



## COURT MARTIAL

**Citation:** *R. v. Murphy*, 2003 CM 260

**Date:** 20030522

**Docket:** F200326

Standing Court Martial

Canadian Forces Base Borden  
Borden, Ontario, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private T.F. Murphy, 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> ".
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### FINDING

(Orally)

[1] Private Murphy is charged with four offences under the Code of Service Discipline. Charges one and two allege contraventions, by Private Murphy, of section 83 of the *National Defence Act*; that is to say, disobedience of a lawful command of a superior officer. Charges three and four relate to breaches of section 85 of the *National Defence Act*, to have behaved with contempt towards a superior officer. Private Murphy pleaded guilty to the third charge that dealt with his contemptuous behaviour toward Sergeant Maranda.

[2] All these charges arise from an incident that occurred on 24 October 2002, around 1100 hours, in the vicinity of Sergeant Maranda's office located on the second floor of building 201 at Canadian Forces Base Borden, Borden, Province of Ontario. Charges one and two allege that Private Murphy did not leave the office of Sergeant Maranda when ordered to do so by Sergeant Maranda in the case of the first charge, and did not leave the office of Sergeant Maranda when ordered to do so by Captain Vigneault with respect to the second charge. As to the fourth charge, it alleges that Private Murphy did, by his acts and words, behave with contempt toward Captain Vigneault.

[3] Let me deal first with the presumption of innocence and the standard of proof beyond a reasonable doubt. It is fair to say that a presumption of innocence is perhaps the most fundamental principle in our criminal law system. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her 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, and that, beyond a reasonable doubt.

[4] The 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 evidence upon which the prosecution relies to prove the guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person. The court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all the evidence. The term "beyond reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R. v. Lifchus*, a case reported in (1997) 3 S.C.R. 320, the Supreme Court of Canada proposed a model charge on a reasonable doubt, and the principles laid out in *Lifchus* have been applied in a number of Supreme Court subsequent decisions.

[5] In substance, a reasonable doubt is not an imaginary or frivolous doubt. It must not be based on sympathy or prejudice, rather, it is based on reason and common sense and it must logically come from the evidence or the lack of evidence. In *R. v. Starr*, a case of 2000 reported at 2 S.C.R. 144, at paragraph 242 the Supreme Court 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 an absolute certainty and the prosecution is not required to do so. Such a standard of proof is impossibly high. The prosecution only has the burden of proving the guilt of an accused person, in this case Private Murphy, beyond a reasonable doubt.

[6] To put it in perspective, if the court is convinced that the accused is probably or likely guilty, then the accused shall be acquitted. As I said earlier, the proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation. It is essential that the credibility and reliability of the complainants' evidence be tested in the light of all of the other evidence presented. In this case the accused has chosen to testify, but his version does not contradict the evidence heard from the prosecution witnesses, and that is the testimonies of Sergeant Maranda and of Captain Vigneault. All witnesses heard before the court are credible witnesses.

[7] Turning, now, to the evidence. The evidence before this court consists of the testimony of Sergeant Maranda, Captain Vigneault, Private Murphy, but also of those facts and matters contained in Military Rule of Evidence 15. The facts leading to the incident can be summarized along this way: around 1100 hours on 24 October, 2002, Private Murphy stops in the doorway of Sergeant Maranda's office, which is adjacent to Captain Vigneault's office, in order to ask her if he could see Sergeant Thomson with regard to Private Murphy's parental leave request, and that request arose from the recent birth of his son; Sergeant Maranda is alone in her office, standing by the file cabinet, and she is looking at the doorway; Private Murphy stands at the doorjamb; Sergeant Maranda testified that Private Murphy did not come into her office; Sergeant Maranda was, and still is today, Canadian Forces School of Aerospace Technology and Engineering Chief Warrant Officer's Assistant.

[8] After Private Murphy's request to see Sergeant Thomson, Sergeant Maranda asked Private Murphy if this is related to his request for parental leave, and adds that it seems some papers were missing; Private Murphy indicates that all the paperwork has been done properly and that the Commandant has already signed the pass, the leave pass; Private Murphy believes that the chain of command is holding everything back. It is relevant to know that, several weeks prior to the incident, Private Murphy was denied compassionate leave from his unit and granted annual leave, instead, in order to go to Moncton, New Brunswick so that he could be with his girlfriend when giving birth to their child.

[9] In reaction to Sergeant Maranda's comments, Private Murphy appears to be frustrated and angry. Sergeant Maranda described Private Murphy as being arrogant, very demanding, and forceful. When asked how loud Private Murphy's voice was, Sergeant Maranda described it to be five on a scale from zero to ten, and the number three to four being the normal tone of voice. Sergeant Maranda tells Private Murphy, then, that papers may be missing and that the commanding officer can always deny such a request for parental leave, so Private Murphy replies promptly and more loudly by saying that the

Commandant cannot deny and that he has signed already. At that time Murphy is very angry, his fists are clenched, and his face is red. Sergeant Maranda realizes that their discussion cannot go anywhere and she tells Murphy, "It's enough, the conversation is over, you are dismissed."

[10] When she says that they are four or five feet from each other. She does not speak to him louder than Private Murphy did himself, and he is still standing at the doorway. He is extremely stiff, his shoulders are moving up and down, and his fists are clenched. He continues to speak to her, throwing words and demands. In response to her statement, he replies that he is not finished. He is very angry and agitated, she is concerned. After ten to fifteen seconds she tells him, "You're dismissed, leave my office." Private Murphy continues to talk, speaking through his teeth, and he is very tense, he is very angry. He is in a very agitated and emotional state. At that time Captain Vigneault hears Sergeant Maranda's loud voice, which in her case is unusual, so he leaves his own office to inquire the matter.

[11] Standing a foot or two behind Private Murphy's left side, at an angle of 45 degrees, Private Murphy does not notice him and Sergeant Maranda asks Captain Vigneault to take over. Private Murphy looks as if he was surprised. Captain Vigneault tells Private Murphy, in a fairly loud manner, to get out of Sergeant Maranda's office and to go to the canteen and not to move from there. Private Murphy does not react immediately, but he appears to become more angry, he is tighter, his fists are tighter. Ten to twenty seconds elapse. Captain Vigneault thought that Private Murphy was to jump over Sergeant Maranda. He then tells him, again, to go to the canteen, so Private Murphy turns and walks toward the canteen. Captain Vigneault briefly loses sight of Private Murphy, then Private Murphy stops, very briefly, on his way and Master Corporal Lindsay comes out of his own office. Private Murphy and Master Corporal Lindsay exchange words. Captain Vigneault referred to Private Murphy as being in a state of commotion at the time; in other words, Private Murphy is very agitated and angry.

[12] Captain Vigneault then tells Private Murphy to go to the canteen, again, and Private Murphy continued in that direction. The events with Captain Vigneault last about or between ten to twenty seconds. The whole incident took between three to five minutes. Sergeant Maranda, Captain Vigneault, and Private Murphy were, at the time of the incident, all wearing uniforms.

[13] Before I address the particular elements of the charges that are before this court, let me say that they are all general intent offences and that I share my colleague's comments, that of Commander Jim Price, in the case of *R. v. Liu*, on that issue. However, the facts in *Liu* are distinguishable from the case at bar. Now, I turn to a consideration of

the elements of the particular offences here. Dealing with the first charge, the first charge alleges a breach of section 83 of the *National Defence Act*, in that Private Murphy did not leave the office of XXXX Sergeant Maranda, S., when ordered to do so by Sergeant Maranda. The facts in support of this charge show that Private Murphy stood in the doorway of Sergeant Maranda's office and never entered the office. In fact, Sergeant Maranda told Private Murphy, the first time, "It's enough, the conversation is over, you're dismissed."

[14] Then Private Murphy became very angry and replied to Sergeant Maranda, who then stated "You're dismissed, leave my office," at which time Captain Vigneault arrived and Sergeant Maranda asked him to take over the situation. There is no doubt that Private Murphy acted in a contemptuous manner toward Sergeant Maranda when he was having a very heated discussion, almost to say a one-way discussion. Private Murphy has already entered a plea of guilty with respect to charge number three and the court has accepted and recorded that plea. However, the particulars of charge number one, of disobeying a lawful command of a superior officer, are unambiguous. They read:

“In that he, on 24 October 2002, at Canadian Forces Base Borden, Borden, Province of Ontario, did not leave the office of XXXX Sergeant Maranda, S., when ordered to do so by Sergeant Maranda, S.”

[15] Under section 83 of the *National Defence Act* an order must, at the very least, be capable of being executed or carried out by the recipient of that order to be considered lawful. In this particular case Private Murphy could never comply with the order issued to him by Sergeant Maranda to leave her office as he never entered in that office. Although an argument could be made that the words spoken by Sergeant Maranda when she said, "You're dismissed," constituted a lawful order, the court takes a different view based on the totality of the evidence. The court is of the view that these words do not amount to an order in the circumstances of this case. At most, they meant that Sergeant Maranda did not want to pursue the conversation. She did not want to have anything to do with Private Murphy at that time. That statement could not be reasonably interpreted to mean anything more in absence of additional evidence.

[16] The only clear order that she issued to Private Murphy was to leave her office, however, he was not physically able to comply with it as he was not in her office. She could have said, Go away, or, I do not want to see you anymore, that may well have been not elegant, but it would have been a clear order, in the circumstances, and Private Murphy would have had no other option than to comply with that order. In the court's opinion the prosecution failed to prove, beyond a reasonable doubt, one of the essential elements of the first charge by failing to establish that Sergeant Maranda gave a lawful

order to Private Murphy. The fact that Private Murphy admits that he did not leave her office, as told by Sergeant Maranda, does not make that order lawful as it could not be complied with whatsoever, because he never entered her office in the first place.

[17] The second charge. The second charge alleges another contravention of section 83 of the *National Defence Act*, but this time it is alleged that Private Murphy did not leave the office of Sergeant Maranda when ordered to do so by Captain Vigneault. I will not repeat the comments I have just made with regard to the compliance by Private Murphy of an order to leave Sergeant Maranda's office that particular morning. These comments apply to that second charge, therefore, the part of the order given by Captain Vigneault to that effect was not a lawful order. However, Captain Vigneault clearly issued an order to Private Murphy asking him to go to the canteen. Section 138 of the *National Defence Act* allows a court to make a special finding of guilty instead of a finding of not guilty when the facts proven differ materially from the facts alleged in the Statement of Particulars, but are sufficient to establish the commission of the offence.

[18] This provision would apply here, with respect to the order given by Captain Vigneault requesting Private Murphy to go to the canteen, if all elements of that offence were proven beyond a reasonable doubt. The defence suggests that the only issue, as it relates to the second charge, deals with the timeliness of Private Murphy to have complied with this order. The evidence before the court clearly indicates that Private Murphy was, at the time, in a very agitated and emotional state of mind. He was a very young private with no or very little experience. There is no evidence that he knew or should have known, to any extent, the personnel policies in matters such as parental leave.

[19] The evidence before the court is that a young private, in occurrence, Private Murphy, was trying to sort out a matter that was of great importance to him. That matter dealt with his parental leave in order to take care of his newly born child. He was making his demand to the same people, at least in Private Murphy's perspective, to the same people who had previously refused to grant him a compassionate leave for the birth of that same child, further to a request that he had made after receiving advice from the base social worker. In other words, Private Murphy's confidence and trust in his superiors, as it related to these personnel matters, were very low at the time. Maybe he was wrong to think that way, but this, nevertheless, explains his state of mind at the time, and that is for that purpose that I am making those comments only.

[20] So Captain Vigneault said that his encounter with Private Murphy took approximately between ten to twenty seconds. So although Private Murphy stopped briefly on his way to the canteen until he was ordered, again, by Captain Vigneault to

continue to the canteen, the interruption in the execution of that order took, at the most, a few seconds. In a state of extreme frustration and agitation such as the one displayed by the accused this interruption cannot be interpreted as a denial or refusal to comply with the order. The order was ultimately executed within seconds. The court is, therefore, left with a reasonable doubt with regard to the second charge.

[21] As to the fourth charge, it alleges that Private Murphy did, by his acts and words, behave with contempt towards Captain Vigneault. It is clear from the evidence before this court that Private Murphy did not utter any words towards Captain Vigneault. As Captain Vigneault said in his testimony, after describing Private Murphy's reaction following his order to leave Sergeant Maranda's office and to go to the canteen, Captain Vigneault said, in relation to Private Murphy's reaction to his order, and I quote, "He had no reaction at all. Private Murphy was angry and looking in the direction of Sergeant Maranda." Captain Vigneault said that he was afraid that Private Murphy would jump on Sergeant Maranda. On the other hand, Sergeant Maranda said that Private Murphy was looking in her office and she was concerned that Private Murphy would be violent towards the captain.

[22] However, the evidence indicates that there was only five to ten seconds between the two requests that were made by Captain Vigneault to Private Murphy. The evidence before this court shows that Private Murphy was extremely frustrated and angry at the situation and that he was emotionally upset. He had lost his composure completely. He nevertheless complied with the order given by Captain Vigneault in a timely fashion when he had realized the nature and the gist of that order. He may have stopped mid-way to the canteen. One should appreciate that he was still emotionally distressed at the time. Captain Vigneault's reminder of his order was carried out immediately and without any discussion from Private Murphy.

[23] So after considering the evidence as a whole, the court is not convinced beyond a reasonable doubt that Private Murphy's actions, in reaction to Captain Vigneault's order, amounted to contempt. This court finds you not guilty of the first charge, the court finds you not guilty of the second charge, and the court finds you not guilty of the fourth charge.

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