



COURT MARTIAL

Citation: *R. v. Brady*, 2003 CM 281

Date: 20031030
Docket: F200328

Standing Court Martial

Jericho Garrison Vancouver
Vancouver, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer A.J. Brady, Accused

Before: Lieutenant-Colonel M. Dutil, M.J.

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's " <i>Use of Personal Information in Judgments and Recommended Protocol</i> ".

FINDING

(Orally)

[1] Warrant Officer Brady is charged with four offences under the Code of Service Discipline which is part III of the *National Defence Act*. The first and third charges allege a contravention by Warrant Officer Brady of section 114 of the *National Defence Act*, that is stealing, when entrusted by reason of his employment, with the custody, control or distribution of the thing stolen. The second and fourth charges are laid as alternate charges and they relate to an act to good order and discipline, to the prejudice of good order and discipline, for having used a Department of National Defence (DND) Unit Acquisition MasterCard to purchase goods for his personal use.

[2] These charges arise from a series of events that allegedly occurred on or about 10 February 2000, at or near the City of Vancouver, British Columbia, and that is in the case of the first and second charges and on or about 17 January 2001, at or near the city of Langley, British Columbia in the case of the third and fourth charges.

[3] These charges arise from purchases made by Warrant Officer Brady using a DND Unit Acquisition Credit Card and these purchases were made by Warrant Officer Brady for his personal use and the merchandise acquired consisted, in both cases, of computer software.

[4] The evidence before this court consists in the testimony of Captain Van Slyke. In addition, the evidence consists in the admissions made by the defence that have been reproduced in writing and filed before the court as Exhibit 3.

[5] The following exhibits are also in evidence:

- (a) Exhibit 4: This exhibit consists of two documents, both from Office Depot Store number 724 located at 310 West Broadway, Vancouver, BC, related to purchases totalling \$634.38 made at that location for various office supply items and the Computer Software QuickTax of \$34.99. These documents show that the purchases were made using a MasterCard credit card number XXXX at 1300 hours on 10 February 2000;
- (b) Exhibit 5: Exhibit 5 consists also of two documents, but this time both from Staples Store number 93 located at 20055 Willobrook Drive, Langley British Columbia, and they relate to purchases totalling \$68.91 made at that location for various office supply items and the Computer Software QuickTax, this time at the price of \$29.95. These documents show that the purchases were made using the same credit card at 12:42 p.m. on 17 January 2001;
- (c) Exhibit 6: Exhibit 6 is an exhibit that consists of two forms entitled "Acknowledgement of Responsibility for an Acquisition Card" in the name of Warrant Officer Brady for the card associated with that account, that is card XXXX. The first sentence of the second paragraph of these forms state: "This card has been issued to me for the purpose of making procurement and payments as required in the course of my regular duties". These forms appear to have been signed in 1998 and 1999 by Warrant Officer Brady;
- (d) Exhibit 7: Exhibit 7 is a photocopy of a Statement of Account for a Business Card-Procurement Card issued by the National Bank of Canada on 3 March 2000 which indicates, in part, that a transaction was made on 10 February 2000 at Office Depot Store number 724 in the amount of \$634.38; and

- (e) Exhibit 8: Exhibit 8 is the original of a Statement of Account for a Business Card-Procurement Card issued by the National Bank of Canada again but this time on 2 February 2001 which indicates, in part, that a transaction was made on 17 January 2001 at Staples Store number 93 in Langley in the amount of \$68.91.

[6] All of the exhibits were filed by the prosecution with the defence's consent and therefore no witnesses were called to introduce those documents in court.

[7] Finally, the evidence consists of the judicial notice taken by the court for those facts and matters that are contained at Military Rule of Evidence 15.

[8] The evidence before this court is straightforward. Warrant Officer Brady was, at the time of the alleged offences, a member of the 15 Field Artillery Regiment Band. This Regiment is a unit embodied in the Reserve Force. As one of the senior members of that band, he was performing his primary duties of being a musician in that band but he was also tasked with secondary duties, like many others in his unit and of course that he had accepted to perform. Secondary duties in that unit ranged from being in charge of the musical library, being responsible for finance budget and allocations, ops and course loading, stores and office supply as well as band transportation arrangements, et cetera. Captain Van Slyke, the officer in command, had assigned his senior personnel with some of these secondary duties in order to achieve the proper functioning and operation of that band because he did not have the benefit of having dedicated personnel to perform these important functions for reasons that were beyond his control. At the time of the alleged offences, Warrant Officer Brady's secondary duties included being in charge of the office or the stores and office supply. In order to perform these secondary duties, he had been issued, like others in his unit, with a DND Unit Acquisition Credit card MasterCard number XXXX. This card was issued to Warrant Officer Brady in order to simplify and expedite the acquisition procedure by not having to go through the Canadian Forces Supply system. Captain Van Slyke expected Warrant Officer Brady to make sure that the band had whatever was required to perform their tasks in terms of office supply. The individuals in possession of acquisition credit cards would make the required purchases and bring back the receipts for approval. There was no instruction, order or directive, as to when, where and how these secondary duties would be performed.

[9] There is no evidence before this court supporting that Warrant Officer Brady could have been employed by the Canadian Forces in some type of service other than Class "A" service during the period where the offences were allegedly committed. In fact, the evidence provided by Captain Van Slyke is to the effect that people attending on Class "A" service would sign the attendance register and pay sheet in order to be paid for their duties. Captain Van Slyke testified that his personnel would be paid or would have been paid for performing their secondary duties, if funding was present, if these duties would have been performed outside of a defence establishment. However, duties could be performed by his personnel on their own and remain unpaid. Captain Van Slyke testified that Warrant Officer Brady did not sign the unit attendance register on 10 February 2000 and he did not receive any reserve military pay for the day. Captain Van Slyke also

testified that Warrant Officer Brady was on Class “A” service on 17 January 2001 and paid for half a day for a period that commenced at 1900 hours as reflected on Warrant Officer Brady's pay statement for that day. The alleged illegal purchase in January 2001 would have been made at 1242 hours on 17 January 2001.

[10] Counsel submit that the only issue in this case is one of jurisdiction. The question can be framed this way: Was Warrant Officer Brady, when he committed the alleged offences, subject to the Code of Service Discipline by being on duty within the meaning of subparagraph 60 (1) (c) (iii) of the *National Defence Act*?

[11] The court agrees with counsel that this is the only issue in this case.

[12] In matters dealt with under the Code of Service Discipline, as in cases dealt with under the criminal law, every person charged with a criminal offence is presumed innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case, on each element of the offence, beyond a reasonable doubt.

[13] That standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of the evidence upon which the prosecution relies to prove guilt. The burden of proof, that is to prove the guilt of the accused beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[14] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after considering all of the evidence.

[15] In substance, a reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy or prejudice. Rather, it is based on reason or common sense. It must be logically deriving from the evidence or from the lack of evidence.

[16] In *R. v. Starr*, the Supreme Court of Canada held that an effective way to define the reasonable doubt standard, for a jury, is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. On the other hand, it should be remembered that it is virtually impossible to prove anything to absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. Therefore the prosecution only has the burden of proving the guilt of an accused person, in this case Warrant Officer Brady, beyond a reasonable doubt. To put it in perspective, if the Court is convinced that the accused is probably guilty or likely guilty, then the accused shall be acquitted.

[17] Unlike provincial courts or superior courts of criminal jurisdiction, Courts Martial are ad hoc tribunals created by statute and that statute is the *National Defence Act*. Military tribunals do not have inherent jurisdiction over persons and offences. The disciplinary jurisdiction of the Canadian Forces is set out in Division I of Part III of the Act. Subsection 60 (1) of the Act provides an exhaustive list of persons and situations

where these persons are subject to the Code of Service Discipline. As a result, the prosecution shall not only prove every essential ingredient or element of an offence, but it shall establish beyond a reasonable doubt that an accused person was subject to the Code of Service Discipline when he or she committed a service offence.

[18] Officers and non-commissioned members of the Reserve Force are subject to the Code of Service Discipline when they fall within the ambit of paragraph 60 (1) (c). This paragraph provides:

- (c) an officer or non-commissioned member of the reserve force when the officer or non-commissioned member is
 - (i) undergoing drill or training, whether in uniform or not,
 - (ii) in uniform.
 - (iii) on duty,
 - ...
 - (v) called out under Part VI in aid of the civil power.
 - (vi) called out on service,
 - (vii) placed on active service,
 - (viii) in or on any vessel, vehicle or aircraft of the Canadian Forces or in or on any defence establishment or work for defence,
 - (ix) serving with any unit or other element of the regular force or the special force, or
 - (x) present, whether in uniform or not, at any drill or training of a unit or other element of the Canadian Forces.

[19] The prosecution submits that this case should be distinguished from a decision rendered by a Standing Court Martial in December 2002, presided by this Military Judge, in the case of *R. v. Gamache*. That case was held in Rimouski, Quebec. In *Gamache*, the accused, a Class “A” reservist, had performed some illegal acts of a fraudulent nature such as thefts, while he was performing his duties as mess manager. In *Gamache*, the evidence was that the function of mess manager was a volunteer activity. Gamache had accepted that responsibility and he was not remunerated either as part of being on Class “A” Reserve Service or as a civilian. The court found that the prosecution had failed to prove beyond a reasonable doubt that the illegal acts had taken place on a defence establishment or while in uniform and was left therefore with the issue as whether the accused was on duty within the meaning of subparagraph 60 (1) (c) (iii) of the *National Defence Act*, and that, when the acts were committed. After reviewing the legislative and regulatory framework dealing with the Reserve Force, the court concluded that the prosecution had failed to establish beyond a reasonable doubt that the court had jurisdiction to try the accused and terminated the proceedings.

[20] In the case before this court today, the prosecution submits that the accused was on duty within the meaning of subparagraph 60 (1) (c) (iii) of the Act when he committed the illegal acts. The prosecution submits that, unlike *Gamache*, Warrant Officer Brady was subject to the Code of Service Discipline when he performed the illegal purchases or illegal acts because he was performing a secondary duty that was lawfully imposed or assigned to him by his officer in command, Captain Van Slyke, and that he had accepted to perform them whether or not he was remunerated for his duties at the time. The prosecution relies on the definition contained in the *Concise Oxford English Dictionary* for the phrase or expression "on duty" that means: "engaged (or not engaged) in one's regular work". The prosecution adds that "on duty" in the circumstances does not mean necessarily that the person is performing a military duty for which the person is being paid, but that a person is "on duty" when he is performing or acting on behalf of the military or leads someone to believe that he is doing so when he pretends to perform one of his duties. Therefore, when a person is illegally using a DND credit card that was provided to him for the performance of his regular or secondary duties, that person is acting "on duty" because he is purposely acting, in the public perception, as if he was performing his military duties. That is whether or not the person is committing the illegal act in uniform or not, on a defence establishment or not, on Class "A" remunerated service or on his own personal time and not being paid at that time. The illegal use of the card in that context, in the prosecution's submission, would trigger the application of subparagraph 60 (1) (c) (iii) of the Act and render that person liable to be prosecuted under the *National Defence Act*.

[21] The prosecution suggests that this court must follow the guidelines issued by the Supreme Court of Canada in *Bell-Express Vu Limited Partner v. Rex*, (2002) S.C.R. 559, in interpreting section 60 of the *National Defence Act*, and that in applying the contextual and purposive interpretive approach. This method requires reading the words in their entire context and in their grammatical and ordinary harmonious sense within the scheme of the Act, the object of the Act and the intention of Parliament. Given this overriding principle, in the case for example where the constitutional validity of a statute is challenged, if there is ambiguity, the interpreter then would look for an interpretation that will save the law rather than render it unconstitutional. However, if no interpretation or no reasonable interpretation that is consistent with the purpose and wording of the Act can be found, the statute will be held invalid. That is, of course, an example dealing with constitutional law issues. The prosecution suggests that in using the contextual and purposive approach, the expression "on duty" must receive its ordinary meaning, therefore a reservist fulfilling a task that is part of his or her regular work, such as using a DND credit card, the said card of course that was issued to him or her by reason of employment, in any circumstance would be subject to the Code of Service Discipline under the scheme provided under the *National Defence Act* which enable, at least in part, the Canadian Forces to maintain a disciplined military forces.

[22] Although this court is sympathetic to this argument, it must fail. In fact, what the prosecution is asking the court to do is not to follow the contextual and purposive interpretative approach. The court is of the view that a plain reading of section 60 of the

National Defence Act does not leave room for any ambiguity. The expression "on duty" as it is defined in the dictionary must be used in the proper context and that context is the one of the *National Defence Act*. In this case, I would add that the context is that of a Class "A" reservist liable to serve within the applicable statutory and regulatory framework. The Reserve Force, pursuant to section 2 of the Act, means the component of the Canadian Forces that is referred to in subsection 15 (3) of the Act and that subsection provides:

(3) There shall be a component of the Canadian Forces, called the reserve force, that consists of officers and non-commissioned members who are enrolled for other than continuing, full-time military service when not on active service.

[23] By nature, members of the Reserve Force are not performing full-time military service when not on active service.

[24] Section 33 (2) of the Act provides the liability regime applicable to members of the Reserve Force and it reads as follows:

(2) The reserve force, all units and other elements thereof and all officers and non-commissioned members thereof

- (a) may be ordered to train for such periods as are prescribed in regulations made by the governor in Council; and
- (b) may be called out on service to perform any lawful duty other than training at such times and in such manner as by regulations or otherwise are prescribed by the Governor in Council.

[25] Chapter 9 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) provide that there is three types of service for the Reserve Force. The type of service enables the Canadian Forces to determine, amongst other things, the level of pay, but more importantly the reservist liability to serve in different circumstances. QR&O article 9.06 provides:

9.06 - CLASS "A" RESERVE SERVICE

(1) A member of the Reserve Force is on Class "A" Reserve Service when the member is performing training or duty in circumstances other than those prescribed under articles 9.07 (Class "B" Reserve Service) and 9.08 (Class "C" Reserve Service).

And paragraph (2) states:

(2) Class "A" Reserve Service includes proceeding to and returning from the place where the training or duty is performed, but not when that training or duty, including attendance at local parades, local demonstrations or local exercises, is performed at local headquarters.

[26] Pursuant to section 35 of the *National Defence Act*, the rates and conditions of issue of pay of officers and non-commissioned members, except for military judges, of the Canadian Forces is established by the Treasury Board. The Treasury Board has

provided compensation and benefit instructions for the Canadian Forces for the Reserve Force and in particular in Chapter 204, section V which deals with the pay reserve, other than on Class "C" Reserve Service. It is of interest to note that article 204.51 deals with the pay of Reserve Service members on Class "C" for periods of duty or training and is broken down in less than six hours or not less than six hours. So this is the legislative and regulatory framework in a nutshell of the members of the Reserves in the Canadian Forces.

[27] Members of the Regular Force are at all times liable to perform any lawful duty. This is what was referred by the defence counsel as the 24/7 liability to serve. The rate and conditions of pay of the members of the Regular Force reflect that reality. They are paid accordingly on a monthly basis. In the case of a reservist on Class "A" Reserve Service, the rate and condition of pay is set out on the basis of the period of service or instruction being performed and as it is referred in the Compensation and Benefits Instruction, on the period of duty or training. By nature, Class "A" service is part-time and rigorously structured. There is no unpaid Class "A" service. Military service in Canada is always remunerated. Whether someone is fairly compensated for the work he or she performs is another issue. Whether someone is so dedicated that he performs tasks at home, on his own time, and for no remuneration or compensation is also another issue. However, when members of the reserve choose wilfully and voluntarily to perform tasks that are in part one or more of their military secondary duties, on their own time, this initiative does not make them on duty for the purpose of being subject to the Code of Service Discipline. For a reservist, being on duty cannot be dissociated from the type of service, either Class "A", Class "B" or Class "C" Reserve Service he is performing at the time and compensated pursuant to Treasury Board Directives or in accordance with Treasury Board Directives. Everything else is volunteer work or dedication, unlike the member is of the Regular Force.

[28] When Warrant Officer Brady made the purchases using the DND credit card on the dates set out on the charge sheet, he may have purchased at that moment some items for a legitimate purpose. The use of that card, on his own time, in order to perform at least in part one of his military duties, did not make him "on duty". The defence used the example of the single purchase, using the DND credit card, that of a bathtub for his own purpose, on his own time, and the defence suggested that this would not trigger the "on duty" status under subparagraph 60 (1) (c) (iii). For example, a Canadian Forces member, other than a member of the Regular Force or a member of the Reserve Force on full-time service, that performs such a simple and obvious military duty as maintaining or polishing his kit, on his own time, is not on duty even if such duties are military duties when he does that at home. Using the card in those circumstances cannot act as a trigger for "on duty" as much as cleaning your kit at home. The prosecution did not provide sufficient evidence in this case to establish beyond a reasonable doubt that Warrant Officer Brady was on duty at the time of the alleged offences.

[29] The court certainly sympathizes with the prosecution, but that does not mean that society in general is left with no mechanism or process to deal legally and effectively with an offence of theft that would have been committed by a Canadian Forces member who

was not subject to the Code of Service Discipline at the time of the alleged offence, nor is the Canadian Forces deprived of any means to deal with that member effectively, but in using avenues other than the Code of Service Discipline. Maybe the legislator should review the status of reservists under section 60 of the *National Defence Act* and consider, for example, if a deeming provision should cover this situation. It is not, however, the role of this court to speculate on the propriety of any legislative proposal or amendment.

[30] In consequence, the court having determined that prosecution failed to establish beyond a reasonable doubt that Warrant Officer Brady was subject to the Code of Service Discipline at the time of the offences set out in the charge sheet that is before this court, the court concludes that it does not have jurisdiction to try the accused and therefore the court terminates the proceedings with respect of Warrant Officer Brady.

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