Citation: *R. v. Master Corporal R.E. Barkley*, 2006 CM 23

Docket: 200623

STANDING COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO

Date: 21 March 2006

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL R.E. BARKLEY
(Accused)

DECISION PURSUANT TO QR&O 112.05(13)
NO *PRIMA FACIE* CASE APPLICATION
(Rendered orally)

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[1] The defence has made an application pursuant to paragraph 112.05(13) of the QR&Os that the prosecution has failed to make out a prima facie case with regard to the charge. Notwithstanding Note (B) to paragraph (13) of QR&O 112.05, the court is bound to apply the legal principles that have been developed in common law as it relates to motions for dismissal or non-suit at the end of the Crown's case on the basis that the Crown has not presented a *prima facie* case; that is, a case containing evidence on all essential elements of the charge that, if believed by the trier of fact and unanswered, would warrant a conviction.

[2] A motion of non *prima facie* at the close of the prosecution's case must be distinguished from a request for an acquittal. The latter argument accepts that there may be some evidence upon which a jury, properly instructed, might convict, but proposes that the evidence is insufficient to establish a guilt beyond a reasonable doubt.

[3] Since the concept of reasonable doubt is not called into play until all the evidence is before the trier of fact, reasonable doubt cannot be considered until the trial judge has

decided that there is some evidence on each essential element on the motion for non-suit and has called upon the accused to elect whether to call evidence.

[4] 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 the charge so that a reasonable jury, properly instructed, could convict. Not would, or should, but simply could convict.

[5] In *R. v. Arcuri* (2001), 157 C.C.C. (3d) 21, the Supreme Court of Canada refined the test to be followed in determining if a *prima facie* case has been met, whether the prosecution's case relies on direct or circumstantial evidence. In a nutshell, the Supreme Court held that the test is the same, whether the evidence is direct or circumstantial.

[6] This test is as follows: Whether or not there is any evidence upon which a reasonable jury, properly instructed, could return a verdict of guilty. The application of this test varies according to the type of evidence in the Crown's case. Where a Crown's case is based entirely on direct evidence, application of the test is straightforward. If the judge determines that the Crown has presented direct evidence as to every element of the 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, does the inference to be drawn from it propose 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 its credibility. The issue is only whether the evidence, if believed, could reasonably support an inference of guilt.

[7] In this case, the essential elements of the charge are: first, the identity of the accused, Master Corporal Barkley; second, the date and the location of the offence as alleged in the particulars, and that is on or about 21 May 2005 at or near Sennybridge Road, in Shilo, Manitoba; and the third element is that Master Corporal Barkley was drunk. For the purposes of the offence of drunkenness under section 97 of the *National Defence Act*, you must keep in mind that, according to subsection (2) of section 97:

> ... [T]he offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug,
>
> (*a*) is unfit to be entrusted with any duty that the person is or may be required to perform; or
>
> (*b*) behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

And, finally, the last element of the offence is that the accused has the requisite intent or blameworthy state of mind at the time of the alleged offence, which has been referred to by the defence counsel as the *mens rea*.

[8] So we must keep in mind that the offence of drunkenness is not made or is not made out when there is evidence that the person was intoxicated, that's not the offence. The offence has to be in the context of subsection (2).

[9] In this case, the evidence lies on the testimony of Corporal Woods, Corporal Durnford and Master Seaman Farrel, all members of the military police who attended at Master Corporal Barkley's residence during the early hours of 21 May 2005, on or after receiving noise complaints. The first occurrence occurred at approximately 0243, and involving the two corporals, and Master Seaman Farrel went with those same military police persons an hour, or approximately an hour later, as a result of a second complaint.

[10] There's ample evidence that people were having a party in Master Corporal Barkley's residence backyard and that there was alcohol being consumed. There's clear evidence that this party caused a significant level of disturbance because the music level emanating from the accused's vehicle, which was parked in the driveway, as well as the activities of the attendees, also were disturbing for neighbours or close residents. However, Master Corporal Barkley has not been charged with causing a disturbance, or he has not been charged with any by-laws or standing orders that would relate to the violation of peaceful enjoyment of one's place or premises because of disrespectful neighbours making excessive noise. He has been charged with drunkenness in the context of section 97 of the *National Defence Act*. There's no evidence that he was required to perform any duty at the time or that he would have been required to do so on 21st of May, 2005, which was a Saturday. This is the reason why the prosecution is relying on the proposition that the accused's conduct falls within the ambit or in the context of paragraph 97(2)(*b*), which reads:

> (*b*) behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[11] Defence counsel made comments about the lack of evidence as it relates to the *mens rea* of the offence linked to the voluntary consumption of alcohol by the accused. His argument on that basis, or on that subject, is not valid. There's evidence that the person was intoxicated, and looking at the circumstantial evidence the court is satisfied that there is some evidence on which a jury, properly instructed, could infer that his intoxication was voluntary. But the court, based on that same evidence, is not satisfied, taking a best case scenario for the prosecution, that a well-informed and properly instructed jury could reasonably infer that Master Corporal Barkley's behaviour was disorderly or likely to bring discredit on Her Majesty's service, and that is was owed to his level of intoxication by alcohol. He was certainly aggressive towards Corporal Woods, in particular for Corporal Woods' refusal to provide him with his name and credentials. He was certainly unhappy and aggressive about having to deal with or to be the subject of noise complaints. He may have acted in a manner that was disrespectful to the policemen. But, in the context, he was also very upset as he was convinced that the military police were violating his rights because they didn't have a search warrant to enter his property, whether the fact that this was right or wrong would be irrelevant at this stage. So he may have used disrespectful language, but in the context of what he perceived to be an abusive conduct by the military police.

[12] Overall, he was coherent, despite the fact that he was under the influence of alcohol. As I said, the charge of drunkenness requires more than being intoxicated, it must be linked to the requirements set out in subsection 97(2), which has not been proven here. So for these reasons the court finds that the prosecution has not established a *prima facie* case for its failure to provide evidence under (2)(*b*), 97(2)(*b*), not as it relates to the influence of alcohol or the consumption of alcohol, but as it relates to the behaviour in a disorderly manner or in a manner to bring discredit on Her Majesty's service.

[13] Master Corporal Barkley, stand up. The court finds you not guilty of the charge.

LIEUTENANT-COLONEL M. DUTIL, M.J.

COUNSEL

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