COURT MARTIAL

Citation: *R. v. Williams*, 2017 CM 4016

Date: 20171128
Docket: 201654

Standing Court Martial

Canadian Forces Station St. John's
St. John's, Newfoundland and Labrador, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Sergeant M.B. Williams, Applicant

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

DECISION ON A MOTION BY DEFENCE THAT NO PRIMA FACIE CASE HAS BEEN MADE OUT ON THE THIRD CHARGE FOR CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE

(Orally)

Introduction

[1] In this trial, Sergeant Williams is facing three charges. The first two charges of ill-treatment of a subordinate contrary to section 95 of the *National Defence Act* (*NDA*) arise out of one incident where it is alleged that he ordered two subordinates to consume water until they vomited. The third charge alleges that Sergeant Williams did harass a third subordinate, thereby committing the offence of conduct to the prejudice of good order and discipline contrary to section 129 of the *NDA*.

[2] At the close of the prosecution's case, and pursuant to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.05(13), the defense presented a non-prima facie motion with regard to the third charge under section 129 of the *NDA* contending that the prosecution has failed to introduce any evidence concerning one essential element of the offence, namely the prejudice to good order and

discipline arising out of the conduct described in the evidence heard thus far from prosecution witnesses. Specifically, the defence argues that proof of prejudice to good order and discipline in this case necessarily requires that the prosecution present evidence of a standard of conduct applicable to the accused at the time of the offence and evidence of actual or implied knowledge of that standard by the accused. The defence submits that although the prosecution produced as Exhibit 3 the Defence Administrative Orders and Directives (DAOD) 5012-0, *Harassment Prevention and Resolution* that was in force at the time of the alleged offence, it has failed to produce any evidence of the actual or deemed knowledge by Sergeant Williams of the order found at DAOD 5012-0.

[3] In reply, the prosecution submits that the particulars of the third charge do not mention a contravention of DAOD 5012-0 as the sole source allowing to conclude that the conduct proven is conduct to the prejudice of good order and discipline. Referring the court to the recent decision of the Court Martial Appeal Court (CMAC) in *R. v. Golzari*, CMAC-587 of 23 June 2017, the prosecution asserts that there is ample evidence on record to allow the court to infer prejudice to good order and discipline resulting from the proven conduct of the accused in this case.

The applicable law

[4] Note (B) to QR&O article 112.05 provides:

> (B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

[5] The note substantially captures the rule that applies with respect to directed verdicts of not guilty at the close of the evidence for the prosecution, as accepted by the Supreme Court of Canada. For instance, the test to be applied was mentioned by Fish J., who delivered the decision for the Supreme Court in *R. v. Fontaine*, 2004 SCC 27 at paragraph 53 and more recently in *R. v. Barros*, 2011 SCC 51, at paragraph 48 by Binnie J.:

> A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction: *R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 1-4; *R. v. Bigras*, 2004 CanLII 21267 (Ont. C.A.), at paras. 10-17. Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge....

[6] Indeed, a non prima facie motion at the close of the prosecution's case is different from a request for an acquittal based on reasonable doubt. The latter is based on the premise that there may be some evidence upon which a jury, properly instructed, might convict, but that this evidence is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt is not called into play until all

the evidence is in, reasonable doubt cannot be considered unless the accused has either elected not to call evidence or has completed the presentation of his evidence.

[7] The court may not take into account the quality of the evidence in determining whether there is some evidence offered by the prosecution on each essential element of each charge so that a properly instructed jury *could* reasonably decide on the issue: not "would" or "should", but simply "could".

[8] The burden of proof rests on the accused to demonstrate, on a balance of probabilities, that this test is met.

Issue

[9] In light and in the context of the arguments of the parties, what the court needs to do is to measure the impact of the *Golzari* decision as to what exactly needs to be proven by the prosecution and determine whether there is evidence on record, upon which a properly instructed panel could rationally conclude that the accused is guilty beyond a reasonable doubt of charge 3, on the essential element of the prejudice to good order and discipline.

Analysis

[10] I acknowledge the reference made by the applicant to the case *R. v. Donohue*, 2015 CM 4006, where I granted a non-prima facie application with respect to six charges laid under section 129 of the *NDA* on the basis that no evidence was adduced to prove that, at the time of the commission of the alleged offences, the accused had the requisite knowledge of the standard of conduct required to prove prejudice to good order and discipline, an essential element of the offences under section 129 of the *NDA* for which he was charged. I note that the publications and notifications requirements were simplified post-*Donohue* but I find that these new requirements in force on 1 August 2015, which is during the period of time particularized in the charge, do not apply to my analysis of this application. The *Donohue* precedent cannot be applied to this case for two reasons:

(a) first, the six charges in *Donohue* alleged that the accused did harass a number of named persons by committing certain acts contrary to DAOD 5012-0, Harassment Prevention and Resolution. In this case, there is no mention of DAOD 5012-0 in the particulars of the charge;

(b) second, the law has changed with *Golzari*, especially as it pertains to the proof of a standard of conduct. Indeed, the essential element of whether the neglect or conduct particularized in the charge is to the prejudice of good order and discipline was redefined to evacuate the previously adopted view that there were three things to be proven: a standard, knowledge of that standard and a conduct which breached that standard. In granting the appeal in *Golzari*, the CMAC reversed the trial judge’s

> decision to require proof of a standard. If the proof of the standard is no longer required, it flows that proof that the accused was aware of that standard, as part of the prejudice to good order and discipline element of the offence under section 129, cannot be demanded.

[11] Indeed, *Golzari* stands for the proposition that prejudice will be proven, beyond a reasonable doubt, so long as the totality of the circumstances supports the finding that the conduct in question would tend to or be likely to result in prejudice to good order and discipline (see paragraph 77). The notion of *prejudice* is distinguished from a physical manifestation of *injury* to good order and discipline (see paragraph 76). Furthermore, at paragraph 79, the CMAC stated that in most instances, the trier of fact in a Court Martial should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge.

[12] The prosecution submits that numerous witnesses testified as to what they perceived as a consequence of the alleged conduct of the accused in relation to Private Renouf, identified in the particulars of charge 3. It is argued that this evidence is of a type that may allow an inference that the alleged conduct would *likely* result in prejudice to good order and discipline. I agree with that assessment.

[13] The concern expressed by the defence appears to relate to the applicable norm of conduct to be applied, so that a proper defence can be advanced, in light of paragraph 79 of *Golzari* to the effect that the trier of fact should be able to determine whether the proven conduct is prejudicial to good order and discipline based on their experience and general service knowledge. I am alive to that concern. A trier of fact should be wary of deciding the issue of the existence of a prejudice to good order and discipline on the basis of their own subjective assessment. Indeed, crimes should be defined in a way that affords citizens a clear idea of what acts are prohibited. (see Reference re *ss. 193 and 195.1(1)(c) of the Criminal Code* (Man.), [1990] 1 S.C.R. 1123, per Lamer J.) We generally convict and sometimes imprison people only where it is established beyond a reasonable doubt that they have violated objectively defined norms.

[14] In this case however the service knowledge in the field of harassment is educated by the production of Exhibit 3, which includes the version of DAOD 5012-0 in force at the time of the alleged offence. There is evidence on record that could allow a trier of fact to conclude that a breach of the "non-harassment" standard defined in DAOD 5012-0 has occurred. It would then be possible to infer prejudice to good order and discipline, as stated not only in *Golzari* but also by Parliament at section 129(2) of the *NDA*. In doing so, the overall analysis becomes in practice similar to what has been applied prior to *Golzari*.

[15] This is in line with the CMAC decision of *R. v. Latouche*, CMAC-431 (2 August 2000), incidentally quoted in *Golzari*, which is also particularly helpful as to the *mens rea* required in this case. In that decision, the Court held that section 129 of the *NDA* does not require the prosecution to prove that an accused had any intent whatsoever to engage in conduct to the prejudice of good order and discipline. It is the underlying

violation that is relevant to determine what *mens rea* is required for a finding of guilt pursuant to section 129.

Conclusion

[16] The defence has not demonstrated on a balance of probabilities that no evidence was adduced to prove the essential element of prejudice to good order and discipline on the third charge, laid under s. 129 of the *NDA* for conduct to the prejudice of good order and discipline. Therefore, this Court finds that a prima facie case has been made out on that charge.

FOR THESE REASONS, THE COURT:

[17] **DISMISSES** the application.

Counsel:

The Director of Military Prosecutions as represented by Major G.J. Moorehead and Captain B.E. Jalonen

Major J.L.P.L. Boutin, Defence Counsel Services, Counsel for Sergeant M.B. Williams