COURT MARTIAL

Citation: *R v Lynk*, 2014 CM 2001

Date: 20140203
Docket: 201351

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer D.A. Lynk, Accused

Before: Colonel M.R. Gibson, M.J.

REASONS FOR FINDING

(Orally)

[1] Warrant Officer Lynk is charged with three offences: disobedience of a lawful command of a superior officer, contrary to section 83 of the *National Defence Act*; neglect to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act*; and, an act to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act*. The second and third charges are laid in the alternative to the first charge.

[2] All three charges relate to an order allegedly given to Warrant Officer Lynk by Master Warrant Officer Olsen on 22 November 2012 that "no physical contact" was to occur with respect to the handling of prisoners during an exercise scenario on Exercise Charging Dragoon, a training exercise involving the Royal Canadian Dragoons which was held in Renfrew County.

[3] The evidence in this case consists of the oral testimony of 10 witnesses called by the prosecution (Lieutenant McNaughton, Master Corporal Norquay, Trooper Bishop, Trooper Heffernan, Master Corporal Bergeron, Corporal Pope, Master Warrant Officer Olsen, Trooper Beebe, Trooper Deutsch and Trooper Schoufour) and five witnesses called by the defence (Warrant Officer Lynk, Sergeant Edwards, Sergeant Horne, Captain Roach and Warrant Officer Gigacz). All of these witnesses testified at considerable length and in considerable detail about the events of 22 and 23 November 2012, concerning things that transpired in the context of Exercise Charging Dragoon. There was also considerable discussion about standards for handling of prisoners in the context of domestic training exercises involving fellow Canadian soldiers.

[4] In addition, there were three still photos and two videos taken on the cell phone of Sergeant Edwards that were entered into evidence as exhibits. The three photos and the first video depicted events during a search scenario that took place on 22 November. The second video depicted a portion of the events that transpired during the search scenario on 23 November that led to the charges before the court.

[5] Before this court provides its analysis of the evidence and of the charges, it is appropriate to deal with several key elements of the law that the court must apply. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[6] The first of these is the principle that the prosecution is bound by the particulars of the charges that it has preferred for trial by court martial. As I mentioned in my reasons for decision regarding the no *prima facie* case motion made by the defence, it is a fundamental principle of criminal law that the prosecution must prove the case as particularized in the charges. The Court Martial Appeal Court (CMAC) recently reiterated this principle at paragraphs 29 and 30 of its decision in the case of *Bombardier Tomczyk v The Queen*, 2012 CMAC 4.

[7] The second relates to the presumption of innocence and the standard of proof beyond a reasonable doubt. It is fair to say that the presumption of innocence is perhaps the most fundamental principle in Canadian criminal law, and the standard of proof beyond a reasonable doubt in order to displace the presumption of innocence is an essential part of the law that governs criminal trials in this country. In matters dealt with under the Code of Service Discipline, as with cases dealt with under Canadian civilian 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 essential 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.

[8] 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. In order to secure a conviction, it is incumbent on the prosecution to prove each essential el-

ement of the offence charged to the standard of proof beyond a reasonable doubt. 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.

[9] The court must find an accused person not guilty if it has a reasonable doubt about his or her guilt on all the essential elements of the offence 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 tradition of justice.

[10] In *R v Lifchus* [1997] 3 SCR. 320, the Supreme Court of Canada proposed a model jury charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice; rather, 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 the evidence tells the court, but also on what that evidence does not tell the court. The fact that the person has been charged is no way indicative of his or her guilt.

[11] In *R v Starr* [2000] 2 SCR 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 Warrant Officer Lynk, 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.

[12] 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, videos, 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.

[13] 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 and reliable.

[14] Credibility is not synonymous with telling the truth, and the lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credi-

bility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe events, as well as 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.

[15] 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? However, demeanour must be assessed with caution, and should be assessed in conjunction with an assessment of whether the witness's testimony was internally consistent; that is, consistent with itself, and consistent and with the other uncontradicted or accepted facts in the evidence.

[16] 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 taint 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. The court may accept the evidence of a particular witness in total, in part, or not at all.

[17] Warrant Officer Lynk gave evidence in his defence. He testified in a calm, confident and straightforward manner. His evidence was internally consistent. He specifically denied being given an order by Master Warrant Officer Olsen that no physical contact with persons being searched during the exercise should occur. He stated that "that did not happen".

[18] This is a crucial point in the determination of this case, because the allegation that such an order was given to Warrant Officer Lynk by Master Warrant Officer Olsen is pleaded as an essential element in all three charges on the charge sheet as particularized by the prosecution.

[19] Given this, the court must focus its attention on the test provided for in the reasons for decision of Justice Cory in the Supreme Court of Canada case of *R v W. (D.)* [1991] 1 SCR 742, for cases such as this where the accused has testified and his evidence essentially constitutes a denial of one of the essential elements of the charge. This guidance provided by the Supreme Court provides as follows:

a) First, if I believe the evidence of the accused, then I must acquit.

b) Second, if I do not believe the testimony of the accused but am left in reasonable doubt by it, I must acquit.

c) Third, even if I am not left in doubt by the evidence of the accused, I must ask myself whether, on the basis of the evidence that I do accept, I am convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[20] In *R v J.H.S.* 2008 SCC 30 at paragraph 12, the Supreme Court of Canada quoted approvingly the following passage from *R v H.(C.W.)* (1991) 68 CCC (3d) 146 (BCAA) 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."

Turning to the evidence in the present case, I find that the evidence of Warrant Officer Lynk has left me with a reasonable doubt as to whether the order in question was given.

[21] Moreover, even apart from this, considering the evidence as a whole, I am left with a reasonable doubt as to whether the order that there should be no physical contact with the persons being searched during the remainder of the exercise scenarios in Exercise Charging Dragoon was given by Master Warrant Officer Olsen to Warrant Officer Lynk on 22 November 2012.

[22] This reasonable doubt would arise from a number of factors, including:

a) The comment made by Master Warrant Officer Olsen in relation to these proceedings to the effect that "this is bullshit";

b) The testimony of Sergeant Edwards;

c) The contents of the second video (Exhibit No. 7 in evidence) depicting a portion of the events of 23 November;

d) The evidence of Warrant Officer Gigacz that, as the Operations Warrant, he was unaware of such an order having been given or disseminated within the unit;

e) The absence of documentary evidence adduced to substantiate the assertion that the "no contact" rule is in fact a standard Army rule as asserted by Master Warrant Officer Olsen;

f) The absence of evidence to indicate that the purported order (which would have been of application to others beyond Warrant Officer Lynk’s troop) was ever passed on to or disseminated to other members of the unit, which would have been imperative if the OC or CO had ordered it; and

g) The evidence concerning Master Warrant Officer Olsen's interaction with Sergeant Edwards at the truck stop, which did not seem to evidence concern that an order had been violated.

[23] Given that the making of this order is an essential element of the offence as particularized in all three charges on the charge sheet, the court considers that the prosecution has not met its burden of proof to the requisite standard to sustain a conviction.

FOR THESE REASONS, THE COURT:

[24] **FINDS** you not guilty of all three charges on the charge sheet.

Counsel:

Major T.E.K. Fitzgerald, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major C.E. Thomas, Directorate of Defence Counsel Services
Counsel for Warrant Officer D.A. Lynk