



COURT MARTIAL

Citation: *R. v. Martin*, 2022 CM 5008

Date: 20220329

Docket: 202164

General Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Petty Officer, 1st Class J. T. Martin, Respondent

Before: Commander C.J. Deschênes, M.J.

DECISION ON AN APPLICATION BY THE PROSECUTION TO AMEND THE CHARGE SHEET

(Orally)

Introduction

[1] The accused, Petty Officer 1st Class Martin, is charged with three offences pertaining to events that allegedly took place while aboard Her Majesty's Canadian Ship's (HMCS) *Harry Dewolf*. The first and second charges, laid pursuant to section 129 of the *National Defence Act (NDA)*, allege conduct to the prejudice of good order and discipline in relation to harassment on the basis of race toward two crewmates of the rank of sailor, 2nd class. The alleged conduct described in both charges would have taken place between 1 January 2020 and 31 March 2021. The particulars of the third charge, struck a person who, by reason of rank, was subordinate to him contrary to section 95 of the *NDA*, alleges that between 1 and 31 March 2021, the accused struck the leg of Sailor, 2nd Class Brady with his knee.

[2] Before the commencement of the trial by General Court Martial, prior to reading the charge sheet, the prosecutor sought an order to make two amendments to the charge sheet. The first amendment was not contentious and was granted: the word “Canadian” was added after “Her Majesty’s” to the ship’s name, which is where the three infractions allegedly took place. The second amendment pertained to the third charge. The prosecution asked that the word “struck” be replaced with the word “ill-treated” in the statement of the offence because this amendment would align the title of the third charge with the Notes of article 103.28 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) - Abuse of Subordinates. The prosecution submitted that this amendment does not affect the substance of the charge; the allegations against the accused as detailed in the statement of particulars of the charge do not change. The amendment would therefore not cause prejudice to the defence.

[3] The defence objected to the second amendment. He contended that the authority found in the *NDA* for amending a charge is not intended for substantive changes. The amendment would effectively expand the scope of the jeopardy against the accused because he considered ill-treatment of a subordinate to be broader than striking. Therefore, the amendment would cause a prejudice to the defence. Additionally, he submitted that the procedure to amend is not complied with by the prosecution. The prosecution was required to withdraw the charge sheet and serve an amended version.

[4] The issue I must decide is whether the amendment sought by the prosecution is a technical defect that does not affect the substance of the charge and that the conduct of the accused person’s defence will not be prejudiced by the amendment.

Analysis

[5] Section 95 of the *NDA* creates the infraction of abuse of subordinates. Under the title “Abuse of subordinates”, this section reads as follows:

Every person who strikes or otherwise ill-treats any person who by reasons of rank or appointment is subordinate to him, is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment. [Emphasis added.]

[6] The terms found in the article “every person who strikes or otherwise ill-treats any person” indicates that, for the offence to be committed, the abuse can take several forms, such as striking. The offence is meant to cover an array of acts of an abusive or violent nature committed by a superior toward a subordinate, such as butting with the head, kicking or a mere touch in the context of an alleged sexual misconduct. The French version aligns with the words used in the English version: “*quiconque frappe ou de quelque autre façon maltraite*”. Whether the contentious act is a kick or a strike with the hand, these acts are intended to be captured by section 95 as constituting an abuse of subordinate. Put simply, striking is a specific form of ill-treatment.

[7] This interpretation is further confirmed by article 103.28 of the QR&O which incorporates section 95 of the *NDA* and provides at paragraph 2 a specimen charge for this offence. The specimen charge indicates that the statement of the offence (in French,

“*énoncé de l’infraction*”) for a charge under section 95 should contain either one of the two terms: “struck” (a person who by reason of rank or appointment was subordinate to him); or “ill-treated” (a person who by reason of rank or appointment was subordinate to him).

[8] Note (B) of QR&O article 103.28 explains that:

“Strikes” means that a blow is struck with the hand or fist or something which is held in the hand. Violence other than striking, such as butting with the head, and kicking, is included, for the purposes of section 95 of the *National Defence Act*, under “ill-treatment”. [Emphasis added.]

[9] Although notes in the QR&O serves as guidance for Canadian Armed Forces (CAF) members and are not to be construed as if they had the force and effect of law, they should not be deviated from without good reason (see article 1.095 of the QR&O). While it is true that Note (B) seems to narrow the meaning of the term “strike”, the use of this term is simply meant to provide additional specificity to the type of violence alleged. When the alleged prohibited act does not involve a strike as described in Note (B), then the other, more generic term “ill-treated” which covers other types of violent acts, should be used in the statement of the offence.

[10] Since “striking” is a form of “ill-treatment”, substituting these terms in the statement of the offence would not affect the substance of the charge. The proposed amendment regarding the statement of the offence does not involve a charge substitution. Additionally, in accordance with paragraph 101.03(2) of the QR&O, the statement of the offence and the particulars of the offence shall be read and construed together. When reading the statement of the offence and the particulars of the offence together, one can only wonder why the statement of the offence as it currently reads would require an amendment, other than to address a minor technical defect.

[11] In sum, the amendment sought does not affect the statement of the particulars of the act or conduct constituting the offence. The statement of the particulars alleging that, “he, between 1 March 2021 and 31 March 2021, aboard Her Majesty’s Canadian Ship HARRY DEWOLF, struck the leg of Sailor Second Class J.T. Brady with his knee” remains the same and provides sufficient details to enable the accused to be reasonably informed of the offence alleged against him.

[12] Since the charges were preferred in December 2021, the accused has known the details of the prohibited act alleged against him. He was informed that the third charge pertains to striking the leg of the alleged victim with his knee. Consequently, I do not agree with the defence’s contention that the amendment sought by the prosecution, if granted, would broaden the scope of the legal jeopardy faced by the accused. The essential elements which the prosecution have to prove beyond a reasonable doubt remain exactly the same if the amendment is granted. The act alleged in the offence charged was always about ill-treatment of a subordinate.

Conclusion and disposition

[13] In conclusion, the Court finds that, in light of the circumstances of this case and the nature of the offence it pertains to, the amendment sought by the prosecutor would correct a technical defect of the charge, which is permitted under section 188 of the *NDA*. Thus, the prosecution's application to amend the statement of the offence of the third charge is allowed. I therefore order that the statement of the offence of the third charge be amended as follows: the word "struck" is removed and replaced with "ill-treated". The statement of the third charge now reads, "ill-treated a person who, by reason of rank, was subordinate to him".

[14] The amendment is recorded on the charge sheet in accordance with subsection 188(3) of the *NDA*.

Counsel:

The Director of Military Prosecutions as represented by Major G. J. Moorehead and Lieutenant-Commander H. E. Burchill, Counsel for the Applicant

Major É. Carrier, Defence Counsel Services, Counsel for the Respondent, Petty Officer, 1st Class J. T. Martin