



COURT MARTIAL

Citation: *R. v. Ross*, 2003 CM 521

Date: 20031031

Docket: F200352

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.

<p>NOTE: Personal data identifiers and other information connected to the individual have been redacted to ensure that their identity is protected, in accordance with the Canadian Judicial Council's "<i>Use of Personal Information in Judgments and Recommended Protocol</i>".</p>
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FINDING

(Orally)

[1] Sergeant Ross, this court finds you not guilty with respect to charge number 2 on the charge sheet.

[2] The accused, Sergeant Ross, is charged in charge number 2 with an offence contrary to section 129 of the *National Defence Act*; that is, neglect to the prejudice of good order and discipline, in that he, on or about 4 January 2003, at or near Halifax, Nova Scotia, failed to call off a vehicular pursuit conducted by XXXX Corporal Hape, as it was his duty to do.

[3] At an earlier stage in this trial, I found the accused not guilty of charge number 1, a charge of conduct to the prejudice of good order and discipline, which arose out of the same circumstances and was laid as an alternative charge to charge number 2.

[4] These are my reasons for the finding I have made with respect to charge number 2.

[5] The incident giving rise to the charges occurred in the late afternoon of 4 January 2003. Corporal Ian Hape, a military policeman, was on duty in a military police vehicle. He observed two vehicles, a Taurus and an Explorer, leaving the area of the permanent married quarters (PMQs) at Canadian Forces Base Shearwater and approaching his position. Both vehicles were travelling at a high rate of speed and apparently committing other traffic violations, including driving in a dangerous manner.

[6] Corporal Hape decided to follow the vehicles away from the base to monitor them until other police agencies could get involved and intending to stop them, as he testified, "to see what was going on." He followed the vehicles for some considerable distance along the streets and highways of Dartmouth and Halifax until the vehicles, or the individuals in them, made good their escape.

[7] Corporal Hape advised "Control" by radio in his vehicle that he was leaving the area of the base, and he relayed further information concerning his observations by radio as the events unfolded. By "Control", the witness was referring to the person or persons at the other end of his radio transmission located in the military police detachment office. These persons included a Corporal Kostiw and the accused, Sergeant Ross. At a point in the events, Corporal Hape was instructed by Sergeant Ross to follow safely.

[8] There is no doubt that the driving behaviour that Corporal Hape observed from both the vehicles posed a grave danger to the public, and it is indeed fortunate that, so far as the evidence in this case tells us, nobody was killed or injured by the driving.

[9] Sergeant Ross was the immediate supervisor of Corporal Hape. He was on duty as in charge of the shift in the military police (MP) detachment in Halifax. He was in radio contact with Corporal Hape during the incident. The theory of the prosecution is that Sergeant Ross should have ordered Corporal Hape not to pursue the vehicles, and that his failure to do so prejudiced good order and discipline.

[10] The prosecution at court martial, as in any criminal prosecution in a 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.

[11] 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.

[12] 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."

[13] 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.

[14] 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.

[15] The elements of the offence charged in charge number 2 were set out in an earlier ruling I made with respect to a prima facie case. They are as follows:

- (a) The identification of the accused as the offender. The accused, through his counsel, has formally admitted that identification is not in issue in this case;
- (b) The date and place of the offence as particularized. The evidence satisfies me beyond a reasonable doubt that the incident took place on 4 January 2003 at or near Halifax, and there is no issue with this element;
- (c) A duty imposed by law, practice or custom upon the accused;

- (d) That the accused knew, or ought to have known, of the duty;
- (e) A failure to discharge the duty by neglect; that is to say, by reason of a lack of zeal or carelessness, or in some cases, an intentional failure to adhere to the standard of a reasonable person charged with the duty; and
- (f) Prejudice to good order and discipline as a result. It is not necessary that the prosecution establish an intention on the part of the accused to prejudice good order and discipline; it is sufficient if the neglect of the accused merely had the effect of prejudicing good order and discipline.

[16] In this case, the evidence of a duty imposed by law, practice, or custom came both from some of the witnesses and from documentary evidence. The prosecution introduced evidence of various policy instruments of the Canadian Forces that are intended to address the situation of vehicle pursuits by members of the military police.

[17] The most recent instrument is Standard Operating Procedure (SOP) No. 42 drafted by Captain Edwards, the acting Naval Provost Marshal Atlantic, who gave evidence for the prosecution in this case. The document is Exhibit 4. It states in paragraph 3:

“Effective immediately, and until further notice, Military Police members shall not initiate or take part in any vehicular pursuit.”

[18] Captain Edwards testified that SOP No. 42 was not rescinded or superseded, and was accordingly in force on the date of 4 January 2003. As far as Captain Edwards is concerned, it was intended that the SOP be followed by all military police members.

[19] The accused has formally admitted that he received actual notice and knowledge of the contents of this document on 15 October 2002, prior to the date of the incident giving rise to the charge.

[20] Captain Edwards produced SOP No. 42 after receiving a Police Policy Bulletin 6/2000 from the Canadian Forces Provost Marshal under the date of 29 March 2000. This document became Exhibit 6 in this trial. It refers in turn to an earlier document entitled “Chapter 29 MP RESPONSE: VEHICULAR PURSUIT”, which was introduced and marked as Exhibit 5.

[21] Although there is no evidence that the purport of these documents, that is Exhibits 5 and 6, was brought to the attention of the accused in the same manner as the SOP, Exhibit 4, I am satisfied that, as a senior non-commissioned member with 14 year-experience in the military police, the accused should have been aware of the existence and purport of Exhibits 5 and 6.

[22] Exhibit 5, a national policy document for military police, defines a vehicular pursuit as occurring:

“[W]hen the military police attempts to stop a vehicle, the driver of the vehicle refuses to stop, and the seriousness of the offence warrants that the police chase the vehicle until it is stopped.”

[23] The document goes on to deal with certain factors that military police shall consider before conducting a pursuit. It is clear that this national policy document contemplates that military police members exercise an individual judgement based on the circumstances as to whether to engage in a pursuit, recognizing that in some circumstances, a police pursuit of a vehicle may well pose a danger to members of the public.

[24] Major Garrick testified for the prosecution. He is the Deputy Military Police Policy on the staff of the Canadian Forces Provost Marshal. He testified that Chapter 29 was first promulgated in August 1996 and has not been rescinded or superseded. He stated that this instrument has been expanded upon, or amplified, by Exhibit 6, the Police Policy Bulletin.

[25] Exhibit 6 refers in paragraph 1 to:

“[A]n increasing number of high speed pursuits for what could be considered non serious incidents.”

And contains the clear statement in paragraph 4:

“MP members shall not initiate any vehicular pursuit.”

[26] It was this document that prompted Captain Edwards to draft SOP No. 42 in the way he did.

[27] In my view, the current policy instruments dealing with vehicle pursuit by the military police are confusing, and indeed, contradictory. While Chapter 29 authorizes

pursuits in some circumstances, the Police Policy Bulletin contains a blanket prohibition. But the Bulletin appears to be concerned with high speed chases while neither Chapter 29 nor SOP No. 42 make this distinction. Although Chapter 29 gives a definition of vehicular pursuit, there is no definition of a "chase".

[28] The confusion among the policy instruments was reflected in the evidence of the military police members who testified in this case. Some, including Corporal Hape and Lieutenant Kirschner, the Deputy Naval Provost Marshal Atlantic, seemed to think that the policy direction was limited to high-speed chases. Some thought the policies were merely guidelines as to best practices rather than a rule or order.

[29] While the documentary evidence and the testimony establish a general, if somewhat confusing, duty upon military police members in situations involving a "vehicular pursuit," the issue is whether at the time of the incident in question the general duty required the accused to instruct Corporal Hape to stand down. This in turn depends upon the information that was available to Sergeant Ross at the time of the incident.

[30] At the time of the incident, Corporal Hape was the only source of information for Sergeant Ross. The prosecution introduced into evidence a transcript of an interview of Sergeant Ross conducted by members of the National Investigation Service on 4 February 2003. The document was marked Exhibit 3. Sergeant Ross stated, and I am beginning at page 20, line 21 and continuing to page 28:

“SGT ROSS: ... We had been working the day shift.

Corporal Hape radioed, stating that he was following two vehicles, and he explained where he had seen these vehicles, that they had been departing the base, the upper PMQ area, that neither of them had stopped at the stop sign, that they're both proceeding at an excessive rate of speed, normally than what -- because they're cutting on to a main highway from the upper PMQ area. In the background I could hear his lights or his sirens going as we was relaying his message across.

At that time he couldn't provide us with licence plate numbers, and he couldn't provide us with a lot of detail other than the colour of the vehicles. One was a Ford Taurus, one was a Explorer.

He saw one individual in the Ford Explorer and he saw four occupants in the Ford Taurus. They proceeded -- he was following -- he was coming up as these two vehicles turned on to Eastern Passage Highway. He met them, that's when he observed them. He turned around, is what he relayed to me afterwards, when we were doing up the daily occurrence book report, and proceeded to follow them, because they -- and attempt to stop them.

The individuals failed to stop, and he was saying over the radio that they were all over the place, weaving back and forth, said that there was not a lot of traffic on the roadway on Eastern Passage Highway --

LT SNOW: Eastern Passage is also Pleasant (inaudible).

SGT ROSS: But it runs together.

...

SGT ROSS: It changes into Pleasant.

At that point -- I can't recall exactly whether it was after he relayed all this information that they're weaving back and forth and that the two subject vehicles were driving at excessive speeds, weaving in and out of traffic and forcing the [individuals] off to the sides of the roadway.

Sergeant Ross continues:

SGT ROSS: Now around that time, I contacted Halifax Regional Police, their dispatch. Whether it was while they were still on the Eastern Passage Highway or just as they were turning on to the Circumferential, I can't remember exactly.

I was in touch with Halifax Regional -- no, it was before they turned on the Circumferential, because Corporal Hape related to me that he was losing sight of the vehicles. He saw the Ford Explorer, and he believed that the Ford Taurus continued on on Pleasant Street, kept going straight. He observed the Explorer turning on to the Circumferential, so he continued to follow the Circumferential. Meanwhile, I was on with HRP dispatch, explaining, trying to relay the information from the radio to the dispatch, Halifax Regional

Police, exactly what vehicles were involved, where our patrolman was, and that we requested a unit to assist or attend. We were now obviously in their jurisdiction.

As I was relaying the information, I had a fellow patrolman, one of my patrolmen, using the radio, relaying what I was saying, so I could understand and hear Halifax Regional dispatch, because the communications, it was a stormy day and some of the radio transmissions weren't clear.

LT SNOW: Coming from Ian (inaudible) –

SGT ROSS: That's correct. I mean, some of it was broken, plus he had the siren in the background and –

LT SNOW: Who was talking to him while you were talking to Halifax?

SGT ROSS: That was Corporal Kostiw, Patricia Kostiw.

So I was still on with Halifax Regional Police when Corporal Hape saw that the Taurus was still on the Circumferential, as it pulled out of -- it was directly in front of the Explorer, apparently, and pulled out and saw the Taurus. Then both vehicles started weaving back and forth again across the lane, and around –

INSP BLIZARD: I'm sorry, Ken, but I guess by this point now we're a few minutes and a few kilometres kind of later from where he first picks it up?

SGT ROSS: That's correct.

LT SNOW: Okay.

I'm sorry; go ahead.

SGT ROSS: So the Ford Taurus, around, I guess after he identifies that the Ford Taurus is still on the Circumferential, moving with the Explorer, the Taurus cut across the median. There's a break on the

Circumferential where he crossed and continued on the opposite lane, on the oncoming traffic.

Corporal Hape radioed the desk, saying -- relaying that information, that he was concentrating on watching the Ford Taurus and remained in the inside lane closest to the median, and with his -- kept his lights and sirens going. And he was -- he said he was concerned about the oncoming traffic, because it was quite heavy, so he was going to stay in the centre lane, to try and warn oncoming motorists that this Taurus was coming up on them. He stayed on the right-hand side of the meridian.

The Taurus, he reported, then kept on going against oncoming traffic and then proceeded up an off, an on ramp, but going up the wrong way. He lost sight of the Taurus, and I was relaying that to HRP, advised them that he lost -- our patrolman had lost sight of the Taurus.

Also at that time, as soon as he lost sight of the Taurus, I think it was about, around that time that the Ford Explorer went out of control, slid into the ditch, regained control, and kept on going. Shortly thereafter, Corporal Hape lost sight of the Ford Explorer.

At that time, I told Corporal Hape, if you've lost sight of both vehicles, stand down. And, like I said, radio communications were poor. So I believe I had to -- he radioed back and asked me to repeat my message, or something to that effect. And I told him again "stand down if you can't see the vehicles", so -- because there was no further information that he could provide that I could relay to the HRP dispatch until their officers could arrive.

When I was on with HRP dispatch, she was trying to obtain all the information, which was sometimes broken and scattered because of the time delay in transferring that information from Corporal Hape to the dispatcher.

I told the dispatcher at that point our patrols were standing down, and apparently they still did not have an officer in the area or a unit in the area, and that was the end of it.

Corporal Hape advised me that he was turning around and would be coming back on the Circumferential, just making sure that there was no motorists off in the ditch or that there was any accidents caused by the Taurus, as he was proceeding back to the base 12 Wing Shearwater.

As he was turning around, I don't know, I guess it would be 3 or 4 minutes, if that, he came back over the radio and said that he had spotted the Explorer again, that he was driving in a -- as soon as he saw Corporal Hape, he increased his speed and bolted away from him. Corporal Hape activated his emergency equipment, and immediately I contacted HRP dispatch again, advised them, and -- by that time, shortly thereafter, while I was still on the phone with HRP dispatch, Corporal Hape reported that the Explorer had slid into a snowbank and both -- there was two occupants, I guess he hadn't seen the second, the passenger. Two occupants were exiting the vehicle, running away from the vehicle.

He came up behind, parked his vehicle, and I instructed him to stay with the vehicle and try and get as much of a description of the individuals fleeing which he provided, and to remain with the vehicle until HRP was on the scene.

When he arrived at the scene, HRP still wasn't there but the media was, obviously scanning our net.

I omit a short irrelevant passage, then Sergeant Ross continues:

SGT ROSS: Shortly thereafter, HRP showed up.”

[31] I accept as the truth the account of the incident given by Sergeant Ross in this statement. It accords in material particulars with the evidence of Corporal Hape. In my view, there is no basis to find that Sergeant Ross knew that Corporal Hape was acting other than in accordance with at least some of the policy direction given to the military police. There was no duty upon Sergeant Ross to order Corporal Hape to stand down any earlier in the events than he did. Indeed, Sergeant Ross's response to the events, as he understood them at the time they were unfolding, strikes me as exemplary.

[32] If the driving of Corporal Hape had posed an unacceptable danger to the public, then, of course, Sergeant Ross as his supervisor would have a duty to stop him.

The prosecutor has suggested that indeed Corporal Hape's driving was dangerous to others and points specifically to the evidence of Captain Raiche-Marsden. It is argued that the witness was distracted; that is, Captain Raiche-Marsden was distracted by Corporal Hape's use of his emergency equipment on his police vehicle. The prosecutor also refers to the actions of other drivers who moved off the roadway to get out of Corporal Hape's way.

[33] In my view, the evidence is entirely insufficient to support the conclusion that Corporal Hape's driving posed a danger to the public. Of course, Sergeant Ross's duty to stop his subordinate from proceeding further might well arise well before his driving became a danger. Nevertheless, I cannot say that on all the facts of this case, Sergeant Ross neglected his duty in any material particular.

[34] Because of the conclusion I have reached with respect to the element of neglect of duty, it is not, strictly speaking, necessary to comment on the element of prejudice to good order and discipline. Nevertheless, I am not satisfied that the actions of Sergeant Ross resulted in prejudice to either good order or to discipline.

[35] For these reasons, I have found the accused not guilty on charge number 2.

Counsel:

Captain A.J. Carswell, Directorate of Military Prosecutions, Counsel for Her Majesty the Queen

Captain T. McLeod, Directorate of Law Human Resources, Assistant Counsel for Her Majesty the Queen

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