



COURT MARTIAL

Citation: *R v Olive*, 2011 CM 2009

Date: 20110512

Docket: 201113

Standing Court Martial

Sault Ste Marie Armoury
Sault Ste Marie, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant R.R. Olive, Accused

Before: Commander P.J. Lamont, M.J.

REASONS FOR FINDING

(Orally)

[1] Sergeant Olive, would you stand please. This court finds you guilty of the charge. You may be seated.

[2] Sergeant Randy Olive is charged in a charge sheet with one offence of an act to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*. The particulars allege that he:

"... between August 2010 and September 2010, mailed from Kandahar Afghanistan to his residence in Sault Ste Marie, Ontario two AK-74s, one AK-47, and three 30-round magazines contrary to Joint Task Force Afghanistan Theatre Standing Order 108."

[3] An agreed statement of facts is properly before me as Exhibit 3. On the basis of this evidence I find that Sergeant Olive deployed to Afghanistan for seven months from 1 May to 22 November 2010, where he was employed in Civil Military Cooperation

with the Task Force Kandahar CIMIC Team. On 17 September 2010, officials with the Canada Border Service Agency in Trenton, Ontario intercepted a package of in-coming mail from Afghanistan. The Canada Post Customs Declaration and Shipping Label affixed to the package indicated Sergeant Randy Olive as the sender and Randy Olive as the addressee and was addressed to Sergeant Olive's residence in Sault Ste Marie. The package contained two AK-74 military assault rifles and two 30-round magazines. The items were seized and transferred to the military police. Inspection of the seized items disclosed that the rifles had been rendered inoperable. Both were missing bolts and return springs and the barrels were welded shut. On 24 October 2010, the military police attended Sergeant Olive's residence in Sault Ste Marie where they retrieved an AK-47 assault rifle and a 30-round magazine contained in a package sent to the residence from Afghanistan. Again, the Canada Post Customs Declaration and Shipping Label indicated Sergeant R.R. Olive as the sender and Randy Olive as the addressee. Again, an inspection disclosed that the weapon was inoperable because parts were missing and the barrel was weld shut.

[4] Meanwhile, on 17 October, Sergeant Olive was arrested by a military policeman, Master Corporal Mullins while the two were aboard a Chinook helicopter headed back to Kandahar from a forward operating base. Sergeant Olive was transported to the military police facility in Kandahar and lodged in cells overnight. The next morning on 18 October 2010, Sergeant Olive was interviewed by Master Corporal Mullins. At the request of counsel, the court conducted a *voir dire* to determine the admissibility of statements made by Sergeant Olive in the course of this interview. At the conclusion of the argument I ruled that the statements were admissible and undertook to give reasons for the ruling.

[5] The law governing the admissibility into evidence of statements made by an accused person to a person in authority is well settled. At common law, such statements are inadmissible in evidence unless they are made voluntarily. A person in authority is generally someone engaged in the arrest, detention, interrogation, or prosecution of an accused. And there is no doubt that Master Corporal Mullins was a person in authority at the time he arrested and spoke to Sergeant Olive. The burden is upon the prosecution to satisfy the court beyond a reasonable doubt that a statement made by Sergeant Olive to Master Corporal Mullins was given voluntarily before it will be admitted into evidence.

[6] In law, a "voluntary" statement has a well developed meaning. In *R v Oickle*, 2000 SCC 38, the Supreme Court of Canada recast the law relating to the voluntariness of confessions. Mr Justice Iacobucci delivered the judgement of the Court and noted that:

... [T]he confessions rule is concerned with voluntariness broadly defined [because] one of the predominant reasons for [the rule] is that involuntary confessions are more likely to be unreliable. [reference paragraph 32].

In the later case of *R v Spencer*, 2007 SCC 11, the Supreme Court of Canada considered its earlier judgement in *Oickle*. Madame Justice Deschamps speaking for the majority of the Court stated, reference paragraph 12:

In *Oickle*, the Court recognized that there are several factors to consider in determining whether there is a reasonable doubt as to the voluntariness of a statement made to a person in authority, including the making of threats or promises, oppression, the operating mind doctrine and police trickery. Threats or promises, oppression and the operating mind doctrine are to be considered together and "should not be understood as a discrete inquiry completely divorced from the rest of the confessions rule". (*Oickle*, at para 63). On the other hand, the use of "police ... trickery" to obtain a confession "is a distinct inquiry ... [given that] its more specific objective is maintaining the integrity of the criminal justice system" (para 65).

[7] In the present case, the submissions of counsel focused upon the existence and effect of promises or threats that were alleged to have been made by Master Corporal Mullins toward Sergeant Olive. Master Corporal Mullins was the only prosecution witness on the *voir dire*. He testified that he has been a military policeman for 10 years. In October of 2010, he was the NCO in charge of the investigation section in Kandahar. As a result of information he received from Canada, he travelled by helicopter to a forward operating base in order to arrest Sergeant Olive. On the return flight, he identified himself to Sergeant Olive and arrested him. There was no significant interaction during the flight back to Kandahar because it was noisy and dark in the helicopter. The flight landed at a small airport terminal. Once landed, Master Corporal Mullins told Sergeant Olive he was suspected of transporting weapons by Canada Post. He read him cautions from a form and told him he wished to conduct an interview. The two boarded a police vehicle described as a SUV and drove to the military police facility. In the course of the short drive, Master Corporal Mullins stated that there was some discussion of what the military police knew about two packages. Sergeant Olive asked him how the chain of command perceived the matter and Master Corporal Mullins replied that it was an investigation and he could not say what the chain of command would do. Master Corporal Mullins said he did not wish to discuss matters further at that point, as both he and Sergeant Olive were tired. Master Corporal Mullins thought that Sergeant Olive seemed very scared. Master Corporal Mullins gave him 20 pages of Queen's Regulations and Orders and paper and a pencil so that Sergeant Olive could make written representations concerning his being kept in military custody. Master Corporal Mullins gave Sergeant Olive some food and left him in cells and went to bed.

[8] The following morning, Master Corporal Mullins conducted an interview with Sergeant Olive. The interview was video and audio recorded to the knowledge of Sergeant Olive. And the recording was admitted into evidence on the *voir dire*. The recording became Exhibit 4 on the trial proper following the ruling on the *voir dire*. A transcript of the interview was provided for the convenience of the court, but was not exhibited. The recording demonstrates that at the time of the interview on the morning of 18 October, Sergeant Olive was alert and apparently well rested. He was cautioned again, as he had been the previous evening, with respect to the evidentiary value of any statement he might make, and was specifically cautioned with a supplementary caution. He immediately and entirely cooperated with Master Corporal Mullins. He answered

the questions put to him responsively and without hesitation. Towards the end of the recording, Sergeant Olive was offered and accepted the opportunity to prepare a hand-written statement on one page, and was left alone for that purpose. Throughout the interaction between the two, as shown on the recording, both parties were polite, respectful, and businesslike.

[9] Sergeant Olive gave evidence in the course of the *voir dire*. He testified that in the SUV vehicle, on the way to the military police facility, Master Corporal Mullins told him that the Canadian Border Services Agency had intercepted the weapons, that they were furious, and wanted to keep jurisdiction over the case, that they considered charges of importation and perhaps trafficking, and that the charges would attract a sentence of 15 years in jail. He testified that Master Corporal Mullins said that he, Mullins, had been fighting the CBSA for jurisdiction and that he, Olive, was lucky that the military kept jurisdiction because if the CBSA dealt with the case it would involve a jail sentence up to 15 years and a criminal record. Master Corporal Mullins stated that the chain of command was looking for his cooperation and that his cooperation would be viewed favourably and the charges would not be so serious. In the vehicle, Master Corporal Mullins showed Sergeant Olive a warrant to search his kit and anywhere that Sergeant Olive lived. He said he had other warrants to search his kit box and his house. Sergeant Olive understood this to be a reference to his home in Sault Ste Marie where he lived with his family. Sergeant Olive testified that Master Corporal Mullins said that if Sergeant Olive cooperated they would only search his kit, but if he did not cooperate they would tear his house apart. Sergeant Olive further testified that he was terrified that the case might be handled by the CBSA authorities and he would face a lengthy term of imprisonment. He thought about his situation and decided to cooperate with Master Corporal Mullins and submit to an interview the following morning because he thought the chain of command would view his cooperation with favour and not hand the investigation over to CBSA authorities. That is why in the course of the interview he told Master Corporal Mullins about the third weapon that they would find at his home in Canada. He knew he was being video and audio recorded and he wanted to appear to be cooperative, but he cooperated only because he believed the case would otherwise be handed over to civilian authorities and so that the investigators would not tear the house apart.

[10] Master Corporal Mullins was cross-examined on the points that were later made by Sergeant Olive in his examination-in-chief concerning their conversation in the SUV vehicle. Master Corporal Mullins testified that he did not recall saying to Sergeant Olive that the CBSA authorities were furious. He stated that he does not recall the details of conversation in the SUV, but stated that he would not say something like that. He does not recall saying that the CBSA wanted to charge Olive with trafficking and he denied telling Sergeant Olive that the maximum penalty would be 15 years in jail if the CBSA held on to the case. He denied saying to Sergeant Olive that if he cooperated the military would hold on to the case and that if he cooperated he would not get a criminal record. He testified that he did not recall whether he showed a search warrant to Sergeant Olive for the house, but states that he did not consider that at that point he had the

grounds to obtain a warrant to search the house. He denied saying to Sergeant Olive that the police can go and tear your house apart.

[11] It is plain and obvious that there are large and important discrepancies between the evidence of Master Corporal Mullins and Sergeant Olive as to what was said to Sergeant Olive by Master Corporal Mullins in the SUV vehicle. On balance, I prefer the evidence of Master Corporal Mullins on the areas where the testimony is conflicting. He impressed me as a conscientious and capable police investigator who was aware of the limits of his authority. At the time he dealt with Sergeant Olive in the SUV, he had only just met him and they were just beginning their interaction. Master Corporal Mullins would have no reason at that point to assume that Sergeant Olive would not cooperate by answering his questions. There was simply no basis at that early stage of their acquaintance for Master Corporal Mullins to assume that Sergeant Olive would not cooperate with his investigation or that the threats or promises that Sergeant Olive attributes to him would be required to secure the cooperation of Sergeant Olive. I have had the opportunity to watch the video recording of the interaction of Master Corporal Mullins with Sergeant Olive over a period of about 40 minutes. Throughout the recording Master Corporal Mullins is a calm, professional and meticulous investigator who demonstrates a scrupulous regard for the rights and interests of Sergeant Olive. This behaviour I find to be markedly inconsistent with the impression that Sergeant Olive leaves of Master Corporal Mullins' statements to him the previous evening in the SUV vehicle. I simply do not accept the evidence of Sergeant Olive as to what occurred in the vehicle.

[12] I do not accept the evidence of Sergeant Olive when he states that Master Corporal Mullins threatened to tear the house apart in the course of executing a search warrant. On the evidence I have heard, there were no reasonable grounds to suppose that another weapon might be found at the residence of Sergeant Olive in Canada until Sergeant Olive mentioned this earlier shipment in the course of the recorded interview the following day. Until that point, a proper search warrant for the house in Canada could not have been obtained. I accept the evidence of Master Corporal Mullins that he did not have a search warrant for the residence at the time he dealt with Sergeant Olive in the police vehicle. Nor do I accept the evidence of Sergeant Olive that Master Corporal Mullins told him the chain of command was looking for his cooperation or the case would be turned over to civilian authorities. In our system of military justice, civilian authorities are always at liberty to exercise their lawful jurisdiction without interference from military authorities. As an experienced military police investigator, Master Corporal Mullins would be aware that the chain of command within the Canadian Forces does not decide whether the CBSA takes over a case. I do not accept the implicit suggestion in the evidence of Sergeant Olive that Master Corporal Mullins abused his authority as a military police investigator by misrepresenting to Sergeant Olive the relationship between civilian and military investigative authorities.

[13] I do not accept the submission of counsel for the defence that Master Corporal Mullins was prepared to do anything to obtain a statement from Sergeant Olive nor do I

accept the submission that Sergeant Olive was retained in custody for the purpose of making him more compliant with the police request to give a statement.

[14] In summary, I do not accept the evidence of Sergeant Olive as to the threats and promises that he states were made in the course of the conversation that took place in the SUV nor does his evidence on these points raise a reasonable doubt in my mind. On the contrary, I am satisfied beyond a reasonable doubt that the statements made by Sergeant Olive, both oral and written, on the morning of 18 October, were freely and voluntarily made to Master Corporal Mullins and the statements were accordingly admitted into evidence.

[15] The prosecution at court martial as in any criminal prosecution in a Canadian court assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed, the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes by evidence that the court accepts the guilt of the accused beyond a reasonable doubt. Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt and the accused must therefore be found not guilty. Indeed the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt. But reasonable doubt is not a frivolous or imaginary doubt, it is not something based upon sympathy or prejudice; it is a doubt based upon reason and common sense that arises from the evidence or the lack of evidence. The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[16] The rule of reasonable doubt applies to the credibility of witnesses. Arriving at conclusion as to the facts of the case is not a process of preferring one version given by one witness over the version given by another. The court may accept all of what a witness says as the truth or none of what a witness says, or the court may accept parts of the evidence of a witness as truthful and accurate. If the evidence on behalf of the accused as to the issues or the important aspects of the case is accepted, it follows that he is not guilty of the offence. But even if the evidence on his behalf is not accepted if the court is left with a reasonable doubt, he is to be found not guilty. Even if that evidence does not leave the court with a reasonable doubt, the court must still look at all the evidence it does accept as credible and reliable to determine whether the guilt of the accused is established beyond a reasonable doubt.

[17] There are several elements of the offence charged in the first and only charge in this case, some of which are not really in issue. I am satisfied that the date and place of

the offence charged are established beyond a reasonable doubt, and the identity of Sergeant Olive as being the offender is not in dispute. Nor is it disputed that he mailed the specified items to his home address in Sault Ste Marie from Kandahar. All of these matters are established in the course of the written and oral statements that Sergeant Olive made to Master Corporal Mullins. In those statements to Master Corporal Mullins I accept that Sergeant Olive was speaking the truth. As well, the prosecution must, of course, establish that the conduct of the offender was to the prejudice of good order and discipline. The prosecution called no evidence as to the effect of the charged conduct upon good order and discipline. But in order to establish this element of the offence, the prosecution relies on subsection 129(2) of the *National Defence Act* which provides in its relevant part as follows:

... [A] contravention by any person of

...

- (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof ...

...

is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[18] In the present case, the prosecution now argues that the conduct of the offender violated an order; that is, Theatre Standing Order 108. Two versions of this instrument are in evidence as Exhibits 6 and 7. This reflects minor changes that were made to this instrument effective 15 September 2010. I am satisfied on the basis of the documentary evidence, Exhibits 8 and 9, that the accused sent the two parcels to Canada prior to 15 September 2010, and accordingly, as a member of Task Force Afghanistan at the time of the importations, he was subject to the version of the TSO 108 in effect prior to that date. Exhibit 6, TSO 108 is headed "Task Force Afghanistan Theatre Standing Order (TSO) 108 Artifacts/Trophies of War". The purpose of this order is stated in paragraph 1 as follows:

"The purpose of this TSO is to promulgate policy and procedures pertaining to the acquisition or collection of war souvenirs or memorabilia."

Paragraph 3 states that the Commander's intent is:

"To deter TFA members from collecting potentially dangerous and/or illegal items for use in theatre, or for importation into Canada."

And as a general policy, paragraph 4 states:

"Members of TFA shall not purchase, accept as a gift or otherwise acquire firearms, ammunition, military equipment, other such military artefacts or trophies of war except as permitted below."

Paragraph 8 is headed "Exceptions" and reads as follows:

"In accordance with reference A, Chapter 28.63 and reference B, paragraph 1306, it is possible for artefacts or trophies of war including weapons, inert ammunition and/or accoutrements to be imported for museum collections or as mess artefacts. Authority for importation requires the approval of NDHQ DCDS through COS J3. No staffing of an importation request shall occur without the approval of the Comd TFA. Comd TFA will only grant approval when it can be proven that the donor is in fact the rightful owner of the article in question, and that its intended destination in Canada is one permitted under the applicable regulations. The TFA OPI for the repatriation of artefacts and/or war trophies is TFA HQ G1."

[19] Counsel for the accused argues that the prosecution has not established that the accused violated TSO 108 by mailing these items to Canada. But even if he did contravene the order, the prosecution has not established the mental element of the offence charged; and that is, to establish that he knew of the order at the time he sent the items to Canada; that is to say, that he didn't know that what he was doing was wrong because it violated the order. As to the first submission, I am satisfied that the conduct of the accused in sending these items by mail to Canada is within the terms of TSO 108. I have no doubt that the weapons in question are artefacts or war trophies as contemplated by TSO 108. Sergeant Olive seems to have agreed with this view, himself, in the course of his conversation with Master Corporal Mullins. As well, in his statements to Master Corporal Mullins, Sergeant Olive stated that he and a colleague wished to acquire items like the weapons he sent to Canada for use as Mess artefacts at their home unit.

[20] Defence counsel submitted that the items in question were not "potentially dangerous and/or illegal" and were therefore outwith the reach of the TSO. I do not accept this submission. I conclude that the intent of the Commander as expressed in paragraph 3 should not be read to restrict the expansive language of the prohibitions created in paragraph 4. Paragraph 8 of the TSO 108 specifically contemplates that war trophies and artefacts such as the weapons in this case may be imported into Canada provided that approval is given. It is an agreed fact that at no time did Sergeant Olive seek authorization or approval to import these items into Canada and at no time was any approval given for either of the importations. I am therefore satisfied beyond a reasonable doubt that the conduct of Sergeant Olive in importing these items into Canada by mail without approval was contrary to TSO 108.

[21] As to the mental element of this offence, I agree with the submission of defence counsel that the prosecution must prove that Sergeant Olive knew he was acting in contravention of orders when he mailed the weapons to Canada. A close study of the recorded conversation between Master Corporal Mullins and Sergeant Olive and a reading of the short written statement made at the same time by Sergeant Olive satisfies me beyond a reasonable doubt that Sergeant Olive knew at the time that he was acting in contravention of orders. In answer to Master Corporal Mullins' open-ended questions Ser-

geant Olive stated that he agreed with another member to send similar items; that is to say, weaponry that had been rendered inoperable to Canada by mail. He states during the interview: "We knew what we were doing, we discussed it beforehand." And later: "Him and I were talking about trying to do something for our messes, like, you know, Reg Force units, they get to take home war trophies and that kind of thing. And him and I would talk about if there's something that we could do, to do something nice for our messes and our respective units back home." At a later point, Master Corporal Mullins says: "So, basically, you guys knew that there is a TSO and you know that you are not allowed to collect" and Sergeant Olive answered: "Correct." Later still, Master Corporal Mullins referred to the approval process required under the TSO. He stated to Sergeant Olive "There is a process in place where if you would have taken that weapon to the ammo techs, they would have certified it being free of any radiation and free, like, they would give you a piece of paper, certificate, saying this thing is inoperable and following from there any need to get permission. Even with that done, you still need to get permission from the J4 to ship them back to Canada, and he has to be aware of serial numbers and the whole nine yards. So you were aware of that?" and Sergeant Olive answered: "Yes." As well, Sergeant Olive was explicit as to his state of mind at the time of the importations when he wrote in his written statement, Exhibit 5: "I was aware of the orders not to send war trophies home, but honestly believed that I took the right steps to make these guns inactive and harmless." It is clear that Sergeant Olive thought that the modifications that were made to render the weapons inoperable resulted in them no longer being considered a weapon, but I am satisfied that there was no reasonable basis upon which Sergeant Olive could conclude, nor did he conclude, that the modifications made to the weapons made the TSO inapplicable so that the weapons could be imported into Canada without the approvals required by TSO 108. Sergeant Olive knew he had not obtained approval to send these items to Canada and he knew at the time that approval was required.

FOR THESE REASONS, THE COURT:

[22] **FINDS** the accused guilty of the first and only charge.

Counsel:

Captain R.D. Kerr, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander P.D. Desbiens, Directorate of Defence Counsel Services
Counsel for Sergeant R.R. Olive