



## COURT MARTIAL

**Citation:** *R. v. Giri*, 2014 CM 1020

**Date:** 20140911

**Docket:** 201353

Standing Court Martial

Canadian Forces Base Comox Goose Spit Site  
Comox, British-Columbia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Ex-Corporal A.B. Giri, Accused**

**Before:** Colonel M. Dutil, C.M.J.

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### REASONS FOR FINDING

(Orally)

#### **Introduction**

[1] Ex-Corporal Giri is charged with three offences; namely, two counts of disobedience of a lawful command, contrary to s. 83 of the *National Defence Act*, and one count for an act to the prejudice of good order and discipline, contrary to s. 129 of the *Act*. The alleged offences would have been committed at or near Canadian Forces Base Comox, British Columbia, on or about 7 April 2013.

#### **The Evidence**

[2] The evidence consists of the following:

- (a) the testimonies, in order of appearance before the Court, of Warrant Officer J.R.F.A. Boutin, Master Corporal B. Hammond, Sergeant R.D.

Slonski (who was called by both parties as a witness), Corporal M.D. Dueck, Captain S.L. Robinson, Mrs A. Kato and ex-Corporal A.B. Giri;

- (b) Exhibit 3, a bundle of five medical chits issued between 7 February 2013 and 8 April 2013 by Canadian Forces medical authorities concerning the health condition of then-Corporal Giri; and
- (c) the facts and matters for which the Court has taken judicial notice under s. 15 of the Military Rules of Evidence.

### **The Facts**

[3] The events that led to the charges before the Court occurred on Sunday, 7 April 2013. They began early that morning in the lines of 407 Squadron, more precisely, in hangar 7 of Canadian Forces Base Comox. As part of their normal duties, a small crew had the task to repair a potential fuel leak problem on an aircraft. The personnel involved for the task included Master Corporal Hammond, Master Corporal Wheeler, Master Corporal (as he then was) Dueck, Corporal Giri and one other member. The senior supervisors were also involved in setting up the task for that day, namely Warrant Officer (then Sergeant) Boutin and Sergeant Slonski. As part of the planning, it had been determined that Corporal Giri would act as the entrant of the fuel cell tank team, where the others would play various roles, including rescuers. It is to note that the person acting as an entrant has to get into a very tight space literally located in the wing of the aircraft. This task, although routine for aviation technicians, is known to be very demanding and difficult physically and mentally.

[4] At approximately 0800 hours on 7 April 2013, the senior supervisors asked their subordinates to round up the fuel tank repair team. Master Corporals Hammond and Wheeler were told by Corporal Giri that he could not enter the fuel tank that morning because he had a sore back. Corporal Giri told them that he had a medical chit to prove it. This information was immediately passed on to Sergeant Boutin and Sergeant Slonski. Sergeant Boutin asked Master Corporal Hammond to tell Corporal Giri to get that chit.

[5] At 0815 hours, Master Corporal Hammond told his supervisors that in light of Corporal Giri's stated condition, they would not have enough persons on the team to carry on the task that morning. Master Corporal Hammond informed Sergeant Boutin that Corporal Giri had lost his medical chit. Sergeant Boutin was surprised to hear that because medical chits were normally handed to the chain of command by the members and placed in a sleeve attached to the Unit Employment Record (UER). Sergeant Boutin looked in the accused's UER and found five medical chits but not one that would have excused Corporal Giri to perform his military duty that day. Sergeant Boutin then saw both Master Corporal Hammond and Corporal Giri. The accused then said that he had a medical chit for his sore back and that he could not act as an entrant that morning, but that he had lost that chit. Sergeant Boutin asked him where it was, to which Corporal Giri could not answer. Sergeant Boutin then ordered Corporal Giri to go

home, look for the medical chit and then return to his place of duty. Corporal Giri understood the order and then left immediately. It appears that on his way out, Corporal Giri expressed his doubts about retrieving that chit to Master Corporal Wheeler who would have invited him to get one at a civilian medical clinic because the MIR was closed on Sundays. This was quickly conveyed to Sergeant Boutin who asked Wheeler to send a text message to the accused to ask him to come back to work immediately. Shortly after, the phone rang at the servicing desk and Corporal Giri asked to speak to a sergeant. Sergeant Boutin quickly walked to the phone and spoke to Corporal Giri. Corporal Giri told Sergeant Boutin that he was at a civilian clinic to be seen by a doctor for his back. Corporal Giri was afraid that without a document issued by a doctor he would be forced to enter the fuel tank that morning to perform his task. All the evidence leaves no doubt that there is no support to this belief as the supervisors would not have required Giri to enter the tank whether he had a chit or not that morning. Sergeant Boutin was surprised to hear that Corporal Giri was at a medical clinic. Sergeant Boutin then asked the accused if he had told him to go to a civilian clinic, to which the accused said no. He reiterated that he had asked the accused to go home and look for the chit and return to his place of duty. Sergeant Boutin then explained to the accused that he could only go to a civilian clinic in the case of an emergency and that Corporal Giri could have to assume the cost of his visit and that he may not be reimbursed. Corporal Giri said he understood the policy but wanted to remain at the clinic as he had already registered as a patient. Sergeant Boutin told him to come back immediately to the unit and Corporal Giri said no. He wanted to remain at the clinic. Sergeant Boutin warned him about the consequences of his disobedience and Corporal Giri still declined. Corporal Giri showed up at his place of duty shortly before 1100 hours after receiving another message from Master Corporal Wheeler, at the request of Sergeant Boutin, telling the accused at 10:15 that he had 15 minutes to show up.

[6] Corporal Giri and his wife testified. Their evidence indicates that Corporal Giri went to his home that morning to quickly search for a medical chit. Corporal Giri thought that the chit dated 27 March 2013 excused him from duties that morning. Corporal Giri then went to a walk-in-clinic near his home to register and returned home shortly after, according to his testimony. He then went back to the clinic to subsequently return to his place of duty. He expressed his concerns that he was convinced at the time that without producing a medical document, his superiors would force him to act as the entrant that morning and he used that belief to explain why he went to a civilian clinic that morning as opposed to returning to his place of duty as requested by Sergeant Boutin.

### **The law and the essential elements of the charges**

#### *Section 83 of the National Defence Act — Disobedience of a Lawful Command*

[7] With regard to the first and second charge, section 83 of the *National Defence Act* reads as follows:

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

This offence covers a large spectrum of refusals. From the more simple, like refusing to perform a clerical task, to the more serious such as refusing to put your life at risk in the heat of combat operations. Beyond the elements relating to the time and place of the alleged offence as well as the identity of the offender, the other essential elements are:

- (a) the fact that an order was given to the accused;
- (b) that the order was lawful;
- (c) that the order was received by the accused or that he knew about the order;
- (d) that the order was given by a superior officer;
- (e) that the accused knew that the person who gave the order was a superior officer;
- (f) that the accused failed to comply with the order; and
- (g) the blameworthy state of mind of the accused.

[8] The particulars of the first charge read as follows:

"In that he, on or about 7 April 2013, at or near Canadian Forces Base Comox, British Columbia, failed to go to his residence to search for a medical chit he claimed he had been issued, when ordered to do so by Sergeant Boutin, J.R.F.A."

Whereas, the particulars of the second charge read as follows:

"In that he, on or about 7 April 2013, at or near Canadian Forces Base Comox, British Columbia, failed to return to his unit when ordered to do so by Sergeant Boutin, J.R.F.A."

*Section 129 of the National Defence Act — An act to the prejudice of good order and discipline*

[9] The third charge relates to an alleged contravention of section 129 of the *National Defence Act* for an act prejudicing good order and discipline. For our purposes, the relevant portions of section 129 of the *Act* reads as follows:

- (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence ...

[10] The particulars of the third charge read as follows:

"In that he, on or about 7 April 2013, at or near Canadian Forces Base Comox, British Columbia, told a superior officer that he had been given a medical chit excusing him from performing a military duty that he was called on to perform, knowing that statement to be false."

Generally speaking, proof of prejudice to good order and discipline beyond a reasonable doubt is required, although this proof of prejudice can sometimes be inferred from the circumstances if the evidence clearly points out to the prejudice as a natural consequence of a proven act. To be found guilty of an act to the prejudice of good order and discipline, the prosecution must prove beyond a reasonable doubt the identity as the offender as well as the date and the place described in the particulars of that charge. In addition, it must prove beyond a reasonable doubt that:

- (a) the accused committed the alleged act as indicated in the particulars;
- (b) that the consequence of the proven act is prejudicial to good order and discipline; and
- (c) the blameworthy state of mind of the accused.

### **Legal analysis and decision**

[11] Before this Court provides its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Two rules flow from the presumption of innocence: one is that the prosecution bears the burden of proving guilt; the other is that guilt must be proved beyond a reasonable doubt. These rules are linked with the presumption of innocence to ensure that no innocent person is convicted.

[12] The burden of proof rests with the prosecution and it never shifts. There is no burden on ex-Corporal Giri to prove that he is innocent. He does not have to prove anything. A reasonable doubt is not an imaginary or frivolous doubt. It is not based on sympathy for or prejudice against anyone involved in the proceedings. Rather, it is based on reason and common sense. It is a doubt that arises logically from the evidence or from an absence of evidence. It is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard would be impossibly high. However, the standard of proof beyond a reasonable doubt falls much closer to absolute certainty than the probable guilt.

[13] In this case, the Court finds no support to reject in its entirety the testimony of any witness heard during the trial. I agree with the prosecution that the testimony of Mrs Kato is not entirely reliable, but despite her interest in this case, as the spouse of the accused, I find her testimony credible and not contradicted by the rest of the evidence. I can simply not reject her version of events where she states that her husband came home on a Sunday searching for a medical chit further to a request he

had received from his superiors. With regard to the part of her testimony where she first stated that the event did not take place on a Sunday because it was her day off and later to change her version to the effect that it was in fact a Sunday, the Court finds her explanation reasonable in the circumstances. The fact that she has discussed the charges and the events that led to the charges with her husband before this trial is not per se fatal to her credibility and the reliability of her testimony. Her direct examination and cross-examination do not raise sufficient concerns to reject her testimony. As to the testimony of the accused, he testified in a straightforward and articulate manner. His explanation that he feared for his health by being forced to enter the fuel tank by his superiors that morning is not reasonable in light of the evidence heard at trial, but his belief was sincere. The part of his testimony where he said that he was relying on the medical chit dated 27 March 2013 to support his inability to perform the task may have been sincere, but he knew or must have known that this particular chit would not support that he was excused from performing the task that morning. Therefore, the Court finds that his belief that the chit would exonerate him was minimal, that is not to say that he did not go home to find it.

[14] The issues in this case are limited and straightforward. The accused admitted during his testimony that two orders were given to him and they are corroborated by the testimony of Warrant Officer Boutin. Firstly, Corporal Giri received the order from Warrant Officer Boutin (when he was sergeant at the time) to go home, look for a medical chit that he claimed had been issued to him and return to his place of duty. There is no issue that this order was lawful and that Corporal Giri disobeyed it. From his own testimony in Court, Corporal Giri admitted all the essential elements of the charge, the *actus reus* and the *mens rea* required with regard to that specific order. However, the particulars of the first charge refers to his failure to go to his residence to search for a medical chit he claimed he had been issued, when ordered to do so by Sergeant Boutin, J.R.F.A. The evidence before the Court indicates that he did in fact go home to look for his medical chit and complied with the order.

[15] As to the second charge, the evidence also clearly establishes that the second order was disobeyed by Corporal Giri. It took place when he was at the medical clinic and when Sergeant Boutin ordered him on the phone to return immediately at the unit. The Court has no issue, in the circumstances present at the time, that the order was lawful and that Corporal Giri disobeyed it. However, similarly to the first charge, the particulars of the second charge refer to the accused's failure to return to his unit when ordered to do so by Sergeant Boutin, J.R.F.A. The evidence at trial clearly shows that although he did not return immediately, he did so in less than half an hour later.

[16] The prosecution therefore asks the Court to find the accused guilty of the first and second charge by making a special finding under section 138 of the *National Defence Act* on the basis of the orders revealed by the evidence at trial. The prosecution submitted that because the accused admitted firstly that he disobeyed the order of Sergeant Boutin to go home, look for his medical chit and return to his unit; and secondly, that he disobeyed the second order of Sergeant Boutin when he told him on the phone to return to the unit immediately, when the accused was at the civilian

medical clinic, the accused would not suffer any prejudice as a result because he confessed to the disobedience of materially different orders.

[17] Based on the evidence accepted by the Court, the accused complied with the orders as particularized in the first and second charge. Equally, he disobeyed two other distinct lawful orders that were given by Sergeant Boutin as revealed by the evidence. In the matter of special findings, section 138 of the *Act* provides:

Where a service tribunal concludes that

- (a) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and
- (b) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence,

the tribunal may, instead of making a finding of not guilty, make a finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.

[18] Particulars serve to enable an accused person to fully assess the case against him, define the issues and prepare his or her defence, including whether or not to call evidence and testify at trial. It also assists the Court to manage the trial as it relates to issues concerning the admissibility of evidence. It is trite law that the prosecution is bound by the essential particulars of the charge, subject to the rule of surplusage. For example, the date and the location, the identity of the victim or the amount of money stolen in a charge of stealing are all particulars that would fall in that category. All particulars that are not surplusage shall be proven by the prosecution, if not, the Court will simply find the accused not guilty subject to the rule of special findings. However, the Court cannot make a special finding when the facts differ materially from the facts alleged in the particulars if it would prejudice the accused. In this case, the accused based all his defence on the basis that he had complied with both orders, despite his admission that he disobeyed two other distinct orders. The line of questions during the cross-examination of the prosecution witnesses and the calling of the defence witnesses, including the accused, reflect the defence strategy to defend the case against the accused. Allowing a special finding on the first and second charge would simply have the effect of substituting two other counts of the same offence. Should the Court be asked to make a special finding with regard to non-essential particulars such as the date or the location of the offence, the accused could not claim prejudice. In the circumstances of this case, the difference between the facts proved and the facts alleged in the statement of particulars has prejudiced Corporal Giri in the conduct of his defence.

[19] As to the third charge, the Court finds that there are two issues. The first one relates to the blameworthy state of mind of the accused when he made the statement to his superior officer that he had been given a medical chit excusing him from performing

a military duty he was called to perform. The second issue relates to the proof beyond a reasonable doubt of the existence of prejudice to good order and discipline.

[20] Corporal Giri relied on his recollection of the medical chit that he had received on 27 March 2013, which exempted him from military duties for three days. He stated that after that period he attended a civilian course of one week duration while on leave. Corporal Giri was familiar with the procedure and the practice surrounding medical treatments receive by members of the Canadian Forces as well as the employment limitations imposed or sick leave granted as a result of sickness or injury. Accepting the most favourable scenario for the accused, Corporal Giri may have hoped that his recent medical chit would cover him, but that would be a long shot. However, his belief was not reasonable because he knew or should have known that his sick leave did not extend beyond three days past 27 March 2013. His belief could only arise from his wilful blindness. When confronted by Sergeant Boutin with the medical chits, he became aware of the need for some inquiry and look at the medical chits that he gave to his chain of command. Instead, he delayed his search by stating that he had lost his chit and that it could be at his home. All his actions at the time were aimed at finding a justification to avoid being ordered to go in the fuel tank because he sincerely feared to aggravate his injury. He had to find a way out. In short, he declined to make the relevant inquiry because he did not wish to know the truth about the medical chit dated 27 March 2013. At least not when he was in the presence of Sergeant Boutin. Therefore, the Court is satisfied that both the act alleged in the charge and the blameworthy state of mind of the accused have been established beyond a reasonable doubt.

[21] The second and remaining issue as it relates to the third charge deals with the essential element of prejudice to good order and discipline. Firstly, the Court has concluded that the accused's blameworthy state of mind at the time of the alleged offence was the result of wilful blindness. In the particular circumstances of this case, the Court is not satisfied beyond a reasonable doubt that such context would be sufficient to meet the threshold set in *R. v. Jones*, 2002 CMAC 11, in order to infer prejudice from the said circumstances as a natural consequence of a proven act. The Court must be satisfied then beyond a reasonable doubt that there was actual prejudice to good order and discipline. The evidence indicates that the task was delayed until the early afternoon and that even without a medical document excusing Corporal Giri to perform the task that had been planned for him the morning of 7 April 2013, his superiors would have accepted his words that his medical condition was such that he should not perform the task in any event. The delay resulted in the absence of another person to be able to act as the entrant at that time. Despite the general responses of Warrant Officer Boutin and Sergeant Slonski during their testimony with regard to the importance of the level of trust required between superiors and subordinates in a small unit or crew as well as the potential effect of the accused's behaviour in not being forthright with his superiors about the medical chit he had received on 27 March 2013, which could cause those superiors to take additional steps to ascertain the physical condition of their crew before assigning them routine tasks, the testimony of Sergeant Slonski was very clear on that point: the task would have been delayed as it was



excluded to force Corporal Giri to act as the entrant in the fuel tank. Sergeant Slonski was not concerned that the conduct of Corporal Giri was such that it would cause concerns for the other members of the crew in the future.

[22] The fact that Warrant Officer Boutin lost his trust with regard to Corporal Giri is not sufficient in itself. Corporal Giri was under the supervision of Sergeant Slonski at the time. Sergeant Slonski testified that his level of trust towards Corporal Giri was certainly diminished by his subordinate's behaviour on 7 April 2013, but he also stated that similar situations ought to be handled on a case by case basis. Sergeant Slonski testified that the fact that Corporal Giri did not go into the tank that morning had a small effect on the task that was scheduled to start during the said morning. It had no effect on the discipline of that crew. The delay in performing the task was not due to the behaviour of Corporal Giri, but to the inability of the other members of the team to act as an entrant. Therefore, the Court is left with a reasonable doubt with regard to the essential element of prejudice of good order and discipline.

**FOR THESE REASONS, THE COURT:**

[23] **FINDS** ex-Corporal A.B. Giri not guilty of all charges.

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**Counsel:**

Lieutenant-Colonel Richards, Canadian Military Prosecution Service, Counsel for Her Majesty the Queen

Lieutenant-Colonel Berntsen, Directorate of Defence Counsel Services, Counsel for ex-Corporal Giri