



COURT MARTIAL

Citation: *R v Lapierre*, 2012 CM 3025

Date: 20121221

Docket: 201237

Standing Court Martial

St-Jean Garrison
Saint-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Sergeant G.L. Lapierre, Accused

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR FINDING

(Orally)

[1] Sergeant Lapierre is charged with two counts relating to conduct to the prejudice of good order and discipline for harassing a platoon's trainees by making comments intended to belittle, embarrass or intimidate them, contrary to Chapter 5012-0 of the Defence Administrative Orders and Directives (DAOD), namely, one count regarding the events that allegedly took place at St-Jean Garrison and one other count, this time concerning events of a similar nature at Farnham Garrison. This concerns facts that unfolded between 23 May and 4 August 2011 during a Basic Military Officer Qualification (BMOQ) course.

[2] This purpose of this decision is therefore to determine whether the prosecution has proved beyond a reasonable doubt that Sergeant Lapierre committed each of the offences of which he is accused.

[3] The evidence before this Court Martial essentially consists of the following:

- a. first, the in-court testimonies of, in order of appearance, Officer Cadet Otis, Officer Cadet Marier, Private Gariépy-Bureau, Master Seaman Tremblay, Private Girard, Petty Officer 1st Class Casavant, Captain Dallaire and Mr. Tanguay;
- b. Exhibit 3, CFAO 19-39, entitled "HARASSMENT";
- c. Exhibit 4, DAOD 5012-0, Harassment Prevention and Resolution;
- d. Exhibit 5, a printout concerning the staff's qualifications, particularly as regards Sergeant Lapierre;
- e. Exhibit 6, CF 743B, various remarks in the UER of Sergeant Lapierre;
- f. Exhibit 7, another CF 743B, in which various remarks appear in the UER of Sergeant Lapierre; and
- g. Exhibit 8, Standing Operating Procedures, SOP 1-09 of the Canadian Forces Leadership and Recruit School, the CFLRS, entitled Personal Relationships/Harassment.
- h. The Court also took judicial notice of the facts and matters covered by section 15 of the Military Rules of Evidence and, more specifically, of the contents of Chapter 5012-0 of the DAOD and Chapter 19-39 of the CFAO.

[4] The facts in this case may be summarized as follows. In a course identified by the witnesses bearing the number 0063F and identified as being L14 Platoon, the students of the Royal Military College Saint-Jean and the Royal Military College Kingston were taking the BMOQ, in which 69 candidates were enrolled. The platoon was divided into five sections. The division commander was Major Dallaire, and the commander of L14 Platoon was Captain Dallaire. The section commander: 1 Section, Sergeant Johansson; 2 Section, Sergeant Charest; 3 Section, Sergeant Marois; 4 Section, Sergeant Brassard; and 5 Section 5, Sergeant Moore. The training sergeant for the platoon was the senior sergeant, Sergeant Cleary. The deputy platoon commander was Warrant Officer Tremblay. He was replaced two weeks later by Sergeant Lapierre, given that Warrant Officer Tremblay was retiring.

[5] Warrant Officer Tremblay and Sergeant Lapierre met a few times beforehand, which allowed Sergeant Lapierre to familiarize himself with his duties, and he spent four days with Warrant Officer Tremblay to get to know the platoon and what was going on with it a little better, and to meet the instructors and the platoon commander.

[6] On 6 June 2011, Sergeant Lapierre met all of the candidates in the course, and he was alone with them. He got in with the candidates; he introduced himself. He talked to

them about his philosophy and his approach. In taking over from Warrant Officer Tremblay, Sergeant Lapierre had noted a lack of effort on the part of all the platoon members. So when he introduced himself, he wanted to let the candidates know that he was a demanding person, that he was direct and frank, that he was familiar with the Royal Military College after having worked there, and he mentioned that he had already hit an officer in a specific context. According to Sergeant Lapierre, his intention was to convey that in the situation where there was a lack of effort while the candidates thought they were doing everything right, they were wrong, and that they were not perfect. And he himself even referred to the fact that he was not perfect, that he could make mistakes, and for example, he mentioned that among the errors he had made, intending to introduce some levity, was that he had enrolled in the Canadian Forces, had married and had already struck an officer in his career.

[7] The candidates who testified before this Court related that they found this last comment regarding the fact that Sergeant Lapierre had apparently hit an officer to be unfunny and unusual, and for them, it was no joke.

[8] During the course, there was also an initial 13-kilometre endurance test that all members must complete and that is scheduled in the course. During the preparations for this 13-kilometre test, while they were in Farnham, Private Girard, an officer cadet at the time, handed in a medical document excusing her from the march. She told the Court that she gave it to Sergeant Lapierre and that he called her a [TRANSLATION] "scammer" because she was working the system so that she would not have to take part in the march or undergo the test. For his part, regarding the same incident, Sergeant Lapierre testified, and he said that he simply was not there, that he was not on the base or at the garrison in Farnham that day.

[9] It was entered into evidence that 27 candidates failed the 13-kilometre test that day, and plans were made to rerun another at the end of the confirmation exercise for the officer cadets, which was called Exercise VIMY, which lasts a week, which is the second last of the course. For the second 13-kilometre test, Private Gariépy-Bureau, who was also an officer cadet at the time, took part in Exercise VIMY throughout the entire week, and on the last day, she handed in a medical document stating that she could not do the 13-kilometre test. The following Monday, which was the last week, during which the candidates were practicing for the final parade, she was in the parade. And she was told by Sergeant Lapierre that she could not be in the parade and that she had to get a medical document from a doctor who would shed light on whether or not she was able to take part in the final parade, given the existing restrictions, which were to the effect that she could not do any exercises involving her lower body, that is, her legs, essentially.

[10] When she went back to the instructors' office, she allegedly met with Sergeant Lapierre, gave him the medical document from the doctor and, according to Private Gariépy-Bureau, he called her a [TRANSLATION] "scammer" while saying it was terrible that she was using the system this way. For his part, Sergeant Lapierre related these facts in his testimony but denied having called Private Gariépy-Bureau a [TRANSLATION] "scammer".

[11] Finally, one last incident, again concerning the same course, was related to this Court. It was during a film about veterans that Sergeant Lapierre allegedly showed to all the candidates. He was alone with them. He showed them this video to underscore the pride that officer cadets were supposed to have. At the end of the video, he made certain statements, and one, among others, was to the effect that those without pride would get shot in the back, which the officer cadets generally interpreted as meaning if they were lacking in pride, such an incident could happen to them. They said that they did not understand the nature of this comment or why it was made. There was also a witness who related the fact, and it was Officer Cadet Otis, the fact that Sergeant Lapierre said that he was a member of the Corporation Saint-Jean and that if the officer cadets came to see him, he would hit them.

[12] Sergeant Lapierre, for his part, explained to the Court that the incident, which is related to showing the video, stemmed from a previous incident. An officer cadet allegedly informed him that his boots had been packed away with his belongings and were not available for the parade. He therefore thought it was necessary to send a message to all the graduating officer cadets by showing them this video on veterans that focused on the pride in being a soldier, and he allegedly sent the message, again referring to the video, that officers who have no pride in this time of war could find themselves being shot in the back or shot from behind. This sums up all the facts that were presented to the Court.

[13] Regarding the essential elements of the offence, Sergeant Lapierre has been charged with two counts, both of which refer to the same section, section 129 of the *National Defence Act* and, more specifically, at subsection (2). In a case like this one, the prosecution must prove beyond a reasonable doubt, first, the identity of the person who committed the offences; the location and date of the offence; the conduct that is alleged in the count as such. Here, the conduct is harassing the trainees of L14 Platoon—in one count at St-Jean Garrison, in the other count, at Farnham Garrison—by making comments intended to belittle, embarrass or intimidate them, contrary to DAOD 5012-0; and finally, the last essential element of this charge is the prejudice of good order and discipline found where the prosecution refers to the legal presumption of having proved the standard of conduct, that is, its nature, its existence, the fact that the accused should have, was or should have been aware of the required standard of conduct, to the effect that the order was issued, published and notified, that the alleged act or conduct is a violation of the standard of conduct that is required. Therefore, essentially that the conduct amounts to a violation of the order or directive referred to.

[14] Before applying the law to the facts of the case, I believe it is important to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, which is an essential component of the presumption of innocence.

[15] Whether facing charges under the Code of Service Discipline before a military court or proceedings before a civilian criminal court involving criminal charges, an accused person is presumed to be innocent until the prosecution has proved his or her

guilt beyond a reasonable doubt. This burden of proof rests with the prosecution throughout the trial. An accused person does not have to prove that he or she is innocent. The prosecution must prove each of the essential elements of a charge beyond a reasonable doubt. A reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. Rather, it is based on reason and common sense. It can be based not only on the evidence, but also on a lack of evidence. Proof beyond a reasonable doubt does not apply to individual pieces of evidence or to separate parts of the evidence; it applies to the entire body of evidence relied on by the prosecution to establish guilt. The burden of proof rests with the prosecution throughout the trial and is never shifted to the accused. A court must find the accused not guilty if it has a reasonable doubt as to his or her guilt after having assessed all of the evidence.

[14] In *R v Starr*, [2000] 2 SCR 144, at paragraph 242, Justice Iacobucci, writing for the majority, stated as follows:

... [A]n 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.

It is useful, however, to recall that it is virtually impossible to prove something with absolute certainty, and that the prosecution is not required to do so. A standard of proof does not exist in law. In other words, if the Court is satisfied that Sergeant Lapierre is probably or likely guilty, it must acquit him, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt. The standard of proof beyond a reasonable doubt also applies to questions of credibility. The Court need not make a definitive determination of the credibility of a witness or group of witnesses. In addition, the Court need not believe the entire testimony given by a person or group of persons. If the Court has a reasonable doubt regarding the guilt of Sergeant Lapierre that stems from the credibility of the witnesses, it must acquit him.

[15] What is evidence? Evidence may include testimony under oath or solemn affirmation by witnesses about what they observed or what they did; it could also 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 under the Military Rules of Evidence. It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events, and the Court has to determine what evidence it finds credible.

[16] 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, the Court will assess a witness's opportunity to observe, a witness's reasons to remember, such as whether the events were noteworthy, unusual or 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 the accused chooses to testify.

[17] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor that may be used in assessing credibility. Consideration must be given to whether the witness was responsive to questions, straightforward in his or her answers, or evasive, hesitant or argumentative, and indeed whether his or her testimony is consistent with itself and with the uncontradicted facts. Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, deliberate falsehoods are an entirely different matter; they are always serious and may well taint a witness's entire testimony. 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, the Court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[18] As the rule of reasonable doubt applies to the issue of credibility, the Court must first decide on the credibility of the accused, that is, whether or not it believes the evidence submitted to the Court by the accused, including the accused's own testimony. This is one of those cases where the approach to the assessment of credibility was expressed by the Supreme Court of Canada in *R v W(D)*, [1991] 1 SCR 742, and must be applied because the accused, Sergeant Lapierre, testified. As established in that decision, at page 758, the test goes as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

This test was established mainly to prevent the judge of the facts proceeding by choosing the evidence he or she believes, either that submitted by the accused or that submitted by the prosecution. However, it is also clear that the Supreme Court has reiterated several times that this formula does not have to be recited word for word as some magic incantation. On this point, see *R v S (W D)*, [1994] 3 SCR 521, at page 533. The trap that this Court must avoid is to appear to be or to be in a situation where it chooses between two versions in its analysis, namely that submitted by the prosecution and that put forward by the accused.

[19] So, having instructed myself as to the presumption of innocence and the standard of proof beyond a reasonable doubt, I will now turn to the questions in issue.

[20] In my view, concerning the first count, as regards the identity, the date and the place, the prosecution has discharged its burden of proof and proved beyond a reasonable doubt these essential elements of the offence. Now, the question that the Court must

determine concerns the other two essential elements of the count, that is, whether the conduct alleged in the charge, in fact, did take place and was to the prejudice of good order and discipline. I would like to begin with the issue of the prejudice of good order and discipline. There are three elements that the prosecution must establish: the standard of conduct; the accused's awareness of the standard of conduct, that is, whether he was or should have been aware of that standard; and whether the act constitutes a violation of the standard of conduct.

[21] As regards awareness of DAOD 5012-0, first, the prosecution filed Exhibits 5, 6 and 7, which set out a context to the effect that over a certain period of time, Sergeant Lapierre completed certain training courses on harassment. However, the evidence is essentially based on the testimony of Sergeant Lapierre himself, who admitted having taken the SHARP course and the diversity course, who in his testimony readily acknowledged that he was aware that the policy existed and that, in his view, if I may sum up what he said, harassment is an insistent behaviour towards individuals. Of course, the testimony of Mr. Tanguay, who explained the content of the various courses that Sergeant Lapierre allegedly took, having regard to Sergeant Lapierre and his admissions, and having regard to the evidence presented by the prosecution regarding the content of these courses, I am of the opinion that the prosecution has proved beyond a reasonable doubt that Sergeant Lapierre was aware of what the standard of conduct required by DAOD 5012-0 entailed.

[22] That being said, did the alleged behaviour in fact take place, first of all, and if the alleged behaviour did in fact take place, does it constitute a violation of the required standard of conduct, the last element proved to establish beyond a reasonable doubt the prejudice of good order and discipline? I must first consider, as I have said, the testimony of the accused, of Sergeant Lapierre, in this case since, as I mentioned previously, the analysis that the judge must do, it is not choosing between one version or another but determining, first, whether the accused's version is credible and reliable and raises a reasonable doubt in this case. I would just mention that in terms of awareness of the DAOD, my finding applies to both counts.

[23] Now, to start off, I would like to state that the testimony of Sergeant Lapierre was frank, direct and consistent, and he demonstrated a good memory of the events about which he was examined. As regards these questions of the awareness of the content of the DAOD, he consistently stated that he was aware that the policy existed and that he had taken certain courses, but he also made it clear that he did not know this policy by heart and was not essentially aware of all its ins and outs. In my opinion, this does not pose a problem and is definitely not indicative of a selective memory, as the prosecution suggested. I would add that throughout his testimony, throughout this case, through Captain Dallaire and as counsel for the defence mentioned, proof of reputation was established by a witness for the prosecution, who gives us an idea of who Sergeant Lapierre is, or at least gives the Court an idea. It is within this framework, too, that I am conducting my analysis.

[24] I must take into account the fact that over a 31-year career, Sergeant Lapierre has been an instructor for a period of 16 years—11 years at the Canadian Forces Leadership and Recruit School and 5 years at the Royal Military College Saint-Jean—and that he has 33 basic courses concerning recruits and officer cadets under his belt. He was described as someone having a rigid approach to total compliance with the program in which he is involved, and I must say that this also implies the fact that this is reflected somewhat in his personality in terms of rigidity. It is neither a virtue nor a vice; it is simply something that may be observed, or at least something that the Court observes. He was described as being a reliable person, a touchstone for the instructors at the Canadian Forces Leadership and Recruit School. He is also someone who is not afraid to make others rethink their approach and their way of doing things. He also takes pride in success, that is, in bringing out the best in the people under his responsibility, be they recruits or officer cadets.

[25] Therefore, if I repeat the words of Sergeant Lapierre during the first alleged incident, that is, the meeting with the candidates at the beginning of the course, when he joined the course, he said that he was aware of a lack of effort on the part of the group, which was confirmed by the witnesses for the prosecution. I do not think that he characterized that as being a failing, but simply a finding of fact in his work as an instructor and second in command of the platoon. His memory is clear regarding the fact that he wanted to make the candidates understand that they were not perfect and had to improve. He wanted to cite himself as an example to show that even he was not perfect. And that is when he mentioned that he too had made mistakes in his life, and he therefore referred to the fact that he enrolled in the Canadian Forces, that he had married and that he had hit an officer. In this context, and according to the way in which Sergeant Lapierre reported what happened, I find his testimony entirely credible and reliable in the circumstances, and this is corroborated by the prosecution's evidence. The comments were intended to make the officer cadets realize that they had to take a different perspective in terms of effort and stop thinking that they were perfect and invincible. And I have no difficulty believing Sergeant Lapierre when he said that he was not trying to intimidate them. It may be that the comments were poorly chosen, however, and set the tone for the rest of the course in terms of the relationship between Sergeant Lapierre and the officer cadets in the course. In the case of this incident, I find that the testimony of Sergeant Lapierre is credible and reliable.

[26] Now, regarding the incident with Private Girard, who was an officer cadet at the time, I think the testimony of Sergeant Lapierre is credible and reliable with regard to this aspect as well, when he says that he simply was not present at Farnham Garrison. Apart from the testimony of Private Girard, the prosecution's evidence tends to support his version of the facts. It is possible that he was on leave. Apart from Private Girard, all the other witnesses confirmed that he was not there for the 13-kilometre test, and Captain Dallaire went so far as to say in his testimony that he was not there that day.

[27] Regarding the second 13-kilometre test, surrounding what happened, I also believe Sergeant Lapierre regarding his version of the facts and the events concerning the incident with Private Gariépy-Bureau, who was an officer cadet at the time. His

description of the facts was consistent and logical. He had a very good memory of what happened. He answered the questions without hesitating, on both examination and cross-examination, regarding the facts that occurred. And everything he described overwhelmingly matches what the prosecution introduced as evidence. He does not at all deny, on the contrary, he states that he was disappointed with the behaviour of Officer Cadet Gariépy-Bureau. From his perspective, he explains that he had noticed that Officer Cadet Gariépy-Bureau had done Exercise VIMY all week, during which she had done an awful lot of walking. He was not involved in receiving the medical document exempting her from the 13-kilometre test that she was supposed to retake that day. However, he confirms that he received the medical document the following Monday, and he noted that it stated that she could no longer do any exercises involving her lower body at all. She ended up taking part in the exercise for the final parade. It seemed illogical to him that, initially, she was not allowed to do the 13-kilometre march or any other exercise in light of the fact that she had not had any difficulty, in his opinion, in doing Exercise VIMY. He therefore decided, as second in command, to ask a doctor for clarifications regarding Officer Cadet Gariépy-Bureau's medical restrictions. Sergeant Lapierre confirms that when she returned with the medical document in question, which stated that she was fit for the parade, he expressed his disappointment to the candidate, to the officer cadet, telling her that he had the impression that she was using the system in the circumstances. He denies having called Officer Cadet Gariépy-Bureau a [TRANSLATION] "scammer"; it is something that he says he did not do. Having listened to his testimony, and in looking at all of his testimony, I find that Sergeant Lapierre is credible and reliable regarding this incident, and I therefore believe his testimony.

[28] Now, concerning the last meeting before the final parade, once again, Sergeant Lapierre described the events in detail. He contextualized the situation for the Court and explained that there was a trigger for his presenting the video, namely, that the person who was acting as colour officer did not have his boots for the parade because they had been packed away with his belongings. Sergeant Lapierre stated to the Court that he tried to start a discussion about pride, which is something that abides in him and for which he has a reputation. He showed the video on veterans of the Second World War and tried to draw a parallel in terms of pride between the fact that certain individuals in the war were eliminated because they were not true leaders and did not inspire those under their command; therefore, they did not inspire pride, and thus the bullets could come from behind. These comments, according to him, were not intended to belittle, embarrass or intimidate but rather to send a message to the effect that as future leaders in the Canadian Forces, the officer cadets had to act as leaders and show pride in doing so. Although Sergeant Lapierre's approach may seem unusual, it is not illogical in the context. It is an attempt—a clumsy one, perhaps, depending on your perspective—that is consistent with Sergeant Lapierre's desire to make the officer cadets become better officers. So, on this point, too, I find that the testimony of Sergeant Lapierre is credible and reliable.

[29] Therefore, since the Court finds the testimony of the accused to be reliable and credible both on the whole and in respect of the specific aspects of the incidents set out in the charges, namely, prejudice of good order and discipline, in that his behaviour

constitutes a violation of the required standard of conduct, or that he harassed the trainees of L14 Platoon contrary to DAOD 5012-0 because he allegedly made comments designed to belittle, embarrass and intimidate them, the Court concludes that the prosecution has not discharged its burden of proof regarding the essential elements of the offences, namely, the behaviour alleged in the charge and the prejudice to good order and discipline, more specifically, that the behaviour constitutes a violation of the required standard of conduct. Essentially, your testimony, Sergeant Lapierre, on the two counts and on the two essential elements of the charge raises a reasonable doubt.

FOR ALL THESE REASONS, THE COURT

[28] **FINDS** Sergeant Lapierre not guilty on the first and second counts.

Counsel:

Major G. Roy, Canadian Military Prosecution Services
Captain M. Ferron, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander Desbiens, Defence Counsel Services
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