COURT MARTIAL

Citation: *R. v. McKenzie,* 2014 CM 2016

Date: 20140922
Docket: 201354

Standing Court Martial

Canadian Forces Base Gagetown
Gagetown, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer (Retired) D.P. McKenzie, Accused

Before: Colonel M.R. Gibson, M.J.

REASONS FOR FINDING

(Orally)

[1] Warrant Officer (Retired) McKenzie is charged with three offences: the first charge, punishable under section 130 of the *National Defence Act* is one of criminal harassment, contrary to section 264(2)(d) of the *Criminal Code*; the second charge, laid in alternative to the first charge, is of conduct to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act* for allegedly harassing Warrant Officer Christine Prudhomme, contrary to Defence Administrative Orders and Directives (DAOD) 5012-0, Harassment Prevention and Resolution; and the third charge, to which Warrant Officer McKenzie has pleaded guilty, is of disobedience of a lawful command, contrary to section 83 of the *National Defence Act*.

[2] In explaining the Court's decision, I shall first review the facts of the case as they have emerged in the evidence heard by the Court, then instruct myself as to the applicable law, and indicate the findings that I have made with regard to the credibility of certain witnesses. I will then apply the law to the facts in explaining the analysis that

I have made, before indicating the Court's determination as to finding on the first two charges.

[3] Extensive evidence was called by both the prosecution and defence in this case, only a portion of which was directly relevant to the period of 1 January to 10 December 2012, which is the subject of the first two charges. The evidence established that over the period of a number of years from 2008 onwards, Warrant Officer McKenzie and Warrant Officer Prudhomme had a consensual sexual relationship in the form of an ongoing extra-marital affair. The relationship was a volatile and emotionally intense one, of a recurring on-again, off-again nature. What happened when this relationship began to break down, and eventually ended, during the year of 2012 in question, is the nub of this trial.

[4] In order to arrive at a proper finding in this case, the Court must instruct itself as to the applicable law. First, the elements of the offences with which Warrant Officer McKenzie is charged. The first charge on the charge sheet, criminal harassment, contrary to section 264(2)(d) of the *Criminal Code*, has the following elements:

(a) identity;

(b) date and place as particularized on the charge sheet;

(c) that Warrant Officer McKenzie engaged in the alleged conduct; that is, threatening conduct directed at Warrant Officer Prudhomme;

(d) that he had no lawful authority to do what he did;

(e) that his conduct harassed Warrant Officer Prudhomme;

(f) that Warrant Officer McKenzie knew that his conduct harassed Warrant Officer Prudhomme or was reckless as to whether she was harassed;

(g) that Warrant Officer McKenzie's conduct caused Warrant Officer Prudhomme to fear for her safety; and

(h) that Warrant Officer Prudhomme's fear was reasonable in the circumstances.

[5] The second charge engages section 129(2) of the *National Defence Act*, which provides that:

> An act or omission constituting an offence under s.72 or a contravention by any person of
>
> (a) any of the provisions of the Act,
>
> (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or

(c) any general, garrison, unit, station, standing, local or other orders,

is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[6] The wilful contravention by a person subject to the Code of Service Discipline of an order made under the *National Defence Act* would thus be deemed to have a prejudicial effect on good order and discipline. In order to establish the offence, it must be established that the person intended to do the prohibited underlying act that would constitute a contravention of the order or regulation, and that the act did in fact contravene the order or regulation.

[7] The second charge on the charge sheet thus has these elements:

(a) identity;

(b) date and place;

(c) that Warrant Officer McKenzie wilfully did the specified actions;

(d) that these actions harassed Warrant Officer Prudhomme, within the meaning of Defence Administrative Orders and Directives 5012-0; and

(e) that there was sufficient notification and publication of Defence Administrative Orders and Directives 5012-0.

As indicated, if these elements were established, the element of prejudice to good order and discipline would be established by the deeming effect of section 129(2).

[8] The first charge is more complex than the second charge, and its proof more stringent. The charges are, as I have noted, laid in the alternative to one another.

[9] The second issue that the Court must instruct itself on relates to the presumption of innocence and the standard of proof beyond a reasonable doubt.

[10] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in Canadian criminal law, and the standard of proof beyond a reasonable doubt in order to displace the presumption of innocence is an essential part of the law that governs criminal trials in this country. In matters dealt with under the Code of Service Discipline, as with cases dealt with under Canadian civilian criminal law, every person charged with an 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 essential element of the offence beyond a reasonable doubt. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[11] 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 guilt. In order to secure a conviction, it is incumbent on the prosecution to prove each essential element of the offence charged to the standard of proof beyond a reasonable doubt. 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.

[12] The Court must find an accused person not guilty if it has a reasonable doubt about his or her guilt on all the essential elements of the offence after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and tradition of justice.

[13] In *R. v. Lifchus*, [1997] 3 SCR 320, the Supreme Court of Canada proposed a model jury charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice; it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case, based not only on what the evidence tells the Court, but also on what that evidence does not tell the Court. The fact that the person has been charged is no way indicative of his or her guilt.

[14] In *R. v. Starr*, [2000] 2 SCR 144, at paragraph 242, the Supreme Court of Canada 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 nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person beyond a reasonable doubt.

[15] To put it in perspective, if the Court is convinced, or would have been convinced, that the accused is probably or likely guilty, then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[16] The third issue is the assessment of the testimony of witnesses. Evidence may include testimony under oath or solemn affirmation before the Court by witnesses about what they observed or what they did. It could be documents, photographs, videos, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts either the prosecution or the defence, and matters of which the Court takes judicial notice.

[17] It is not unusual that some evidence presented before the Court may be contradictory. Often witnesses may have different recollections of events. The Court has to determine what evidence it finds credible and reliable.

[18] Credibility is not synonymous with telling the truth, and the lack of credibility is not synonymous with lying. Many factors influence the Court's assessment of the credibility of the testimony of a witness. For example, a Court will assess a witness's opportunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the event that he or she described? Were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? The last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where the accused chooses to testify.

[19] The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant or argumentative? However, demeanour must be assessed with caution and should be assessed in conjunction with an assessment of whether the witness's testimony was internally consistent; that is, consistent with itself, and consistent and with the other uncontradicted or accepted facts in evidence. The Court of Appeal for Ontario and the Court Martial Appeal Court have cautioned against over-reliance on demeanour as a factor in assessing the credibility of witnesses and the reliability of their evidence.

[20] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well taint a witness's entire testimony.

[21] The Court is not required to accept the testimony of any witness except to the extent that it has impressed the Court as credible. The Court may accept the evidence of a particular witness in total, in part, or not at all. In *Captain Clark v R*, 2012 CMAC 3, the Court Martial Appeal Court has given very clear guidance as to the assessment of credibility of witnesses. Justice Watt for the Court elaborated the governing principles. First, witnesses are not "presumed to tell the truth." A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced at the proceedings, unaided by any presumption, except the presumption of innocence of the accused person. Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense, and rationality to reject uncontradicted evidence. A trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.

[22] Credibility is not an all or nothing proposition, nor does it follow from a finding that a witness is credible that his or her testimony is reliable. A finding that a witness is credible does not require a trier of fact to accept the witness's testimony without qualification. Credibility is not co-extensive with proof. As Justice Watt indicated at paragraph 48 of *Clark*:

> Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as a witness believes it to be. In a word, credibilty. Accuracy concerns have to do with the actual accuracy of the witness' account. This is reliability. The testimony of a credible, in other words an honest witness, may nonetheless be unreliable.

[23] The accused, Warrant Officer McKenzie, gave evidence in his trial and his evidence was essentially a denial of several facts directly relevant to essential elements of these offences. Given this the Court must focus its attention on the test provided for and the reasons for decision of Justice Cory in the Supreme Court of Canada case of *R. v. W.(D.)*, [1991] 1 SCR 742, for cases such as this where the accused has testified and his evidence essentially constitutes a denial of one of the essential elements of the charge. This guidance provides as follows: first, if I believe the evidence of the accused, then I must acquit; second, if I do not believe the evidence of the accused, but I am left in reasonable doubt by it, I must acquit; third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[24] In *R. v. J.H.S.*, 2008 SCC 30, at paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R. v. H.(C.W.)*, (1991) 68 CCC (3d) 146 (BCAA), where Wood J.A. suggested the additional instruction:

> I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If, after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[25] I will now turn to an assessment of the evidence in this case, and whether the prosecution has met its burden of proving the guilt of the accused on each essential element of the offence to the standard of proof beyond a reasonable doubt.

[26] Applying the *W.(D.)* analytical framework, I start with the evidence of the accused Warrant Officer McKenzie. I did not find Warrant Officer McKenzie to be a generally credible witness, and I did not accept most of his evidence. I do not accept these portions because they are not internally consistent, are illogical, or are contradicted by the evidence of other witnesses whose evidence I specifically do accept. Moreover, aware of the limitations and caveats regarding using demeanour to assess credibility, to which I earlier referred, as a secondary element of my assessment I found that the answers and demeanour of Warrant Officer McKenzie during his cross-examination in particular were evasive, obstructive and entirely unpersuasive.

[27] In sum, I do not believe the evidence of Warrant Officer McKenzie in relation to several crucial elements of the offence, nor does his evidence give rise to a reasonable doubt for me. I must then turn to assessing whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[28] I will start by an assessment of the credibility and reliability of the evidence of the witnesses called by the prosecution, mindful of the guidance of the Court Martial Appeal Court described earlier. The key question in this regard relates to the credibility of the main prosecution witness, Warrant Officer Prudhomme, and the reliability of her evidence. The prosecution's case largely turns on this.

[29] Warrant Officer Prudhomme's credibility is problematic. One the one hand, she testified compellingly in Court, admitting that she had lied in the past in relation to this case, but insisting that she was now telling the truth. The story she recounted is a difficult one, fraught with emotion, and full of details about her conduct that were no doubt highly embarrassing and difficult to relate in Court. At first impression, she presented as a sympathetic witness, but on the other, as the defence has submitted, she has had a substantial history of untruth in relation to the events engaged by the charges before the Court. She made material misrepresentations to military police in both Gagetown and Kingston. She misled her chain of command, specifically a chief warrant officer who was conducting an investigation. She contravened a direct order to stay away from Warrant Officer McKenzie. She lied to the defence counsel, Major Collins. And perhaps most significant of all, she initially lied to the prosecutor during his preparations for this trial. And the backstory of the relationship and her role in it provided by the totality of the evidence presents a much more nuanced and complicated picture.

[30] All of this must give rise to significant doubt about the credibility of Warrant Officer Prudhomme's evidence in relation to this case, and there were numerous inconsistencies in her evidence. For example, she testified that she was cc'd on the email that Warrant Officer McKenzie sent to her husband while she was in Kuwait, telling him about her affair with Warrant Officer McKenzie, and then indicated that she did not see the email and had to ask about its content.

[31] A considerable portion of the evidence presented before the Court may be considered as background context to the events of the year in question, but was not directly relevant to the charges before the Court. It is important for all to understand that, ultimately, the task of the Court is to assess and make a finding on the specific charges before the Court, which relate to specific incidents. Given the findings that I have made, it is not necessary to rehearse the entire body of evidence in detail.

[32] I will now turn to an analysis of each charge. In respect of the first charge, the elements of identity, date and place are made out. As indicated in the emails in evidence at Exhibits 4, 5 and 6, Warrant Officer McKenzie did make statements, for example, "an eye for an eye," "I will always haunt you," "you need to call me now before my anger

makes me do something I don't want to do" that could reasonably be taken to constitute threats. But the problematic element is that of whether Warrant Officer Prudhomme actually feared for her safety. During the course of the year in question, there are many indicia suggesting that she may not have. She continued to meet Warrant Officer McKenzie in defiance of a direct order not to, at least 10 times during this period, and had consensual sexual relations with him at least three times during this period. She continued to have extensive email interaction with him. By September of 2012, I do not doubt that Warrant Officer Prudhomme was afraid that Warrant Officer McKenzie would contact her children or do something else to embarrass her, but that is not the same as whether she feared for her safety. Her evidence on this point was telling in its ambiguity.

[33] The conduct of Warrant Officer McKenzie through this period was obnoxious, unwarranted, unprofessional, and foolish. He was clearly obsessed with Warrant Officer Prudhomme and had great difficulty in thinking clearly and in letting go of the relationship. It dominated his life and clouded his judgment. His actions can in no way be condoned. But in order to found a criminal conviction, the elements of the offence must be construed strictly. On the evidence as a whole, taking into account the lingering questions about Warrant Officer Prudhomme's credibility in relation to this matter that I have referred to earlier, and the inferences to be drawn from her continuing conduct throughout the period in question, I consider that there must be a reasonable doubt as to this element of the offence, and that it would be unsafe to found a conviction on these facts as they have emerged in evidence.

[34] The Court thus finds that the prosecution has not met its burden of proving all of the essential elements of the offence for the first charge to the requisite standard of proof beyond a reasonable doubt.

[35] In respect of the second charge, the elements of identity, date and place are made out. There is evidence that Warrant Officer McKenzie was directly aware of the contents of DAOD 5012-0 from the training that he had received, and arising from his secondary duties within the unit.

[36] The definition of harassment for the purposes of DAOD 5012-0 is:

> "any improper conduct by an individual that is directed at and offensive to another person or persons in the workplace, and that the individual knew or ought reasonably to have known would cause offence or harm. It comprises any objectionable act, comment or display that demeans, belittles or causes personal humiliation or embarrassment, and any act of intimidation or threat."

[37] The emails in question from the period of September to October 2012 clearly fall within this definition, and were sent to Warrant Officer Prudhomme's DIN email account at CDA Kingston. They thus clearly constituted harassment in the workplace.

[38] Warrant Officer McKenzie's contravention of the DAOD is, by operation of law pursuant to section 129(2) of the *National Defence Act*, deemed to be prejudicial to good order and discipline. The Court thus finds that all of the essential elements of the offence for the second charge are thus established to the standard of proof beyond a reasonable doubt.

FOR THESE REASONS, THE COURT:

[39] **FINDS** you not guilty of the first charge on the charge sheet.

[40] **FINDS** you guilty of the second charge on the charge sheet.

Counsel:

Lieutenant-Commander D.T. Reeves, Canadian Military Prosecution Service, Counsel for Her Majesty the Queen

Major S.L. Collins, Directorate of Defence Counsel Services, Counsel for Warrant Officer (Retired) D.P. McKenzie