COURT MARTIAL

Citation: *R v Courneyea*, 2012 CM 4013

Date: 20120618
Docket: 201153

Standing Court Martial

Canadian Forces Base Edmonton
Edmonton, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Corporal J.H. Courneyea, Accused

Before: Lieutenant-Colonel J-G Perron, M.J.

REASONS FOR FINDING

(Orally)

[1] Corporal Courneyea is accused of assault with a weapon, of pointing a firearm, and of uttering threats. Defence counsel argues that three issues are at the heart of this case: firstly, whether Corporal Courneyea acted voluntarily at the time of the alleged offences; secondly, if Corporal Courneyea acted voluntarily at the time of the alleged offences, whether he actually pointed a weapon at Corporal Kehler; and finally, if he acted voluntarily at the time of the alleged offences, whether he had the necessary *mens rea* for charges 1 and 3. Defence counsel argues Corporal Courneyea should be found not guilty of charge No. 2 and not criminally responsible on account of mental disorder of charges Nos. 1 and 3.

[2] The prosecutor has argued the evidence clearly proves every element of these offences. She also argued the evidence does not prove that Corporal Courneyea was unable to appreciate the consequences of his acts or omissions at the time of the alleged offences. She also concurred that he should be found not criminally responsible on ac-

count of mental disorder should the court decide Corporal Courneyea's actions were involuntary.

[3] Before this court provides its analysis of the evidence, of the issues to be determined, and of the charges, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Although these principles are well known to counsel, other people in this courtroom maybe be less familiar with them.

[4] It is fair to say that the presumption of innocence is most likely 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 with cases dealt under Canadian 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 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.

[5] 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.

[6] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence.

[7] In *R v Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart 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, 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 evidence tells the court, but 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.

[8] In *R v Starr*, [2000] 2 S.C.R. 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.

[9] 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 Courneyea, 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.

[10] 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.

[11] It is not unusual that some evidence presented by the court may be contradictory. Often witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[12] 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. 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 that accused chooses to testify.

[13] 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.

[14] The evidence before this court martial is composed essentially of the following: judicial notice, exhibits, and the testimony of witnesses. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. One exhibit was produced by the prosecution and defence presented two exhibits. The prosecution presented three witnesses during the trial, namely: Corporal Kehler, Corporal Pinard, and Corporal La Bastille. Corporal Courneyea, Corporal Geernaert, Sergeant McGarity, Warrant Officer Connauton, Master Corporal Ellis, and Dr Girvin were called to testify by defence counsel.

[15] It is clear from the evidence that Corporal Courneyea, Corporal Kehler, Corporal Pinard, and Corporal La Bastille were members of the Mission Closure Unit at Kandahar Airfield at the time of the alleged offences. On 15 July 2011, personnel of that unit went for lunch at one of the camp dining facilities. They were waiting for a

bus after lunch when the incident occurred. Corporal Kehler was kicking sand onto his boots to cover the oil and was creating a cloud of dust. Corporal Pinard and Corporal Courneyea would have told Corporal Kehler to stop kicking sand or words to that effect, such as "Way to go." Corporal Kehler would have done it again. Corporal Courneyea would then have said, "Stop or I'll shoot you" or "Stop or I'll kill you." Corporal Kehler then kicked some sand at Corporal Courneyea. Corporal Courneyea put a magazine on his C7, cocked the C7, and held it with the barrel pointing towards the ground at the feet of Corporal Kehler. Corporal Pinard testified Corporal Courneyea did not have his finger on the trigger. Corporal Kehler yelled at Corporal Courneyea and he then unloaded his C7. Corporal Kehler testified Corporal Courneyea had a blank look on his face at the moment and that he looked dazed. Corporal La Bastille testified that he could not say if Corporal Courneyea was angry or joking because he had a straight face, but he did indicate that Corporal Courneyea was "not acting as he knew him." He did not perceive Corporal Courneyea as a threat at that moment. They then all took the bus to return to work.

[16] The particulars of the first charge read as follows: "In that he, on or about 15 July 2011, at or near Kandahar Airfield, Afghanistan, did in committing an assault upon Corporal Kehler, A.R., use a weapon to wit a C7 rifle." The prosecution alleges that Corporal Courneyea committed the assault by threatening to apply force to Corporal Kehler and that he had the ability to apply the force. The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

(a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;

(b) that Corporal Courneyea threatened to apply force to Corporal Kehler;

(c) that Corporal Courneyea had the ability to carry out the threat;

(d) that Corporal Kehler did not consent to the force that Corporal Courneyea applied or threatened to apply;

(e) that Corporal Courneyea knew that Corporal Kehler did not consent; and

(f) that Corporal Courneyea carried or used a weapon.

[17] The identity of the offender and the time and place of the offences are not contested by defence counsel. It is not contested that the C7 is a firearm. The evidence before this court also proves these elements of the offences beyond a reasonable doubt.

[18] Did Corporal Courneyea threaten to apply force to Corporal Kehler? Corporal Courneyea put a magazine on his C7, cocked his C7, and pointed his C7 to the ground in front of Corporal Kehler. He did this after he had told Corporal Kehler he would shoot him or kill him if Corporal Kehler did not stop kicking dust and after Corporal Kehler had kicked dust on Corporal Courneyea.

[19] It is a fundamental principle of our criminal law that a person is not criminally responsible for his or her actions unless those actions were voluntary. Thus if a person's consciousness was so impaired that he or she had no voluntary control over his or her conduct, that person cannot be held criminally responsible for that conduct.

[20] The law presumes that when people act they are acting voluntarily. If an accused person claims that his or her actions were involuntary because of impaired consciousness at the time of those actions, the law places the burden on that accused person to prove on a balance of probabilities that his or her act were in fact involuntary. "Proof on a balance of probabilities" means that it is more likely than not that the actions of Corporal Courneyea in threatening to use force were involuntary. If the court finds those actions were involuntary then Corporal Courneyea cannot be found guilty of that offence.

[21] Corporal Courneyea has presented evidence that raises the defence of automatism. He has to convince the court on a balance of probabilities that he was in a state of automatism at the time of the incident. "Automatism" means a state of impaired consciousness in which an individual is capable of performing physical actions, but because of his or her impaired consciousness, that person has no voluntary control over that action. In other words, the conscious mind of the person is not in control of his or her actions.

[22] In deciding whether Corporal Courneyea has established on a balance of probabilities that his actions were involuntary due to an impaired state of consciousness, the court must keep in mind two general factors. First, the concern that it is relatively easy for an accused person to claim that he was in a dissociative state at the time of the alleged offence; second, the concern that the credibility of our criminal justice system will be strained if accused persons are routinely acquitted based on a claim that they were in a state of automatism at the time of their actions. However, notwithstanding these concerns, if the evidence accepted by the court convinces the court on a balance of probabilities that Corporal Courneyea's conduct was involuntary due to an impaired state of consciousness, the court must not find him guilty.

[23] Corporal Courneyea testified he has no recollection of the incident; thus he is in effect saying that he did not voluntarily load and cock his C7. This incident occurred during Corporal Courneyea's second tour of duty in Afghanistan.

[24] Corporal Courneyea was employed as the driver of a tank during his first six-month tour in Afghanistan in 2009. The driver is seated in the bottom portion of the tank, by himself. His tank struck an improvised explosive device (IED) on two different occasions during that tour, on 29 April and 4 August 2009. He described these IED strikes. His 70 ton tank was lifted off the ground by about four or five feet. While he was not physically injured except for some minor injuries, he is suffering from PTSD as a consequence of these IED strikes. He described the chaos that ensued and more precisely how his immediate breathing space was filled with smoke, dust, and halon gas.

He also described how his tank mates were injured; some had fractured legs, collapsed lungs, and compressed vertebrae. Warrant Officer Connauton, Sergeant McGarity, and Corporal Geernaert also described the IED strikes. Corporal Geernaert confirmed that it was very dusty after the blast and difficult to breathe. Sergeant McGarity also testified the tank was full of smoke, dust, and sand after the blast. Warrant Officer Connauton testified the tank was filled with dust and halon gas after the blast and that one could not see through this dust.

[25] Following his return to Canada in 2009, he had trouble sleeping, he did not associate with people as he used to, he did not want to be in crowds, and felt more anxious. He did not want to drive a tank and he became an armoured recovery vehicle driver. He did not report these issues after his first deployment and was not treated.

[26] Corporal Courneyea testified that he felt frustrated during the few days that preceded the 15 July incident because he was working long hours in hot, dirty, and dusty conditions. His sleep was interrupted and he only slept four to six hours a night. He was feeling rundown on 15 July 2011. Corporal Pinard also testified that Corporal Courneyea's attitude changed a few days before the incident. He stated Corporal Courneyea looked tired, angry, and frustrated, and that he seemed to be having a bad day on 15 July.

[27] Corporal Courneyea testified he was annoyed with Corporal Kehler because he was causing an excessive amount of dust. It was windy and the dust was coming at him. He testified that he does not remember saying anything or doing anything after Corporal Kehler moved in his direction. He does not remember any flashbacks. He was scared and anxious after the incident. He testified that he had three previous incidents of blacking out before the 15 July incident.

[28] Dr Girvin is a psychiatrist. She testified as an expert witness on the field of Post-Traumatic Stress Disorder (PTSD). She was Corporal Courneyea's psychiatrist during the period of September 2011 to March 2012. She first met Corporal Courneyea on 29 September 2011 and she diagnosed him as suffering from mild and chronic PTSD as well as from mild symptoms of major depressive episode. The IED strikes in 2009 are the cause of his PTSD. She testified that he was suffering from PTSD at the time of the 15 July incident.

[29] Dr Girvin testified that at the time of the 29 September interview with Corporal Courneyea she did not think he was truthful when he was asserting he could not remember the 15 July incident. She did not believe he did not recall saying the words, thus this created some doubts in her as to whether he was truthful about having no memories of loading his C7.

[30] She testified that she thought it was more likely than not that he was not in a dissociative state when he would have uttered the threats and she thought it was unlikely, but possible he was in a dissociative state when he loaded and cocked his C7. She explained why she had come to these conclusions based on the more complex mental pro-

cess of saying words compared to a more basic mental process of performing a routine task.

[31] She expressed some uncertainty about her opinion concerning the dissociative state when handling the C7 and stated she would need more information on how Corporal Courneyea appeared and acted from the people who were present at the time of the incident. She stated it could be possible he was in a dissociative state.

[32] She stated she had no reason to disbelieve Corporal Courneyea when he described his symptoms and the memory lapses he had had before the 15 July incident and she explained why she believed him. She explained she did not think he was in a dissociative state at the time of the incident because he had not reported any heightened anxiety or any flashback or intrusive memory. She also based her opinion on the fact that the 15 July incident was not similar to the three previous incidents.

[33] She did agree that one does not need to experience heightened anxiety to become dissociated and that one could have an intrusive memory or flashback and not remember it. A stimulus may cause a flashback or intrusive memory and dust could have caused Corporal Courneyea to have an intrusive memory. She also agreed that a lot of dust could have caused a dissociative episode since it would have reminded Corporal Courneyea of the IED blast. She referred to the fact that Corporal Courneyea had been bullied when he was younger and that the approach of Corporal Kehler could have precipitated a dissociative episode. She agreed that dissociative episodes do not have to be consistent and that having previous episodes of dissociation can elevate the risk of having a dissociative episode. She felt that the PTSD had set the stage for his behaviour. The combination of sleep deprivation and hyper vigilance to threats caused by PTSD could be a trigger to irritability or anxiety. The sleep deprivation would have made him more irritable and the PTSD would have made him react more impulsively because of his heightened perception of threat.

[34] Corporal Kehler was closest to Corporal Courneyea at the time of the incident. He testified that Corporal Courneyea seemed dazed and had a blank look on his face. Corporal La Bastille could not say if Corporal Courneyea was angry or joking because he had a straight face. This incident involving the handling of the C7 lasted but a few seconds.

[35] A trial judge must first conclude that there is evidence to establish a proper foundation for the defence of automatism. The trial judge must examine the psychiatric or psychological evidence and inquire into the foundation and nature of the expert opinion. The trial judge will also examine all other available evidence. Relevant factors may include: the severity of the triggering stimulus, corroborating evidence of bystanders, corroborating medical history of automatistic-like dissociative states, whether there is evidence of a motive for the crime, and whether the alleged trigger of the automatism is also the victim of the automatistic violence. No single factor is meant to be determinative (see *R v Stone*, [1999] 2 SCR 290, at paragraph 192).

[36] Dr Girvin's expert medical opinion is helpful, but is also inconclusive in determining whether Corporal Courneyea was in a dissociative state when he loaded his weapon. She indicated she needed more information concerning Corporal Courneyea's behaviour at the time of his handling of the weapon to form an opinion and she stated he could have been in a dissociative state at that time.

[37] There is no doubt the two IED strikes had a devastating effect on Corporal Courneyea. The kicking of a large amount of dust can represent a significant stimulus for Corporal Courneyea. Dr Girvin did agree that a lot of dust could have caused a dissociative episode since it could have reminded Corporal Courneyea of the IED blast. Corporal Kehler's description of Corporal Courneyea indicates that Corporal Courneyea was in a daze when he was holding his C7. Corporal Courneyea did experience dissociative episodes in the past. While the events of 15 July appear to be quite different from his past dissociative experiences, Dr Girvin did not categorically state that dissociative episodes had to be consistent.

[38] There is no motive for these actions. Corporal Courneyea was on friendly terms with Corporal Kehler before the incident. The general mood of the group was friendly. An absence of motive will generally lend plausibility to a claim of involuntariness. The Supreme Court of Canada based this factor on the proposition that since the mind and body of a person in a dissociative state have been split; one would expect that there would usually be no connection between involuntary acts done in a state of automatism and the social context immediately preceding them (see *R v Stone*, at paragraph 191).

[39] Corporal Kehler is the alleged victim of this offence. He is also the person who was creating the dust. When a single person is the trigger of the alleged automatism and the victim of its violence, the claim of involuntariness should be considered suspect. On the other hand, if the involuntary act is random and lacks motive, the plausibility of the claim will be increased. A question the trial judge must ask is whether or not the crime in question is explicable without reference to the alleged automatism. If this question can be answered in the negative, the plausibility of the claim will be heightened. An example is where there was no explanation for why the accused would attack the victim with whom he otherwise had a good relationship. In contrast, if this question invokes a positive response, the plausibility of the claim of involuntariness will be decreased (again see *R v Stone*, at paragraph 191).

[40] Do Corporal Courneyea's actions *vis-à-vis* Corporal Kehler make any sense when one considers the events surrounding those actions and Corporal Courneyea's previous behaviour and his relationship with Corporal Kehler? Every witness testified that Corporal Courneyea's actions are totally out of character. Corporal Courneyea's extreme reaction is accompanied by a blank facial expression. His reaction is grossly disproportional to the actions of Corporal Kehler. These actions appear to be impulsive reactions to a significant stimulus; this stimulus appears to be the dust, a reminder of the IED strike. A combination of sleep deprivation and hyper vigilance to threats caused by PTSD could have also precipitated a dissociative episode when Corporal Kehler performed actions perceived as aggressive by Corporal Courneyea.

[41] Having considered the above mentioned factors and the entire evidence, the court has concluded that Corporal Courneyea has convinced it on a balance of probabilities that his consciousness was so impaired that he had no voluntary control over his actions when he loaded and cocked his C7 rifle.

[42] The particulars of the second charge read as follows: In that he, on or about 15 July 2011, at or near Kandahar Airfield, Afghanistan, did, without lawful excuse point a firearm to wit a C7 rifle at Corporal Kehler, A.R. The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

(a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;

(b) that Corporal Courneyea pointed a firearm;

(c) that Corporal Courneyea pointed the firearm at Corporal Kehler; and

(d) that Corporal Courneyea had no lawful excuse for pointing the firearm.

[43] The evidence of the prosecution's witnesses clearly tells the court that Corporal Courneyea never pointed his C7 rifle directly at Corporal Kehler. Corporal Courneyea always kept his C7 pointed at the ground in front of Corporal Kehler when he loaded and cocked the weapon. The Concise Oxford Dictionary defines the verb "point" as follows: "direct someone's attention in a particular direction by extending one's finger" and "direct or aim (something)." While the evidence does indicate the weapon was pointed towards the ground in front of Corporal Kehler, it also clearly indicates that Corporal Courneyea did not aim his weapon at Corporal Kehler. Therefore, the court concludes the prosecution has not proven this element of this offence beyond a reasonable doubt.

[44] The particulars of the third charge read as follows: In that he, on or about 15 July 2011, at or near Kandahar Airfield, Afghanistan, did knowingly utter a threat to Corporal Kehler, A.R., to shoot the said Corporal Kehler. The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

(a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;

(b) that Corporal Courneyea made a threat to cause Corporal Kehler's death or to cause Corporal Kehler bodily harm; and

(c) that Corporal Courneyea made the threat knowingly.

[45] The Supreme Court of Canada described the aim of the offence of uttering threats and the approach to be taken by courts at paragraphs 24 to 27 of *R v McGraw*, [1991] 3 SCR 72. The court stated:

> The aim and purpose of the offence is to protect against fear and intimidation.

A threat is a tool of intimidation that is uttered by a person to facilitate the achievement of a goal. A threat need not be carried out; the offence is completed when the words are spoken. The intention to carry out the threat is irrelevant to the determination of this offence. It is the element of fear instilled in the recipient that is the *actus reus* of this offence.

[46] Corporals Courneyea, Kehler, Pinard, and La Bastille had been working together for some time before the incident. They were all on friendly terms. They had gone for lunch together. Corporal Pinard and Corporal Courneyea had told Corporal Kehler to stop kicking sand; Corporal Kehler kicked some sand again.

[47] Corporal Courneyea states he does not remember telling Corporal Kehler he would shoot him or kill him if he did not stop kicking dust. Corporal Kehler testified Corporal Courneyea told him he would shoot him if he did not stop and Corporal La Bastille was not sure if he had heard Corporal Courneyea say he would shoot him or would kill him if he did not stop. Corporal Pinard testified he thought he heard Corporal Courneyea say, "Don't even," but he could not be more precise and he did state that he did not hear Corporal Courneyea threaten Corporal Kehler.

[48] Corporal Kehler testified there had been no hostility between him and Corporal Courneyea before the 15 July incident. Cpl Pinard and Corporal La Bastille testified they had never seen Corporal Courneyea in a verbal or physical confrontation with anyone or be aggressive before the incident. Corporal Kehler testified that he thought Corporal Courneyea was joking when he said he would shoot him. He stated he did not feel threatened by Corporal Courneyea and he did not think that Corporal Courneyea wanted Corporal Kehler to take his words seriously. He jokingly walked up to Corporal Courneyea and jokingly kicked sand on his boots because Corporal Kehler did not think Corporal Courneyea was serious or intimidating or that he was trying to make him fearful.

[49] Corporal Kehler did not feel threatened and none of the witnesses testified he thought Corporal Courneyea was threatening Corporal Kehler by saying these words. Examining these words within the context of the conversations and events in which they occurred and in taking into account the situation of the recipient of the alleged threat, the court concludes the evidence does not prove beyond a reasonable doubt that, considered objectively, those words conveyed a threat to cause death of serious bodily harm to Corporal Kehler.

[50] Corporal Courneyea did not provide the court with any explanation concerning these words since he states he does not remember saying those words. Corporal Cour-

neyea did testify he was annoyed with Corporal Kehler because of the dust he was creating by kicking the sand. Based on the evidence describing the behaviour of Corporal Courneyea and his relationship with Corporal Kehler before the incident and the evidence of the events leading to the incident, the court concludes the evidence does not prove beyond a reasonable doubt that Corporal Courneyea intended those words to be taken seriously or to intimidate.

FOR THESE REASONS, THE COURT:

[51] **FINDS** Corporal Courneyea not criminally responsible of charge number 1 on account of a mental disorder and finds Corporal Courneyea not guilty of charges 2 and 3.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Services
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