

Citation: *R. v. Corporal C.P. Griffin*, 2007 CM 3007

Docket: 200702

**STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
HALIFAX**

Date: 1 March 2007

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

HER MAJESTY THE QUEEN

v.

CORPORAL C.P. GRIFFIN

(Accused)

FINDING

(Rendered orally)

INTRODUCTION

[1] Corporal Griffin is charged under section 83 of the *National Defence Act*, to wit, disobeyed a lawful command of a superior officer, and alternatively, he is charged under section 90 of the *National Defence Act*, to wit, absented himself without leave.

[2] The facts on which the two counts are based relate to events that took place from 1 to 3 February 2005 in Halifax, at the unit of 30 Military Police Company.

THE EVIDENCE

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

The testimonies heard in the order of their appearance before the court, the testimony of Sergeant Coté, Major Campbell, and ex-Sergeant Gravel;

Exhibit 3, the route letter for Corporal Griffin's Class B service for the period from 1 September 2004 to 31 March 2005, and Corporal Griffin's statement on the same subject. This document was entered in evidence by consent;

Exhibit 4, a copy of CANFORGEN 053/02 concerning modifications to CF leave policy. This document was also entered in evidence by consent;

The judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

The facts

[4] The facts involved in this case thus relate to a series of events that took place in Halifax and Shearwater between 1 and 3 February 2005. On 1 September 2004, Corporal Griffin, a member of the 30 Military Police Company, started his Class B service as a recruiting non-commissioned member, NCM, for that unit. He was employed by his unit on a full time basis in this occupation until 31 March 2005, as stated in the route letter, Exhibit 3. His direct supervisor was, during that time, Sergeant Gravel, employed three days a week at the same unit. The personnel employed during the day at the unit was under the responsibility of Lieutenant (N) Campbell, as he was then, a Regular Force officer being in the Operation's Officer position, and in the Deputy Commanding Officer's position at the unit.

[5] At that time, the unit was operating in two locations: the main one was in Shearwater, where Lieutenant (N) Campbell had his office; the other one was in Lower Sackville, where Corporal Griffin was. By the nature of his functions, Sergeant Gravel had to work and travel between the two locations. On 27 January 2005, Corporal Griffin asked Sergeant Gravel if he could take some time off on 1 February 2005 in order to attend or coach a basketball team game. Sergeant Gravel passed the request to Lieutenant (N) Campbell, who denied it because he needed Corporal Griffin to perform his usual function as a recruiter on that day.

[6] On 1 February 2005, at approximately 0645 hours, Sergeant Gravel received a call at home from Corporal Griffin. The latter informed him that he was sick, and asked if he could stay home. Sergeant Gravel authorized him to do so. However, before finishing the conversation, Corporal Griffin asked Sergeant Gravel if he needed a medical chit. Sergeant Gravel responded by telling him that he thought that it was probably not necessary. As soon as he arrived in the morning at the unit in Shearwater, Sergeant Gravel informed Lieutenant (N) Campbell about the conversation he had with Corporal Griffin, and that the latter would stay at home for a day. Lieutenant (N) Campbell ordered, right away, to Sergeant Gravel to call back Corporal Griffin and

order him to report to the MIR in Stadacona to be checked out by a doctor. Sergeant Gravel called back Corporal Griffin at home, and told him that he had to report to the MIR, and that a medical chit was necessary. Then Corporal Griffin requested the permission to report to his civilian doctor because it was closer than the MIR in Stadacona. Sergeant Gravel agreed that he sees his civilian doctor because that request made sense to him; however, he specifically ordered Corporal Griffin to bring him back a medical note from the civilian doctor on 2 February 2005. The main idea of this order was that it would be proven that Corporal Griffin saw a doctor, and that he was sick enough to not perform his work that day.

[7] However, according to Major Campbell's testimony, he was informed later, on the morning of 1 February, by Sergeant Gravel, that authorisation was given to Corporal Griffin to go see his civilian doctor. According to him, it is him that instructed Sergeant Gravel to call back Corporal Griffin in order that he brings back a doctor's chit to prove that he had seen a doctor that day. He also told the court, that later that same day, Sergeant Gravel confirmed to him that the message was passed to Corporal Griffin.

[8] On 2 February 2005, Corporal Griffin was at work at the usual time. First thing in the morning, Sergeant Gravel asked him if he had the medical note. Corporal Griffin replied that he did not have the medical note, even though he tried and couldn't get a medical appointment with his civilian doctor. Then, Sergeant Gravel told him that it was imperative that he sees a doctor, that he brings a medical note. He told him that he wanted the note on 3 February 2005, giving him a second chance to comply with the order.

[9] According to Major Campbell's testimony, he was informed by Sergeant Gravel, on 2 February 2005, that Corporal Griffin met his doctor, but he also had to return to retrieve the chit from his civilian doctor. In his testimony, Sergeant Gravel mentioned that he informed Lieutenant (N) Campbell, as it was then, about the fact that Corporal Griffin did not provide a medical note; however, he was unable to recall if he mentioned anything to Lieutenant (N) Campbell about the fact that Corporal Griffin saw his doctor or not on 1 February 2005.

[10] At the beginning of the afternoon of 3 February 2005, Lieutenant (N) Campbell asked Sergeant Gravel if he received a medical note from Corporal Griffin. He answered that he could not respond in a way or another because he had not talked, yet, to the corporal that day. Then, Lieutenant (N) Campbell called directly Corporal Griffin at his work, and found out that he had not seen a doctor on 1 February 2005, and that he was unable to provide a medical note as ordered. Corporal Griffin's sergeant major was informed about what transpired about that situation, and an investigation was conducted.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGES

[11] Section 83 of the *National Defence Act* reads as follows:

83. 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.

[12] Then, the prosecution had to prove the following essential elements for this offence 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 Griffin and that it was lawful, that Corporal Griffin received or knew the order, the fact that Corporal Griffin was given the order by a superior officer and that this status was known by him, the fact that Corporal Griffin did not comply with the order, and finally, the blameworthy state of mind of Corporal Griffin.

[13] Section 90 of the *National Defence Act* reads, in part, as follows:

90. (1) Every person who absents himself without leave is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

And at subparagraph (2):

- (2) A person absents himself without leave who
- ...
- (b) without authority is absent from his place of duty ...

[14] For this alternative offence, the prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove, also, the identify of the accused and the date and place as alleged in the charge sheet; the prosecution also had to prove the following additional elements, the fact that Corporal Griffin knew, or should have known, where and when the duty took place, that Corporal Griffin was absent and the length of the absence, and that the absence was not authorized.

[15] 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.

[16] 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.

[17] 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.

[18] 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.

[19] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles layed out in *Lifchus* have been applied in a number of Supreme Court and Appellate Court 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 only charges that are faced by an accused person are those that appear on the charge sheet before a court.

[20] In *R. v. Starr*, [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court 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 Corporal Griffin, 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.

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

[22] 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.

[23] 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.

[24] 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?

[25] 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.

[26] 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.

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

ANALYSIS

[28] First, the court has to deal with the first charge in the charge sheet. It is only if the court found Corporal Griffin not guilty of the first charge that, then, alternatively, it will proceed to the analysis of the second charge. It does mean that this court will first determine if Corporal Griffin is guilty or not of having disobeyed a lawful command of a superior officer. The identity of the accused, the date, the place, the fact that the order was given to the accused by a superior officer, are essential elements that are supported by uncontradicted evidence, and the court is satisfied that it was proved beyond a reasonable doubt.

[29] Concerning the order given, the court finds credible and reliable the testimony of ex-Sergeant Gravel on that issue. A minor discrepancy appeared between Major Campbell's and ex-Sergeant Gravel's testimonies on the number of conversations they had on 1 February, concerning the manner to deal with the absence of Corporal Griffin. However, there is no such matter concerning the substance of their conversation, and more important, they both confirmed the substance of the order given to Corporal Griffin. Because of the particulars of the charge, it is the testimony of ex-Sergeant Gravel that matters for the court because he is the one who allegedly gave the order to Corporal Griffin.

[30] Based on the evidence as a whole, the court is satisfied beyond a reasonable doubt that a clear order was given on 1 and 2 February 2005, to Corporal Griffin, by a superior officer, Sergeant Gravel; that the order was well received and known by the accused. Additionally, the court is satisfied beyond a reasonable doubt that the order given was for Corporal Griffin to provide a medical note to his direct supervisor in the morning of 2 February 2005, and subsequently, before 3 February 2005, in order to confirm that he saw a doctor and he was sick.

[31] In the context described to the court, it is loud and clear that the order was lawful. Nothing precludes a superior officer to exercise his discretionary power, including the wording of QR&O article 16.16, which mirrored CANFORGEN 053/02, Exhibit 4, when he has a doubt about the incapacity of a soldier to perform his or her military duty, to request a medical opinion when the welfare and the health of a military member is involved, nor is the request to provide with an evidence to that effect. Finally, the court is satisfied beyond a reasonable doubt that Corporal Griffin never complied with the order he received from Sergeant Gravel. Even though it was mentioned that he tried to carry out the order, the court considers that it is more than reasonable to think that it was not impossible to fulfil it.

[32] Now, the court would like to address the nature of the medical note described in the particulars of the first charge, in comparison to the evidence that was brought before this court on the same issue. It appears from the particulars of the first

charge that the accused is charged with the fact that he allegedly, "failed to provide a medical note confirming that a medical doctor had treated him." It means, in other words, if a doctor gave him medical care or attention. As stated above, the uncontradicted evidence put before the court disclosed that Corporal Griffin was ordered to provide a medical note in order to establish that he saw a doctor, and that he was really ill, not that he received medical care or attention. For the court, it appears that the fact proved differs materially from the fact alleged on that specific issue in the statement of particulars, but it is sufficient to establish the commission of the offence charged. Additionally, the court finds that the difference has not prejudiced the accused in his defence.

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

[34] Additionally, having regard to the findings 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 is satisfied that the prosecution has discharged its burden of proof by establishing, beyond a reasonable doubt, the fact that the accused did not comply with the order he received from Sergeant Gravel.

DISPOSITION

[35] Corporal Griffin, stand up. This court is making a special finding for the reasons mentioned above, and it finds you guilty of the first charge. Consequently, this court directs that the proceedings be stayed on the second charge.

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

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