Citation: *R. v. Corporal M.C. Mleinek,* 2010 CM 3003

Docket: 200930

STANDING COURT MARTIAL
CANADA
ALBERTA
CANADIAN FORCES BASE EDMONTON

Date: 29 January 2010

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

HER MAJESTY THE QUEEN
v.
CORPORAL M.C. MLEINEK
(Accused)

FINDING
(Rendered Orally)

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[1] Corporal Mleinek is charged with one offence punishable under section 130 of the *National Defence Act* for uttering threats to Master Corporal Truchon to cause bodily harm to Warrant Officer Buffet contrary to section 264.1(1)(a) of the *Criminal Code*.

[2] The facts on which this count is based relate to an event that occurred on 25 November 2008, at the Edmonton Garrison, in the working environment of the accused.

The Evidence

[3] The evidence before this court martial is composed essentially of the following facts:

a. The testimonies heard in the order of their appearance before the court: the testimony of Master Corporal Truchon; Master Corporal Holloway; Corporal Mleinek, the accused in this case; and Dr Phillips, psychiatrist of the accused, who was also accepted as an expert witness;

b. Exhibit 3, the personnel evaluation report of Corporal Mleinek for the period of 1 April 2006 to 31 March 2007;

c. Exhibit 4, the personnel evaluation report of Corporal Mleinek for the period of 1 April 2007 to 31 March 2008;

d. Exhibit 5, the personnel evaluation report of Corporal Mleinek for the period of 1 April 2008 to 31 March 2009;

e. Exhibit 6, the *curriculum vitae* of Dr Catherine L. Phillips;

f. Exhibit 7, a letter from Dr Phillips made in response to a written request of Lieutenant-Commander Walden on 1 October 2009; and

g. The judicial notice taken by the court of the facts in issue under Rule 15 of the Military Rules of Evidence.

[4] At this stage, it would be appropriate for the court to provide the testimonial evidence presented by both parties in this case.

The testimony of Master Corporal Truchon

[5] Master Corporal Truchon testified that at the time of the alleged incident on 25 November 2008, he was working at the Information System (IS) section as the person responsible for the help desk. His assistant and the person who was second in command was Corporal Mleinek. He explained that other members in the section were Private Holloway and Private Johnson.

[6] He told the court that the IS section was under the supervision of Warrant Officer Buffet. The latter was not well seen by the section members because he was micromanaging their work. He explained that because of this supervisor the atmosphere was tense in the section.

[7] He told the court that on the afternoon of 25 November 2008, while being in his office area with Corporal Mleinek, he told the latter about a task and about the fact that Warrant Officer Buffet had just told him to lower the points on Corporal Mleinek's personnel evaluation report.

[8] Master Corporal Truchon said that Corporal Mleinek's reaction was to tell him that, "He will go home, get his tac vest and his collection of knives with him, he will go stab Warrant Officer Buffet on the neck, and that it will take more than two or three MPs to get him off him." Master Corporal Truchon testified that Corporal Mleinek appeared frustrated, upset, and angry when he said those words. He also confirmed to

the court that he was aware of the mental health problems that the accused had at the time.

[9] Master Corporal Truchon told the court that it was a surprising reaction and that the comments came out of the blue. He said that he did not feel that Warrant Officer Buffet was at threat and that Corporal Mleinek was not serious when he said those words. He said that, according to him, Corporal Mleinek did not mean what he said because it was not the first time that comments of such nature were formulated by a member of the section including himself and Corporal Mleinek.

[10] Then he asked Corporal Mleinek if he was talking to the master corporal or to Steve. The accused replied that he was talking to the master corporal and that he wanted him to report his comments. He testified that he asked the accused to think about him reporting the incident and to sleep on it. He told the court that at the end of the day he accompanied Corporal Mleinek to his car and told him to think about having him reporting the incident.

[11] The morning after, he met Corporal Mleinek and asked him if he still wanted him to report the incident. He said to the court that the accused wanted him to report it, which he did. He then reported the incident to Warrant Officer Buffet. According to him, he said that Corporal Mleinek wanted him to report the incident because of his previous unsuccessful attempts to his chain of command and to the medical authorities in order to get some help.

The testimony of Master Corporal Holloway

[12] Master Corporal Holloway testified that on 25 November 2008, he was in the office area of the IS section. He was working in that section and he knew Corporal Mleinek for a few months. He told the court that while he was working there, he noticed that Master Corporal Truchon and Corporal Mleinek were having a conversation, but he did not hear much of it. He suddenly heard Master Corporal Truchon raise his voice and asking to the accused if he was talking to Steve or to the master corporal. He said that it appeared to him that they did not have a buddy-buddy conversation and that they were arguing.

The testimony of Corporal Mleinek

[13] Corporal Mleinek testified that he was deployed for nine months on a mission in Afghanistan in 2006. Considering that the equipment for which he was supposed to work with never reached the camp at the Kandahar Airfield (KAF), he was employed on force protection for five months for which he received a Commander's Commendation, and further to, he was promoted in advance to the rank of corporal. He then was

detached to a British PRT with four other Canadian soldiers where he was involved in a war fighting operations.

[14] He said that on his return from this mission he noticed that he had a tough time with crowds, that he had trouble sleeping, that he woke up in a field position, that he had a tough time being without weapon, and that he had trouble to control his anger. He said that he mentioned this to a social worker and that he was told that those things will disappear within six months.

[15] The accused explained that over the period of the year 2007 and the year 2008, he was sent twice on his QL5 course in order to be promoted to the appointment of master corporal, but each time he got physically injured at the very end of the course and could not be assessed on the field exercise portion of the course. He never finished the course and he was then medically recoursed twice.

[16] During that same period, he explained that he was referred to a psychologist and a psychiatrist in order to deal with his mental health problems. He was put on medication. He said that during the fall of 2007, he was prescribed Lithium which made him really better. However, because of the toxicity of this medication requiring the level in the body to be checked every two weeks, he became undeployable and unable to go on a QL5 course.

[17] He said that at the end of the spring 2008, his medication was changed in order to allow him to be deployable again. However, he told the court that he felt that his ability to deal with some symptoms related to his mental health condition, such as his anger and his impulsive reactions, got worse.

[18] He told the court that concerning his work, he did very well. He received two excellent PERs for the reporting period of 2006/2007 and 2007/2008, which made him proud. He essentially said that he was considered ready for his promotion to the appointment of master corporal, but he had to do the course before it materialized.

[19] Corporal Mleinek explained that at the end of October and the beginning of November 2008, the battalion went to an exercise in Shilo. He said that he had a tough time on this exercise because he had to cope with different symptoms coming from his mental health condition. He said that he was nervous, he had flashbacks on a weapons range, and his anger was a bit high. At the end of the exercise he was told by Warrant Officer Buffet that he would stay in Shilo, and that he will be sent on a QL5 course. He explained that, essentially, it meant to him that, further to the battalion exercise, he would have one day of preparation for the course, which made him very frustrated.

[20] He told the court that toward the end of the exercise he twisted his knee and was unable to go on the course. He said that he met a physician who put limitations for six

months to his employment because of medical limitations related to his knee and his feet. He told the court that he could not go to the course because of that. Also, the physician told him that his career was pretty much over considering his physical injuries. He said that he was asked what he wanted to do, to which he responded that he wanted to be released for medical reasons.

[21] The accused explained that once he got back from the exercise he met his supervisors, Sergeant Healy and Warrant Officer Buffet, he told them about his physical condition and about his temper problems. He was sent to the padre who basically told him that he could not help him because his hands were tied and it was more a medical issue.

[22] He said that he went back to meet, again, Sergeant Healy and Warrant Officer Buffet in order to get some help. He was told to soldier himself and to return to work, which he did.

[23] Corporal Mleinek testified that Warrant Officer Buffet micromanaged and changed his mind many times about different things and came back to the original plan, which added to the stress of the job and made it frustrating to have things done on time. He told the court that many people in the section had difficulties with Warrant Officer Buffet, including himself, and that threats were made on a daily basis by people against him, but they were not serious. He said that Warrant Officer Buffet made members of the IS section miserable, that he made them want to leave the section or the CF. He told the court that the morale of the IS section was lowered further to the arrival of Warrant Officer Buffet.

[24] The accused testified that on the morning of 25 November 2008 there was nothing significant going on. In the afternoon, in the IS section's office area, he was approached by Master Corporal Truchon who told him that he was instructed by Warrant Officer Buffet to give him a bad PER. He said that he replied to this by using words such as stabbing Buffet in the neck, but he does not remember the exact words he used. Master Corporal Truchon did not appear shocked by what he said, but he asked him if he was talking to Steve or to the master corporal. He said that he never mentioned to Master Corporal Truchon that he wanted these words to be reported and then walked out of the office.

[25] He told the court that it was a heated conversation, but that he was not serious when he formulated those words. He said that he was venting his frustration towards Warrant Officer Buffet, but he never intended to stab, intimidate, or make Warrant Officer Buffet change his mind.

[26] Corporal Mleinek testified that at the end of that day he did not walk to his car with Master Corporal Truchon. He said that he went home and discussed what occurred all along the day at work with his wife.

[27] He said that the morning after, he went to work and he had no special conversation nor was he approached by Master Corporal Truchon concerning the incident. He told the court that right before lunch time he was asked to leave the IS section, which he did, and he met a social worker. He was given one month sick leave and put back on Lithium.

[28] He said that when he got back to work in January 2009 things went pretty normal.

The testimony of Dr Catherine L. Phillips

[29] Dr Phillips testified that she works as a consultant psychiatrist at the Edmonton Mental Health Services, 1 Field Ambulance, on the Edmonton Garrison since 2003. She said that she first met Corporal Mleinek in November 2007, further to a reference by a psychologist for a medication consultation and that she is following him since that time.

[30] She explained that he was diagnosed with a major depressive disorder, and in July 2009 with post-traumatic stress disorder (PTSD) chronic. She said that he has also some "Cluster B traits," which means that he has some characteristics of those impulsive people who do not have the ability to control their impulsivity at all times.

[31] She told the court that the main symptoms he has experienced are flashbacks, the difficulty to deal with crowds, sleeping problems, and a difficulty to control his irritability and his anger. She said that he was put on Lithium in November 2007, which worked well, and that his medication was changed during the spring of 2008 to Sodium Valproate and Seroquel in order to allow him to be deployable again while continuing to settle his irritability. She explained that the change of medication did not work well and he experienced difficulties again to control his anger, irritability, and reactivity. She said that he was put again on Lithium further to the alleged incident.

[32] She said that on the day of the alleged incident, Warrant Officer Buffet, the PER issue, and the limitations caused by his physical injuries were stressors which contributed to make him irritable and increase his anger. She told the court that considering his mental health condition at the time of the alleged incident, it was not unusual for Corporal Mleinek to have difficulty to contain his frustration, to act impulsively on his emotions, and express it with words more easily without really making it happen.

The Applicable Law and the Essential Elements of the Charge

[33] Section 264.1(1)(a) of the *Criminal Code* reads, in part, as follows:

> Uttering threats
>
> 264.1(1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
>
> (*a*) to cause death or bodily harm to any person;

[34] In *R. v. Clemente*, [1994] 2 S.C.R., 758, the Supreme Court of Canada, through the words of Justice Cory, said about the essential elements of the offence of uttering threats at paragraph 12 and 13:

> [12] Under the present section the actus reus of the offence is the uttering of threats of death or serious bodily harm. The mens rea is that the words be spoken or written as a threat to cause death or serious bodily harm; that is, they were meant to intimidate or to be taken seriously.
>
> [13] To determine if a reasonable person would consider that the words were uttered as a threat the court must regard them objectively, and review them in light of the circumstances in which they were uttered, the manner in which they were spoken, and the person to whom they were addressed

[35] Then, the prosecution had to prove the following essential elements beyond a reasonable doubt; the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet. The prosecution also had to prove the following additional elements; that the accused made a threat, that the threat was to cause bodily harm, and that the accused made the threat knowingly.

[36] A threat may be spoken, written, or communicated in some other way. It may be direct, for example, “I am going to kill you.” Or it may be conditional, for example, “If you don’t give me a thousand dollars, I am going to kill you.” A threat may be made in some other manner making it known or causing someone to receive it. A person who is the subject of the threat does not have to be aware of it or put in fear by it. What is important is the meaning that a reasonable person in all the circumstances would give to the words used. Words spoken or written in jest or in such a way that they could not be taken seriously by a reasonable person in the circumstances are not a threat.

[37] To decide whether the words used amount to a threat to cause bodily harm, the court must consider the circumstances in which they were used, the manner they were communicated, the person to whom they were addressed, and the nature of any prior or existing relationship between the parties.

[38] "Knowingly” means that the accused uttered the words as a threat, intended that

they be taken seriously, and meant to intimidate or cause the complainant to be afraid. The prosecution does not have to prove that the accused intended that the words be passed along to the complainant or that the complainant was actually threatened or made afraid by them. It does not matter whether the accused meant to carry out the threat. To decide whether the accused made the threats knowingly, the court must consider the words used, the context in which they were used, and the accused's mental state of mind at the time the words were used.

[39] Before this court provides its legal analysis, it's 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, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[40] 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 guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[41] 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.

[42] 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 S.C.R., 320, the Supreme Court of Canada proposed a model charge 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 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 no way indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are the ones that appear on the charge sheet before a court.

[43] In *R. v. Starr* [2000] 2 S.C.R., 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.

[44] 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 Corporal Mleinek, 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 been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[45] 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.

[46] 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.

[47] 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, like 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 that accused chooses to testify.

[48] 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?

[49] 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.

[50] 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 rather to disbelieve it.

[51] 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 must be applied because the accused, Corporal Mleinek, 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.

[52] This test was enunciated mainly to avoid for the court to proceed by establishing which evidence it believes; the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word by word as some sort of incantation (see *R.* v. *S. (W. D.)*, [1994] 3 S.C.R., 521, at page 533).

[53] As underlined by Justice Abella, writing for the majority in *R.* v. *C.L.Y.*, 2008 SCC 2, at paragraph 10, I want to confirm that I am aware of the test in *W. (D.)*, aforementioned, and of the decision of the Supreme Court of Canada delivered in *C.L.Y.* quoted aforementioned in *R.* v. *J.H.S.*, 2008 SCC 30 on the application of that test while assessing credibility. The pitfall that this court must avoid is to be in a situation appearing or in reality as it chose between two versions in its analysis.

[54] Having instructed myself as to the presumption of innocence, the reasonable doubt, the onus, and the required standard of proof, I will now address the legal principles.

Analysis

[55] The identity, the date and place of the offence are not disputed by the accused.

In his testimony, he clearly admitted them. Also, he admitted that the words he used were a threat, and that threat was to cause bodily harm to Warrant Officer Buffet. Accordingly, the court concludes that these essential elements of the offence of uttering threats were proved by the prosecution beyond a reasonable doubt.

[56] I am turning now to the test enunciated by the Supreme Court in *W. (D.)*, aforementioned. I will first proceed with the analysis of the evidence introduced by the accused. It requires finding on the reliability and credibility of the accused's testimony in light of the last and disputed essential element of the charge to be proven by the prosecution beyond a reasonable doubt; the *mens rea*, which is about that Corporal Mleinek made knowingly that threat.

[57] Corporal Mleinek testified in a straightforward, calm, and honest manner. His testimony was consistent and logical. He answered clearly to all the questions he was asked, and when some of them appeared unclear to him, he did not hesitate to ask counsel to clarify or repeat them. He never denied the fact that he reacted in an impulsive manner when he was told by Master Corporal Truchon about the instructions received from Warrant Officer Buffet for his PER. He told the court that it was not unusual for the IS section members, including himself, to express their frustration in those words about Warrant Officer Buffet, which confirmed the evidence adduced by the prosecution on this specific matter. He explained to the court the history that led to his mental health condition at the time of the incident, but he never relied on it to explain what he said. Reality is that he was not serious about the meaning of the words he said, and it is clear for the court that he was venting or expressing his frustration about the situation more than anything else. Because of the context he said those words, the manner he said it, the fact that it was not unusual for other members to say such things without meaning it concerning Warrant Officer Buffet, it is obvious for the court that Corporal Mleinek never intended that his words be taken seriously, and he never meant to intimidate or cause Warrant Officer Buffet to be afraid.

[58] Then, it is this court’s conclusion that the evidence provided by the accused is credible and reliable.

[59] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of uttering threats.

[60] Interestingly enough, the court notes that the evidence introduced by the prosecution confirmed such conclusions. If the court would have disbelieved the evidence of the accused, it would have been difficult for it based only on the evidence adduced by the prosecution to make a finding of guilt.

[61] The cornerstone of the prosecution’s case in this matter was the testimony of

Master Corporal Truchon. Concerning the intention of the accused when he formulated the threatening words, he clearly established that the words said by Corporal Mleinek could not be taken seriously or with the intent to intimidate or cause Warrant Officer Buffet to be afraid.

[62] Master Corporal Truchon said to the court during his testimony that he did not feel that Warrant Officer Buffet was at threat and that he did not think that Corporal Mleinek was serious when he said those words. It is confirmed by the fact that he never thought that it would be necessary to prevent this by taking some action. He was surprised by the nature of it, but he never took them seriously because it was not the first time that such thing was said by the accused or by any other member of the section. He did nothing further to that. Master Corporal Truchon clearly stated that he thought that these words had to be reported to his supervisor because of their severity and not because the accused appeared to be serious when he said them. Moreover, he never clearly intended to report these words unless he was asked by the accused. He said that he reported the incident only because he was asked by Corporal Mleinek.

[63] Additionally, the credibility and reliability of the testimony of Corporal Truchon is at stake. He testified in a reluctant and self-serving manner. He had his memory refreshed several times during the main examination and the cross-examination despite the fact that he reviewed his testimony very recently. He modified his version of the events to the court many times when prompted by counsel or by the court and he was defensive and argumentative when questioned by both counsel. Essentially, when his actions or reactions concerning the incident where raised with him, he never hesitated to change his version of the facts in order to appear as a responsible supervisor. The court would not have hesitated, for these reasons, to conclude that his testimony was not credible and reliable. And for that specific reason, it would have been difficult for the court to conclude that the prosecution had proved beyond a reasonable doubt the intent by the accused to commit the offence of uttering threats.

[64] Finally, considering the conclusion of this court, it finds that it is not necessary to make any comment concerning the defence of the impact of a mental disorder on the specific intent required to prove the offence of uttering threats.

[65] In applying the test enunciated in the Supreme Court decision of *R. v. W.(D.)*, quoted aforementioned above, the court did not find any reason in the evidence considered as a whole to disbelieve the accused in his testimony, and more specifically on the issue of knowingly uttering threats toward Warrant Officer Buffet. Consequently, the court believes the evidence provided by the accused.

[66] In the circumstances, Corporal Mleinek must be given the benefit of the reasonable doubt.

[67] Additionally, having regard to the findings of the court concerning the essential elements of section 264.1(1)(a) of the *Criminal Code* and the application of those elements to the facts of this case, the court is not satisfied that the prosecution has discharged its burden of proof by establishing the intent to commit this offence.

[68] Consequently, having regard to the evidence as a whole, it is the court's conclusion that the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of uttering threats.

Disposition

[69] Corporal Mleinek, please stand up. Corporal Mleinek, concerning the first and only charge on the charge sheet, this court finds you not guilty of the offence punishable under section 130 of the *National Defence Act* for uttering threats contrary to section 264.1(1)(a) of the *Criminal Code*.

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

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