



## COURT MARTIAL

**Citation:** *R. v. Day*, 2010 CM 3014

**Date:** 20100619

**Docket:** 201036

Standing Court Martial

Canadian Forces Base Gagetown  
Oromocto, New Brunswick, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Captain T. Day, Accused**

**Before:** Lieutenant-Colonel L.V. d'Auteuil, M.J.

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### **REASONS FOR THE APPLICATION CONCERNING THE EXISTANCE OF A NON PRIMA FACIE CASE ON ALL CHARGES**

(Orally)

[1] Captain Day is charged with two offences for negligently performing a military duty contrary to section 124 of the *National Defence Act* and alternately with two offences for negligence to good order and discipline contrary to section 129 of the *National Defence Act*.

[2] As set out in the *Queen's Regulations and Orders*, (*QR&Os*), at the close of the prosecution's case, the defence is entitled to move for a non guilty verdict on the basis that the prosecution has not presented a *prima facie* case: i.e., a case containing evidence on all essential points of a charge that, if believed by the trier of fact and unanswered, would warrant a conviction.

[3] Then, on 18 June 2010, at the close of the prosecution's case and pursuant to *QR&O* article 112.05(13), the accused presented a motion of non *prima facie* with regard to the four charges on the charge sheet on the basis that the prosecution had failed

to introduce before this Standing Court Martial any evidence concerning two essential elements of the offences laid under sections 124 and 129 of the *National Defence Act*.

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

- a. The testimony heard; in the order of their appearance before the court, the testimony of Captain Corey, Captain Lloyd, Master Corporal Dickison, Corporal Docherty, Master Corporal Guilbeault, Sergeant Leclair, Captain Vincent, and Captain von Finckenstein;
- b. Exhibit 3, a Canadian Forces publication entitled "Staff Duties for Land Operations," listed as B-GL-331-002/FP-001. This document was entered in evidence by consent;
- c. Exhibit 4, an Agreed Statement of Facts;
- d. Exhibit 5, a MIRC log of the Battle Group Company on 23 January 2009;
- e. Exhibit 6, a map of the Ma'sum Ghar area, province of Kandahar, Afghanistan;
- f. Exhibit 7, the radio log sheet for November Company, 2 RCR, on 23 January 2009;
- g. Exhibit 8, a MIRC log of the Battle Group Company on 23 January 2009;
- h. Exhibit 9, the radio log sheet for the Battle Group on 23 January 2009;
- i. Exhibit 10, a MIRC log of the Task Force Kandahar on 23 January 2009;
- j. Exhibit 11, the Camp Security radio log sheet of A Squadron for Forward Operating Base Ma'sum Ghar on 23 January 2009;
- k. Exhibit 12, the Battle Group radio log sheet of A Squadron on 23 January 2009;
- l. The judicial notice taken by the court of the facts in issues under Rule 15 of the Military Rules of Evidence;
- m. The judicial notice taken by the court under Rule 16 of the Military Rules of Evidence of a publication entitled "Staff Duties for Land Operations," listed as B-GL-331-002/FP-001; and

- n. Admissions made by the accused in accordance with Rule 37(b) of the Military Rules of Evidence, which are:
  - i. Captain Day was the duty officer for Forward Operating Base Ma'sum Ghar in Kandahar province, of the Islamic Republic of Afghanistan on 23 January 2009 starting at 0500 hours. He was tasked to perform this duty by the Acting Officer Commanding A Squadron Combat Team, Captain Johnson, who had the authority to task Captain Day; and
  - ii. Captain Day was aware of this duty and was aware that he was required to fulfill those responsibilities that were required of the Forward Operating Base Ma'sum Ghar duty officer.
- o. Two statements made by the accused to two different witnesses and introduced under Military Rule of Evidence 29, which are:
  - i. "I missed it"; and
  - ii. "I messed up. I made a mistake. The squadron SOP mentioned to fire at any potential rocket launch site."

[5] This type of motion at the close of the prosecution's case is different from a request for an acquittal based on reasonable doubt. The latter argument is that there may be some evidence upon which a jury, properly instructed, might convict, but that it is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt is not called into play until all the evidence is in, reasonable doubt cannot be considered unless the accused has either elected not to call evidence or has completed their evidence.

[6] The court may not take into account the quality of the evidence in determining whether there is some evidence offered by the prosecution on each essential element of each charge so that a reasonable jury, properly instructed, could convict: not "would" or "should," but simply "could."

[7] The governing test for a directed verdict is set out by Ritchie J. in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at page 1080, as follows:

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

[8] Also, the burden of proof rests on the accused to demonstrate, on a balance of probabilities, that this test is met.

[9] The test is the same whether the evidence is direct or circumstantial. The application of this test varies according to the type of evidence in the prosecution's case. Where the prosecution's case is based entirely on direct evidence, application of the test is straightforward. If the judge determines that the prosecution has presented direct evi-

dence as to every element of each offence, the application must be denied. The only issue will be whether the evidence is true and that is for the trier of fact. Where proof of an essential element depends on circumstantial evidence, the issue at trial is not simply whether the evidence is true. Rather, if the evidence is accepted as true, is the inference proposed by the prosecution the correct inference? The judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the prosecution. The judge neither asks whether he would draw those inferences or assesses credibility. The issue is only whether the evidence, if believed, could reasonably support an inference of guilt.

[10] The essential elements of the offence under section 124 of the *National Defence Act* are:

- a. The identity of the accused as the offender;
- b. The date and place of the offence;
- c. The accused failed to perform a military duty imposed on him, which includes to prove that:
  - i. A military duty was imposed on the accused; and
  - ii. The accused was aware of the military duty imposed on him.
- d. The accused performed negligently the military duty imposed on him, which includes to prove that:
  - i. There was a standard of care to be exercised by the accused;
  - ii. The acts or omissions of the accused were in relation to the military duty imposed on him;
  - iii. The conduct of the accused breached the required standard of care; and
  - iv. The conduct of the accused amounted to a negligence, which means that the acts or omissions of the accused constituted a marked departure from the expected standard of care.

[11] The essential elements of the offence under section 129(1) of the *National Defence Act* are:

- a. The identity of the accused as the offender;
- b. The date and place of the offence;

- c. The negligence of the accused, which includes to prove that:
  - i. A duty was imposed on the accused;
  - ii. The accused knew or ought to have known the duty imposed on him;
  - iii. There was a standard of care to be exercised by the accused while performing the duty;
  - iv. The accused failed to perform the duty imposed on him;
  - v. The failure to perform the duty by the accused breached the required standard of care; and
  - vi. The failure to perform the duty by the accused constituted a marked departure from the expected standard of care; and
- d. The prejudice to good order and discipline.

[12] In accordance with the Agreed Statement of Facts, the identity, the date and the place for each offence are essential elements admitted by the accused. However, counsel for the accused raised before this court the fact that the prosecution has failed to provide some evidence on two essential elements for each four offences: First, that no evidence was adduced by the prosecution to prove the military duty (section 124 *NDA*) or duty (section 129 *NDA*) imposed to Captain Day, and second, that no evidence was introduced by the prosecution before the court in order to prove the standard of care to be exercised by the accused while performing the military duty or duty.

[13] I come to the conclusion that there is some evidence upon which a reasonable panel, properly instructed, could return a verdict of guilty concerning the military duty imposed to Captain Day for the offences laid under section 124 of the *National Defence Act*. Captains Corey, Lloyd, and von Finckenstein provided some evidence about the role and responsibilities of a duty officer for a combat unit in an operational theatre like Afghanistan, which specifically include the duty of being aware of the location and situation of subunits and other friendly forces in the combat unit's area of operation. In order to do so, there is some evidence from the same witnesses that the duty officer has various communication means to receive and pass relevant information to that effect at the lower and higher level of responsibilities. Moreover, all other witnesses have provided some evidence on what were the role and responsibilities of the A Squadron duty officer on 23 January 2009 by providing how the duty officer performed his role and responsibilities on that day in the command post with the subunits and the higher level in the chain of command.

[14] The prosecution suggested that from this evidence, inferences could be made in order for the court to conclude that there is some evidence concerning the military duty as alleged in the particulars of the two first charges in the charge sheet. I do agree with

the prosecution that the inferences that the duty officer has a military duty to maintain situational awareness of his combat units' area of operation in the command post by receiving and passing information by different means, at lower and higher levels, is a correct one that could be made on the basis of some evidence adduced by the prosecution.

[15] Finally, admissions made by the accused on the fact that he was specifically tasked and he was aware of his duty is some evidence to support the fact that the military duty was imposed on him and that he was aware of it.

[16] I would apply the same reasoning for the issue about the essential element concerning the duty imposed to Captain Day under section 129 of the *National Defence Act*. Knowing that the notion of duty under this provision is a wider concept than the one defined by the Court Martial Appeal Court in *Brocklebank* about a military duty under section 124 of the *National Defence Act*, I have no difficulty to conclude that there is some evidence upon which a reasonable panel, properly instructed, could return a verdict of guilty concerning the duty imposed to Captain Day for the offences laid under section 129 of the *National Defence Act*.

[17] Then, it is my decision that the accused has not demonstrated on a balance of probabilities that the test is met on the first issue he raised.

[18] The accused also submitted to the court that there is no evidence concerning the essential element of the standard of care concerning all charges in order for the prosecution to prove that the accused failed to perform a military duty or duty imposed on him.

[19] In its decision of *Brocklebank*, the Court Martial Appeal Court has indicated the standard of care for an offence under section 124 of the *National Defence Act*. At paragraph 18 of that decision, Judge Décary said:

In summary, the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation.

[20] I would like first to point out the fact that I consider that the standard of care for an offence under section 124 of the *National Defence Act* is the same as the one for an offence of negligence under section 129 of the *National Defence Act*. Both offences have the same maximum punishment and both are penal negligence offences. As mentioned by Judge Hugessen in the Court Martial Appeal Court decision in *Mathieu*:

It is now clearly established that, for penal negligence offences, the applicable standard of liability is an objective standard based on the court's assessment of what a reasonable person would have done in the circumstances. Except where the accused claims incapacity, which is not the case here, this standard applies to establish both the actus reus and the mens rea. Since the standard is objective, it is the act itself that must be assessed; the actor's intention, will and alleged good faith are simply irrelevant.

[21] So concerning the standard of care for all four offences of negligence, the prosecution had to adduce evidence on the conduct expected for the A Squadron's duty officer in the command post at Ma'sum Ghar, province of Kandahar, Afghanistan, in all the circumstances of the accused. It will allow a court to assess, objectively, what is expected from an officer wearing the rank of captain and with the knowledge, training, and experience as Capt Day had, when performing such duty on the day of the alleged offences.

[22] I do agree with the prosecution that there is some evidence about what is expected from the A Squadron duty officer in the command post at Ma'sum Ghar on the day of the alleged offences. Through all witnesses and the publication entitled "Staff Duties for Land Operations," some evidence was put before the court.

[23] However, there is no evidence whatsoever, direct or circumstantial, that was adduced by the prosecution concerning the circumstances of the accused. Other than having introduced evidence on the rank of the accused, no evidence was introduced about the knowledge, training, and experience Captain Day had to perform as the A Squadron's duty officer in the command post at Ma'sum Ghar at the time of the alleged offences, in order to allow the court to determine the standard of care for a duty officer in all the circumstances of the accused.

[24] In making the objective assessment, a panel should be satisfied on the basis of all the evidence that the conduct of Captain Day amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Without being able to establish the standard of care because the circumstances of the accused are unknown, then it makes it impossible for a reasonable panel, properly instructed, that it could return a verdict of guilty.

[25] Then, the court concludes that the accused proved on a balance of probabilities that on all charges, there was no evidence to prove the standard of care, which is an essential element of the offence of negligent performance of a military duty and the offence of negligence to the prejudice to good order and discipline.

[26] Captain Day, it is my decision that a *prima facie* case has not been made out against you on all four charges on the charge sheet and this court martial finds you not guilty of all four charges.

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**Counsel:**

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Counsel for Her Majesty the Queen

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Counsel for Captain T. Day