

Citation : *R. v. Corporal A.E. Liwyj*, 2009 CM 3008

Docket: 200922

**STANDING COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO**

Date : 4 June 2009

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

HER MAJESTY THE QUEEN

v.

CORPORAL A.E. LIWYJ

(Accused)

FINDING

(Rendered Orally)

INTRODUCTION

[1] Corporal Liwyj is charged with three offences for disobedience of a lawful command of a superior officer contrary to section 83 of the *National Defence Act*.

[2] The facts on which these counts are based relate to different events that occurred on 5 and 10 October 2006, at Canadian Forces Base Shilo, Manitoba.

[3] The trial's hearing took place from 1 to 3 June 2009. Four witnesses were heard by the court during this trial, including the accused, and one witness was heard in rebuttal.

THE EVIDENCE

[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 Warrant Officer Rose, Master Warrant Officer Hansen,

Warrant Officer Lotocki and Corporal Liwyj, the accused in this case. Also the court heard in rebuttal, the testimony of Warrant Officer Rose;

- b. Exhibit 3, the operational/parts and maintenance manual for TA-15, 18, 20 Trailer, which is the Canadian Forces Technical Orders (CFTO) for the Beaver Tail trailer. This document was entered in evidence by consent;
- c. Exhibit 4, an agreed statement of facts;
- d. Exhibit 5, an Electrical Mechanical Engineering (EME) equipment inspection report (DND 2027);
- e. Exhibit 6, a trailer inspection sheet;
- f. Exhibit 7, a trailer inspection form;
- g. Exhibit 8, the Commanding Officer 1 RCHA Safety Policy Statement;
- h. Exhibit 9, a USB key containing a Power Point presentation made by the accused on the operation of Beaver Tail trailer brakes;
- i. The judicial notice taken by the court of the facts in issue under Rule 15 of the Military Rules of Evidence, and more specifically:
 - i. Chapter 5 of the Queen's Regulations and Orders called "Duties and Responsibilities of Non-commissioned Members";
 - ii. Annex A of Defence Administrative Orders and Directives 7023-1 called "Statement of Ethics ;"
 - iii. Defence Administrative Orders and Directives 2007-0 called "Safety ;" and
 - iv. Page 3-5 of Technical Management Policy and Procedure for Land Maintenance System (LMS) Inspection System.

THE FACTS

[5] In October 2006, Corporal Liwyj was a fully qualified vehicle technician who was working in C Battery of 1 Royal Canadian Horse Artillery (1 RCHA).

[6] He started his career as a vehicle technician in 1989 with a Reserve Force army unit and obtained his QL6A qualification in 1998. He also completed a 3-year civilian program in 1994 in mechanics. He worked full-time as a civilian mechanic while in the Reserve Force. In July 1999, he started as a military instructor on a full-time basis at Canadian Forces School of Electrical Mechanical Engineering (CFSEME) at Canadian Forces Base (CFB) Borden. He taught mechanics to candidates, including the topic on air brakes. He did that until he joined the Regular Force as a vehicle technician in 2003.

[7] In October 2006, Corporal Liwyj was working under the direct supervision of Sergeant Rose, also a vehicle technician. On the morning of 5 October 2006, Sergeant Rose was informed by the Officer in Command of C Battery that the Beaver Tail trailer and some other vehicles would be required for an exercise the day after. The Beaver Tail trailer is used to unload ammunition for artillery. Otherwise, manpower must be used instead.

[8] Then-Sergeant Rose asked, the same day, Corporal Liwyj to proceed with the inspection of the Beaver Tail trailer, CFR 87-79978, concerning its mechanical condition. Considering that the trailer was parked outside, Corporal Liwyj asked maintenance people to move it inside. The personnel he asked then called him. They thought that the parking brakes were not disengaged despite the fact that air pressure was sent from the truck to the trailer in order to tow it. Corporal Liwyj noticed, further to a quick inspection of the brakes, that they had been adjusted in the wrong way, giving the impression that they were engaged, and he concluded that the trailer could be moved anyway.

[9] After the trailer was moved inside, Corporal Liwyj proceeded with the inspection and noticed different problems. More specifically, he noticed the following issues concerning the brakes:

- a. Air valves were connected in an illegal mode;
- b. Dust plugs were missing on the spring brake chamber;
- c. The push rod was not trimmed;
- d. There was no caging bolt;
- e. Bolts maintaining pieces of the spring air chamber and the service air chamber together were badly rusted; and
- f. As previously noted, brake adjustments had been made in the wrong direction.

[10] Corporal Liwyj put on paper those different defects and passed them to Sergeant Rose. Then-Sergeant Rose asked Corporal Liwyj to proceed with brake adjustments on the trailer, CFR 87-79978.

[11] Sergeant Rose indicated to Corporal Liwyj that he wanted him to proceed to the brake adjustments with air pressure only. However, Corporal Liwyj disagreed with that method because he considered it unsafe, considering the state of the brakes. Rather, he wanted to use a caging bolt to proceed with the brakes adjustment. Sergeant Rose conducted Corporal Liwyj through a brake adjustment with air pressure only and let him go proceed with the repair.

[12] Corporal Liwyj was clearly disagreeing with the method Sergeant Rose wanted him to use. He considered it unsafe because of all other defects he noticed on the brakes. Mainly, he was afraid that the diaphragm in the parking brake chamber would be in so bad condition that it would cause the spring inside that chamber to put so much pressure on the chamber parts, including the rusted bolts that it would explode. He wanted to use a caging bolt to maintain firmly in place the spring in the parking brake chamber before carrying out the brakes adjustment. Then, he decided to go see Sergeant Lotocki at the control office. Sergeant Lotocki is a vehicle technician too and he wanted to discuss with him what to do in such situation.

[13] Sergeant Lotocki advised him that in order to support his opinion, he would have to demonstrate that what was requested by Sergeant Rose was against the Canadian Forces Technical Orders (CFTO) for this specific trailer. Then, he would be in a better position to discuss with Sergeant Rose the manner to repair the brakes. Corporal Liwyj asked Sergeant Lotocki where he could find a copy of this CFTO and he told him that he could find one at the Headquarters (HQ) Battery.

[14] Meanwhile, Sergeant Rose was looking for Corporal Liwyj in order to know how he was progressing on his task. It is on his way to the HQ Battery that Corporal Liwyj was stopped by Sergeant Rose. The latter found out that Corporal Liwyj was looking for the CFTO. He then formally ordered him to carry out the brakes adjustment on the Beaver Tail trailer CFR 87-79978. Corporal Liwyj asked to obtain the order in writing and his request was denied. He then refused to obey the order. Sergeant Rose sent him to the C Battery office and ordered him to stay there, which he did. Sergeant Rose informed right away the Equipment Tactical Quarter Master (ETQM), Master Warrant Officer Hansen, of the situation.

[15] Corporal Liwyj was allowed to go home for lunch, and on his return at the beginning of the afternoon, he learned that he was removed from the task and he was given a list of tasks to perform. Those tasks were not related specifically to his employment as a vehicle technician but were related to the work of a general nature performed in the unit by all military members like cleaning.

[16] The day after, the Regiment deployed for the exercise without the trailer and without trailer assets.

[17] After the thanksgiving weekend, unit members came back to work on 10 October 2006. In the morning, Sergeant Rose ordered Corporal Liwyj to carry out the brakes adjustment on the Beaver Tail trailer CFR 87-79978. Corporal Liwyj refused again, for safety reasons, mainly because he still wanted to proceed with a caging bolt to do the work. His request was denied. Sergeant Rose informed Master Warrant Officer Hansen of the situation and it was decided to have a meeting that morning with Corporal Liwyj.

[18] Prior to that meeting, Master Warrant Officer Hansen asked Sergeant Rose and Sergeant Lotocki, the latter being the acting troop sergeant-major dealing with disciplinary issues, to review the CFTO concerning the Beaver Tail trailer, and more specifically the outline process to adjust the brakes. They assured him that the process put forward by Sergeant Rose was clear, sound, and safe.

[19] About 10:30 a.m. that day, Master Warrant Officer Hansen met Corporal Liwyj in the presence of Sergeant Rose and Sergeant Lotocki. Master Warrant Officer Hansen asked Corporal Liwyj if he understood the task he was asked by Sergeant Rose to perform. He answered that he understood, but that he considered it unsafe. Sergeant Rose read out loud two portions of the CFTO on Beaver Tail trailers concerning the operation instructions for parking brake and the maintenance instructions for brake adjustment. Corporal Liwyj replied that the procedure was wrong and the CFTO was wrong because it was unsafe. Then, Master Warrant Officer Hansen asked him if he could prove that it was really the case. He did not obtain any answer on that matter.

[20] Master Warrant Officer Hansen explained to Corporal Liwyj the seriousness of disobeying orders, the fact that he could put a redress for that matter later, and he ordered him to carry out the brakes adjustment on the Beaver Tail trailer, CFR 87-79978. Corporal Liwyj understood the order but he mentioned that he would carry it out only by using a caging bolt to do it.

[21] After the meeting, Corporal Liwyj went back home for lunch. He called an instructor at the CFSEME and confirmed that brakes adjustment on air brakes with a caging bolt was currently taught to candidates. He went back to the unit and was met again by Master Warrant Officer Hansen, in the presence of Sergeant Rose and Sergeant Lotocki. The purpose of that meeting was to assess progress of the task to be performed by Corporal Liwyj as ordered.

[22] Corporal Liwyj informed them that he called an instructor at CFSEME and that brakes adjustments on air brakes with a caging bolt was currently taught to candidates. Then, Master Warrant Officer Hansen reiterated his order. Corporal Liwyj answered

that he won't proceed without having the order in writing. The order in writing was not provided to him.

[23] Corporal Liwyj never carried out the order. The brakes adjustment was later completed, as ordered by Sergeant Rose, by two other vehicle technicians, who are Master-Corporal Hazlewood and Corporal Carde. Later, three charges were laid against Corporal Liwyj for disobedience of a lawful command.

[24] As part of a re-lifting project, the Beaver Tail trailer CFR 87-79978 had its brakes replaced in February 2007. Then, the brakes that were on the Beaver Tail trailer at the time of the alleged offences no longer exist and could not be recovered.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGES

[25] 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.

[26] Then the prosecution had to prove the following essential elements for these offences beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charged sheet; the prosecution also had to prove the following additional elements, the fact that an order was given to Corporal Liwyj, that it was lawful, and that he received or knew the order; the fact that Corporal Liwyj was given the order by a superior officer, and that this status was known by him; the fact that Corporal Liwyj did not comply with the order; and finally, the blameworthy state of mind of Corporal Liwyj.

[27] 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.

[28] 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.

[29] 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.

[30] 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 courts 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 those that appear on the charge sheet before a court.

[31] In *R. v. Starr* [2000] 2 S.C.R., 144, at paragraph 242, the Supreme Court held that:

... [A]n 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.

[32] 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 Liwyj, 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.

[33] 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 or facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

[34] 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.

[35] 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.

[36] 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?

[37] 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.

[38] 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.

[39] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court and address the legal principles.

ANALYSIS

[40] First, the court is satisfied beyond a reasonable doubt that the identity, date and place are proved by the prosecution on the three charges. Also, the court is satisfied that the prosecution has proved beyond a reasonable doubt, for the three charges, that an order was given to Corporal Liwyj, that he received and knew the order, that he was given the order by a superior officer and this status was known by him, and finally that he did not comply with the order. As agreed by the defence counsel, those essential elements are not in dispute.

[41] Then, the court is left with two essential elements for which the defence counsel has stated to the court that they were not proved beyond a reasonable doubt by the prosecution for the three charges: first, that the order given to Corporal Liwyj was lawful; second, that Corporal Liwyj had the requisite blameworthy state of mind when he did not obey the order.

[42] On the issue of lawfulness of the order, the court considers that the prosecution has proved beyond a reasonable doubt, for the three charges, that the order related to a military duty, which is to repair a piece of equipment belonging to the Canadian Forces and required for military training.

[43] As mentioned by the Court Martial Appeal Court in *Master Corporal Matusheskie, C.A. and Her Majesty the Queen*, 2009 CMAC 3, at paragraph 12:

While the Military Judge was not satisfied that the second order was a lawful order, the Military Judge failed to have regard to Notes B and C of Article 19.015 of the QR&Os. Those Notes are clear that a command is to be obeyed, unless the command is manifestly unlawful. This reflects the fact that obedience to orders is the fundamental rule of military life. There must be prompt obedience to all lawful orders.

[44] The Supreme Court of Canada in its decision of *R. v. Finta*, [1994] 1 S.C.R. 701, provided at paragraph 239 when an order is manifestly unlawful:

Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong.

[45] Then, was the order received by Corporal Liwyj from, first Sergeant Rose, and second, Master Warrant Officer Hansen, manifestly unlawful? Corporal Liwyj described deeply, clearly, and with many details to the court why, according to him, the brakes adjustment he was asked to perform on the Beaver Tail trailer with only air pressure was unsafe. Essentially, the basis of his opinion was his personal detailed observations of the situation and his personal knowledge and experience on the matter.

[46] Also, Corporal Liwyj relied on the fact that it was proved to the court, through the comments made by the company responsible for the re-lifting project in its Replacement Analysis, that the brakes on the Beaver Tail trailer at the time of the incident can also be a safety hazard (see exhibit 4). The court does believe that but it was not explained specifically in what way. In the absence of further evidence, it is difficult for the court to infer anything else on that matter from that comment.

[47] The court understands from the evidence, not being an expert on the subject, that there are two ways to perform a brake adjustment on a Beaver Tail trailer: First, it could be done by using only air pressure, as described in the CFTO specific for that type of trailer; and second, it could be done by using a caging bolt. However, for the second method, the court could only rely on the personal opinion provided by Corporal Liwyj to know when it is appropriate or not to do so. According to other vehicle technicians who testified before this court, which are Warrant Officer Rose and Warrant Officer Lotocki, they had only general comments on this issue saying that both methods could be used.

[48] Reality is that Corporal Liwyj passed to his superior, Sergeant Rose, his issues further to the inspection he made of the trailer. Sergeant Rose made an assessment of the situation and concluded that the brakes adjustment could be made by using air pressure only, which is the manner described in the CFTO. Corporal Liwyj reached a different conclusion and he decided that he could not assume the risk associated to the task he was ordered to perform, considering his personal assessment of the matter. Was there really a risk? Maybe there was one, but it is not obvious for the court. However, it is clear for the court that the prosecution has proved beyond a reasonable doubt that the way Sergeant Rose wanted Corporal Liwyj to proceed was not obviously, patently and flagrantly wrong.

[49] Then, it is the conclusion of this court that the order given twice by Sergeant Rose, and the one given by Master Warrant Officer Hansen, were not manifestly unlawful. The court is satisfied that the prosecution has discharged its burden to prove beyond a reasonable doubt that the order for the three charges was lawful.

[50] Now, did Corporal Liwyj have the requisite blameworthy state of mind when he did not obey the order? Defence counsel raised the fact that Corporal Liwyj had an honest but mistaken belief in a set of facts that if true, would mean that there was a reasonable doubt as to his blameworthy state of mind.

[51] In *R. v. Latouche*, 147 C.C.C. (3d) 420, the Court Martial Appeal Court described the concept of honest but mistaken belief as follows at paragraph 35:

As a general rule, a mistake of fact, which includes ignorance of fact, exists when an accused is mistaken in his belief that certain facts exist when they do not, or that certain facts do not exist when they do. Ignorance of fact exists when an accused has no knowledge of a matter and no actual belief or suspicion as to the true state of the matter.

[52] In order to allow the court to consider this defence, first the accused had to establish an "air of reality" for it. This concept has been defined by Judge Cory in the Supreme Court decision of *R. v. Osolin*, [1993] 4 S.C.R. 595, at page 682:

The term "air of reality" simply means that the trial judge must determine if the evidence put forward is such that, if believed, a reasonable jury properly charged

could have acquitted. If the evidence meets that test then the defence must be put to the jury. This is no more than an example of the basic division of tasks between judge and jury. [Emphasis added.]

[53] It is not sufficient that the accused asserts some belief that he was mistaken, it has to be corroborated by some other evidence, as established at paragraphs 17 and 18 of the Supreme Court decision in *R.v. Park*, [1995] 2 S.C.R. 836.

[54] Did Corporal Liwyj think that he was doing anything wrong because of his belief in certain facts; this is, did he honestly but mistakenly believe the order was unlawful even if that was not the case? In court, he clearly stated that he refused to obey the order each time because he had safety concerns based on his personal observations of the brakes and his personal assessment of the situation. Additionally, he was confronted with the reference, the CFTO, supporting the order. There is no air of reality to this defence because the evidence put forward is not related to the existence or not of facts supporting his belief, but instead it is related to the personal interpretation he made of those facts. Then, the evidence is such that, if believed, a reasonable jury properly charged could not have acquitted.

[55] It is the conclusion of this court that the prosecution proved beyond a reasonable doubt that Corporal Liwyj had the requisite blameworthy state of mind for the three charges when he did not obey the order.

[56] Finally, the defence counsel submitted to the court that the failure for the unit, and the Canadian Forces, to preserve the evidence, which is in this case the brakes of the Beaver Tail trailer CFR 87-79978, should be considered in weighing the evidence and deciding whether the prosecution had proved its case. In support of his argument, he referred to the decision of the Ontario Court of Appeal in *R. v. Bero*, [2000] O.J. No. 4199, and the one from the same court in *R. v. Knox*, [2006] O.J.; No. 1976. However, in order to do so it would have been necessary for Corporal Liwyj to establish first a breach of his section 7 *Charter* right to make full answer and defence. Then, as a remedy under subsection 24(1) of the *Charter*, the failure to preserve evidence as a factor to be considered in deciding if the prosecution had proved its case could have been contemplated. Clearly, such application has not been made to the court on this issue and it is not its intent to consider it. However, it is interesting to note that Corporal Liwyj provided non contradicted and detailed evidence concerning the state of the brakes at the time of the incident.

[57] Consequently, having regard to the evidence as a whole, the prosecution has proved beyond a reasonable doubt all the essential elements of the three offences of disobedience of a lawful command of a superior officer.

[58] Additionally, having regard to the finding of the court concerning the essential elements of section 83 of the *National Defence Act*, and the application of those

elements to the facts of this case, the court considers that the prosecution has discharged its burden of proof by establishing beyond a reasonable doubt the fact that the accused did disobey, on 5 October 2006, to the order he received from Sergeant Rose, on 10 October 2006 to the order he received from the same Sergeant Rose and finally on 10 October 2006 to the order he received from Master Warrant Officer Hansen.

DISPOSITION

[59] Corporal Liwyj, please stand up. Corporal Liwyj, this court finds you guilty of the first, second and third charge on the charge sheet.

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

COUNSEL:

Captain P. Doucet, Regional Military Prosecution, Eastern
Counsel for Her Majesty The Queen

Lieutenant-Commander P. Lévesque, Directorate of Defence Counsel Services
Counsel for Corporal A.E. Liwyj