



COURT MARTIAL

Citation: *R v Foulds*, 2012 CM 3001

Date: 20120118

Docket: 201160

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.T. Foulds, Accused

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

REASONS FOR FINDING

(Orally)

[1] Sergeant Foulds is charged with a service offence under section 130 of the *National Defence Act* for having obstructed justice contrary to paragraph 139(2) of the *Criminal Code*, with a service offence for negligently performing a military duty contrary to section 124 of the *National Defence Act*, and with a service offence for having behaved with contempt toward a superior officer contrary to section 85 of the *National Defence Act*.

[2] The evidence is composed of the testimony of four witnesses heard in the following order: Captain Charette, Warrant Officer Watt, Master Corporal Grandy and Master Corporal Suttie.

[3] On 30 June 2010, Sergeant Foulds was supporting, as a section commander combat engineer, a Canadian Forces platoon who was securing an axe of advance near the patrol base Sperwan Ghar in the province of Kandahar, in Afghanistan. On that day, his section confirmed five improvised explosive devices (IED) and blew in place (BIP)

two of them. Further to that operation and on his return to the base on 2 July 2010, Sergeant Foulds was required by his troop commander to provide a written report concerning the BIP of the two IEDs for which his section was involved, which he did. It is in the context of an exchange with his troop commander, Captain Charette, that the substance supporting the alleged commission of the offences can be found.

[4] On 2 July 2010, Sergeant Foulds went to the command post to see his troop commander, Captain Charette, to submit his draft report before making it official. At that time, Warrant Officer Watt was present. He showed his report to both of them, including some pictures taken during the operation. This practice of taking pictures of the devices before being blown in place is a common practice for combat engineers in order to gather valuable information.

[5] Once they were done with the report, Sergeant Foulds showed to both of them additional pictures taken at the site of the last IED the section dealt with. One picture showed one of his section's members, Corporal Grandy, lie in the prone next to an uncovered pressure plate using a bayonet. Captain Charette then asked Sergeant Foulds if any of the charge or the power supply had been located before this picture was taken, and got from Sergeant Foulds that it was not the case.

[6] Captain Charette became concerned by the answer because he considered that Sergeant Foulds could have failed to ensure the safety of the members of his section during the operation by letting one of them approach a presumed live device. Captain Charette left for supper in order to collect his thoughts and consider what he should do.

[7] When he came back, he asked Warrant Officer Watt to get Sergeant Foulds because he considered that this information, including the pictures, should be shared with the officer in command of the squadron.

[8] Once Sergeant Foulds entered in the office where Captain Charette was, the latter asked him to provide the pictures. Sergeant Foulds told him that he deleted the pictures and that he will not let him screw over his guys. Captain Charette indicated to him that a formal investigation would take place. He then dismissed Sergeant Foulds and reported the situation.

[9] Before this court provides its legal analysis, it's 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.

[10] 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.

[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. 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] 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.

[13] 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.

[14] 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, Sergeant Foulds, 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.

[15] 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.

[16] 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.

[17] 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.

[18] 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?

[19] 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.

[20] 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.

[21] Section 124 of the *National Defence Act* reads as follows:

Every person who negligently performs a military duty imposed on that person is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

[22] The essential elements of the offence under section 124 of the *National Defence Act* are:

- (a) the identity of the accused as the offender;
- (b) the date and place of the offence;
- (c) the accused failed to perform a military duty imposed on him, which includes to prove that:
 - (i) a military duty was imposed on the accused; and
 - (ii) the accused was aware of the military duty imposed on him.

- (d) the accused performed negligently the military duty imposed on him, which includes to prove that:
 - (i) there was a standard of care to be exercised by the accused;
 - (ii) the acts or omissions of the accused were in relation to the military duty imposed on him;
 - (iii) the conduct of the accused breached the required standard of care; and
 - (iv) the conduct of the accused amounted to a negligence, which means that the acts or omissions of the accused constituted a marked departure from the expected standard of care.

[23] Concerning this offence, the identity, the date and place are not disputed. However, the prosecution failed to prove beyond a reasonable doubt two essential elements for this offence.

[24] First, the prosecution had to prove that Sergeant Foulds failed to perform a military duty imposed on him, which includes proving that a military duty was imposed on him. In *R v Brocklebank*, 106 CCC (3d) 234, judge Décary, for the majority of the court, expressed at paragraph 32 what shall be the approach of a court concerning the term “military duty” for an offence under section 124 of the *National Defence Act*:

The scope of application of the offence of negligently performing a military duty is limited to these activities which can be defined as military duties within the meaning of section 124 of the *Act*. A plain reading of the section suggests a restrictive approach in the application of the provision. The fact that the section establishes an offence in relation to the performance of *a* military duty, as opposed to military duty in general, is of particular relevance in understanding the breadth of application of the charge. Had the provision established an offence for "negligently performing military duty," this would conceivably have the effect of creating a service offence of general negligence in the restricted context of military service. Moreover, a person's negligent conduct may only be censured in respect of a military duty "imposed on that person". In *The Concise Oxford Dictionary*, "impose" means to "demand the attention or commitment of (a person)". By specifying that an individual's conduct could only be impugned in relation to "a" military duty "imposed on that person", Parliament has explicitly narrowed the application of the section.

[25] Then, it is not all military duties that can be consider under this specific offence. As established by the Court Martial Appeal Court in the same decision at paragraph 42:

The conclusion, in my view, is inescapable: a military duty, for the purposes of section 124, will not arise absent an obligation which is created either by statute, regulation, order from a superior, or rule emanating from the government or Chief of Defence Staff. Although this casts a fairly wide net, I believe that it is nonetheless necessary to ground the offence in a concrete obligation which arises in relation to the discharge of a particular duty, in order to distinguish the charge from general negligence in the

performance of military duty *per se*, which, upon a plain interpretation of section 124, it was clearly not Parliament's intention to sanction by that section.

[26] Here, in this case, the court recognizes that it has been established that a section commander must, generally speaking, ensure safety during an operation for identifying IEDs but, as expressed by Master Corporal Suttie during his testimony, safety is a personal responsibility for all Canadian Forces members. The prosecution has not established beyond a reasonable doubt a concrete obligation coming from a statute, a regulation, an order from a superior or a rule emanating from the government or the Chief of Defence Staff to be considered in the circumstances as a military duty imposed on Sergeant Foulds.

[27] Second, the prosecution had to prove that Sergeant Foulds performed negligently the military duty imposed on him, and more specifically that his conduct breached the required standard of care. While the court is ready to recognize that the five "C" approach as described by Captain Charette may be considered as the standard of care to apply when section combat engineer has to proceed when an IED has been found, which is to confirm the nature of the device, to clear the area of unnecessary personnel, to establish a cordon, to communicate the information and to control the area, it is clear from the testimony of Master Corporal Grandy, who was the person identified on the picture as the member lying in the prone next to an uncovered pressure plate using a bayonet, that those things happened and that Sergeant Foulds clearly followed the proper procedure to ensure safety of the members of his section. He told the court that the main charge had been found at the time the picture was taken, that the five "C" were done and that he was searching for secondary device. Also the power source connected to the pressure plate was identified. It was non functional. It is after those things were done that the picture was taken.

[28] For the court, Master Corporal Grandy's testimony constitutes the best evidence, which is uncontradicted, and his testimony is credible and reliable. He testified in a clear and straightforward manner, he had a good recollection of the events surrounding the incident and he was on the site.

[29] Captain Charette's evidence is based on his understanding of what has been said by Sergeant Foulds. He admitted that it was possible that he was told by Sergeant Foulds that the devices were not detonated instead of located prior to the picture being taken. In addition, both prosecution witnesses had a different recollection of the sequence of the events. While Captain Charette told the court that Sergeant Foulds left first the meeting before supper, Warrant Officer Watt told the court that it was Captain Charette who left first. Also, while Captain Charette told the court that he was concerned as soon as he saw the picture and got the information from Sergeant Foulds concerning it, Warrant Officer Watt indicated to the court that Captain Charette was not concerned right away but some time later after he saw the picture.

[30] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of negligently performed a military duty imposed on him.

[31] On the charge laid under section 130 of the *National Defence Act*, Sergeant Foulds is charged with obstructing justice contrary to paragraph 139(2) of the *Criminal Code*. It reads as follows:

Every one who wilfully attempts in any manner other than a manner described in subsection (1) to obstruct, pervert or defeat the course of justice is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

[32] For the court, to find Sergeant Foulds guilty of obstructing justice, in addition to the identity, the place and the date, the prosecution must prove each of these following essential elements beyond a reasonable doubt:

- (a) That Sergeant Foulds acted as alleged in the particulars of the charge. This question has to do with his conduct, what he is alleged to have done. There must be a link or connection between his conduct and legal proceedings of some kind in a court of justice. The proceedings do not have to be taking place at the time of his conduct, but they must at least be contemplated, not some distant possibility, or remote chance;
- (b) That Sergeant Foulds' conduct had a tendency to obstruct, pervert or defeat the course of justice. It has to do with the relationship or connection between his conduct and the course of justice. This question is concerned with the tendency of his conduct, not the actual result of it. The court must ask itself whether a reasonable person, aware of the circumstances, would consider or conclude that what the accused did would have a tendency to obstruct, pervert or defeat the course of justice. To obstruct means to interrupt, make difficult, get in the way of something, to impede or hinder. To pervert means to lead astray, to turn away from the right course, to corrupt. To defeat means to prevail over, pervert or frustrate. The course of justice includes, but is not limited to judicial proceedings¹ that are taking place or are proposed, for example the prosecution of a person who is alleged to have committed a crime. The course of justice also includes any investigation that may take place to determine whether a prosecution or other legal proceedings should be taken against someone who is alleged to have committed a crime. To answer this question, the court should ask itself whether it is satisfied beyond a reasonable doubt that a reasonable person, aware of all the circumstances, would consider that the accused's conduct would have a tendency to adversely interfere with the administration of justice; and
- (c) Finally, that Sergeant Foulds intended to obstruct, pervert or defeat the course of justice. This question has to do with his state of mind at the time he did what he did. To prove this essential element, the prosecutor must satisfy the court beyond a reasonable doubt that by his conduct the accused meant to obstruct, pervert or defeat the course of justice. It is

¹The term, "judicial proceeding" is defined in s. 118 of the *Criminal Code*.

not enough that what Sergeant Foulds did accidentally, obstructed, perverted, or defeated the course of justice. He must know that what he is doing obstructs, perverts, or defeats the course of justice, and intends that it do so. As a general rule, a person who foresees that a consequence is certain or substantially certain to result from something that he does intends that consequence. To be more specific, if a person foresees that his conduct is certain or substantially certain to obstruct, pervert, or defeat the course of justice, it is reasonable to conclude that the person intends to obstruct, pervert, or defeat the course of justice. To determine his state of mind, what he intended to achieve by his conduct the court should consider what he did or did not do, how he did or did not do it and what he said or did not say about it. The court should look at his words and conduct, before, at the time and after he did what he did. All these things, and the circumstances in which they happened, may shed light on his intention.

[33] Concerning this offence, the prosecution also failed to prove beyond a reasonable doubt all the essential elements.

[34] As described by all witnesses, the fact that pictures are taken during an operation is not unusual. It helps to gather information in order to have soldiers in a better position to identify an IED. However, none of the witness described the taking of the pictures as an obligation and nobody told the court if they need to be preserved once taken. Reality is that there is no specific procedure for doing such thing. Then, it is possible that those pictures were deleted by Sergeant Foulds to avoid them to be used for a purpose such as an investigation to examine if a service offence was committed. However, he may well have deleted them once shown as a matter of practice because they were of no use for anybody. He was not told by anybody to preserve them. When he deleted them and for what purpose still unclear and the evidence adduced by the prosecution established that when asked to provide them, they did not exist anymore. It is clear for the court that some kind of mistrust and suspicion occurred between Sergeant Foulds and Captain Charette because the latter questioned some of his actions during the first meeting, but to conclude beyond a reasonable doubt that the accused committed the *actus reus*, which is to delete photographs because he knew or ought to have known that they could be used as evidence, is a different matter for which the court has a reasonable doubt. As I said, he could have deleted them because he did not contemplate to use them later, but also he could have deleted them because he thought that despite some concern expressed by Captain Charette, they would be of no use anymore at that stage. Absent of any procedure and any direction concerning the disposal of these photographs, and being not required for any official purpose, it is possible that Sergeant Foulds simply deleted them as a matter of routine.

[35] If the prosecution had established beyond a reasonable doubt the *actus reus*, the court would not have been convinced beyond a reasonable doubt that Sergeant Foulds' conduct had a tendency to obstruct, pervert or defeat the course of justice. The court found that it is possible that a reasonable person aware of all the circumstances would

have found that it is possible that Sergeant Foulds tried to make difficult or frustrate authorities to obtain evidence or information regarding the incident, but as explained earlier, it may be also possible in the context that without any specific instructions, that a reasonable person would have concluded that he just decided to delete the photographs without any specific purpose and when he was called later by Captain Charette, he was very happy to have done so as a matter of coincidence in the circumstances. He could have added to the situation by warning his superior about the fact to go after the members of his section concerning the incident.

[36] Also, from the evidence put to the court, which is very tenuous, it is very difficult for the court to conclude that Sergeant Foulds foreseen or intended to achieve such result. It is true that the fact that he deleted the photographs when added to the sentence he said to Captain Charette, "Sir, I will not let you screw over my guys", may give the impression that he did it on purpose. However, from the court's perspective, these facts are not enough to conclude that Sergeant Foulds had the requisite intention to commit the offence. It is a matter of possibility but not of certitude in the circumstances.

[37] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of obstructing justice.

[38] Sergeant Foulds is also charged with a count referring to behaving with contempt toward a superior officer contrary to section 85 of the *National Defence Act*. The purpose of this offence is to ensure minimal respect that shall exist in a military context between subordinates and superiors, in front of military members or not, with the idea of avoiding any kind of behaviour that would lead ultimately a subordinate to a state of disobedience that would affect cohesion and moral among Canadian Forces members at any level. The section reads as follows:

Every person who uses threatening or insulting language to, or behaves with contempt toward, a superior officer is guilty of an offence and on conviction is liable to dismissal with disgrace from Her Majesty's service or to less punishment.

[39] In addition to the identity of the accused and the date and place as alleged in the charge sheet, the Prosecution must prove also each of the following additional essential elements beyond a reasonable doubt:

- (a) that Sergeant Foulds acted or conducted himself as alleged in the charge;
- (b) that Sergeant Foulds' act or conduct amounted to a contemptuous behaviour;
- (c) that the contemptuous behaviour was expressed to a superior officer; and
- (d) that Sergeant Foulds knew that the person whom he expressed the contemptuous behaviour was a superior officer.

[40] The only question here for the court to analyze is if Sergeant Foulds' conduct amounted to a contemptuous behaviour, considering that the prosecution has established all other essential elements of the offence beyond a reasonable doubt.

[41] In order to prove this essential element of the offence, the prosecution shall establish beyond a reasonable doubt that Sergeant Foulds acted or conducted himself in a way that expressed some contempt, disregard, scorn, disdain or disrespect toward Captain Charette.

[42] Captain Charette described Sergeant Foulds as irritated when he said the words, that it was a stand-off, but that he did not use any insulting or obscene language toward him. Warrant Officer Watt told the court that Sergeant Foulds had a calm demeanour when he said the words.

[43] Clearly, Sergeant Foulds expressed to Captain Charette his intention to firmly dispute any concern regarding the way the operation was handled. However, he did not express himself with any scorn or disdain when he did it. Contrary to the decision of *R v Khadr*, 2007 CM 2027, where Corporal Khadr interrupted the officer at many times, became argumentative, raised his tone of voice to the point he was yelling and started hitting things and calmed down only with the presence of the military police, the court does not see anything in the behaviour or the words used by Sergeant Foulds that would lead it to conclude beyond a reasonable doubt that he acted or conducted himself with a contemptuous behaviour.

[44] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of behaving with contempt toward a superior officer.

FOR THESE REASONS, THE COURT:

[45] **FINDS** Sergeant Foulds not guilty of the first, second and third charge on the charge sheet.

Counsel:

Major E. Carrier, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major E. Thomas, Directorate of Defence Counsel Services
Counsel for Sergeant J.T. Foulds