



COURT MARTIAL

Citation: *R v Alcime*, 2012 CM 3020

Date: 20121121

Docket: 201247

Standing Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Bombardier O. J. Alcime, Accused

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR DECISION

(Rendered orally)

[1] Bombardier Alcime has been charged with the offence of disobeying a lawful command, contrary to section 83 of the *National Defence Act*, for failing to stand at attention when ordered to do so, and with a second offence of insulting or behaving with contempt toward a superior officer, contrary to section 85 of the *National Defence Act*.

[2] The charges concern the relationship and respect required between a subordinate and his or her superior officer in a military context, and they arise from an incident that allegedly occurred on 19 May 2011, in the main building housing the 1st Regiment, Royal Canadian Horse Artillery (1 RCHA) at Canadian Forces Base (CFB) Shilo in Manitoba.

[3] The Court must essentially determine whether the prosecution has established beyond a reasonable doubt that Bombardier Alcime committed each of the offences with which he has been charged. He decided to present a defence and to testify on his own behalf in presenting his case.

[4] This court martial began on 19 November 2012, and the parties' presentation of evidence and submissions took a single day. The evidence consists of the following:

- a. the testimony, in order of appearance before the Court, of Master Bombardier Petkovich, Master Bombardier Meger, Captain McDonald, Bombardier McConnell and Bombardier Alcime, the accused in this case;
- b. Exhibit 3, a copy of Chapter 19-43 of the Canadian Forces Administrative Orders (CFAO), entitled "Racist Conduct";
- c. a verbal confession made by Bombardier Alcime through his counsel that it was he who had committed the two offences with which he has been charged and that he had committed the two offences on the date indicated in the particulars of the offences, 19 May 2011;
- d. a verbal confession made by the prosecution that Bombardier Alcime is black; and
- e. the judicial notice taken by the Court of the facts and matters contained in Rule 15 of the *Military Rules of Evidence*, including the content of Chapter 19-43 of the CFAO.

[5] Bombardier Alcime is a member of the Regular Force who was assigned for duty as a driver to the maintenance and transportation section of the quartermaster of 1 RCHA, B Battery on 19 May 2011. His immediate superior at the time was Master Bombardier Meger. Relations between the two of them had been tense for about a year, and administrative action had already been taken against Bombardier Alcime on account of two previous exchanges.

[6] At the time of the incident, Bombardier Alcime was enrolled in a driver's course covering the MSVS replacement vehicle. He realized that his air brake qualification on his military driver's licence (DND 404) had expired more than a year earlier. The type of vehicle covered in the course had air brakes. He therefore brought the situation to the attention of Sergeant Beaulieu, the warrant officer of his unit's transportation section.

[7] Sergeant Beaulieu therefore told him that he would have to redo the air brake certification test to be able to take the course and also to be able to drive the other types of vehicles he was certified to drive.

[8] Bombardier Alcime failed the air brake certification test twice. On 19 May 2011, his immediate superior, Master Bombardier Meger, who was aware of what was going on, learned that the accused had failed the test a second time. He therefore went to see Bombardier Alcime at the unit to bring him to see Sergeant Beaulieu to discuss the situation and have Bombardier Alcime's DND 404 amended accordingly.

[9] The other consequence was that Bombardier Alcime's usefulness within the quartermaster was now affected, as he was now limited in terms of the types of vehicles he was authorized to drive, and Master Bombardier Meger had been ordered to bring Bombardier Alcime to Sergeant Beaulieu so that the latter could assess the situation and deal with it appropriately.

[10] Therefore, still on 19 May 2011, because of the situation described above, Master Bombardier Meger asked Bombardier Alcime to follow him to the unit's transportation section office. Once they had arrived, he asked him to wait outside the office.

[11] Master Bombardier Meger entered the office to look for Sergeant Beaulieu, who was not there. He learned that Sergeant Beaulieu would be returning within five or ten minutes. After speaking with some other people in the office, he went back outside to find that Bombardier Alcime was no longer where he had left him.

[12] He went searching for Bombardier Alcime and saw him carrying keys. When he intercepted him, he learned that Bombardier Alcime was planning to go work out at the gym and that he had gone to pick up the gym key from the Regimental Duty Centre office located at the entrance to the unit building. Master Bombardier Meger asked him to return the key because they both needed to proceed to the transportation section.

[13] Bombardier Alcime therefore returned the key to the office in question. However, when he did not come back out right away, Master Bombardier Meger decided to go in to see what was happening.

[14] When Master Bombardier Meger entered the Regimental Duty Centre office, Master Bombardier Petkovich was sitting at the desk of the non-commissioned officer on duty, Captain McDonald was there, and the driver on duty, Bombardier McConnell, was also there, or else he came in immediately after.

[15] According to the witnesses for the prosecution, Master Bombardier Meger asked whether Bombardier Alcime could remain there and whether Master Bombardier Petkovich could keep an eye on him. According to Bombardier Alcime, Master Bombardier Meger assigned him extra duty as a driver replacing the driver on duty, thereby requiring him to remain with the unit's duty staff.

[16] This was the catalyst that caused Bombardier Alcime to say to Master Bombardier Meger in an exasperated tone, or a contemptuous tone according to some witnesses, while gesticulating with his hands, “Why are you so hard on me? Is it because you are a racist?”

[17] Bombardier Alcime’s reaction caused Master Bombardier Meger to put on his beret, stand at attention and order Bombardier Alcime to stand at attention.

[18] Bombardier Alcime allegedly did not respond right away. Master Bombardier Meger had to repeat the order several times before Bombardier Alcime stood at attention, according to some witnesses, or stopped talking and gesticulating, according to others, and finally sat down.

[19] Master Bombardier Meger then left the office, allegedly followed by Captain McDonald.

[20] Bombardier Alcime then met with Sergeant Beaulieu to discuss ways to resolve the problems caused by the nature of his working relationship with Master Bombardier Meger. Sergeant Beaulieu opted for an informal resolution of the conflict, and a few days later, Bombardier Alcime was transferred to another location.

[21] Bombardier Alcime obtained his air brake certification earlier this year and was transferred back into the position he had previously held with the maintenance and transportation section.

[22] 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.

[23] The prosecution had to prove the essential elements of the offence beyond a reasonable doubt, namely, the identity of the accused and the date and location of the offence alleged in the charge sheet. It also had to prove the following additional elements: the fact that an order was given to Bombardier Alcime, that this order was lawful and that Bombardier Alcime received or was aware of the order; the fact that Bombardier Alcime was given the order by a superior officer and that this status was known to him; the fact that Bombardier Alcime did not comply with the order and, finally, the blameworthy state of mind of Bombardier Alcime.

[24] Section 85 of the *National Defence Act* 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.

[25] Even though the document refers, in the heading of the second count, to the words [TRANSLATION] “threat” and [TRANSLATION] “insult”, it is clear to the Court that the

particulars of the charge arise from a situation in which the accused has been charged with behaving with contempt toward a superior officer, and it is on this basis that the Court will conduct its analysis. Moreover, in his closing address, counsel for Bombardier Alcime expressed his understanding of the prosecution's theory on the basis of which it was attempting to establish that what his client had said to his superior officer was insulting and contemptuous in the circumstances.

[26] Therefore, in addition to the identity of the accused and the date and location of the offence alleged in the charge sheet, the prosecution also had to prove the following elements of the offence: that Bombardier Alcime behaved with contempt, that the behaviour was directed toward a superior officer and that it occurred in the superior officer's presence.

[27] With respect to establishing contemptuous behaviour by the accused, the prosecution must show the Court that the accused demonstrated his contempt through gestures, words or both, and that the Court may infer from this situation that the accused intended to engage in insubordinate behaviour.

[28] Before this Court provides its legal analysis, it would be 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 principles fundamental to all criminal trials. Although these principles, of course, are well known to counsel, other people in this courtroom may well be less familiar with them.

[29] 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 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 element of the offence beyond a reasonable doubt.

[30] 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.

[31] 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 to provide the necessary instructions as to reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of subsequent Supreme Court and appellate court decisions.

[32] 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 in 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 the Court.

[33] 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.

[34] 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 the accused—in this case, Bombardier Alcime—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 to be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[35] 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 under the *Military Rules of Evidence*.

[36] 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.

[37] 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'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.

[38] 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.

[39] 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's testimony consistent with itself and with the uncontradicted facts?

[40] 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.

[41] A 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 to disbelieve it.

[42] Having given this overview of the essential elements of each of the counts, the presumption of innocence and the standard of proof beyond a reasonable doubt, I will now turn to the questions at issue in the present case and address the legal principles.

[43] At the outset, the Court wishes to emphasize that the credibility and reliability of the witnesses who testified are not being called into question. The testimony of Bombardier Alcime appears to be reliable and credible, as he testified clearly, coherently, naturally and even candidly. He was quite open about what led him to behave as he did in the Regimental Duty Centre office. He did not hide his dissatisfaction with the way Master Bombardier Meger was treating him at that moment and with his subsequent actions. Furthermore, several aspects of his testimony are corroborated by the witnesses for the prosecution, whether in relation to the expiry of his air brake certification, the general sequence of events, where he was when the incident occurred, why he went and then returned to the Regimental Duty Centre office and the sequence of events that unfolded in the office itself.

[44] The Court finds that the witnesses called by the prosecution also testified clearly and coherently. Obviously, there were contradictions among the different versions, which is to be expected in the circumstances. It is clear that the incident happened suddenly and unexpectedly for all the witnesses except the two principal antagonists, that everything happened within a short time frame and that the witnesses' perspectives differed according to where they were standing and what they were focused on while this was happening. It is not unusual for different witnesses to attach more or less importance to gestures, words or their impressions of a single event, and this can easily explain any contradictions that arise in this case.

[45] It should be noted that all of the witnesses, including the accused, related the events connected to the incident in the same sequence, including Master Bombardier Meger's intervention and the order that followed.

[46] The Court notes two areas of apparent discrepancy in the evidence. First, there is the description of the event that caused Bombardier Alcime to lose his patience in the Regimental Duty Centre office. However, regardless of how it was described by the witnesses, it is clear that the nature of what was described by Bombardier Alcime and Master Bombardier Meger is essentially the same. Ultimately, both versions describe an order given by Master Bombardier Meger, which elicited a comment and a reaction from Bombardier Alcime, which constitutes the essence of the second count.

[47] It is true that the witnesses differ in their interpretations as to whether Bombardier Alcime complied with the order given to him by Master Bombardier Meger. However, it should be noted that the testimony of the two principal antagonists in the case is consistent on this issue; I will return to this point later in my analysis.

[48] With respect to the first count, the Court is satisfied that the prosecution has demonstrated the following essential elements beyond a reasonable doubt: the identity of the accused as the offender, the date and location of the offence alleged in the charge sheet, the fact that an order was given to Bombardier Alcime, that the order was lawful and received by Bombardier Alcime, and the fact that Bombardier Alcime was given the order by a superior officer and that this status was known to him.

[49] What about the essential element that Bombardier Alcime did not comply with the order he was given? Bombardier Alcime stated in his testimony that he had complied with Master Bombardier's order to stand at attention, without enthusiasm, and not in the manner that he had been taught during his training. He stated that, essentially, he had put his heels together, let his arms fall to his sides and stopped talking.

[50] Master Bombardier Meger testified that Bombardier Alcime had complied with his order to stand at attention. Master Bombardier Petkovich told the Court that the accused had let his arms fall to his sides, stopped talking and sat down.

[51] This testimony, particularly that of the accused and the issuer of the order, are sufficient, in my view, to raise a reasonable doubt as to whether Bombardier Alcime failed to comply with the order he had been given to stand at attention.

[52] The Court believes the accused on this point; moreover, it has been confirmed by the person who gave the order, and I attach considerable weight to this testimony corroborating that of Bombardier Alcime.

[53] The prosecution raised the fact that the accused did not immediately comply with the order he had received. It is true that in some circumstances, a failure to comply immediately with an order constitutes disobedience, while in other circumstances, even if a soldier has clearly refused to obey, eventual compliance constitutes obedience.

[54] In this context, the purpose of the order was to put a stop to Bombardier Alcime's belligerent attitude toward Master Bombardier Meger by having him stand at attention, which requires that talking cease. It is clear, in this case, that Bombardier Alcime never

expressly refused to comply with the order. Instead, it was his grasp of the context that brought him back to order, such as the beret on the head and the repetition of the order itself. Ultimately, he obeyed the order that he had been given. In the context of this case, the fact that he did not obey the order as soon as it was issued does not constitute, in the opinion of this Court, a clear and deliberate refusal to comply. The Court rejects the prosecution's argument on this point.

[55] Accordingly, the Court is of the view that because there is a reasonable doubt as to whether Bombardier Alcime complied with the order to stand at attention, the prosecution has not discharged its burden of proof, which consists of proving beyond a reasonable doubt that Bombardier Alcime had disobeyed a lawful order.

[56] As for the second count, the Court is satisfied that the prosecution has proven beyond a reasonable doubt the following essential elements: the identity of the accused as the offender; the date and location of the offence alleged in the charge sheet; the fact that Bombardier Alcime's conduct was directed toward a superior officer, namely, Master Bombardier Meger; and the fact that the conduct occurred in the latter's presence.

[57] It remains to be determined whether the prosecution has proven beyond a reasonable doubt that the behaviour of the accused was contemptuous. As the Court has mentioned previously, this means proving beyond a reasonable doubt that the accused demonstrated his contempt through gestures, words or both, and that the Court may infer from this situation that the accused intended to engage in insubordinate behaviour.

[58] This must be an objective assessment, i.e., the Court must determine the meaning that a reasonable person, fully apprised of all the circumstances, would give to the words and gestures that Bombardier Alcime directed toward Master Bombardier Meger in the Regimental Duty Centre office.

[59] In this case, the prosecution demonstrated through the testimony of Master Bombardier Meger that he was attempting to ensure that Bombardier Alcime remained where he was so that he would be able to meet with the warrant officer of the unit's transportation section, Sergeant Beaulieu, as he had been instructed to do.

[60] Given that Bombardier Alcime left, of his own initiative and without warning, the place where he had been told to stay near the transportation section office, Master Bombardier Meger was looking for a way to prevent his subordinate from leaving again.

[61] This is why he told Bombardier Alcime that he was required to remain under the supervision of the non-commissioned officer on duty, either personally or as the duty driver. A reasonable person would understand that the Master Bombardier's order had a legitimate purpose and that what he was telling his subordinate to do had nothing to do with their personal relations.

[62] A reasonable person would also understand that Bombardier Alcime's acts and words at the very least expressed frustration and at worst expressed a form of

intimidation meant to impress his superior officer enough for the latter to leave him alone.

[63] Given that this occurred in front of a small audience of peers and superior officers, a reasonable person would conclude that Bombardier Alcime's gestures and words were disproportionate in the circumstances and that he clearly indicated through his words and gestures that he no longer considered his superior officer worthy of any respect, expressing all of the contempt he felt toward him.

[64] While Bombardier Alcime may have had legitimate reasons for his conduct, the fact remains that he clearly demonstrated through his acts and gestures his intent to refuse to submit to his superior officer's order to remain in the office under the supervision of the non-commissioned officer on duty by confronting him about his actions and his authority.

[65] The Court is therefore satisfied that the prosecution has demonstrated beyond a reasonable doubt that the accused behaved with contempt.

[66] Accordingly, the Court finds that the prosecution has discharged its burden of proving beyond a reasonable doubt that the accused behaved with contempt toward a superior officer.

FOR ALL THESE REASONS, THE COURT

[67] **FINDS** Bombardier Alcime not guilty of the first count; and

[68] **FINDS** Bombardier Alcime guilty of the second count.

Counsel:

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