

Citation: *R. v. Master Corporal J.R.J. McRae*, 2007 CM 4005

Docket: 200631

**STANDING COURT MARTIAL
CANADA
QUÉBEC
GATINEAU**

Date: 6 February 2007

PRESIDING: LIEUTENANT-COLONEL J.-G. PERRON, M.J.

HER MAJESTY THE QUEEN

v.

**MASTER CORPORAL J.R.J. MCRAE
(Accused)**

**FINDING
(Rendered orally)**

[1] The accused, C84 365 830 Master Corporal McRae, was charged with having committed three offences. The court, having found that a no *prima facie* case had been made out in respect of charge No. 3, Master Corporal McRae was found not guilty of that charge of neglect to the prejudice of good order and discipline.

[2] Master Corporal McRae now stands accused of two charges of having disobeyed a lawful command of a superior under section 83 of the *National Defence Act*. The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt every element of the two alleged offences. There is no disagreement between the prosecution and the defence on the issues of time and place of these two alleged offences nor on the identity of the alleged offender.

[3] With respect to charge No. 1, the prosecution argues that the order given to Master Corporal McRae on 23 August 2005 was that he had to order his CADPAT uniforms "ASAP or tonight," and that ordering the CADPAT uniforms on 24 August 2005 does not conform to this order. For its part, the defence argues that no such order was given to order the CADPAT, but that it was suggested to Master Corporal McRae that he order his CADPAT that night. Assuming that such an order was given, the defence argues that Master Corporal McRae offered a reasonable explanation of his attempts to comply with the order.

[4] With respect to charge No. 2, the prosecution and defence hold opposite views on the fact that an order to wear a fresh uniform on 9 September 2005 was given on 8 September 2005. The prosecution and defence have also offered differing evidence on the state of Master Corporal McRae's combat shirt on the morning of 9 September 2005.

THE EVIDENCE

[5] The evidence before this court martial is composed essentially of the following: judicial notice, testimonies, and exhibits. Judicial notice was taken by the court of the facts and issues under Rule 15 of the military rules of evidence. Judicial notice, under Military Rule of Evidence 16(1)(e), of the Canadian Forces Dress Instructions A-AD-265-00/AG/001 was also taken of by the court.

[6] The testimonies heard in the order of their appearance before the court are: Petty Officer 2nd Class De Guise; Master Warrant Officer Watters, warrant officer at the time of the offences; Corporal Thiffault; Chief Warrant Officer Lauzon; Master Corporal McRae, the accused in this case; Mrs McRae; and Mr Michael Sischka. The testimonies of Sergeant Drouin, Mrs Drouin, and Master Corporal Love, heard during the section 11(b) *Charter* application, were also entered as evidence by the accused with the consent of the prosecution.

[7] A number of exhibits were also entered as evidence. Exhibit 3, an email sent by Petty Officer 2nd Class De Guise to Master Warrant Officer Watters on 23 August 2005, was entered by the prosecution in evidence by consent. Exhibit 4, an email sent by Petty Officer 2nd Class De Guise to Master Warrant Officer Watters on 12 September 2005, was also entered by the prosecution in evidence by consent. Exhibit 5, an email sent by Petty Officer 2nd Class De Guise to Master Warrant Watters on 15 September 2005, containing an email sent from Corporal Thiffault to Petty Officer 2nd Class De Guise on 15 September 2005 was entered by the prosecution in evidence by consent.

[8] Exhibit 6, an email sent by Master Corporal McRae to Corporal Thiffault, Master Warrant Officer Watters, and Petty Officer 2nd Class De Guise on 24 August 2005, was entered by defence counsel in evidence by consent. Exhibit 8, a data forensic report prepared by Mr Sischka, prepared on 7 January 2007, was entered by defence counsel in evidence by consent. Exhibit 7, a drab-olive combat shirt was presented to the court by defence counsel shirt owned by Master Corporal McRae and allegedly worn by Master Corporal McRae on the morning of 9 September 2005. The prosecution objected to the admissibility of this exhibit. The court accepted as an exhibit the olive-drab shirt as a shirt owned by Master Corporal McRae.

THE FACTS

[9] The facts involved in this case relate to events that took place on 23 August 2005 and on 8 and 9 September 2005 at Detachment Medina, Lackland Airforce Base, Texas, USA. During the period of the alleged offences, Master Corporal McRae was a member of the Canadian Forces Operations Group Headquarters Detachment Medina, Lackland Airforce Base, Texas, United States of America. This detachment was composed of nine military members. Master Warrant Officer Watters, warrant officer at the time of the alleged offences, was the senior Canadian at the detachment and Petty Officer 2nd Class De Guise was his second in command.

[10] Master Corporal McRae met with Master Warrant Officer Watters and PO2 De Guise on 23 August 2005 because Master Warrant Officer Watters had to discuss errors concerning his terms of service. According to Master Warrant Officer Watters and PO2 De Guise they would have ordered Master Corporal McRae to order his CADPAT uniforms from the out-of-country clerk because PO2 De Guise had just spoken with her and had made arrangements for this order of CADPAT.

[11] Master Corporal McRae testified that they would have suggested he order his uniforms while the conversation with PO2 De Guise was fresh in her head. Master Corporal McRae testified that he tried to order his CADPAT that evening from his home computer, but was unable to access the Internet. He tried again on the evening of 24 August 2005 and he felt he was successful since he had not received any failed delivery message.

[12] On 8 September 2005 the whole detachment, except for Master Corporal MacDonald, were participating in the Hurricane Katrina relief effort by working in a Salvation Army warehouse. It was hot, approximately 90 to 100 degrees, and all were doing manual labour. According to Master Warrant Officer Watters, PO2 De Guise, and Mrs Drouin, Master Warrant Officer Watters and PO2 De Guise addressed the detachment at the end of the day before they were dismissed. PO2 De Guise would have informed everyone that he expected them to wear fresh uniforms the next day. Master Corporal McRae does not recall that PO2 De Guise would have addressed the detachment while they were in formation.

[13] On the morning of 6 September 2005, while at the smoking area, Master Warrant Officer Watters and PO2 De Guise would have seen Master Corporal McRae wearing an olive-drab combat uniform with noticeable sweat stains under the arms and around the waist along the waist cord of the combat shirt. Master Warrant Officer Watters told PO2 De Guise to go see Master Corporal McRae at his work station to confirm the state of his uniform. Upon receiving the confirmation by PO2 De Guise, Master Warrant Officer Watters, in the presence of PO2 De Guise and Chief Petty Officer Herrington, Master Corporal McRae's American supervisor, engaged Master

Corporal McRae in a one way conversation about the state of Master Corporal McRae's uniform and informed Master Corporal McRae that consequences would follow. After conducting a disciplinary investigation, Master Warrant Officer Watters charged Master Corporal McRae on 23 September 2005.

[14] The applicable law and the essential elements of the charge. Section 83 of the *National Defence Act* reads as follows:

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

[15] The prosecution had to prove the following essential elements for these offences beyond a reasonable doubt: The identity of the accused, and the date and place as alleged in the charge sheet; that an order was given to Master Corporal McRae; that the order was lawful; that Master Corporal McRae received or knew the order; that Master Corporal McRae was given the order by a superior officer and that this status was known by him; that Master Corporal McRae did not comply with the order; and the blameworthy state of mind of Master Corporal McRae.

[16] Before this court provides its legal analysis of the two charges 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 are, of course, are well known to counsel, but other people in the courtroom may be less familiar with them.

[17] It is fair to say that the presumption of innocence is 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 the cases dealt with under the 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 his case on each element of the offence beyond a reasonable doubt.

[18] 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 with the prosecution and it never shifts to the accused person. A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt, or after having considered—not "or," after having considered all of the evidence.

[19] The term "beyond a reasonable doubt" has been used for a very long time, it's a part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt, it is not a doubt based on sympathy or prejudice, it is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case based not only what evidence tells the court, but also on what that evidence does not tell the court.

[20] The fact that a person has been charged, is no way indicative of his or her guilt, and I will add that only charges that are faced by an accused person are those that appear on the charge sheet before the court. In *R. v. Starr*, [2000] 2 S.C.R. 144, 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....

[21] 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 Master Corporal McRae, beyond a reasonable doubt. To put it in perspective, if the court is convinced that the accused is probably or likely guilty then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[22] 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 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.

[23] 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 testimonies of a witness. For example, the court will assess a witness' opportunity to observe a witness' reasons to remember; were the events 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?

[24] This last factor applies in the 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 when that accused chooses to testify.

[25] 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. 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 the witness' 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, a court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[26] As the rule of reasonable doubt applies to the issue of credibility, the court is required to definitely decide in this case, first, on the credibility of the accused and to believe or disbelieve him. It is true that this case raises some important credibility issues, and it is one of those cases where the approach on the assessment of credibility expressed by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, can strictly be applied because the accused, Master Corporal McRae, testified. As established in that decision, at page 758, and I quote:

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.

[27] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court and address the legal principles.

[28] Both parties agreed that one critical question in issue in both charges, based on the evidence put before this court, is whether an order was given. The second critical question is whether Master Corporal McRae obeyed the order as described in each charge. While all other essential elements of the two charges, including the

lawfulness of the order, were not challenged by the defence, they must still be proven beyond a reasonable doubt by the prosecution.

[29] I find that the date, location, and identity of the accused for both charges have been proven beyond a reasonable doubt in both charges. Since the defence argues that no order was given, the court must decide if, based on the evidence presented to the court, an order was given to Master Corporal McRae, that the order was lawful, whether Master Corporal McRae received or knew the order, whether the order given to Master Corporal McRae was given by a superior officer and that this status was known by Master Corporal McRae, that Master Corporal McRae did not comply with the order, and finally, the blameworthy state of mind of Master Corporal McRae.

ISSUES OF CREDIBILITY

[30] The nature of the evidence in this case requires the court to make certain findings as to the credibility of various witnesses.

[31] Master Warrant Officer Watters testified in a calm and straightforward manner. He was not evasive or argumentative. He did not try to embellish his version. He testified that PO2 De Guise told Master Corporal McRae to order his CADPAT that night and that he might have confirmed the order. He was not cross-examined on this portion of his testimony. He provided a clear and consistent description of the state of the combat uniform worn by Master Corporal McRae on the morning of the 9th of September 2005. Although he described the 9 September 2005 meeting with Master Corporal McRae as professional, he did admit to using a loud voice, and dismissing him by telling Master Corporal McRae to "get out of my face."

[32] Although he did not interview Master Corporal McRae while conducting his disciplinary investigation, he testified that he would not have laid a charge if he had been shown exculpatory evidence. He also testified that for him "fresh" and "clean" had the same meaning when referring to uniforms. Petty Officer 2nd Class De Guise—the court finds Master Warrant Officer Watters a credible and reliable witness.

[33] Petty Officer 2nd Class De Guise. His demeanour throughout his testimony remained consistent. The court finds his testimony, for the most part, to be credible and reliable. He testified in a consistent manner regarding the order given on 8 September 2005 and the events of the morning of 9 September 2005. He explained that although the harassment investigation report indicated that the order on 8 September was given by Master Warrant Officer Watters, PO2 De Guise had not reviewed in detail the draft document being prepared by Master Warrant Officer Mack nor had he seen the report before. Although he testified that he had ordered Master Corporal McRae to order his CADPAT "that night," he did write "asap" in the email of the following day. PO2 De Guise stated that these two words meant the same thing to him.

[34] Corporal Thiffault. She is a reliable and credible witness. She testified in a very honest and straightforward manner. She testified that she had not received any communication from Master Corporal McRae since April 2005, and she confirmed that Master Corporal McRae's clothing documents indicated that he was in possession of three sets of olive-drab combats at the time of the alleged offences.

[35] Chief Warrant Officer Lauzon. He was qualified as an expert on dress and deportment in the Canadian Forces. His evidence was reliable and credible.

[36] Sergeant Drouin. Although he is deemed a reliable and credible witness, the manner in which he was questioned did not provide this court with much evidence that can greatly assist it in determining the key issues to be resolved in this matter. He did specify that the dress of day at the detachment was CADPAT unless there was a special event.

[37] Mrs Drouin. She is also a credible and reliable witness, but her evidence is also of limited use in this matter. She did confirm that PO2 De Guise did address the group at the end of the day on 8 September 2005. Although she did not remember hearing PO2 De Guise say the order concerning the wearing of a fresh uniform the next day, she did state that this is what PO2 De Guise would say.

[38] Master Corporal Love. Although credible, he is not a reliable witness since he could not remember much of any specific event surrounding these charges.

[39] Mrs McRae. Her demeanour throughout her testimony remained consistent. Although Mrs McRae testified in a straightforward manner, it is evident that she has an interest in providing evidence that would assist her husband. Nonetheless, based on her demeanour, the court finds her to be a credible and reliable witness.

[40] Her testimony does contain evidence that is inconsistent with the evidence contained in the testimony of Master Corporal McRae. She describes the evening of 8 September 2005 as a "pretty normal evening" with her husband, while Master Corporal McRae describes it otherwise. Also, she indicated that the uniform that was put in a bag on 23 September was then hung on a hook in the office where Master Corporal McRae changes clothes while Master Corporal McRae testified that the bag was hung on the shower knob in the second bathroom that was not used. She also testified that she did not see the uniform until 23 September 2005.

[41] Master Corporal McRae. The court does not generally find his testimony to be very credible or reliable. His testimony is tainted by his vision of events. He was intent on contradicting every issue raised by the prosecution and did so in a somewhat argumentative manner. Notwithstanding the fact that Mrs Drouin, a uninterested witness, testified to the fact that PO2 De Guise addressed the group on 8 September

2005, Master Corporal McRae was adamant that this did not happen, at least not during the organized portion of the gathering.

[42] While describing the 9 September 2005 session with Master Warrant Officer Watters, he was quick to mention Chief Petty Officer Herrington's incredulous reaction to the situation, but he was even quicker in dismissing the credibility of Chief Petty Officer Herrington by asserting that he had been demoted for lying when informed that Chief Petty Officer Herrington might have provided statements in the harassment investigation which might not support Master Corporal McRae's position.

[43] His statement concerning the number of combat uniforms in his possession was contradicted by Corporal Thiffault, and his testimony concerning the location of his combat shirt after 23 September is markedly different from the testimony of his wife on this specific issue. Since the state of the uniform since 9 September, and especially since 23 September, was so important to Master Corporal McRae and to Mrs McRae, one would expect them to have an identical description of the location where this important piece of evidence was kept for use in future proceedings.

[44] Mr Shishka. He was qualified as an expert in data forensics and hard disk analysis, and more specifically related to emails. He is a credible and reliable witness. He analyzed Master Corporal McRae's personal computer and confirmed that an email had been sent on 24 August 2005 to Corporal Thiffault, Master Warrant Officer Watters, and PO2 De Guise, but that it might never have been received because it would have been caught and destroyed by a SPAM filter.

ANALYSIS

[45] In applying the test enunciated in the Supreme Court decision of *R. v. W.(D)*, quoted above, and having considered the evidence introduced before this court as a whole, the court finds reasons to disbelieve the accused and his testimony on the following issues: Whether orders were given to him on 23 August and 8 September 2005; whether Master Corporal McRae received or knew the orders; whether Master Corporal McRae did comply with the orders; and the blameworthy state of mind of Master Corporal McRae. Consequently, the court does not believe the evidence provided by Master Corporal McRae except for his evidence concerning his attempt at sending an email on the evening of 24 August 2005.

[46] Now the court is turning itself to the second step of the test enunciated in the Supreme Court decision of *R. v. W.(D)*. After having considered the evidence as a whole, this court is still not left in a reasonable doubt by the testimony of Master Corporal McRae on all the essential elements of the offence of disobedience of a lawful command except for the aforementioned email.

[47] Finally, I will now apply the last step of the *W.(D.)* test to the two charges. Charge No. 1, firstly, the court must answer the following question: Was an order given to Master Corporal McRae? The court finds that the evidence provided by the prosecution demonstrates that Master Corporal McRae was given an order by PO2 De Guise to order his CADPAT. The evidence pertaining to the exact time period in which Master Corporal McRae had to execute this order is ambiguous, "asap" and "tonite" might mean the same thing to PO2 De Guise, but they might mean something else to another person. There is also some uncertainty in master warrant officer's recollection of exactly what was said by whom to Master Corporal McRae. It is evidence that they wanted Master Corporal McRae to order his CADPAT that night, but their testimony leaves this court with enough doubt as to the exactitude of the order as to raise a reasonable doubt on the period of time allowed Master Corporal McRae to execute this order.

[48] Master Corporal McRae testified that he tried to access the Internet on the evening of 23 August 2005, but did not succeed, and he tried again on 24 August 2005. On 24 August 2005 he sent an email that he thought would be received by Corporal Thiffault, Master Warrant Officer Watters, and PO2 De Guise. Mr Sischka, an expert in data forensics, testified that this email had been created and sent, but that it most probably did not reach its intended addressees because it was destroyed by a SPAM filter. Sending an email on 24 August 2005 would satisfy the requirement of ordering the CADPATs asap.

[49] Therefore, on the basis of the evidence that this court accepts, the court finds that this element of the offence has not been proven beyond a reasonable doubt. As a result, the prosecution has failed to establish beyond a reasonable doubt that Master Corporal McRae disobeyed a lawful command of a superior officer on 23 August 2005.

[50] Charge No. 2. Again, firstly, the court must answer the following question: Was an order given to Master Corporal McRae? The court accepts as conclusive evidence the evidence given by PO2 De Guise in that he gave the order to wear fresh uniforms the next day. The court also accepts that anyone hearing this order would understand that after a day of performing manual labour in 100 degree temperature a fresh uniform means a clean uniform. Fresh in the context that existed on 8/9 September 2005, meant clean.

[51] Was the order a lawful order? As testified by Chief Warrant Officer Lauzon, every CF member is taught to wear a clean uniform when reporting to work. There is no doubt that such an order was a lawful order.

[52] Did Master Corporal McRae receive or know the order, was the order given by a superior officer to Master Corporal McRae, and did Master Corporal McRae

know his status? Master Warrant Officer Watters, PO2 De Guise, and Mrs Drouin testified that every member of the detachment were present at the end of the day when Master Warrant Officer Watters and PO2 De Guise addressed the group, but Master Corporal McRae asserts that PO2 De Guise did not address the group while it was in formation. The court accepts the evidence that all were present when PO2 De Guise addressed the group, thus Master Corporal McRae would have heard the order issued by PO2 De Guise. Master Corporal McRae testified that he knew PO2 De Guise was his superior.

[53] Did Master Corporal McRae comply with the order? The court accepts the evidence presented by Master Warrant Officer Watters and PO2 De Guise concerning the state of Master Corporal McRae's combat shirt on the morning of 9 September 2005 in that that shirt was not a clean shirt. Finally, Master Corporal McRae chose to wear the uniform he wore on the morning of 9 September 2005. He knew that he had to wear a fresh uniform on that day. He could have come to work in a fresh combat uniform or by wearing his tan uniform, but he chose to wear the same combat shirt he had worn on 8 September without washing it.

[54] Consequently, having regard to the evidence as a whole, the court considers that the prosecution has proven beyond a reasonable doubt all the essential elements of the second offence of disobedience to a lawful command of a superior officer.

[55] Master Corporal McRae, please stand up. Master Corporal McRae, the court finds you not guilty of charge No. 1, of having failed to order your Canadian Disruptive Pattern combat uniforms as ordered to do so by Petty Officer 2nd Class De Guise. The court finds you guilty of the second charge of having failed to wear a fresh uniform to work as ordered to do so by Petty Officer 2nd Class De Guise.

LIEUTENANT-COLONEL J.-G. PERRON, M.J.

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