COURT MARTIAL

Citation: *R. v. Goulding*, 2023 CM 2015

Date: 20230925
Docket: 202166

General Court Martial

Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

Master Corporal B. Goulding, Applicant

-and-

His Majesty the King, Respondent

Before: Commander S.M. Sukstorf, M.J.

Restriction on publication: Pursuant to paragraph 183.5(2)(b) and 183.6 (1) of the *National Defence Act*, the Court directs that any information that could disclose the identity of the persons described in these proceedings as the complainants identified in the charge sheet as "S.O." and "C.T." as well as the witness S.B. shall not be published in any document or broadcast or transmitted in any way. This order does not apply to disclosure of such information in the course of the administration of justice when it is not the purpose of said disclosure to make the information known to the community.

DECISION ON WHETHER THE DEFENCE OF *DE MINIMIS* WILL BE PUT TO THE GENERAL COURT MARTIAL PANEL WITH RESPECT TO THE FOURTH CHARGE

(Orally)

Introduction

[1] The six charges before the Court relate to alleged incidents that occurred on 3 October 2020, involving Canadian Armed Forces (CAF) members attending a

Qualification Level (QL) course for the cook trade at Canadian Forces Base (CFB) Borden. Master Corporal (MCpl) Goulding was an instructor on that QL3 course.

[2] Most of the allegations are said to have taken place at the Huron Club (Junior Ranks Mess) and relate to MCpl Goulding's conduct on the evening in question after he bought his students a celebratory drink for their physical training (PT) victory over the QL5 course earlier that week.

[3] At the beginning of the trial, the prosecution withdrew the third charge and during the first part of the trial, withdrew the first charge and asked the Court to instruct the panel to only consider the included offence of assault on the third charge. As a result, there are only four charges remaining before the Court. Two of the charges allege assault, one charge alleges assault with a weapon and the final charge alleges drunkenness.

[4] At the conclusion of the evidentiary stage of this trial, counsel for the defence signaled his intention to rely upon the maxim of *de minimis non curat lex*, often translated as "the law does not concern itself with trifles." Essentially, the defence argued that even if touching did occur as particularized in the fourth charge, that the touching was so trivial or minor that the legal maxim of *de minimis* should be applied. This maxim permits a court to accept that in the circumstances of the offence, although legally committed, the offence is so insignificant that it should not result in consequences for the offender.

[5] Whether a case qualifies for application of this defence is a question of law. The Court sought representations from both the prosecution and defence counsel to determine whether this defence should be put to the panel of the General Court Martial (GCM) in closing arguments, as well as in my final instructions.

Defence of de minimis

[6] When asked to consider the same defence in *R. v. Yurczyszyn* 2014 CM 2004, Gibson, M.J. found that there was no binding appellate authority to the effect that the *de minimis* defence pertains in Canadian criminal law, and he was not provided with any judgements of either a court martial or the Court Martial Appeal Court to that effect. In short, there has been no analysis as to whether this is a viable defence within the military justice system.

[7] In this case, the defence did provide some appellate level authority that suggests there is legitimacy to the defence in exceptional circumstances. Its application is not simply exceptional, but it is also highly contextual and applicable in the clearest and most obvious cases.

[8] Essentially, in those jurisdictions where the defence exists, it allows for minor infractions to be disregarded due to their trivial nature. However, even if the defence is recognized as valid in some jurisdictions, this does not mean that the defence is

automatically applicable in the military justice system, with respect to the exercise of discipline as the reliance upon the defence is both contextual and exceptional.

[9] Further, even where the principle does apply, the "application of the principle goes only so far as to preclude criminalization of conduct for which there is no reasoned apprehension of harm to any legitimate personal or societal interest." (See *R. v. Carson*, 2004 CanLII 21365 (ON CA), at paragraph 24, leave to appeal to the Supreme Court of Canada (SCC) dismissed (2004), 187 C.C.C. (3d) vi).

[10] In short, the viability of the defence of *de minimis* is all a matter of context. I do not find that there is a need to take an exhaustive look at the cases or to review the application of the maxim, but rather, I began with the examination of whether based on the facts before me, there was any viability to this defence within the military justice system.

[11] The military justice system is purposefully designed to address a wide spectrum of matters, ranging from the most trivial to the most serious. This comprehensive approach is essential to maintaining discipline, order, and effectiveness within the CAF. While the military justice system addresses *Criminal Code* offences such as assault, it also extends its jurisdiction to seemingly minor issues, such as bad haircuts or instances of absence without leave. This broad reach underscores the military justice system's commitment to upholding standards and regulations, regardless of the scale of the transgression. In the military, even seemingly small breaches of discipline can have cascading effects on morale and operational readiness, making it imperative that the military justice system be equipped to address matters both great and small to ensure the overall integrity and cohesion of military units.

[12] The CAF operates in an environment where adherence to policies, procedures, and the direction from chain of command is critical for achieving mission success and ensuring the safety of personnel. These policies and procedures are not merely "trivial" matters; they often involve matters of life and death, national security, and the success of complex operations.

[13] The fourth charge alleges the *Criminal Code* offence of assault. Some of the civilian case law suggests that the *de minimis* defence is available for all offences in the *Criminal Code.*

[14] Further, I note that section 72.1 of the *National Defence Act* provides that:

> **72.1** All rules and principles that are followed from time to time in the civil courts and that would render any circumstance a justification or excuse for any act or omission or a defence to any charge are applicable in any proceedings under the Code of Service Discipline.

[15] Recognizing that CAF members being tried by court martial are entitled to all the defences available in civil courts, prior to engaging in an analysis on the viability of the defence in the military justice system, I proceeded directly with an

assessment of whether based on the facts before me, there is an air of reality to the defence.

[16] First, this Court must determine whether the defence of *de minimis* has an air of reality based on what is known as the *Cinous* test, which was set out by the Supreme Court of Canada (SCC) in the case of *R. v. Cinous*, 2002 SCC 29. The SCC stated at paragraph 86 that "whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true" is a question of law that requires the judge to determine whether the evidence adduced in the trial is sufficient to give rise to the defence.

[17] The *Cinous* test is uniformly applicable to all defences including that of *de minimis*.

[18] I must review all the evidence and decide if it is sufficient to warrant putting the defence to the panel. In assessing the viability of the potential defence, I must view the evidence in its most favourable light and assume that the evidence relied upon with respect to the defence is true. In doing this, I must not decide on the credibility of witnesses, weigh the evidence, nor make findings of fact nor draw determinate factual inferences.

[19] Secondly, if I decide that it meets that threshold, I must put the defence to the panel who will weigh it and decide whether it raises reasonable doubt.

[20] If the defence does not have an air of reality, it must not be considered by the panel.

Facts

[21] Below is a summary of those facts that bear directly on the circumstances of the offence of assault as particularized in the fourth charge.

[22] The particulars of the fourth charge read as follows:

> "In that he, on or about 3 October 2020 at Canadian Forces Base Borden, Ontario, did assault Private K. Telford."

[23] At the time of the alleged offence, MCpl Goulding was an instructor on a QL3 cook course and Private (Pte) Telford was a student. The alleged incident occurred in the men's washroom at the Huron Club and there is only one witness to the incident who testified and that is Pte Telford himself.

[24] Pte Telford's testimony suggested that when he entered the washroom, MCpl Goulding was in the washroom washing his hands. He testified that:

> "I go to use—to do my business at one of the urinals, he started making fun of how I was standing at the urinal and making fun of my privates as well and that started to make me super uncomfortable. Once he finished washing his hands, he went up behind me and started shaking me while I was still at the urinal."

[25] When asked to describe how MCpl Goulding was making fun of him, Pte Telford told the Court the following:

> "Q. How did he make fun of you standing that way? A. Making fun of the size of privates, like I had something to be ashamed of.
>
> Q. Do you recall what he said? A. I do not.
>
> Q. And next you said he was making fun of your privates; can you describe what you mean by that? A. By the size, like by the size of it.
>
> . . .
>
> Q. And when you say my privates, what do you mean? A. Like, the penis there.
>
> Q. How long did he make fun of you in this manner? A. For less than a minute.
>
> Q. You said when he finished washing his hands, he came over to you? A. Yes.
>
> Q. And he started shaking you? A. Yes.
>
> Q. Can you describe what you mean by shaking you? A. He grabbed both my shoulders and started shaking me back and forth.
>
> Q. What were you doing when he started shaking you? A. I was still currently urinating.
>
> Q. You said he grabbed you by both shoulders? A. Yes.
>
> Q. So both of his hands? A. Yes.
>
> Q. Can you describe how he shook you? A. Quickly.
>
> Q. What was the amount of force? A. Enough force where I had to stop him from pulling me away from the urinal.
>
> Q. And in terms of the shaking, how much would you be moving back and forth when he was shaking you? A. How so?

> Q. Like if he's shaking you, how forward or how back is he pulling you or shaking you? A. Enough where I had to try to keep leaning forward.
>
> Q. You said enough that you had to stop from falling back from the urinal, is that correct? A. Yes.
>
> Q. How did you stop him from shaking you that way . . .
>
> . . .
>
> Q. You indicated earlier that you had to—it was enough—the force of him shaking you was enough that you had to stop from what, could you describe that for the court again? A. Stop being like, stop myself from being pulled away from urinating on the floor.
>
> Q. So you were still urinating at that point? A. Yes.
>
> Q. And my question was, how did you stop yourself from being pulled away? A. By using my body to stop him from pulling me away, if that makes sense.
>
> Q. Just from leaning forward? A. From leaning forward.
>
> Q. Okay? A. Using my strength to lean forward while he was shaking me.
>
> Q. Were you able to use your hands to stop him from pulling you away? A. No.
>
> Q. Why not? A. Because I was using my hands. Using one of my hands to urinate.
>
> Q. How long did the shaking last for? A. Couple seconds.
>
> Q. What if anything was said between the two of you while this was happening? A. I don't remember what was being said, I just remember feeling really uncomfortable in that moment.
>
> Q. What happened next? A. I finished up, washed my hands, and proceeded to the coat room to grab my hat and jacket to leave."

[26] After the incident, Pte Telford grabbed his hat and coat, told his course mates he was leaving, but did not tell them why and he left the Huron Club.

[27] Under cross-examination, now Corporal Telford, was reminded of a conversation that he had with MCpl Goulding earlier in the evening regarding cars. He

confirmed that he told MCpl Goulding that he was not sure whether his current trade was the right trade for him and was talking about an occupational transfer (OT) to Vehicle Technician. The questioning related to this unfolded as follows:

> "Q. And in the course of that conversation he told you that that had been his dream as well? A. I don't remember.
>
> Q. Possible that he said that to you? A. It's possible.
>
> Q. So you guys shared a dream if that's possible? A. Yes, sir.
>
> Q. And then at some point you need to go relieve yourself in the washroom? A. Yes."

[28] The questioning regarding what unfolded in the washroom confirmed that to get from the wash basin to the exit door, MCpl Goulding would have had to pass by the urinal. He further testified that:

> "Q. And then you told my friend that while he was passing you, he stopped, shook you and said something that you can't remember exactly what? A. I can't remember.
>
> Q. I'll put it to you that he may have said something like, don't worry Telford I'll help you with your OT? A. I don't remember what he said.
>
> Q. Is it possible that that's what he said? A. It is possible.
>
> Q. But you didn't really hear anything? A. I was just uncomfortable in that moment of time.
>
> Q. So I would suggest to you that you're a private person and you don't want anyone to see your private parts? A. Yes.
>
> Q. And that was your main concern? A. Yes.
>
> Q. And here's somebody, you weren't expecting it, but started touching on the shoulder and suddenly you went oh my gosh, your whole focus was about not exposing your genitals—? A. Yes.
>
> Q. —is that accurate? A. Yes.
>
> Q. And everything else became secondary? A. Yes.
>
> Q. So you'll agree with me that you've been in the forces now a number of years? A. Yes."

[29] In his cross-examination, defence counsel raised the plausibility that it is common practice for members of the CAF to clap one another on the shoulder. The testimony unfolded as follows:

> "Q. In the Canadian Forces you are comradely with your peers and people you work with? A. Yes, sir.
>
> Q. Okay, it's not unusual for someone to clap you on the shoulder and say good job or? A. Yes. But not in a shaking manner.
>
> Q. Right, but I would suggest to you that when you suddenly get touched and you're now focused on not exposing your privates that that heightens your alertness and that shaking appears to you more than perhaps what it was, is that possible? A. It is possible."

[30] Furthermore, under cross-examination, the defence raised evidence regarding the inconsistency of his in-court evidence on what unfolded with the evidence he gave in his prior statements. The extent of the inconsistency was whether the MCpl touched him on one or both shoulders and shook him or not. The most favourable evidence suggests that in a matter of seconds, MCpl Goulding touched Pte Telford on one of his shoulders and there was a shake and comment.

Law

[31] The evidentiary threshold required to satisfy the "air of reality" test for the defence of *de minimis* in Canadian criminal law is relatively low.

[32] In simple terms, the evidence must establish that there is a plausible and credible argument that the alleged offence is so trivial or minor that it does not warrant a criminal prosecution. This means that the evidence does not need to prove conclusively that the offence falls within the *de minimis* category but should present a reasonable basis for believing that it does.

[33] In short, the evidence should show that pursuing the case would be disproportionate or contrary to the principles of justice due to the trivial nature of the alleged conduct.

[34] After defence counsel signalled their intention to raise this defence with respect to the fourth charge, I solicited comments from counsel who advocated the following positions.

Position of the parties

[35] Defence argued that the alleged assault was simply the result of incidental touching that cannot be considered criminal conduct. He argued that based on the facts, the finding would be disproportionate and to saddle someone for a criminal conviction

for innocuous touching would expose us all. The doctrine of *de minimis* captures the absurdity or mischief rule, and the idea is that the criminal law is not concerned with trivial matters. He argued that the alleged assault was shaking for a couple of seconds and that MCpl Goulding said something to him. Under cross-examination, it was suggested that MCpl Goulding told Pte Telford that he would help him with his occupational transfer. The defence argued that the doctrine of *de minimis* has been applied in many cases where there was minor touching. The defence submitted that the doctrine is most concerned with an abuse of process. At the outset, the prosecution alleged pushing into the urinal, but the evidence from the witness suggested that there was only shaking for a couple of seconds. There was no violence and no harm.

[36] The prosecution was wholeheartedly opposed to the availability of this defence based on the facts before the Court. He argued that the defence was minimizing the conduct of MCpl Goulding and emphasized that the facts must be considered in context which is very important to this application of the *de minimis* doctrine.

[37] The prosecution argued that the level of force is not the only determining factor and in this case the complainant was in a vulnerable and compromised position at a urinal holding his penis when his instructor came up behind him. He argued that this was not incidental or innocuous in any way and the complainant's testimony confirmed that it influenced him.

Analysis

[38] In conducting my analysis, I undertook a careful examination of the specific circumstances of the case and considered whether prosecuting MCpl Goulding for the alleged offence of assault within the military justice system aligns with the underlying objectives of the law.

[39] Assault is a criminal offence under Canadian law, and it is outlined in section 265 of the *Criminal Code*.

[40] The primary purpose of the offence of assault is to deter and punish actions that involve the intentional application of force to another person without their consent or recklessness that results in the reasonable apprehension of bodily harm. It is the personal violation that flows from the touching that is the gist of the offence. By criminalizing assault, Canadian law aims to maintain public order, ensure the safety and well-being of individuals, and uphold the principles of justice and individual rights.

[41] In doing my assessment, I examined any factors that might demonstrate that the act was so minor or inconsequential that it falls within the realm of the *de minimis* doctrine. I was particularly attentive to the suggestion by defence counsel that this touching was consistent with normal expressions of collegiality exchanged between military members within a military environment.

[42] In determining whether there is an “air of reality” that the offence was so trivial or minor that it does not warrant a criminal prosecution, it was imperative to consider the offence in its context and to ensure that there is no reasoned apprehension of harm to any legitimate personal or societal interest. This required an assessment of the environment where the offence occurred as well as the relationships of the individuals involved.

[43] The evidence before this court martial does not support the notion that the offence was so trivial that it does not merit a criminal prosecution. It is crucial to emphasize that the assessment of the incident should not solely revolve around whether the touching was directed at one or both shoulders and how much shaking was involved. Instead, the assessment must consider the broader context. Based on the circumstances surrounding the incident, I must also ask myself whether there was a personal violation that flowed from the touching? The context encompasses factors like the significant rank difference between Pte Telford and MCpl Goulding, who was his instructor during QL3 training, and the expectation of privacy that the complainant had at the time.

[44] The vulnerability of the environment where the incident occurred cannot be overlooked, as it took place in a washroom while Pte Telford was using the urinal with his privates exposed. Importantly, the Court must also consider the words spoken immediately before the alleged touching, which mocked the size of Pte Telford’s penis. The fact that these words were spoken remains unrefuted. Pte Telford's admission of feeling uncomfortable and self-conscious during the incident while using the urinal further underscores the seriousness of the situation. Moreover, his swift departure from the scene after the incident, leaving behind his peers at the Huron Club, adds weight to the argument that this incident must not be considered so trivial that it should not be the subject of a criminal prosecution.

[45] Respect within the military environment is not only a fundamental value but a cornerstone of cohesion and operational effectiveness, especially when service members serve in close quarters. Recognizing and heeding personal space, particularly in vulnerable situations like washrooms, is paramount. This principle is most critical from senior members to their more junior counterparts.

[46] The CAF must foster a culture of dignity and professionalism to ensure that every individual feels safe, valued, and protected within the military family. In close-knit units, or on military training courses, this respect forms the bedrock of trust and cooperation, contributing to overall success and the well-being of those who serve. Military discipline is deeply rooted in a culture of strict adherence to orders and regulations, but it also extends beyond orders and regulations; it encompasses the humane treatment and consideration of one another, a reflection of the highest standards that must be upheld within the CAF.

[47] I acknowledge that playful interactions can occur among comrades, and it is not the intent of the law to penalize such conduct. I was particularly mindful of this

throughout my assessment. However, I also believe that acts with a hostile nature, regardless of how minor they may seem, especially when involving a supervisor and a young private, should generally not be considered eligible for a *de minimis* defence.

[48] Based on the evidence provided by Pte Telford, it is evident that the events in the washroom were neither insignificant, trivial, nor innocuous when examined within the context of the facts.

[49] Further, after considering all the evidence, I do not find that pursuing the case would be disproportionate or contrary to the principles of justice.

FOR THESE REASONS, THE COURT:

[50] **FINDS** the defence of *de minimis* is not viable.

Counsel:

Captain C.M. Da Cruz and Lieutenant-Colonel A.H. Bolik, Defence Counsel Services, Counsel for the Applicant and Accused, Master Corporal Goulding

The Director of Military Prosecutions as represented by Major C.R. Gallant and Captain I.M. Shaikh, Prosecutors and Counsel for the Respondent