COURT MARTIAL

Citation: *R. v. Scott*, 2003 CM 290

Date: 20031112
Docket: F200329

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and –

Lieutenant(N) G.D. Scott, Accused

Before: Commander P. Lamont, M.J.

FINDING

(Orally)

[1] Lieutenant(N) Scott, this court finds you guilty of the charge contained in the charge sheet.

[2] The accused, Lieutenant(N) Scott, is charged with an offence of disobedience of a lawful command of a superior officer contrary to section 83 of the *National Defence Act*, in that, on 28 November 2002, during Ceremonial Divisions held at Canadian Forces Base (CFB) Esquimalt, he did not remove his headdress when ordered to do so by the Parade Commander, Commander Heath.

[3] The evidence, consisting of the testimony of witnesses and formal admissions of fact made by the accused, discloses that, on the date alleged in the charge, Ceremonial Divisions were held for the base at CFB Esquimalt. This consists of a parade during

which the members are formally drawn up on parade and brought to order and dress by the senior non-commissioned members. The parade is then formally turned over to the Parade Commander, in this case then Commander, and now Captain(N) Heath. The purpose of Ceremonial Divisions is to bring together the entire ships company, or for those ashore, the base personnel, for the purpose of permitting the reviewing officer to see and address his or her people, to present awards or promotions, and often to conduct an inspection. Ceremonial Divisions are held approximately four times a year at CFB Esquimalt.

[4] The accused was formed up in a platoon of supernumerary officers in three ranks to the left of the reviewing officer and facing the rest of the parade. At a point in the parade, perhaps a half to two-thirds of the way through the ceremony, the parade commander saluted the reviewing officer and sought permission to carry on with prayers. When permission was given, the parade commander, in a loud voice, ordered the removal of headdress.

[5] The accused failed to remove his headdress and remained at attention, despite the order. Thereafter, the padre, Lieutenant-Commander Cudmore, recited the Naval Prayer and the band played a verse of the Naval Hymn. After this, the parade was brought to attention and the order was given to restore headdress. Then the reviewing officer, the Base Commander, was given an opportunity to address the parade.

[6] Sometime prior to 28 November 2002, the accused had a conversation with his superior, Commander Smith, the Base Information Services Officer. The accused advised Commander Smith that he was considering whether or not he would comply with the order to remove headdress on Ceremonial Divisions. The accused said he did not believe it was right to mix church and state. Commander Smith considered that the accused had a serious concern about removing his headdress on parade before prayers. He advised the accused that the order to remove headdress was a lawful order. He took steps himself to inquire as to the rules set out in the dress manual, and took steps to bring this information to the attention of the accused. Commander Smith felt he had a good indication of how the accused intended to behave on parade.

[7] The accused gave evidence in his defence. He stated that he heard the order to remove headdress, but felt that the order violated his rights to freedom of religion and conscience under the constitution. He describes himself, in answer to his counsel's questions, as an agnostic with atheistic tendencies. He has no faith in any God. He confirms Commander Smith's evidence of their conversation in the run-up to 28 November 2002, when he stated to Commander Smith that he had a problem with taking his hat off on parade. He was told that he would have to obey the order and would have to

attend the parade. This put him in a difficult situation because he did not wish to be a part of the religious aspect of the parade, but he was obliged, by a legal order, to attend the parade.

[8] In cross-examination, the accused confirmed that the problem for him was the religious procedure as he believes that there should be no religious aspect to Ceremonial Divisions. He agreed that his disobedience of the order was for the purpose of demonstrating his disagreement with the religious aspect of Ceremonial Divisions. I have no doubt that the accused is sincere when he testifies that he is without religious faith.

[9] The prosecution at court martial, as in a criminal prosecution in any Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context, this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed, the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[10] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt and the accused must, therefore, be found not guilty. Indeed, the standard of "beyond a reasonable doubt" is much closer to absolute certainty than it is to a standard of "probable guilt".

[11] But reasonable doubt is not a frivolous or imaginary doubt. It is not something based on sympathy or prejudice. It is a doubt based on reason and common sense that arises from the evidence or the lack of evidence. The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[12] In this case, the elements of the offence charged are: one, the identification of the accused as the offender; two, the date and place of the offence as particularized; three, a lawful command as particularized; four, given by or on behalf of a superior officer; five, knowledge by the accused that the officer is a superior; six, knowledge by the accused of the command; seven, disobedience of the command; and eight, an intention on the part of the accused to disobey.

[13] There is really no issue in the present case as to any of the elements except the third; that is, whether the command to remove headdress was a lawful command. As regards the remaining elements, I am satisfied beyond a reasonable doubt as to each of them, and my remarks are addressed, therefore, to the issue of the lawfulness of the command. *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 19.015 requires that:

> Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer.

Note (B) to this article states, and I quote:

> Usually there will be no doubt as to whether a command or order is lawful or unlawful. In a situation, however, where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful.

[14] Concerning the lawfulness of orders, Note (F) to QR&O 103.16 provides, and I quote:

> A command, in order to be lawful must be one relating to military duty, i.e., the disobedience of which must tend to impede, delay or prevent a military proceeding. A superior officer has the right to give a command for the purpose of maintaining good order or suppressing a disturbance ... or for a purpose connected with the welfare of troops or for any generally accepted details of military life. He has no right to take advantage of his military rank to give a command which does not relate to military duty or usage which has for its sole object the attainment of some private end.

[15] Applying this standard, and subject to the consideration of the *Canadian Charter of Rights and Freedoms*-guaranteed right to freedom of conscience and religion, I conclude that the order of Commander Heath to remove headdress, in this case, was a lawful command.

[16] In this case, the accused submits that the order was not lawful as it infringed or denied the right to freedom of conscience and religion guaranteed by section 2(*a*) of the *Charter*. The accused submits that the prosecution bears the burden of persuasion to satisfy the court that the command was lawful, and as I have already stated, I agree. Counsel goes further and submits that where the accused alleges that the command was unlawful because it violated a fundamental right guaranteed by the *Charter*, the Crown bears the burden of disproving a violation of the *Charter* right, and this beyond a reasonable doubt. In a document called a "Notice", which was provided to the court and to the prosecutor prior to the trial commencing, and which was filed with the court as

Exhibit No. 11, counsel for the accused took the position that the command in issue in this case was given in violation of the right of the accused to freedom of conscience and religion guaranteed by section 2(*a*) of the *Charter*, and claimed that, and I quote:

> No particular burden of proof is placed on the accused despite his reliance on the *Charter*.

The Notice does not claim any particular remedy for what is said to be a violation of the *Charter*.

[17] In *R. v. Collins*, [1987] 1 S.C.R. 265, the Supreme Court of Canada dealt with a case in which a *Charter* remedy was sought for a violation of the *Charter*-guaranteed right to be secure from unreasonable search and seizure. The remedy sought was the exclusion of evidence under section 24(2) of the *Charter*. Justice Lamer gave the judgment of the majority of the court and stated, and I quote:

> The appellant, in my view, bears the burden of persuading the court that her *Charter* rights or freedoms have been infringed or denied. That appears from the wording of s. 24(1) and (2), and most courts which have considered the issues have come to that conclusion [authority is cited.]'
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> The appellant also bears the initial burden of presenting evidence. The standard of persuasion required is only the civil standard of the balance of probabilities and, because of this, the allocation of the burden of persuasion means only that, in a case where the evidence does not establish whether or not the appellant's rights were infringed, the court must conclude that they were not.'

[18] In the 1994 case of *R. v. Cobham*, [1994] 3 S.C.R. 360, the same court dealt with the right of a detainee to be informed of the availability of duty counsel services as part of the right to retain and instruct counsel guaranteed by section 10(*b*) of the *Charter*. Again delivering the judgment of a majority of the court, Lamer CJ noted that, and I quote:

> [I]t is, by now, well established that the burden of establishing a violation of a *Charter* right always falls on the applicant.

[19] In the face of these clear statements of the law from the Supreme Court of Canada, it cannot be suggested that the mere invocation of the constitutional right, without evidence or argument, is sufficient to cast the burden upon the prosecution to disprove the violation of the right. I therefore approach this case on the basis that the burden of proof rests with the accused to establish, on a balance of probabilities, that his right to freedom of conscience and religion has been infringed or denied by the command in issue.

[20] In a 1999 case from the Ontario Court of Appeal, *Freitag v. Penetanguishene*, 179 D.L.R. (4th) 150, that court dealt with a challenge based upon *Charter* section 2(*a*) to the practice of a mayor to open meetings of the municipal council with an invitation to rise and recite the Lord's prayer. Madam Justice Feldman delivered the judgment of the court. At paragraph 17 she stated, and I quote:

> The meaning of freedom of religion has been examined in several cases both in the Supreme Court of Canada and in this court. The seminal case is the decision of the Supreme Court in *R. v. Big M Drug Mart Ltd.*, ... where the court held that the federal Lord's Day Act contravened s. 2(a) of the *Charter* because it mandated observance of the Christian Sabbath. The court set out the proper approach when considering whether legislation infringes a guaranteed *Charter* right: one must look first at the purpose of that legislation; if its purpose is constitutionally benign, one looks also to its effects. The court held that the purpose of the Lord's Day Act was clearly to impose Christian sabbatical observance. There was therefore no need to examine its effects.

[21] In the 1988 case of *Zylberberg v. Sudbury Board of Education*, 52 D.L.R. (4th) 577, the Ontario Court of Appeal considered a statutory requirement to open or close each public school day with religious exercises consisting of scripture readings or other suitable readings and repeating the Lord's prayer or other suitable prayer. The majority judgment of four justices referred to the Supreme Court case of *R. v. Big M Drug Mart* as follows, and I quote:

> The nature of the *Charter* freedom of conscience and religion was examined by the Supreme Court of Canada in *R. v. Big M Drug Mart* ... In that case, the Supreme Court held that the *Lord's Day Act* ... which required uniform observance of the Christian Sabbath, was inconsistent with s. 2(a) of the *Charter* and for that reason was of no force or effect under s. 52(1) of the *Constitution Act* ...
>
> [. . .]
>
> Chief Justice Dickson ... speaking for the court, eloquently described the meaning of the words "freedom of conscience and religion". In its most traditional sense, freedom of religion means the unimpeded freedom to hold, profess and manifest religious beliefs, as he said [. . .]
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> > The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination.

The quotation continues:

> He continued by saying that "the concept means more than that" and stated that the freedom can "be characterized by the absence of coercion or restraint". He went on to say
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> > Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices.

[22] The Ontario Court of Appeal went on to quote another passage from the *Big M* case, quote:

> Chief Justice Dickson also emphasized, in a passage of importance in this case [that is the *Zylberberg* case] that s. 2(a), by its very wording, protects the freedom of non-believers to abstain from participation in any religious practices. He said at p. 362 [. . .]
>
> > Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice. It may perhaps be that freedom of conscience and religion extends beyond these principles to prohibit other sorts of governmental involvement in matters having to do with religion.

The Ontario Court of Appeal continued in the *Zylberberg* case, I quote:

> The only limitation upon an individual's freedom of conscience or religion recognized by the Supreme Court of Canada is that its manifestation must not injure others or interfere with their right to manifest their own beliefs and opinions.

[23] In the present case, the religious aspect of Ceremonial Divisions consisted of the recitation by the padre of the Naval Prayer and the playing by the band of a verse of the Naval Hymn. The current version of the prayer dates to 2001, according to the padre. It is in writing and before this court as Exhibit No. 10. I find that this prayer was recited at Ceremonial Divisions on 28 November 2002.

[24] In my view, apart from the fact that it is a prayer, the only reference to religion is in the opening words, "O Eternal Lord God." In particular, I do not consider the reference in the prayer to the sovereign, "... that we may be a safeguard unto our most gracious Sovereign Lady, Queen Elizabeth and her Dominions ...," to have the religious significance the accused attaches to it.

[25] I tend to the view that the use of the non-denominational Naval Prayer, as it now reads, does not run afoul of judicial interpretations of the right guaranteed in section 2(*a*) of the *Charter*. It does not impose, upon those gathered at Ceremonial Divisions, the Christian moral tone of which Feldman J spoke in the *Freitag* case. Its purpose is constitutionally benign, and I do not find there to be any harmful effect on the expression of religious freedom. Indeed, at paragraph 45 and 52 of her judgment, Feldman J appears to approve of the non-sectarian prayer that is currently read by the Speaker of the House of Commons to open parliamentary proceedings. The wording of the Parliamentary prayer is similar, in important respects, to the current Naval Prayer.

[26] But I find that it is not necessary to decide, in this case, whether the use of the current Naval Prayer at Ceremonial Divisions runs afoul of *Charter* section 2(*a*). The real issue here is whether, on the evidence in this case, the accused has established, on a balance of probabilities, an infringement or denial of his guaranteed right to freedom of conscience or religion.

[27] Ultimately, the accused interprets the action of removing his headdress on parade, prior to being led in prayer by the padre, as a visible sign that he, in so doing, subscribes to the tenets of religious belief which he, in fact, does not personally share. In my view, on the evidence led in this case, it is unreasonable to draw such a conclusion.

[28] The act of removing one's headdress, by itself, carries no religious connotation. It is unlike, for example, the gesture of the sign of the cross for Christian Roman Catholics or Eastern Orthodox Catholics. As was pointed out in the evidence and in argument, headdress is formally removed on other occasions to show respect for a visiting dignitary or to offer cheers in a traditional naval manner.

[29] Of course, an otherwise religiously neutral act may acquire some colour from the surrounding circumstances. Simply kneeling is an example of such a neutral act, but kneeling and touching the forehead to the floor while facing in the direction of Mecca may have profound significance for the adherents of Islam.

[30] In this case, Chief Petty Officer 1st Class Reynolds gave evidence of the significance of removing one's headdress on parade prior to prayer. He testified that headdress is ordered removed out of respect for religion or out of respect for those on parade who wish to pray. In cross-examination, he disagreed with the suggestion that removing headdress was a religious act.

[31] Captain(N) Heath, as the Parade Commander, gave the order to remove headdress. Captain(N) Heath testified that he did not consider the order he gave to be a

religious one, and indeed, as far as he was concerned, there were no orders given on the parade relating to prayer. The evidence of Captain(N) Heath and Chief Petty Officer 1st Class Reynolds on this point was not undermined in cross-examination, nor was this evidence contradicted by any other evidence.

[32] I accept the evidence of these witnesses on this point of the significance of removing headdress, when ordered, while on parade. I conclude on all the evidence, and find as a fact, that the removal of headdress prior to prayer is simply a mark of respect which is required of all members of the Canadian Forces who are subject to such a command (by paragraph 13 of section 3 of the Canadian Forces Dress Instructions, this mark of respect on parade is not required of musicians, colour bearers and their close escorts, sentries in the vicinity, and those who are adherents of the Sikh religion). It is not correct to say that the removing of headdress signifies adherence to the tenets of religious belief. It would be no more reasonable to conclude that by donning head wear, such as a yarmulke, before entering an Orthodox synagogue, one can be taken to subscribe to the tenets of Judaism.

[33] It follows that I am not satisfied that the evidence establishes a violation or infringement of the right of the accused to freedom of conscience and religion. As a result, I am satisfied beyond a reasonable doubt that the command to remove headdress was a lawful order, and the accused is, therefore, guilty of the offence of disobeying a lawful command of a superior officer.

[34] As a result of these conclusions, it is not necessary to address section 1 of the *Charter* which was raised in argument before me. But I do say, that if an infringement of the *Charter* right to freedom of conscience and religion were found, section 1 does not save the breach as there is no limit "prescribed by law" requiring that headdress be removed. Specifically, the policy directives in evidence as Exhibits 6, 7, 8 and 12, do not amount to legal prescriptions, see *Committee for the Commonwealth of Canada v. Canada*, [1991] 1 S.C.R. 139, and *Freitag v. Penetanguishene* at paragraph 49.

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