



COURT MARTIAL

Citation: *R. v. Lévesque*, 2016 CM 4017

Date: 20161116

Docket: 201630

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal A.P.M. Lévesque, Accused

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

REASONS FOR FINDING

(Orally)

Introduction

[1] Master Corporal Lévesque is facing one charge under section 85 of the *National Defence Act (NDA)* for behaving with contempt towards Sergeant Sullivan, as a result of an episode of alleged insubordination on 26 February 2016 here at Petawawa Garrison during a course where Master Corporal Lévesque was a student under the supervision of Sergeant Sullivan, who was then his instructor.

[2] It is not disputed that the alleged contemptuous behaviour occurred in the context of a verbal exchange in the presence of then-Corporal Lowe, when Sergeant Sullivan insisted that Master Corporal Lévesque obtain a helmet to be able to partake in an upcoming training activity. Master Corporal Lévesque had left his helmet at home, a 20 to 30 minute drive away and was preoccupied by his desire to attend a service call that morning for a defective water heater at his residence. In the course of the conversation, Master Corporal Lévesque showed no willingness to obtain a helmet from home or otherwise. As a consequence, Sergeant Sullivan announced that he had to

report the situation to Sergeant Price, the course second in command (2IC), to the effect that Master Corporal Lévesque was refusing training. As Sergeant Sullivan turned around to leave, Master Corporal Lévesque said “Fuck off”. Upon hearing these words, Sergeant Sullivan turned back to face Master Corporal Lévesque again and ask him whether he had just said “fuck off” to a sergeant, to which Master Corporal Lévesque replied he was just joking. Sergeant Sullivan was not kidding and reported the situation immediately.

The evidence

[3] The evidence consists in the oral testimony of two witnesses called by the prosecution and the testimony of Master Corporal Lévesque in his own defence, in addition to admissions produced by the defence as Exhibit 3. The witnesses testified as to what they recall having heard of the interaction and the discussion between Master Corporal Lévesque and Sergeant Sullivan on 26 February 2016 and provided elements of context on the circumstances in which the words attributed to Master Corporal Lévesque were uttered.

[4] The first witness for the prosecution was Master Corporal Lowe, who was corporal at the time of the alleged offence and a fellow student with Master Corporal Lévesque on a Light Armoured Vehicle (LAV) Conversion Course at Canadian Forces Base (CFB) Petawawa. He said that on the morning of 26 February 2016, the course was dismissed at around 0900 hours to allow students to get their helmet to be able to ride in the vehicle later in the morning. He was involved in an informal and very relaxed conversation outside the classrooms with Master Corporal Lévesque and Sergeant Sullivan when the need for a helmet was raised by Sergeant Sullivan. Master Corporal Lévesque was adamant he was not going back home to get his helmet as he apparently had to go home again that same morning for an appointment. Master Corporal Lowe said that Sergeant Sullivan then became sterner in his approach when he heard Master Corporal Lévesque say he was not going to get his helmet. Eventually, Sergeant Sullivan mentioned he had to report the situation to Sergeant Price and turned around to leave. At that point, Master Corporal Lévesque said “fuck off” in a regular speaking voice. Sergeant Sullivan turned around and asked “Did you just say ‘fuck off’ to a sergeant?” Master Corporal Lévesque responded “Yes”. At that point, Master Corporal Lowe said that Sergeant Sullivan appeared shocked. He himself felt tense and was taken aback as he did not understand the resistance of Master Corporal Lévesque to get a helmet as he could have borrowed one from unit lines located nearby.

[5] Master Corporal Lowe acknowledged that the word “fuck” is used frequently at work for all kind of reasons in many different contexts, not all of which are confrontational or negative. He said the words “fuck off” spoken by Master Corporal Lévesque appeared to be directed more at the situation than at the sergeant. Master Corporal Lévesque appeared relaxed throughout the conversation and may not have realized that the casual conversation had become more serious as soon as Sergeant Sullivan started insisting on the need for a helmet. Following the departure of Sergeant

Sullivan however, Master Corporal Lévesque seemed to have realized that Sergeant Price would likely come to him and demand explanations as to what had happened.

[6] The second prosecution witness was Sergeant Sullivan who testified that he was the senior instructor for the section of the LAV Conversion course to which Master Corporal Lévesque and Lowe belonged. He said that the students were dismissed at 0810 hours for about one hour to allow time for them to get their helmets, as a result of a change in the program which may have mislead students on what equipment was needed that morning. This testimony differs from Master Corporal Lowe's who said the class was dismissed after 0900 hours. Sergeant Sullivan stated he had been made aware that Master Corporal Lévesque was waiting for a service call for a water heater at his home. He said he approached Master Corporal Lévesque and Master Corporal Lowe to have a discussion with them and found out Master Corporal Lévesque did not have a helmet. He told Master Corporal Lévesque that he needed a helmet but is unsure as to the exact words he used to convey his intent in that regard. Sergeant Sullivan testified that the response he got from Master Corporal Lévesque was that he was not going to get his helmet from home and that he should not have to go home twice that morning. Even if he was getting irritated by that reaction, Sergeant Sullivan said that he remained cordial, explained the reason why a helmet was needed and insisted that Master Corporal Lévesque needed to get a helmet. He said that Master Corporal Lévesque was still expressing his refusal to get a helmet.

[7] Sergeant Sullivan said he mentioned to Master Corporal Lévesque that he would have to report to Sergeant Price, the course 2IC, that he refused to take part in the training that required wearing a helmet. Upon turning around to leave, Sergeant Sullivan said he heard Master Corporal Lévesque say "fuck off" in a clear but normal tone of voice. He then faced Master Corporal Lévesque and asked him if he had just said "fuck off" to a sergeant. He observed Master Corporal Lévesque look up from his phone and replying that he was joking. He said no one was laughing and he did not find the situation funny at all. Sergeant Sullivan acknowledged that the words "fuck off" may have been directed either at him or at the situation but that Master Corporal Lévesque's reply to his question to the effect that he was joking confirmed in his mind that the words were directed at him and not at the phone in Master Corporal Lévesque's hands. He said that as a result of the conversation he felt angry, disrespected and shaken by what had just happened. He confirmed that he did not care what helmet Master Corporal Lévesque got and that he could have borrowed one without having to go home, which he did not order him to do at any point in the conversation.

[8] Master Corporal Lévesque testified in his defence. He explained the difficult situation he found himself in on the morning of Friday 26 February given that the water heater had broken at his home during the night, he had two tenants and he had been given a window for a service call between 0900 to 1000 hours for a technician to attend his home, otherwise the next opportunity for getting the heater fixed was on Monday morning. Facing a weekend without hot water he explained the situation to Sergeant Sullivan upon arriving at work on Garrison Petawawa around 0800 hours that morning. When the class was dismissed a short time later he felt it would make no sense for him

to be driving home to Pembroke 20 to 30 minutes away to get his helmet, drive back to the base and then have to go back home right after to attend the service call. Consequently, he felt Sergeant Sullivan was dismissive of his water heater problems when he insisted that he needed to get his helmet as soon as possible. He said he did not want to go back home. When he heard Sergeant Sullivan state that he would report to Sergeant Price that he was refusing to train, he decided he needed to cancel the service call, looked at his phone to find the number for the technician and said “fuck off”.

[9] Master Corporal Lévesque said he was taken aback when Sergeant Sullivan turned around and asked him whether he had just said “fuck off” to a sergeant. He said the first words that came out of his mouth then were “I was just kidding.” Master Corporal Lévesque insisted that the words “fuck off” were directed at the situation and not at anybody in particular. He insisted he did not intend to offend anyone. He said he had no intention to drop off of training. As soon as Sergeant Sullivan had left, he cancelled the service call and contacted colleagues to borrow a helmet from unit lines close by. However, Sergeant Price soon came to him and admonished him for his behaviour. He was ordered to get his helmet from home and he complied.

The position of the parties

[10] The prosecution submits that the entire behaviour of the accused in relation to the helmet discussion showed indifference and lack of control, part of a conduct which amounts to contemptuous behaviour. For its part, the defence argues that the accused should not be found guilty given that his behaviour was not directed at Sergeant Sullivan and he had no intention to offend anyone. When questioned about the required fault element for the offence, the prosecutor replied that as long as the accused’s conduct was voluntary, as it was in this case, and this conduct is objectively contemptuous, he must be found guilty.

The applicable law

Essential elements of the offence

[11] In my opinion, the essential elements of the charge under section 85 of the *NDA* for behaving with contempt toward a superior officer are as follows:

1. Identity of the accused;
2. Date and place of the offence;
3. The prohibited conduct (*actus reus*) constituting contemptuous behaviour as alleged in the charge;
4. The fact that the prohibited conduct was in relation to a superior officer;

5. The knowledge of the accused that the person subject of the contemptuous behaviour was a superior officer; and
6. The fault element (*mens rea*): that the accused was demonstrating an insubordinate intent.

The need for a distinct fault element

[12] As it should be clear from the list of these elements, I do not agree with the prosecution's contention that the fault element or *mens rea* for the offence under section 85 of the *NDA* is simply made out when it is established that the conduct was voluntary, as long as it is objectively contemptuous. In my view, this would merge the conduct and fault elements to an extent that is not constitutionally permissible given that violations of section 85 are punishable by imprisonment. I do acknowledge that the fault element has often been overlooked in the analysis of section 85 offences but in my view it was always present. The confusion may have been caused by the wording of Note E to *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 103.18 dealing with section 85 of the *NDA* on insubordinate behaviour, that reads as follows:

(E) In the case of threatening or insulting words, they must have been expressed to a superior officer and with an insubordinate intent, that is to say, they must be, either in themselves, or in the manner or circumstances in which they were spoken, insulting or disrespectful.

[13] In my view, what is meant by this note is that proof of insubordinate intent is required, although this proof of intent can be made by resorting to inferences drawn from all of the circumstances. That is so even if this note refers strictly to the language portion of section 85. Indeed, section 134 of the *NDA* provides that a person charged with any one of the three offences provided for at section 85 may be found guilty of any other offence prescribed in that section. It results that the *mens rea* for all of the offences prescribed in section 85 must, in my view be the same.

[14] To be clear, the fault element I highlight here is subjective; what matters is what the accused actually intended. I read Note E to QR&O 103.18 as suggesting that the trier of facts' conclusion about what the accused actually intended may depend on inferences drawn from all of the circumstances. In doing so, I do not depart from the subjective standard of fault. The words of Professor Don Stuart, in his text *Canadian Criminal Law*, 2nd ed. Toronto: Carswell, 1987, at page 125, explain this point:

In trying to ascertain what was going on in the accused's mind, as the subjective approach demands, the trier of fact may draw reasonable inferences from the accused's actions or words at the time of his act or in the witness box. The accused may or may not be believed. To conclude that, considering all the evidence, the Crown has proved beyond a reasonable doubt that the accused "must" have thought in the penalized way is no departure from the subjective substantive standard. Resort to an

objective substantive standard would only occur if the reasoning became that the accused “must have realized it if he had thought about it”.

Elements to be proven in this case

[15] The defence’s admissions at the outset of the trial dispense the prosecution from proving most of the elements. The identity, time and place of the offence are admitted. The facts that Sergeant Sullivan was a superior officer in relation to Master Corporal Lévesque and that Master Corporal Lévesque knew that Sergeant Sullivan was a superior officer are also admitted. There is no contention that Master Corporal Lévesque would have uttered the words attributed to him knowingly. What is in issue is whether these words constitute contemptuous behaviour towards Sergeant Sullivan and whether Master Corporal Lévesque demonstrated an insubordinate intent, i.e. whether he intended to behave with contempt.

[16] As for that first issue of the prohibited conduct, the charge alleges that Master Corporal Lévesque behaved with contempt toward Sergeant Sullivan. It is clear from all of the evidence that the requirements of Note F to QR&O article 103.18 are met, in that the conduct complained of was within the sight or hearing of Sergeant Sullivan. That being said, how to assess whether someone’s actions are contemptuous? The notion of contemptuous or contempt in relation to an offence refers in the Concise Oxford Dictionary to being disobedient or disrespectful. The terms “contemptuous” and “disrespectful” can in my view be used interchangeably in the context of this case. The question of whether the actions attributed to Master Corporal Lévesque are contemptuous is to be decided on an objective standard, meaning that the nature of these actions must be looked at as it would be by the ordinary reasonable person in the circumstances in which the acts were committed. That reasonable person is one who is objective, fully informed of the circumstances of the case, right-minded, dispassionate, practical and realist. Witness opinions are relevant to the application of the reasonable person standard; however, they are not determinative, given that one’s personal opinion does not necessarily satisfy the requirement of the legal test, which is whether the actions would be considered contemptuous or disrespectful by the ordinary reasonable person, in all the circumstances. For that reason, the prosecution is not required to prove that the intended recipient of the contemptuous behaviour found the behaviour to be contemptuous.

[17] As for the second question in issue in this case, as already stated the fault element is subjective. What matters is what Master Corporal Lévesque actually intended: did he intend, by his actions, to behave with contempt that is be contemptuous or disrespectful towards the superior officer in question? This question can be determined based on inferences drawn from all of the circumstances.

[18] Underlying the analysis of those two issues and indeed any charge by a court is the constitutional requirement for the prosecution to prove its case beyond a reasonable doubt. The accused enters penal proceedings presumed to be innocent. The burden of proof rests on the prosecution throughout the trial and never shifts to the accused. The

standard of proof beyond a reasonable doubt is inextricably intertwined with a principle fundamental to all criminal trials: the presumption of innocence. This means that, before an accused can be convicted of an offence, the judge must be satisfied beyond a reasonable doubt of the existence of all of the essential elements of the offence.

[19] A reasonable doubt is not an imaginary or frivolous doubt. It must not be based upon sympathy or prejudice. Rather, it is based on reason and common sense. It is logically derived from the evidence or absence of evidence. It is not sufficient for me to believe the accused is probably guilty or likely guilty. In those circumstances the accused must be given the benefit of the doubt and acquitted because the prosecution has failed to satisfy me of the guilt of the accused beyond a reasonable doubt. On the other hand I must keep in mind that it is virtually impossible to prove anything to an absolute certainty and the prosecution is not required to do so.

[20] In this case, the accused has testified. His evidence impacts both elements remaining to be proven in that he testified that the words “fuck off” which he admits stating were not directed at Sergeant Sullivan but at the situation. He also stated that he did not intent to offend anyone. In order to respect the fundamental principle obliging the prosecution prove the guilt of the accused beyond a reasonable doubt I must assess the credibility of the accused as follows:

First, if I believe the evidence of the accused, I must acquit.

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

Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence which I accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

Analysis

[21] The charge of behaving with contempt has been particularized as follows:

“In that he, on or about 26 February 2016, at Garrison Petawawa, ON, behaved with contempt toward Sgt Sullivan.”

[22] The behaviour complained of occurred in the course of a conversation dealing with the requirement imposed on Master Corporal Lévesque, as well as all other participants in the course, to obtain a helmet. It has not been contested that this requirement, expressed by Sergeant Sullivan to Master Corporal Lévesque was legitimate, as admitted by the accused himself. I find that prosecution witnesses testified in a calm and straightforward manner in conveying to the court their recollection of what was said then. When they did not remember, they said so. They did not show an interest in influencing a given outcome. For instance, both conceded that it was possible that the words uttered by Master Corporal Lévesque may not have been directed at

Sergeant Sullivan but rather at the situation. Master Corporal Lowe concluded that they may have been directed at the situation while Sergeant Sullivan explained clearly why he thought they were directed at him. Although their reliability as to the exact words spoken was deficient at times, I have no reasons to doubt their credibility.

[23] Prosecution witnesses were adamant that Master Corporal Lévesque had shown no indication that he was to comply with the requirement to get a helmet. Master Corporal Lévesque himself conceded that he was not going back home to get a helmet and from his testimony, he made no steps or has expressed no intent to obtain a helmet from within Petawawa Garrison until Sergeant Sullivan had left. The words spoken at the end of the conversation are important and intricately linked with the conduct and the words expressed earlier. Confronted with an apparent refusal from Master Corporal Lévesque to get a helmet, Sergeant Sullivan told him he would have to report to Sergeant Price his refusal to take part in the training. That statement is immediately met with the words “fuck off” from Master Corporal Lévesque.

[24] From that point, the element of the prohibited conduct has in my view been made out. The actions of Master Corporal Lévesque must be looked at as it would be by the ordinary reasonable person in the circumstances prevailing at the time. In my view, the prosecution has discharged its burden to present evidence that would lead an ordinary reasonable person to conclude that the actions of Master Corporal Lévesque were contemptuous in the circumstances. Master Corporal Lowe expressed that he was taken aback and felt tense at the situation. Sergeant Sullivan said he felt upset and disrespected. These opinions are not determinative as the test is objective yet they are relevant to the application of the reasonable person standard and in that sense provide some indication as to what a reasonable person would have concluded of the situation.

[25] I am aware of the testimony of the accused to the effect that his words “fuck off” were directed at the situation and not at Sergeant Sullivan but I do not believe his testimony. Even accepting the evidence I heard to the effect that the word “fuck” is used profusely in the workplace of the accused, it remains that saying “fuck off” immediately after hearing a superior officer state that he is going to take action against you is not a conduct that is insignificant and should be considered casually as I am invited to do. As far as the prohibited conduct is concerned, saying something like “fuck off” in the course of an argument with a superior is objectively disrespectful regardless as to whether it is directed at the person or at the situation. The testimony of the accused leaves me with no doubt. I accept the evidence of Sergeant Sullivan, to the effect that the reply by Master Corporal Lévesque to his inquiry about saying “fuck off” to a sergeant reveals he was addressing these words to him. This is the only logical conclusion that can be reached.

[26] That being said, considering Master Corporal Lowe’s opinion that the words “fuck off” were directed at the situation more than at Sergeant Sullivan, I wish to add that even if I were to accept that distinction, my conclusion about the contemptuous nature of the acts would not change. Indeed, I should not lose track of what that *situation* towards which the words would have been directed is. I am dealing with a

sergeant telling a master corporal subordinate, on a course, that a helmet is needed for training. The sergeant is confronted with refusals from the subordinate to get a helmet. The same sergeant is consequently telling his master corporal subordinate that he needs to go disclose those refusals to his superior. Immediately after saying these words, the sergeant hears the words “fuck off” from the mouth of his subordinate. In that context, attempting to distinguish *the situation* from *the person* of Sergeant Sullivan is in my view entirely artificial. Sergeant Sullivan is the source of the situation. In the context of this case, even if I were to accept that the words “fuck off” were directed at the situation, these words would still constitute contemptuous behaviour toward Sergeant Sullivan.

Conclusion on the prohibited act (actus reus) element

[27] As a result, I conclude that on the facts of this case, the *actus reus*, that is the prohibited act on the charge, has been proven beyond a reasonable doubt.

Analysis of the fault (mens rea) element

[28] It is admitted that Master Corporal Lévesque would have uttered the words attributed to him knowingly. Yet, he testified that he did not mean to offend anyone. This raises the issue of whether the fault element of the offence has been made out on the evidence. As mentioned earlier, the fault element or *mens rea* of the offence requires the application of a subjective test relating to whether the accused intended to behave with contempt by his conduct. As noted in Note E to QR&O 103.18 when words attributed to the accused are at issue, I must find an insubordinate intent on the basis of all of the circumstances of this case. In trying to ascertain what was going on in the accused’s mind, as the subjective approach demands, I may draw reasonable inferences from the accused’s actions or words at the time of his act or in the witness box. I may choose to believe or not believe the accused.

[29] Here I do not believe the testimony of the accused to the effect that he did not intend to offend anyone. At the risk of repeating myself, the unchallenged evidence in this case is that once faced with a reasonable demand from his superior to get a helmet as it was needed for the day’s training, all that Master Corporal Lévesque could say is that he was not going to get his helmet at home and showed no sign of getting a helmet anywhere else. When his superior told him he was going to take action on the basis of what he quite appropriately considered to be a refusal to train, Master Corporal Lévesque said “fuck off.” In his testimony, Master Corporal Lévesque explained the stress he was under in relation to the water heater issue at his home. He stated he was upset, as he perceived Sergeant Sullivan to be dismissive of his water heater problem. In the circumstances it is impossible for me to accept that the conduct of Master Corporal Lévesque in stating that he was not going to get a helmet and saying the words “fuck off” immediately after having been told his conduct would be reported did not show insubordinate intent targeted at the source of his frustration. His evidence on that point does not leave me with a reasonable doubt. I conclude that, considering all the evidence, the prosecution has proven beyond a reasonable doubt that the accused must have

intended to behave with contempt toward a superior officer by his conduct on 26 February 2016.

Conclusion on the fault (mens rea) element

[30] As a result, I conclude that on the facts of this case, the *mens rea* or fault element of the charge has been proven beyond a reasonable doubt.

CONCLUSION

[31] In all of these circumstances therefore, I am convinced beyond a reasonable doubt that all of the essential elements of the charge have been made out and therefore Master Corporal Lévesque must be found guilty.

FOR THESE REASONS, THE COURT:

[32] **FINDS** the accused guilty of the one charge on the charge sheet, behaving with contempt towards a superior officer, contrary to section 85 of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Captain L. Langlois

Major A.H. Bolik, Defence Counsel Services, Counsel for Master Corporal Lévesque