



COURT MARTIAL

Citation: *R. v. Marczewski*, 2010 CM 4014

Date: 20101216

Docket: 201047

Standing Court Martial

The Argyll and Sutherland Highlanders of Canada
Hamilton, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.G. Marczewski, Accused

Before: Lieutenant-Colonel J.G. Perron, M.J.

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] The accused, K19 307 980 Sergeant Marczewski, is charged under section 83 of the *National Defence Act* of having disobeyed a lawful command of a superior officer.

[2] The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt every element of the alleged offence. The prosecution argues the evidence demonstrates that Lieutenant Andrushko ordered Sergeant Marczewski to change the redeployment plan twice on the morning of 14 June 2009 and that Sergeant Marczewski did not obey that order because he wanted to follow his plan. Defence counsel argues the evidence does not prove beyond a reasonable doubt that an order was given, that the order was received and that the accused willingly disobeyed the order.

THE APPLICABLE LAW

[3] Before this court provides its analysis of the evidence and of the charge, 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. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[4] It is fair to say that the presumption of innocence is most likely 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 Canadian criminal law, every person charged with an 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. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[5] 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.

[6] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt 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.

[7] 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 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 arrives at the end of the case, based not only on what 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.

[8] In *R. v. Starr*, [2000] 2 S.C.R. 144 at paragraph 242, the Supreme Court of Canada 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.

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 Marczewski, 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 be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[9] 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.

[10] 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. 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. Was there something specific that helped the witness remember the details of the event that he or she described? 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 the accused chooses to testify.

[11] 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?

[12] 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 tint 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, a court will accept evidence as trustworthy unless there is a reason to disbelieve it.

[13] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R. v. W. (D)*, [1991] 1 S.C.R. 742. 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.

In *R. v J.H.S.*, [2008] SCC 30 para 12, the Supreme Court of Canada quoted approvingly the following passage from *R. v. H. (C.W.)* (1991), 68 C.C.C. (3d) 146 British Columbia Court of Appeal, where Wood J.A. suggested the additional instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If , after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[14] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue before the court. The evidence before this court martial is composed essentially of the following: judicial notice and the testimony of witnesses. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. The testimonies heard in the order of their appearance before the court are those of Lieutenant Andrushko and Master Corporal Parr for the prosecution and Master Corporal Bezuk-Greig, Master Bombardier Jackson and Sergeant Marczewski for the defence.

[15] The particulars of the charge read as follows: "In that he, on 14 June, 2009, at Canadian Forces Base Borden, Ontario, did not utilize the entire platoon to assist with the cleaning of weapons when ordered to do so by Lieutenant Andrushko."

[16] The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- a. Firstly, the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- b. that an order was given to Sergeant Marczewski;
- c. that it was a lawful order;
- d. that the accused received or knew the order;
- e. that the order was given by a superior officer;

- f. that Sergeant Marczewski was aware of that officer's status;
- g. that Sergeant Marczewski did not comply with the order; and finally
- h. the blameworthy state of mind of the accused.

[17] Firstly, I will review the evidence that is not disputed in this trial. Lieutenant Andrushko, Sergeant Marczewski, Master Corporal Parr and Master Bombardier Jackson were members of the staff responsible for the Basic Military Qualification Land Course. At the time of the alleged offence, Lieutenant Andrushko was the course officer and Sergeant Marczewski was the course second in command. The course consisted of approximately 41 candidates at the time of the alleged offence. During the weekends of 5 to 7 June and 12 to 14 June 2009, the course was conducted at CFB Borden. The field portion of the course ended on the morning of Sunday, 14 June 2009 at approximately 0630 hours, after a final attack on the defensive position prepared by the course participants. The course occupied two positions, one area used for administrative purposes and the exercise area. These areas were approximately 200 meters apart.

[18] On 7 June 2009 Lieutenant Andrushko had a brief conversation with Sergeant Marczewski where he informed Sergeant Marczewski that he did not agree with his redeployment plan. On 13 June, at approximately midnight, Lieutenant Andrushko had another conversation with Sergeant Marczewski concerning the redeployment plan. He disagreed with the plan where only a small group of eight candidates would clean the machine guns while the rest of the course would fill the trenches and pick up the defensive stores. He preferred that the whole course clean the defensive position and then move on to clean the machine guns. Sergeant Marczewski disagreed with that plan. Lieutenant Andrushko did not order Sergeant Marczewski to follow his plan during their conversations of 7 June and of 13 June; he only suggested that his plan was the better one.

[19] On the morning of 14 June Lieutenant Andrushko was present at the defensive position when the attack occurred and he then declared ENDEX. He was walking towards the administrative area when he met Sergeant Marczewski who was walking towards the exercise area. They crossed paths at approximately halfway between the two positions. Sergeant Marczewski had just woken up and he was quickly making his way to the exercise area. Master Corporal Parr was walking with Lieutenant Andrushko. Sergeant Marczewski took control of the course and executed the redeployment in accordance with his plan, in that a group of eight candidates under the supervision of Master Corporal Parr cleaned the machine guns while the rest of the course cleaned the defensive position.

[20] It is thus clear from the undisputed evidence that Sergeant Marczewski is the accused and that the alleged offence occurred at CFB Borden on 14 June 2009. Sergeant Marczewski knew that Lieutenant Andrushko was a superior officer. An order by a course officer to a course 2 I/C that the whole course is to be utilized for the cleaning of weapons is a lawful order since it is clearly related to a military duty. It is not a manifest-

ly unlawful order (see 2010 CMAC 6 *Corporal Liwyj v. Her Majesty the Queen*, at paragraph 24).

[21] The main issues in this trial are whether the prosecution has proven beyond a reasonable doubt that an order was given to Sergeant Marczewski, that he received the order, that he did not comply with the order, and the blameworthy state of mind of the accused.

[22] A trial such as this one turns on the assessment of the credibility of the witnesses. An assessment of credibility involves the evaluation of the honesty of a witness but also the reliability of the evidence of that witness. Credibility is a function of the veracity of the witness and reliability pertains to the accuracy of the evidence. The assessment of credibility may not be a purely intellectual exercise. Numerous factors are involved. Some factors may defy verbalization (see *R. v. R.E.M.*, 2008 SCC 51 at paragraph 49). A trial judge may assess evidence "through the lens of common sense and everyday experience, in the same manner as juries are instructed to do by trial judges." (see *R. v. H.C.*, 2009 Ontario Court of Appeal 56 at paragraph 64)

[23] I will now examine the evidence of the accused and of the prosecution as it relates to the conversation between Lieutenant Andrushko and Sergeant Marczewski on 14 June 2009. It is clear from the evidence of Sergeant Marczewski and of Lieutenant Andrushko that they discussed the redeployment plan on 7 and 13 June, and that Lieutenant Andrushko only expressed his opinion concerning his preferred course of action. Lieutenant Andrushko did not order Sergeant Marczewski to follow his plan during these discussions. It is clear they disagreed and that Sergeant Marczewski thought his plan of using a small group of soldiers to clean the weapons was more efficient. Sergeant Marczewski had not slept during the night of 12 to 13 June, and he had slept approximately five hours during the night of 13 to 14 June. On the morning of 14 June Sergeant Marczewski was awoken by his alarm at approximately 0630 hours and he stated he panicked because he was late for the final attack. He was rushing to get to the defensive position. He remembered passing by Lieutenant Andrushko on his way to the position. Lieutenant Andrushko testified that Sergeant Marczewski appeared to be tired and that he had just awoken. Lieutenant Andrushko, Master Corporal Parr and Master Bombardier Jackson testified Lieutenant Andrushko and Sergeant Marczewski spoke to each other while they were walking in opposite directions. This conversation would have taken but a few seconds, definitely less than a minute, and neither would have stopped walking while talking.

[24] Sergeant Marczewski testified and he had a clear recollection of every event preceding the alleged offence and of every event following the alleged offence, but he cannot recall having a conversation with Lieutenant Andrushko as he was walking to the defensive position on the morning of 14 June. It is not clear why he cannot remember that conversation, since he was not asked to explain that lapse. One would have to infer that he was still too tired and in too much of a hurry to remember that brief conversation. Yet, he was conscious enough to walk to the defensive position and to take charge of the course.

[25] Lieutenant Andrushko, Master Corporal Parr and Master Bombardier Jackson described the conversation. Master Corporal Parr testified that Sergeant Marczewski twice disagreed with Lieutenant Andrushko, that the tone was somewhat hostile and that Sergeant Marczewski would have mentioned the need to lubricate the weapons while they were still warm to make the cleaning easier and that he wanted to prioritize the cleaning of the weapons. Master Corporal Parr's testimony was not challenged by defence counsel. Master Bombardier Jackson testified Sergeant Marczewski told Lieutenant Andrushko he wanted to stay with his original plan and when Lieutenant Andrushko had again told him he thought it should be done his way, Sergeant Marczewski replied it was too late to change the plan and that it was already in motion. While this conversation took but a few seconds while they were walking in opposite directions, it is clear that Sergeant Marczewski was actively involved in this conversation. Sergeant Marczewski testified that eight candidates had already been selected for the cleaning of the machine guns. He testified his plan was more efficient. Sergeant Marczewski's demeanour and attitude changed considerably when he was cross-examined. He was very relaxed during his examination-in chief, but he became evasive and less forthright during his cross-examination. The court does not believe Sergeant Marczewski when he says he does not recall that conversation. The court believes he had a plan in mind and he did not want to change it.

[26] The court must now review the evidence presented by the accused and determine whether this evidence, considered in the context of the evidence as a whole, raises a reasonable doubt as to his guilt (see *R. v. Dinardo* 2008 SCC 24 at paragraph 23). Master Bombardier Jackson testified he overheard the conversation between Lieutenant Andrushko and Sergeant Marczewski. He had left the defensive position to go see Sergeant Marczewski. He described the conversation. His testimony concerning the conversation was not challenged during his cross-examination. He confirmed this conversation occurred on the last day of the course in June. He is deemed a credible and reliable witness. He stated that no order was given by Lieutenant Andrushko and that the conversation was one of two people talking and deciding on how a task should be done.

[27] Master Corporal Parr testified for the prosecution. He was standing beside Lieutenant Andrushko during the conversation. He also described the conversation as a disagreement and that Lieutenant Andrushko's words, "came across as an implied order." Although his testimony concerning the different events of 14 June is somewhat vague, his testimony concerning the exchange between Lieutenant Andrushko and Sergeant Marczewski was precise and consistent. He did indicate that Lieutenant Andrushko had told him to take note of the conversation. Although he was challenged during his cross-examination, he did not modify his testimony concerning that discussion. His testimony concerning the discussion is deemed reliable and credible.

[28] Lieutenant Andrushko testified that he gave Sergeant Marczewski a direct order to utilize the whole course to clean the machine guns on two occasions during the conversation. He stated he felt he needed to give that order because of the two previous discussions with Sergeant Marczewski concerning the redeployment plan. Lieutenant Andrushko explained that he did not want to cause a scene in front of the candidates once it

was made clear to him by Sergeant Marczewski that he would not follow his order. He also explained why he let the situation develop as it did because "lives were not at risk should the order be disobeyed." He stated Master Corporal Parr was quite shocked by the exchange and he did not want to see that type of look on the faces of the candidates. Master Corporal Parr did not testify that he had a look of shock on his face.

[29] Master Bombardier Jackson stated that he did not hear an order being given by Lieutenant Andrushko to Sergeant Marczewski. The word "order" is not defined in the *National Defence Act* or in the *Queen's Regulations and Orders for the Canadian Forces (QR&O)*. Thus one must look at the Concise Oxford Dictionary, (see article 1.04 of QR&O) to define that word. The *Concise Oxford Dictionary 10th Edition*, defines "order" as "an authoritative command or direction." "Authoritative" is defined as "commanding and self-confident." Master Corporal Parr interpreted Lieutenant Andrushko's words as an implied order. The Concise Oxford Dictionary defines "imply" as "indicate by suggestion rather than explicit reference."

[30] Article 19.015 of the Queen's Regulations and Orders provides that "Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer." The bedrock of any military force is its discipline. Discipline is defined in the Oxford dictionary as "the practice of training people to obey rules or a code of behaviour." CF doctrine demands that leaders "ensure that their followers are given clear direction and understand what is required of them."¹ Clear orders ensure that missions are executed correctly and successfully; vague orders lead to confusion and failure and may prejudice good order and discipline.

[31] Based on the evidence accepted by the court, the court finds that the evidence of the accused, considered in the context of the evidence as a whole, raises a reasonable doubt as to whether Lieutenant Andrushko gave an order to Sergeant Marczewski to utilize the entire platoon to assist with the cleaning of the weapons.

FINDING

[32] Sergeant Marczewski, having decided that the prosecution did not prove beyond a reasonable doubt that Lieutenant Andrushko had given an order on the morning of 14 June 2009, the court finds you not guilty.

1

¹ <http://www.cda.forces.gc.ca/cfli-ilfc/doc/LeadingPeople-Eng.pdf> Leadership in the CF: Leading People, p.46

Counsel:

Captain R.D. Kerr, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major C.E. Thomas, Directorate Defence Counsel Services
Counsel for Sergeant J.G. Marczewski