’s behaviour at the mess dinner to reply by email with the details. It appears

that a unit investigation was launched later and that charges were laid against Warrant Officer Pear.

[27] Before this court can provide 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. And these principles, of course, are well known to counsel, but other people in this courtroom may be less familiar with them.

[28] The first and most important principle of law applicable to every Code of Service Discipline and criminal case is the presumption of innocence. Warrant Officer Pear 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.

[29] 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.

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

[31] 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.

[32] 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 Warrant Officer Pear guilty unless it is sure he is guilty. Even if the belief is 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 Warrant Officer Pear and find him not guilty because the prosecution has failed to satisfy the court of his guilt beyond a reasonable doubt.

[33] 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 Warrant Officer Pear’s guilt beyond a reasonable doubt.

[34] 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 Warrant Officer Pear's guilt arising from the credibility of the witnesses, then it must find him not guilty.

[35] The court has heard Warrant Officer Pear 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 Warrant Officer Pear's evidence.

[36] 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.)*, [1991] 1 SCR 742, must be considered, because Warrant Officer Pear testified.

[37] 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. The pitfall that this court must avoid is to be in a situation appearing or, in reality, as it chose 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. (citation omitted) However, trial judges are not required to explain in detail the process they followed to reach a verdict. (citation omitted)

[38] Of course, if the court believes the testimony of Warrant Officer Pear, that he did not commit any offence charged, the court must find him not guilty.

[39] However, even if the court does not believe the testimony of Warrant Officer Pear, 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.

[40] Even if the testimony of Warrant Officer Pear 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, it must acquit.

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

[42] Warrant Officer Pear is charged with drunkenness. Section 97 of the *National Defence Act* reads as follows:

(1) Drunkenness is an offence and every person convicted thereof is liable to imprisonment for less than two years or to less punishment, except that, where the offence is committed by a non-commissioned member who is not on active service or on duty or who has not been warned for duty, no punishment of imprisonment, and no punishment of detention for a term in excess of ninety days, shall be imposed.

(2) For the purposes of subsection (1), the offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug,

- (a) is unfit to be entrusted with any duty that the person is or may be required to perform; or
- (b) behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

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

- (a) Warrant Officer Pear was owing to the influence of alcohol or drug; and
- (b) Warrant Officer Pear was unfit to be entrusted with any duty that he was or might be required to perform or he behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[44] It is clear for the court that the prosecution proved beyond a reasonable doubt the identity, date and place of the offence, considering the admissions made by the accused on those essential elements.

[45] In addition, Warrant Officer Pear admitted in his testimony that he was owing to the influence of alcohol at the mess dinner. He clearly said that he ordered five drinks during the cocktail hour, which were two beers and three liquors. He said that he drank one beer and two brandies, left aside another glass of liquor and brought his second beer to the table for the dinner. He also mentioned that despite being served wine during the dinner, he did not consume any.

[46] The fact that he consumed alcohol was confirmed by three prosecution witnesses; however, they said that he was quickly impaired during the cocktail hour despite being able to provide the quantity he consumed. Essentially, those witnesses relied on the fact that he had a glass or two in his hands when they saw him, that he was served with alcohol more than once and that he stayed in the vicinity of the special bar

for a long time to make their observations. In addition, they found him excited, outspoken and very joyful, which was explained by the fact that he consumed a lot of alcohol, according to them.

[47] The court concludes also that the prosecution proved beyond a reasonable doubt that Warrant Officer Pear was owing to the influence of alcohol.

[48] Now, as expressed by Judge Pelletier in *R. v. Sloan*, 2014 CM 4004, paragraph 14:

The offence of drunkenness is not aimed at sanctioning the consumption of alcohol or a drug. It is meant to address fitness for duty or behaviour that is disorderly or discredits Her Majesty's service.

[49] The expressions "behaving in a disorderly manner" and "discredit on Her Majesty's service" are undefined in the section. 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*. Then, the word "disorderly" means acting in a way that contributes to a breakdown in peaceful behaviour, and the word "discredit" means harm to the good reputation of Her Majesty's service.

[50] The position of the prosecution is that what was done by the accused, from speeches up to the time he left the dinner, is evidence beyond a reasonable doubt that supports that he behaved in a disorderly manner and/or in a manner likely to bring discredit on Her Majesty's service. More specifically, what occurred during the grace said by the padre, the way the accused acted during the dinner by making noises and spilling wine, the word he used when he brought his stolen chair back from the table and the fact of his falling asleep are evidence, taken each separately or as a whole, to support such a conclusion.

[51] To the contrary, defence counsel said that the court could not uphold such decision. He is of the opinion that what is disclosed by such evidence is that there was nothing out of the ordinary that could lead the court to conclude that this essential element was proven by the prosecution beyond a reasonable doubt.

[52] Warrant Officer Pear never denied displaying the behaviour as reported by some witnesses for the speeches and dinner. He testified in a clear and straightforward manner. He never hesitated to provide details that would help the court understand what happened. He told the court that he inadvertently repeated some words said by the padre, and realized that he was the only one doing that. He stopped doing it right away. He explained how his chair was stolen while he went to the bathroom and that he used the word "jackass" to express, to those sitting on each side of him, his disapproval of the gesture made toward him by moving his chair. He also explained how he began to feel sick and how he behaved up to the time he left the dinner.

[53] Evidence adduced by the prosecution supports his version of the events regarding the grace and the chair incident. Moreover, the prosecution called a witness that contradicted other witnesses it had called about the event concerning the chair, which clearly impacted on the credibility and reliability of its own witnesses. Captains Girvan, Decaire and Bye told the court a totally different story, while Master Warrant Officer Scott, who was sitting beside the accused, confirmed the story told by the latter. In addition, some witnesses called by Warrant Officer Pear for his defence confirmed his version of the story.

[54] Essentially, Warrant Officer Pear, recognized that he was involved in those events prior to and during the mess dinner, but denied that it constitutes, in any shape or form, evidence that he behaved in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[55] The court does believe him on this issue. In addition, his version is supported by some other witnesses. It is true that there are some minor discrepancies, which normally occur after more than three years after the incident. As an example, some witnesses were able to recall if they were standing or sitting during the grace, while some were unable to answer this question; however, most of them agreed that the accused repeated some words said by the padre, which is the essential part to understand from the evidence and which confirmed the accused's version.

[56] Even if the court had disbelieved the version provided by the accused, the court would have concluded that his testimony raised a reasonable doubt.

[57] As mentioned by the accused, and confirmed by some witnesses, Warrant Officer Pear did nothing out of the ordinary on that night that would lead the court to conclude that the prosecution proved this essential element. Taken separately or as a whole, those events do not support that the accused was acting in a way that contributes to a breakdown in peaceful behaviour. He may have irritated some guests, but his behaviour was not disruptive or disturbing to the extent that it resulted in a sudden collapse or breakdown of the dinner, even for a very short period of time.

[58] In addition, those events did not result in any harm to the good reputation of Her Majesty's service. In fact, the prosecution failed to adduce any evidence on that very specific point.

[59] Consequently, having regard to the evidence as a whole, the prosecution has not proven beyond a reasonable doubt all the essential elements of the offence of drunkenness.

[60] Warrant Officer Pear is also charged with two counts for having used insulting language to a superior officer. The purpose of this offence is to ensure minimal respect that shall exist in a military context between subordinates and superiors, in front of military members or not, with the idea of avoiding any kind of behaviour that would lead ultimately a subordinate to a state of disobedience that would affect cohesion and

morale among Canadian Forces members at any level. Section 85 of the *National Defence Act* reads as follows:

Every person who uses threatening or insulting language to, or behaves with contempt toward, a superior officer is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

[61] In addition to the identity of the accused and the date and place as alleged in the charge sheet, the prosecution must also prove each of the following additional essential elements beyond a reasonable doubt:

- (a) that Warrant Officer Pear said the words alleged in each charge;
- (b) that Warrant Officer Pear used insulting language;
- (c) that Warrant Officer Pear expressed those words to a superior officer; and
- (d) that Warrant Officer Pear knew that the person to whom he expressed those words was a superior officer.

[62] Concerning the identity, date and place, the admissions made by the accused on those elements do not require the court to proceed with further analysis. In addition, evidence is clear that Warrant Officer Pear did express words to a superior officer and that he knew about such status when he did so.

[63] Warrant Officer Pear admitted that he used words to the effect of meaning "I like a girl with a little extra" to Captain Decaire, then Lieutenant Worr, without using specifically those words. He also admitted having used the word "pussy" while talking to Captain Bérubé at the mess dinner; however, he denied vigorously that they constituted insulting language and were said with an insubordinate intent.

[64] He also denied having said the word "loser" to Captain Decaire, then Lieutenant Worr.

[65] In order for the court to conclude that the prosecution proved beyond a reasonable doubt that Warrant Officer Pear used insulting language, it must be satisfied that an informed reasonable person, aware of all the circumstances of this case, could conclude that the words used were disrespectful, abusive in the context they were said, demonstrating at the same time an insubordinate intent.

[66] The court does believe Warrant Officer Pear when he said that he never intended to insult any officer that night at the mess dinner. He has his own way to express things, sometime in an inappropriate way. However, the court concludes that an informed reasonable person, aware of all the circumstances of this case, could conclude that the words used were not disrespectful or abusive in the context they were said.

[67] Clearly, from an objective perspective, Warrant Officer Pear had some kind of challenging attitude, but he never intended or meant to challenge the authority of the officers involved in the charges by saying those words. He was more than anything trying to make a joke of the situation in a social context, without giving full consideration on how it could be interpreted differently by the receiver of those words. This candid attitude from the accused in mixing with officers, as they were more than acquaintances, clearly gave them the feeling that he was trying to act in a disrespectful manner by not respecting the hierarchy that must exist between a NCO and an officer.

[68] In reality, from an objective perspective, he was not. During the entire mess dinner, including the pre-dinner cocktail hour, he was respectful towards officers and when he acted out of the ordinary, he was told to correct his behaviour, which he did without any discussion. What was inappropriate and unexpected by the officers is the level of familiarity disclosed by the accused when he made those comments; however, such a thing did not make them insulting language, nor disclose any insubordinate intent from the accused.

[69] From an objective perspective, the comments made by Warrant Officer Pear to Captain Decaire, then Lieutenant Worr, could be seen as being very inappropriate, unnecessary and misplaced comments without knowing clearly the person; however, they could not be interpreted, from an objective perspective, as being insulting language and disclosing any insubordinate intent.

[70] About the incident with Captain Bérubé, words said by the accused never made the officer feel insulted, but Captain Bérubé worried about the exact meaning of it. I would say that, from an objective perspective, the result is the same because of the context, the tone used by the accused and the level of familiarity between both individuals.

[71] Concerning the use of the word “loser”, the accused’s testimony raised a doubt about if, in fact, it was really said or not. In addition, if that word was said, the court reached the same conclusion about the fact that it does not constitute insulting language and that it was not said with an insubordinate intent by the accused, from an objective perspective, considering the context in which this word was said, the subject matter involved and the tone used by the accused.

[72] Then, it is the conclusion of this court that the prosecution failed to prove beyond a reasonable doubt that Warrant Officer Pear used insulting language on both charges.

[73] 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 using insulting language to a superior officer.

FOR THESE REASONS, THE COURT:

[74] **FINDS** Warrant Officer Pear not guilty on the first, second and third charge on the charge sheet.

Counsel:

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

Major B.L.J. Tremblay, Defence Counsel Services, Counsel for Warrant Officer W.L. Pear.