COURT MARTIAL

Citation: *R v Butt*, 2012 CM 3006

Date: 20120502
Docket: 201203

Standing Court Martial

Canadian Forces Base Edmonton
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Private M.E. Butt, Accused

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

REASONS FOR FINDING

(Orally)

[1] Private Butt is charged with one offence for disobedience of a lawful command of a superior officer contrary to section 83 of the *National Defence Act*. The facts on which this count is based relate to an event that took place outside the Kandahar Airfield camp in Afghanistan on 25 September 2011. The trial's hearing took place on 30 April 2012. Three witnesses were heard during this trial. The accused decided that he would not present a defence. Essentially, as presented by his defence counsel, the accused alleged that the prosecution did not discharge its burden to prove beyond a reasonable doubt the requisite *mens rea* for the offence as charged.

[2] The evidence before this court martial is composed of the following facts:

(a) the testimony heard; in the order of their appearance before the court, the testimony of Warrant Officer Heselton, Master Corporal McRae and Warrant Officer Moores; and

(b) the judicial notice taken by the court of the facts in issue under Rule 15 of the Military Rules of Evidence.

[3] Prior to his deployment in Afghanistan in June 2011, as part of 3 section, 4 Platoon, Private Butt received pre-deployment training for a period of six to seven months, on which he learned how and when to wear his personal protective equipment (PPE). The latter is composed essentially of a helmet, ballistic eyewear, a fragmentation vest (frag vest), gloves, and if necessary, a gas mask. Throughout the training phase, platoon members were all required to wear their full PPE at all time. This equipment and its replacement are issued by the clothing store. If someone loses an item, he must fill out a Lost Store Report (LSR) in order to get it replaced. Essentially, during the pre-deployment phase, platoons members, including Private Butt, practised convoy orders, convoy actions on objectives, actions on ambush IED, clearance patrols and securing ground. During convoy drills, they were wearing full PPE, which would include ballistic eyewear.

[4] Members of 4 Platoon left the country on 23 June 2011 and arrived at Kandahar Airfield (KAF) on 25 June 2011. Upon their arrival in operational theatre, they were all briefed on various issues, including the fact that full PPE must be worn once outside the wire, which the court infers as a reference of being outside the limits of KAF's camp. They were told by a medical representative that ballistic eyewear must be worn instead of any other type of glasses, including sunglasses, because it provided the best protection.

[5] Prior to the alleged incident for which Private Butt has been charged, the accused lost his ballistic eyewear in theatre and got replacement for it through the clothing store. Essentially, when he noticed that it was missing because he thought he misplaced it, he told his section commander 2 i/c, Master Corporal McRae, about it. As his supervisor, Master Corporal McRae told the accused that in order to avoid losing it again, to wear sunglasses instead of ballistic eyewear while on the camp; to put a strap on it; to wear it on his neck, if he took it off; and to put it in the hard case, which could be placed in his down pouch on his tactical vest. Reality is that it was well known by Private Butt's supervisors that he was regularly loosing some parts of his personal kit.

[6] In theatre, Private Butt was with 4 Platoon, Force Protection Company, for about two weeks. He was transferred with the CQ staff because he did not fit in the new LAV vehicle used at KAF. Because of his height, he couldn't fit anymore in the vehicle because of the new seats that were considerably higher. He came back to the platoon on 27 September 2011, which is two days after the alleged incident before this court.

[7] Three to four days prior to the mission, the acting platoon commander, Warrant Officer Heselton, learned that his platoon was tasked on 25 September 2011 on a bomb destroyer mission. Essentially, it consisted in proceeding in the transportation of ammunition from the camp to a site located fifteen minutes outside the camp, where it would be blown up.

[8] Warrant Officer Heselton knew Private Butt for some time, having the latter under his command for the last two years. Considering that Private Butt have had limited exposure to missions outside the wire, and because the platoon needed some help, he was tasked as a co-driver on an Armoured Heavy Support Vehicle Systems (AHSVS), a ten-ton armoured transportation vehicle for that mission.

[9] In the morning of 25 September 2011, at the CQ compound, Private Butt attended to the orders given by Warrant Officer Heselton for that mission. The latter specifically mentioned that full PPE must be worn at all time outside the wire, which would include wearing ballistic eyewear. However, while he was in the truck and the vehicles were about to leave on the mission, Private Butt noticed that he did not have his ballistic eyewear. Once at the location outside the wire, while he was unloading the ammunition from the vehicle with the engineers, Master Corporal McRae and Warrant Officer Heselton noticed that Private Butt did not wear his ballistic eyewear.

[10] Warrant Officer Heselton went to the accused and asked him if he had his ballistic eyewear, to which he replied "no." He told the Warrant Officer that he had the glasses and showed them to him, but that he did not have the frame for them. Warrant Officer Heselton decided to pass to Private Butt his own ballistic eyewear and went back to his turret where he put on his crew goggles.

[11] Once back to the camp, Master Corporal McRae went with Private Butt to have him search his room and also the other location where his full fighting order kit was kept, in order to see if he could find his ballistic eyewear, which he couldn't. On that same day, as the acting Sergeant Major for the CQ, Warrant Officer Moores was tasked to investigate the matter.

[12] 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 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.

[13] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. 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 guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[14] 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. 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.

[15] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or 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 traditions of justice. In *R v Lifchus* [1997] 3 SCR, 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts subsequent 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 arises 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 a person has been charged is no way indicative of his or her guilt and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before a court.

[16] In *R v Starr* [2000] 2 SCR, 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.

[17] 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, in this case, Private Butt, beyond a reasonable doubt. 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 have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[18] What is evidence? 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, maps or other items introduced by witnesses; the testimony of expert witnesses; formal admissions of facts by either the prosecution or the defence; and matters of which the court takes judicial notice. 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.

[19] Credibility is not synonymous with telling the truth and a 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' opportunity to observe; a witness' reasons to remember, like, 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? This 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 that accused chooses to testify.

[20] Another factor in determining credibility is the apparent capacity of the witness to remember. 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? Finally, was the witness' testimony consistent with itself and with the uncontradicted facts?

[21] 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' entire testimony.

[22] The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason, rather, to disbelieve it.

[23] Section 83 of the *National Defence Act* reads as follows:

> Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

[24] Then the prosecution had to prove the following essential elements for this offence beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charged sheet; the prosecution also had to prove the following additional elements, the fact that an order was given to Private Butt, that it was lawful, and that he received or knew the order; the fact that Private Butt was given the order by a superior officer, and that this status was known by him; the fact that Private Butt did not comply with the order; and finally, the blameworthy state of mind of Private Butt.

[25] First, the court concludes that the credibility and the reliability of the witnesses presented by the prosecution are not at issue in this trial. All of them testified in a straightforward and calm manner. It is clear for the court that they don't have any interest in the outcome of the trial and they were all responsive to questions put to them by both parties and the court. If they couldn't understand a question, they did not hesitate to request to repeat it. Once, Master Corporal McRae was asked about a prior statement he made and he had no difficulty to admit that what he said previously was the correct statement. Reality is that facts supporting this case are not a matter of controversy.

[26] The court is satisfied beyond a reasonable doubt that the prosecution has proved the identity of the accused and the date and place as alleged in the charged sheet. Also, the court is satisfied that the prosecution discharged its burden to prove beyond a reasonable doubt that the order to wear his ballistic eyewear was given to Private Butt,

that this order was lawful, that he received and knew the order. The court also concludes that the prosecution has proved beyond a reasonable doubt that Private Butt was given the order by a superior officer, which is Warrant Officer Heselton, and that the status of the latter was known to the accused. Finally, the court is satisfied that the prosecution has proved beyond a reasonable doubt that Private Butt did not comply with the order

[27] Then, the only essential element left to discuss in this case, as suggested by the defence counsel, is if the prosecution has proved beyond a reasonable doubt the blameworthy state of mind of Private Butt when he committed the offence. The defence counsel suggested to the court that the prosecution failed to prove that Private Butt had the requisite *mens rea* to commit the service offence of disobedience of a lawful command. He took the position that by not having his ballistic eyewear with him because he lost it, the accused couldn't wilfully commit the offence because he did not put himself intentionally in that situation.

[28] In its decision of *R v Matusheskie,* 2009 CMAC 3, at paragraph 17, the Court Martial Appeal Court stated:

> Intent is a constituent element of the offence of disobeying a lawful order contrary to section 83 of the *National Defence Act.* Absent proof of the requisite intent, the offence has not been proven.

[29] *In R v Latouche,* CMAC-431, the Court Martial Appeal Court took the opportunity to comment and discuss what the *mens rea* is in general. At paragraphs 19 to 23, it said:

> [19] It is, therefore, necessary to briefly review the general nature of the concept of the mental element required of a criminal offence, commonly known as *mens rea*. To begin with, a criminal offence is composed of an *actus reus* (prohibited conduct) and a *mens rea* (mental fault). In other words, a criminal offence consists of a prohibited act, committed in specified factual circumstances, combined with a blameworthy mental state, both of which are prescribed either by statute or common law. It is important to note that it is the statutory definition of the criminal offence that determines the essential physical and mental elements of the offence.
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> [20] *Mens rea*, which literally literally means "guilty mind", refers to the blameworthy state of mind required for the commission of the particular crime charged, as prescribed by the definitional elements of the crime. Thus, *mens rea* is defined by the essential elements of the crime. There is no such thing as a fixed *mens rea*. Instead, *mens rea* varies from crime to crime. *Mens rea* generally requires not only an intention, whether general or specific, to commit a prohibited act, but also knowledge of or wilful blindness to the relevant factual circumstances that may or may not involve a prohibited result or consequence of the accused's conduct. In any situation, much depends on the definitional essential elements of the alleged offence. Alternatively, the *mens rea* of the offence may require either the wilful commission of a prohibited act or knowledge of a prohibited state of affairs combined with knowledge of or wilful blindness as to relevant factual circumstances.

> [21] *Mens rea* may also be subjective or objective in nature. The accused's requisite mental fault may consist of negligence, knowledge, wilfulness, recklessness, wilful blindness, intent, or purpose, depending again on the definition of the crime charged.
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> [22] It is also necessary to review briefly what *mens rea* is not. *Mens rea* does not require that the accused have a morally blameworthy, reprehensible, unethical or evil state of mind. Moral blameworthiness must be distinguished from mental blameworthiness. Moral blameworthiness or turpitude generally relates to the accused's motivation for committing a crime. An accused's motive is not an essential element of that crime: an accused may be convicted of a crime even though he has a good motive or no motive for committing it.

[30] At paragraphs 24 and 25, the court added:

> [24] Similarly, *mens rea* does not require that the accused must intend to contravene the law. Indeed, an accused need not even know that his conduct constitutes a crime inasmuch as "[i]gnorance of the law by a person committing an offence is not an excuse for committing that offence" ("[i]gnorance de la loi chez une personne qui [commet] une infraction n'excuse pas la perpétration de l'infraction") section 19 of the *Criminal Code*, R.S.C. 1985, c. C-46. Furthermore, section 150 of the *National Defence Act* provides that:
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> | 150. The fact that a person is ignorant of the provisions of this Act, or of any regulations or of any order or instruction duly notified under this Act, is no excuse for any offence committed by the person. | 150. Le fait d'ignorer les dispositions de la présente loi, de ses règlements ou des ordonnances ou directives dûment notifiées sous son régime ne constitue pas une excuse pour la perpétration d'une infraction. |
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> [25] Likewise, *mens rea* does not require that an accused must intend to contravene a law if he knows the general state of the law regulating his conduct. Even where an accused knows the law and honestly believes that his conduct does not contravene that law, he may, nonetheless, be guilty of a crime. An honest mistake of law is not a defence to the crime charged, even though an honest mistake of fact may be.

[31] Finally, at paragraph 27 of the same decision, the court said:

> In the end, *mens rea* is the mental fault required by the definitional essential elements of the crime charged, regardless of the accused's intent, or lack thereof, to contravene the law, and regardless of his knowledge of the law, his moral blameworthiness, or his motivation for his conduct.

[32] The essence of the service offence identified in the Code of Service Discipline at section 83 of the *National Defence Act* was articulated in 2010 by the Court Martial Appeal Court in *R v Liwyj*, CMAC 6 at paragraph 22 in those terms:

> The offence set out in section 83 of the *NDA* is particular to the military world and reflects the fact that obedience to orders is the fundamental rule of military life.

[33] Obeying orders is at the heart of the profession of arms and of an armed force. The essential elements, which define this very specific offence, tell us that the mental fault required for committing this offence is established once the prosecution has proved beyond a reasonable doubt that a person subject to the Code of Service Discipline, did

not comply with the order known by him or her and given by a superior officer, unless he demonstrates that he did so because the order was manifestly unlawful or he was factually mistaken as to the content of the order or as to the identity of the person giving the order.

[34] Interestingly enough, in this case, Private Butt knew before departing the camp in the vehicle, that he shall wear his ballistic eyewear once outside the wire because he was ordered to do so by a superior officer. However, just before departure, he realized that he did not have it and, from that point, he knew or should have known that he couldn't comply with the order given to that effect by Warrant Officer Heselton. Then, despite knowing that he won't be able to comply with this order, he got out of the vehicle once at the location and decided to perform his task of unloading the vehicle without saying a word about his situation. It is only when Warrant Officer Heselton challenged him with his non-compliance of the order that he admitted his failure to act in accordance with it. This set of facts supports and is enough for this court to conclude that the prosecution has proved beyond a reasonable doubt the requisite *mens rea* for this offence.

[35] Consequently, having regard to the evidence as a whole, the prosecution has proved beyond a reasonable doubt all the essential elements of the offence of disobedience to a lawful command of a superior officer.

[36] Additionally, having regard to the finding of the court concerning the essential elements of the offence of disobeying a lawful order, and the application of those elements to the facts of this case, the court considers that the prosecution has discharged its burden of proof by establishing beyond a reasonable doubt that on 25 September 2011, at or near Kandahar Airfield, province of Kandahar, Islamic Republic of Afghanistan, Private Butt did disobey the order given by Warrant Officer Heselton to wear his ballistic eyewear.

FOR THESE REASONS, THE COURT:

[37] **FINDS** Private Butt guilty of the first and only charge on the charge sheet.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander B. Walden, Directorate of Defence Counsel Services
Counsel for Private M.E. Butt