



COURT MARTIAL

Citation: *R. v. Ross*, 2003 CM 520

Date: 20031031

Docket: C200352

Standing Court Martial

6080 Young St, 5th Floor, Suite 506, Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Sergeant K.G. Ross, Accused

Before: Commander P. Lamont, M.J.

**DECISION RESPECTING AN APPLICATION ASKING FOR THE
DECLARATION THAT SUBSECTION 129(2) OF THE NATIONAL DEFENCE
ACT IS CONTRARY TO SECTIONS 7 AND 11(d) OF THE CANADIAN
CHARTER OF RIGHTS AND FREEDOMS**

(Orally)

[1] The accused, Sergeant Ross, is charged with two charges contrary to section 129 of the *National Defence Act*. Charge number 1 alleges an offence of Conduct to the Prejudice of Good Order and Discipline, in that, on or about 4 January 2003, at or near Halifax, he did abet Corporal Hape in taking part in a vehicular pursuit contrary to Halifax Military Police Standard Operating Procedure No. 42 of May 2001.

[2] Counsel on behalf of Sergeant Ross applies by a Notice of Application, dated 21 October 2003, for a declaration that subsection 129(2) of the *National Defence Act* is invalid because it is contrary to sections 7, 11(d), and 52 of the *Canadian Charter of Rights and Freedoms*, hereinafter, the *Charter*.

[3] Section 129(1) of the *National Defence Act* creates the offence of committing an act, conduct, disorder, or neglect to the prejudice of good order and discipline and provides for a maximum punishment of dismissal with disgrace from Her Majesty's service. Prejudice of good order and discipline is not defined, although there is a well-developed body of jurisprudence, in part reflected in the Notes to Queen's Regulations and Orders for the Canadian Forces (QR&O) article 103.60, and at court martial, and in the Court Martial Appeal Court that deals with this concept.

[4] Subsection 129(2), which is the subject of the declaration sought by the defence, provides that the contravention of provisions of certain subsidiary instruments "is an act, conduct, disorder or neglect to the prejudice of good order and discipline."

[5] In the present case, the prosecutor relies on paragraph (b) of subsection 129(2) and alleges that the Halifax Military Police Standard Operating Procedure No. 42 of May 2001 is an, and I quote, "order ... published for the general information and guidance of the Canadian Forces or any part thereof."

[6] Defence counsel for Sergeant Ross submits that the effect of subsection 129(2) is to deem certain conduct to be prejudicial to good order and discipline. He submits that the result is that an accused may be convicted of the offence created by section 129 even where there is no evidence of prejudice to good order and discipline, merely for the violation of a subsidiary instrument such as the order referred to in charge number 1 in this case.

[7] Relying on the decision of the Supreme Court of Canada in *R. v. Downey*, [1992] 2 S.C.R. 10, also reported at 72 C.C.C. (3d) 1, counsel submits that subsection 129(2) violates the presumption of innocence enshrined in section 11(d) of the *Charter* by creating a non-rebuttable presumption that the contravention of a subsidiary instrument occasioned prejudice to good order and discipline. Put another way, it is said that subsection 129(2) mandates a conviction even where there is a reasonable doubt as to an element of the offence; that is to say, prejudice to good order and discipline, as long as the prosecution establishes merely a contravention of one of the subsidiary instruments referred to in subsection 129(2).

[8] In *Downey*, the Supreme Court of Canada considered a provision of the *Criminal Code* which made it an offence to live wholly or in part on the avails of another person's prostitution. Then subsection 195(2) of the *Criminal Code* provided that "Evidence that a person lives with or is habitually in the company of prostitutes ... is, in the absence of evidence to the contrary, proof that the person lives on the avails of prostitution."

[9] All the judges of the Supreme Court of Canada who heard the *Downey* case agreed that this statutory evidential burden upon the accused violated section 11(d) of the *Charter*. Justice Cory delivered the majority judgement and set out seven principles derived from the authorities at 72 C.C.C. (3d) 13. For present purposes it is only necessary to refer to the fourth principle, and I quote:

IV. Legislation which substitutes proof of one element for proof of an essential element will not infringe the presumption of innocence if as a result of the proof of the substituted element, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of the other element. To put it another way, the statutory presumption will be valid if the proof of the substituted fact leads inexorably to the proof of the other. However, the statutory presumption will infringe s. 11(d) if it requires the trier of fact to convict in spite of a reasonable doubt.

[10] Subsection 129(2) permits a conviction for the offence of conduct to the prejudice of good order and discipline to rest upon a finding of a contravention of any regulations, orders, or instructions. The issue is, therefore, whether it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of prejudice to good order and discipline if a contravention of a regulation, order, or instruction is established.

[11] Counsel for the prosecution points out that QR&O article 19.01, headed, and I quote, "OBSERVANCE AND ENFORCEMENT OF REGULATIONS, ORDERS AND INSTRUCTIONS," requires that both officers and non-commissioned members, such as the accused:

[S]hall become acquainted with, obey [I emphasize "obey"] and enforce:

[. . .]

4 all other regulations, rules, orders and instructions necessary for the performance of the member's duties.

[12] Thus, disobedience of one of the subsidiary instruments described in subsection 129(2)(b), such as the order in issue in this case, may itself be a

contravention of QR&O where the order relates to the performance of the member's duties. I say “may” because the evidence in this case is not yet concluded and no findings of fact have yet been made.

[13] A military organization cannot function effectively without diligent obedience to all lawful orders, whether they be orally conveyed from a superior to a subordinate, or in writing by means of the instruments referred to in subsection 129(2)(b). Discipline is simply the habit of obedience to lawful orders, even in situations of grave peril to the person who is subject to the order.

[14] I conclude that, indeed, it would be unreasonable for the trier of fact not to be satisfied beyond a reasonable doubt of the existence of prejudice to good order and discipline if a contravention of a regulation, order, or instruction is established. Proof of a contravention of one of the subsidiary instruments described in subsection 129(2)(b) leads inexorably to the conclusion of prejudice to good order and discipline.

[15] Indeed, in the 1997 case of *R. v. Maier*, the Standing Court Martial took judicial notice of the proposition that “failure to comply with direction, instructions, command, order of a superior is prejudicial to good order and discipline” as being a matter “of general service knowledge which is not subject to any reasonable dispute.”

[16] In my view, subsection 129(2) is not strictly speaking a reverse-onus provision. The provision does not cast a burden, either evidentiary or legal, upon the accused. It simply provides for categories of conduct, as described in the subsidiary instruments, which the statute defines to be “to the prejudice of good order and discipline.”

[17] The prosecution bears the burden of establishing beyond a reasonable doubt the contravention of the subsidiary instrument, and the accused bears no burden to establish his innocence. See *R. v. Latouche* [2000] C.M.A.J. No. 3, CMAC - 431.

[18] Subsection 129(2) does not violate the presumption of innocence protected by section 11(d) of the *Charter*. It was not suggested in argument that section 7 of the *Charter* provided any more protection for the presumption of innocence than was provided by section 11(d).

[19] Accordingly, the application for a declaration is dismissed.

Counsel:

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Major D. Antonyshyn, Directorate of Defence Counsel Services, Counsel for Sergeant K.G. Ross