



COURT MARTIAL

Citation: *R. v. Lewis*, 2019 CM 3009

Date : 20190828

Docket : 201904

Standing Court Martial

2nd Canadian Division Support Base Valcartier
Courcelette, Quebec, Canada

Between :

Her Majesty the Queen

- and -

Corporal A.G. Lewis, Accused

Before : Lieutenant-Colonel L.-V. d'Auteuil, D.C.M.J.

REASONS FOR FINDING

(Orally)

[1] Corporal Lewis is charged with one offence for having used provoking speeches, and another one for having used provoking gestures, both toward a person subject to the Code of Service Discipline contrary to paragraph 86(b) of the *National Defence Act (NDA)*.

[2] The first offence involves words that he would have said to Corporal Larivière on or about 22 February 2018 at or near the 2nd Canadian Division Support Base Valcartier.

[3] The second offence is related to some gesture he allegedly made, which is pushing Corporal Bertrand with his hands, on or about 22 February 2018 at or near the 2nd Canadian Division Support Base Valcartier.

[4] The prosecution called four witnesses: Corporal Larivière, Corporal Bertrand, Private Benard and Corporal Blanchette.

[5] It must be noted that Corporal Larivière, Corporal Bertrand and Corporal Blanchette testified in French, while the language chosen by the accused for the trial is English. These witnesses testified this way without any interpretation services and with the agreement of the accused, further to a request made by the prosecutor, which I granted. Obviously, the other witness provided her testimony in English.

[6] The accused admitted, through his counsel, for the purpose of dispensing with proof the prosecution that both offences occurred on 22 February 2018.

[7] Finally, the Court took judicial notice of facts and matters contained and listed in Military Rule of Evidence (MRE) 15.

[8] At the end of their work day, around 3:30 p.m. on Thursday, February 22, 2018, members of A platoon of the transport company gathered in the canteen to receive instructions and orders. Among other things, they were told that in the event of a recall exercise, some people of the rank of corporal would have to call other fellow members of the rank of corporal and private.

[9] A recall exercise is made by a unit to test the ability of its members to gather quickly and get ready in case of any emergency. This type of exercise could take place at any time and supervisors wanted to explain and clarify the way they wanted to proceed if need be.

[10] Following the dismissal of members at the end of the meeting and while they were on their way to prepare themselves to return home, Corporal Lewis expressed to another member his disagreement regarding the fact that he would have to make calls in the context of such exercise. He clearly loudly stated that in his opinion, it was not for any corporal or private to do such thing. Essentially, he said that it was not his “fucking” job to do this.

[11] According to Corporal Larivière, Corporal Lewis was talking to Private Benard. Private Benard told the Court that she was about four feet from Corporal Lewis, but she was talking to a person of the rank of sergeant when she noticed that Corporal Lewis was angry. But he was clearly not talking to her, according to her testimony.

[12] Corporal Larivière also said during his cross-examination that the person Corporal Lewis was talking to could have been Corporal Racicot. He also mentioned that in his opinion, it was urgent to step in because Corporal Lewis seemed aggressive.

[13] Corporal Larivière, who was on his way to his locker, heard what was said by Corporal Lewis and decided to go see him. He asked Corporal Lewis what his job was. The latter answered that it was to come to the unit, work and leave at 4 p.m. He said that with an aggressive and loud tone.

[14] Corporal Blanchette said that Corporal Larivière approached Corporal Lewis aggressively.

[15] Both individuals got a bit closer and they adopted a threatening attitude in their voice. Corporal Larivière then asked Corporal Lewis if working was what he was doing when he was coming to the unit, and that his work was about more than driving, meaning to do anything else connected to such task.

[16] Corporal Lewis would have responded, in the French language: “mange de la fucking merde Larivière, va chier” and many other insults.

[17] Corporal Larivière saw Corporal Lewis coming towards him and he decided to turn back and walk towards his locker. When he realized that Corporal Lewis was closer to him, he faced him and told him that [TRANSLATED BY THE COURT] “If things are not going well in [his] head, [he] can get an excuse chit at the Unit Medical Station and leave this place.” Corporal Lewis got closer to him and asked him what he will do — “*Qu’est-ce que tu vas faire?*” — waiting for Corporal Larivière to do something. Corporal Larivière interpreted Corporal Lewis’ attitude as an invitation to hit him.

[18] At this point, Corporal Blanchette and Corporal Bertrand stepped in to remove Corporal Lewis from the area.

[19] According to Corporal Larivière, Corporal Blanchette positioned himself directly between him and Corporal Lewis. Then, Corporal Bertrand would have indicated to Corporal Lewis to calm down by gently tapping on his shoulder to calm him down and guiding him in another direction. Corporal Bertrand gently grabbed Corporal Lewis by the shoulder and invited him to go outside to discuss. In response, he was pushed on the chest by Corporal Lewis with both hands. He then fell on a fence and stood up right away. He then continued to try to calm Corporal Lewis down.

[20] Corporal Bertrand said that he tried to get the attention of Corporal Lewis by touching him on the shoulder with his left hand. Corporal Lewis then responded by pushing him. Corporal Bertrand lost his balance but did not fall. He then totally disengaged himself from the situation.

[21] According to Corporal Blanchette, he faced Corporal Lewis and escorted him out of the area. He confirmed that Corporal Lewis gave a small push on Corporal Bertrand when the latter touched him.

[22] Corporal Larivière then said to call the military police in order to have Corporal Lewis arrested because he was still agitated. Meanwhile, a person of the rank of sergeant showed up and asked Corporal Lewis to come see him. However, Corporal Lewis tried to leave. The sergeant ordered Corporal Lewis to come to attention, which he did. Both then started to discuss. When Corporal Larivière saw that everything was then under control, he dismissed everybody and left.

[23] Corporal Larivière said that further to the incident, he was of the opinion that a person like Corporal Lewis has no place in the Canadian Armed Forces (CAF) and that he did not want to be with him because he did not feel safe.

[24] Corporal Larivière said that the day after, Corporal Lewis apologized to him, told him that it was very difficult for him to go to the MIR (Medical Inspection Room) and that he would take steps to release from the CAF.

[25] Before this Court provides its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt; a standard that is inextricably intertwined with the principle fundamental to all Code of Service Discipline and criminal trials. And these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[26] The first and most important principle of law applicable to every Code of Service Discipline and criminal case is the presumption of innocence. Corporal Lewis entered these proceedings presumed to be innocent and the presumption of innocence remains throughout the case unless the prosecution, on the evidence put before the Court, satisfies it beyond a reasonable doubt that he is guilty.

[27] Two rules flow from the presumption of innocence: one is that the prosecution bears the burden of proving guilt, and the other is that guilt must be proven beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[28] The burden of proof rests with the prosecution and never shifts. There is no burden on Corporal Lewis to prove that he is innocent. He does not have to prove anything.

[29] Now, what does the expression “beyond a reasonable doubt” mean? A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence.

[30] It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than to probable guilt. The Court must not find Corporal Lewis guilty unless it is sure he is guilty. Even if the Court believes that he is probably guilty or likely guilty, that is not sufficient. In those circumstances, the Court must give the benefit of the doubt to Corporal Lewis and find him not guilty because the prosecution has failed to satisfy the Court of his guilt beyond a reasonable doubt.

[31] The important point for the Court is that the requirement of proof beyond a reasonable doubt applies to each of those essential elements. It does not apply to individual items of evidence. The Court must decide, looking at the evidence as a whole, whether the prosecution has proven Corporal Lewis’s guilt beyond a reasonable doubt.

[32] Reasonable doubt applies to the issue of credibility. On any given point, the Court may believe a witness, disbelieve a witness, or not be able to decide. The Court need not fully believe or disbelieve one witness or a group of witnesses. If this Court has a reasonable doubt about Corporal Lewis's guilt arising from the credibility of the witnesses, then it must find him not guilty.

[33] Regarding the evidence, it is important to say that the Court must consider only the one presented in the courtroom. Evidence is the testimony of witnesses and things entered as exhibits, including documents and pictures. It also comprises admissions. The evidence includes what each witness says in response to questions asked. Only the answers are evidence. The questions are not evidence unless the witness agrees that what is asked is correct.

[34] If the Court has a reasonable doubt about Corporal Lewis's guilt arising from the evidence, the absence of evidence, or the credibility or the reliability of one or more of the witnesses, then it must find him not guilty.

[35] Corporal Lewis is charged with having used provoking speeches and provoking gestures toward a person subject to the Code of Service Discipline. This specific offence is enunciated at paragraph 86(b) of the *NDA* and reads as follows:

Every person who

(b) uses provoking speeches or gestures toward a person so subject that tend to cause a quarrel or disturbance,

is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[36] The prosecution must prove beyond a reasonable doubt that Corporal Lewis is the author of the alleged offences on the date and at the place described in the particulars of each charge. The prosecution must also prove each of the following additional essential elements beyond a reasonable doubt: that Corporal Lewis used provoking speeches/gestures toward a person as it is alleged in each charge; that such provoking speeches/gestures tend to cause a quarrel or disturbance; that the person toward whom the speeches/gestures are directed is subject to the Code of Service Discipline; and finally the blameworthy state of mind of Corporal Lewis.

[37] As mentioned by Pelletier M.J. in *R. v. Sketcher*, 2016 CM 4014, at paragraph 37, whether Corporal Lewis used provoking speeches and gestures and whether those speeches and gestures tended to cause a quarrel or disturbance must be determined objectively, that is, on the basis of a reasonable person standard, in light of all circumstances.

[38] I also agree with him when he said, in the same decision, at paragraph 40:

I believe that frank discussions and voicing of disagreement between colleagues subject to the Code of Service Discipline should not be discouraged by the application of penal sanctions. This accords with the Note to *Queen's Regulations and Orders for the Canadian Forces* article 103.19, to the effect that charges should not be laid indiscriminately under section 86 of the *National Defence Act* for mere isolated squabbles (In French, "*simples chamailleries isolées.*") Yet, what tends to provoke a quarrel needs to be assessed in all of the circumstances. There are times and places for arguments and the standard of what is acceptable to a reasonable person must be adapted to the circumstances. Sometimes, causing an argument may be detrimental to discipline and worthy of penal sanctions in light of the specific disciplinary needs applicable at the time of an alleged offence.

[39] The first charge was particularized as follows:

“In that he, on or about 22 February 2018, at or near the 2nd Canadian Division Support Base Valcartier, province of Quebec, said to Corporal V. J. F. Larivière : ‘mange de la fucking marde Larivière, va chier coliss’ ‘qu’est-ce que tu vas faire’ or words to that effect.”

[40] The Court concludes that the prosecution proved beyond a reasonable doubt the essential elements of this offence regarding the identity, the date, the location and the person toward whom the speeches were directed is subject to the Code of Service Discipline.

[41] When determining if Corporal Lewis used provoking speeches toward Corporal Larivière, the Court, as suggested by Pelletier M.J., should assess this element on the basis of the following question: did Corporal Lewis utter words which would be perceived by a reasonable person to be of the type to stimulate a strong or unwelcome reaction or emotion?

[42] Considering the overall circumstances, the answer is no. Corporal Lewis engaged in an exchange with Corporal Larivière further to the latter using words to qualify him as lazy and useless people before all persons present in the canteen. It is true that he became angrier, but he limited himself by inviting Corporal Larivière to [TRANSLATED BY THE COURT] “Get loose [and] [t]ake care of [his] own business.” In addition, Corporal Larivière insulted Corporal Lewis by attacking his reputation as a soldier. Corporal Lewis could not be perceived objectively as trying to stimulate any kind of emotion. He was replying and defending himself in response to some provoking attitude taken by Corporal Larivière.

[43] The evidence clearly supports the fact that Corporal Larivière was angry at Corporal Lewis. He never tried to discipline or calm Corporal Lewis down. He wanted to let him know what he thought of him and his attitude. As such, the fact that Corporal Larivière referred Corporal Lewis having a possible mental health issue only added to that conclusion. At the end, once Corporal Larivière said what he had to say, Corporal Lewis then put him before the result of his own conduct: now that you have said

everything you thought of me, what do you intend to do next? This is where the intervention of Corporal Blanchette and Corporal Bertrand helped to prevent things from getting.

[44] The overall circumstances clearly demonstrate from an objective perspective that Corporal Larivière tried to tell Corporal Lewis what he thought of him once and for all, expecting Corporal Lewis would stop complaining. However, this approach was more of a provoking one than an invitation to stop anything and is clearly not in line with what is considered as being effective leadership within the CAF: directing, motivating, and enabling others to accomplish the mission professionally and ethically, while developing or improving capabilities that contribute to mission success (*Leadership in the Canadian Forces: Conceptual Foundations*, A-PA-005-000/AP-004, at page 30).

[45] It is the conclusion of the Court that a reasonable person would have reached this exact same conclusion on the basis of the facts before this Court.

[46] Then, it is the conclusion of this Court that the prosecution failed to prove beyond a reasonable doubt that Corporal Lewis used provoking speeches toward Corporal Larivière as it is alleged in the first charge.

[47] The second charge is particularized as follows:

“In that he, on or about 22 February 2018, at or near the 2nd Canadian Division Support Base Valcartier, province of Quebec, pushed with his hands Corporal V. Bertrand.”

[48] Again, as for the first charge, the Court concludes that the prosecution proved beyond a reasonable doubt the essential elements of this offence regarding the identity, the date, the location and the person toward whom gestures were directed is subject to the Code of Service Discipline.

[49] When determining if Corporal Lewis used provoking gestures toward Corporal Bertrand, the Court should assess this element on the basis of the following question: did Corporal Lewis make gestures which would be perceived by a reasonable person is of the type to stimulate a strong or unwelcome reaction or emotion?

[50] As for the first charge, the Court is of the opinion that the answer to this question is no. The overall circumstances clearly established that while he was having an argument with Corporal Larivière, who made him angrier with some comments, Corporal Bertrand gently touched Corporal Lewis on the shoulder to get his attention. Corporal Lewis pushed him back with some force to clearly let him know that he did not consent being touched at that point. It can be easily inferred from all the circumstances that his gesture never stimulated, from an objective perspective, a strong or unwelcome reaction or emotion from the person subject to the Code of Service Discipline, Corporal Bertrand. The latter just stopped touching him. He never interpreted this gesture, as other witnesses may have, as trying to provoke a reaction.

Corporal Lewis just physically expressed that he wanted to be left alone once he was touched, nothing more and nothing less. It is also the conclusion of the Court that a reasonable person would have reached this exact same conclusion on the basis of the facts before this Court.

[51] Then, it is the conclusion of this Court that the prosecution failed to prove beyond a reasonable doubt that Corporal Lewis used provoking gestures toward Corporal Bertrand as it is alleged in the second charge.

[52] Consequently, the Court concludes that the prosecution has not proven, beyond a reasonable doubt, that Corporal Lewis used provoking speeches and provoking gestures toward a person subject to the Code of Service Discipline.

FOR ALL THESE REASONS, THE COURT

[53] **FINDS** Corporal Lewis not guilty of the first and second charges of having used provoking speeches and provoking gestures toward a person subject to the Code of Service Discipline contrary to paragraph 86(b) of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major M.-A. Ferron and Captain L. Bonenfant

Major F. Ferguson and Captain M. Melbourne, Defence Counsel Services, Counsel for Corporal A.G. Lewis