Citation: *R. v. Private S.J.L.S. Bergeron,* 2008 CM 3017

Docket: 200802

STANDING COURT MARTIAL
CANADA
QUEBEC
VALCARTIER GARRISON

Date: 9 May 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
(Prosecutor)
v.
PRIVATE S.J.L.S. BERGERON
(Accused)

DECISION ON MOTION BY ACCUSED ALLEGING NO *PRIMA FACIE* EVIDENCE OF AN ESSENTIAL ELEMENT OF AN OFFENCE
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

[1] Private Bergeron is charged with injurious or destructive handling of dangerous substances, contrary to section 127 of the *National Defence Act*, and, in the alternative, he is charged with neglect to the prejudice of good order and discipline in failing to follow firing instructions issued to him as part of practical training in the throwing of a C-13 grenade, contrary to section 129 of the *National Defence Act*.

[2] As prescribed in the *Queen's Regulations and Orders for the Canadian Forces* (hereinafter the *QR&O*), when the case for the prosecution is closed, the accused may, upon motion, ask to be pronounced not guilty on a charge because no *prima facie* case has been made out in respect of that charge. A *prima facie* case is one where there is some evidence with respect to each of the essential elements of the offence charged, and where that evidence, if believed by the trier of fact, would result in conviction.

[3] Consequently, on May 8, 2008, following the closing statement of counsel for the prosecution, and in accordance with paragraph 112.05(13) of the *QR&O*, the accused brought a motion of no *prima facie* case with respect to the second count in the indictment, alleging that counsel for the prosecution had not adduced any evidence

in this Court concerning one of the essential elements of the offence charged under section 129 of the *National Defence Act*.

[4] The evidence adduced by counsel for the prosecution at this trial by Disciplinary Court Martial is as follows:

a. The testimony heard, in order of appearance of the witnesses: the testimony of Lieutenant Massé, Sergeant Deschênes, Sergeant Longval, Master Corporal St-Onge-Martel, Master Bombardier Rochefort and Warrant Officer Hêtu;

b. Exhibit 4, a photographic representation of the grenade range at Valcartier Garrison;

c. Exhibit 5, an extract from the weapons manual, volume 7, concerning grenades and explosives;

d. Exhibit 6, an extract from the manual on fragmentation grenades, description and maintenance instructions;

e. Exhibit 7, the test on the handling of C-13 fragmentation grenades taken by Private Bergeron as part of his course; and, finally,

f. The judicial notice taken by the Court of the facts and questions contained in Rule 15 of the *Military Rules of Evidence*.

[5] A motion of this kind, made immediately after counsel for the prosecution declares his evidence closed, is different from a motion requesting acquittal on the basis of a reasonable doubt. The latter argument is to the effect that there is some evidence concerning all the essential elements of an offence and on which a reasonable jury, properly instructed, could return a verdict of guilty, but that is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt does not come into play until all the evidence has been adduced, the concept of reasonable doubt cannot be considered here unless the accused has decided not to adduce evidence or has declared his case closed, which is not the case here.

[6] I do not have to assess the quality of the evidence in determining whether or not counsel for the prosecution has adduced some evidence concerning each of the essential elements of the offence in the second count, on the basis of which a reasonable jury, properly instructed in the law, could return a verdict of guilty.

[7] The test for a directed verdict, which applies in a motion of this kind, was set out by Justice Ritchie in *United States of Amer*ica v. *Shephard*, [1977] 2 S.C.R. 1067, at page 1080, and reads as follows:

> ... whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

[8] It is important to note that the burden of proof lies with the accused to establish, on a balance of probabilities, that the test has been met.

[9] The test is the same, whether the evidence is direct or circumstantial. The application of this test will vary with the kind of evidence adduced by the prosecution. When the prosecution's case is based entirely on direct evidence, the application of the test is simple. If the judge determines that the prosecution has adduced some direct evidence on each of the essential elements of the offence, the motion must be dismissed. The only issue that will remain relates to the truth of the evidence, and this aspect will have to be considered by the trier of fact. However, where the evidence of an essential element of the offence is based on circumstantial evidence, the question to be decided relates not merely to the truth of this evidence. To the extent that the evidence is accepted as truthful, there is also the issue of whether the inferences based on this evidence, as proposed by the prosecution, can be drawn as suggested. The judge must weigh the evidence by determining whether there is a reasonable likelihood that this evidence will support the inferences proposed by the prosecution. The judge does not ask whether he or she personally would draw such inferences and does not determine the credibility thereof. The only question is whether the evidence, if it is believed, may reasonably support an inference concerning guilt.

[10] It was first suggested by counsel for the prosecution that the second count, as worded, reflects an offence under subsection 129(2) of the *National Defence Act*.

[11] The purpose of subsection 129(2) of the *NDA* is to give effect to the regulations made by the civilian authorities concerning the "organization, training, discipline, efficiency, administration and good government of the Canadian Forces", as mentioned in section 12 of the *NDA*, and to ensure that all orders and instructions issued by the Chief of the Defence Staff that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister are applied, as indicated in subsection 18(2) of the *NDA*.

[12] Moreover, Major Jean-Bruno Cloutier clearly identifies the purpose of this provision in his Master's thesis entitled "L'utilisation de l'article 129 de la *Loi sur la Défense nationale* dans le système de justice militaire canadien", where he states at pages 71 and 72:

> [TRANSLATION]
> Subsection 129(2), for its part, is not residual in nature. It is a specific offence designed to punish a contravention of the instruments described in paragraphs (*a*), (*b*) and (*c)* of subsection 129(2). It creates a duty for the parties involved to comply with the regulations

> and orders set out in subsection 129(2) that have been duly issued and published and of which they have been notified.

[13] Consequently, it is clear to me that the second count constitutes a charge laid under subsection 129(1) of the *NDA* because it refers to a breach of firing instructions that had been issued to the accused and not to a breach of a regulation or order within the meaning of subsection (2) of section 129 that had been duly issued and published and of which the accused had been notified.

[14] The essential elements of the offence in subsection 129(1) of the *NDA* are the following:

a. The identity of the accused;

b. The time and place of the offence;

c. The act or omission alleged in the indictment to the effect that it actually occurred;

d. The fact that the act constitutes neglect; and, finally,

e. The prejudice to good order and discipline.

[15] As regards the essential elements relating to identity, time and place, it is clear that they are not the subject of this motion because the accused made a formal admission when the evidence for the prosecution was adduced.

[16] As regards the essential element of evidence of the act alleged in the particulars of the charge, the testimony of Sergeant Deschênes constitutes some evidence on this point.

[17] Now, with respect to the issue as to whether the act constitutes neglect, it is my judgment that there is also some evidence on this point. Indeed, in its everyday meaning to be found in the *Le Petit Robert* dictionary, the term “néglience” (neglect) refers to a lack of attention or application by a person who does something. The testimony of Sergeant Deschênes allows us to infer, at the very least, that there is some evidence on this point in the description he gave of the instructions that were to be followed by any candidate throwing a grenade, and in the description of the actions taken by the accused when he proceeded to throw the first of his two grenades.

[18] Finally, counsel for the defence argued on motion that there was a complete lack of evidence concerning the essential element of prejudice to good order and discipline. We should note what was stated by the Court Martial Appeal Court in

its decision in *Sergeant B.K. Jones* v. *Her Majesty the Queen*, 2002 CMAC 11, particularly at paragraph 7:

> [7] Proof of prejudice can, of course, be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is, however, proof beyond a reasonable doubt.

[19] In the present case, the prosecution did not adduce any evidence whatsoever of an act whose natural consequence would constitute prejudice to good order and discipline. It is true that the prosecution presented some evidence to the effect that the accused opened his hand holding the grenade at the wrong point in the grenade throwing sequence that had been taught to and validated with the candidates. However, the natural consequence of that act alone does not constitute prejudice to good order and discipline.

[20] Moreover, in the absence of any other evidence concerning the attitude and reaction of the accused in connection with the action he took, it seems clear to me that it is impossible to draw any other reasonable inference that would make it possible to characterize his actions in any way and conclude that the prosecution presented some evidence showing that this neglect was to the prejudice of good order and discipline.

[21] Finally, the other evidence that was introduced by the prosecution and that occurred before or after the accused took alleged action does not allow us to draw any reasonable inference that the prosecution presented some evidence in respect of an essential element of the offence, namely prejudice to good order and discipline.

[22] I should like to stress the fact that the seriousness of the circumstances of a particular situation allows us to determine whether or not there is neglect within the meaning of the Code of Service Discipline, but that subsequently it is in respect of this neglect and not the level of danger the circumstances of the case involve that the existence of prejudice to good order and discipline must be determined. In this sense, putting the life of a colleague in danger by taking an action may be a fact that is relevant in the determination of neglect, but not with respect to prejudice to good order and discipline.

[23] I therefore conclude that the accused has established on a balance of probabilities that the prosecution adduced no evidence in this Disciplinary Court Martial of the essential element of prejudice of good order and discipline with respect to the offence of neglect of good order and discipline, which constitutes the second count.

[24] Private Bergeron, stand up. It is my decision that the prosecution did not make a *prima facie* case against you in respect of the second count set out in the indictment. Consequently, I pronounce you not guilty on that count.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

Counsel:

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Counsel for Her Majesty the Queen

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