

Citation: *R. v. Master-Corporal G.C. Steeves and ex-Private K.M. Temple*, 2007 CM 3021

Docket: 2007-41

**STANDING COURT MARTIAL
CANADA
NEW BRUNSWICK
CANADIAN FORCES BASE GAGETOWN**

Date: 15 December 2007

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

HER MAJESTY THE QUEEN

v.

**MASTER-CORPORAL G.C. STEEVES AND EX-PRIVATE K.M. TEMPLE
(Applicants)**

**DECISION - NO *PRIMA FACIE* MOTION
(Rendered orally)**

[1] Master Corporal Steeves and ex-Private Temple are jointly charged under section 129(2) of the *National Defence Act (NDA)*, for a conduct to the prejudice of good order and discipline, because they were allegedly involved in an adverse personal relationship contrary to Defence Administrative Orders and Directives (DAOD) Chapter 5019-1, and alternatively, they are jointly charged under section 129(1) of the *NDA* for a conduct to the prejudice of good order and discipline because they were allegedly involved in an inappropriate instructor/student relationship.

[2] As set out in the Queen Regulations & Orders (QR&O), at the close of the prosecution's case, the defence is entitled to move for a non-guilty verdict on the basis that the prosecution has not presented a *prima facie* case; *i.e.*, a case containing evidence on all essential points of a charge, that if believed by the trier of fact and unanswered, would warrant a conviction.

[3] Then, on 14 December 2007, at the close of the prosecution's case, and pursuant to QR&O article 112.05(13), both accused presented a motion of non-*prima facie* with regard to the two charges on the charge sheet, on the basis that the prosecution had failed to introduce before this Standing Court Martial any evidence concerning one essential element of the offence for both charges laid under section 129 of the *National Defence Act*.

[4] The evidence introduced by the prosecutor before this court martial is composed essentially of the following facts:

- a. the testimonies heard in the order of their appearance before the court: the testimony of Private Forestell, Private Player, Private Gallant, Private Grasse, Private Beals, Private Kelly, Warrant Officer Boucher, Private Hiscock, Warrant Officer Warren, Master Warrant Officer Bartlett, and Corporal Temple;
- b. Exhibit 3, a copy of a plan of the second floor of Building M-5, CFB Gagetown. This document was entered in evidence by consent;
- c. Exhibit 4, a copy of the course intake report with a list of the candidates on BMQ course 0061. This document was entered in evidence by consent;
- d. Exhibit 5, a copy of the MR 01-02 School Directives on dress and deportment. This document was entered in evidence by consent;
- e. Exhibit 6, a copy of a handout of a PowerPoint presentation entitled, "Course Warrant Officer's Address." This document was entered in evidence by consent;
- f. Exhibit 7, a copy of a lesson plan entitled, "Personnel Conduct Policies." This document was entered in evidence by consent;
- g. Exhibit 8, a copy of the Defence Administrative Orders and Directives (DAOD) Chapter 5019-1 entitled, "Personal Relationships and Fraternization." This document was entered in evidence by consent;
- h. Exhibit 9, a copy of Land Forces Command Orders Chapter 11-84 entitled, "Personal Relationships/Fraternisation." This document was entered in evidence by consent;
- I. Exhibit 10, a copy of the Land Force Atlantic Area Manual entitled, "Instructor Indoctrination Workshop, Programmed Instructional Package (PIP)." This document was entered in evidence by consent;
- j. Exhibit 11, an agreed statement of facts concerning the way the Programmed Instructional Package was completed by Master Corporal Steeves. This document was entered in evidence by consent;

k. Exhibit 12, the original Confirmatory Questions Answer Sheet filled by Master Corporal Steeves. This document was entered in evidence by consent;

l. Exhibit 13, a copy of the Schedule for the Land Force Atlantic Area Indoctrination Training course, A Company, fall 2006. This document was entered in evidence by consent; and

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

[5] This type of motion at the close of the prosecution's case is different from a request for an acquittal based on reasonable doubt. The latter argument is that there may be some evidence upon which a jury properly instructed might convict, but that it is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt is not called into play until all the evidence is in, reasonable doubt cannot be considered unless both accused have either elected not to call evidence or have completed their evidence.

[6] 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 each charge so that a reasonable jury, properly instructed, could convict; not "would" or "should," but simply "could."

[7] The governing test for a directed verdict is set out by Ritchie J. in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067 at page 1080, as follows:

... whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

[8] Also, the burden of proof rests on each accused to demonstrate, on a balance of probabilities, that this test is met.

[9] The test is the same whether the evidence is direct or circumstantial. The application of this test varies according to the type of evidence in the prosecution's case. Where the prosecution's case is based entirely on direct evidence, application of the test is straightforward. If the judge determines that the Prosecution has presented direct evidence as to every element of each 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, is the inference proposed by the prosecution 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 credibility. The issue is only whether the evidence, if believed, could reasonably support an inference of guilt.

[10] The essential elements of the offence under section 129(2) *NDA* are:

- a. the identity of the accused;
- b. the date and place;
- c. the conduct alleged in the particular of the charge really occurred; and
- d. the prejudice to good order and discipline.

[11] In order to prove the prejudice to good order and discipline under section 129(2) *NDA*, the prosecution had to adduce evidence:

- a. on the nature and the existence of the regulation;
- b. on the fact that each accused knew or ought to have known the standard of conduct required; and
- c. on the fact that the conduct of each accused amounted to a contravention of the regulation, order or instruction published for the general information and guidance of the Canadian Forces or any part thereof.

[12] The main purpose of section 129(2) of the *NDA* is to give effect to the regulation made by the civilian authorities concerning “the organization, training, discipline, efficiency, administration and good government of the Canadian Forces” as mentioned at section 12 of the *NDA*, and to enforce all orders and instructions issued by the Chief of Defence Staff that are required to give effect to the decisions and to carry out the directions of the Government of Canada or the Minister as mentioned at section 18(2) of the *NDA*.

[13] Both defence counsel admitted that there is some evidence before this court martial on the essential elements of the offence concerning the identity of both accused, the date and place. It is also admitted that there is some evidence on the nature and existence of the directive and that both accused knew or ought to have known the standard of conduct required.

[14] However, it was raised by both accused that the prosecution failed to introduce any evidence in order to prove, first, the alleged conduct, which is the fact that they had an adverse personal relationship, and second, that there was a prejudice to good

order and discipline, i.e., that their conduct amounted to a contravention of DAOD 5019-1.

[15] Concerning Master Corporal Steeves, there is some evidence that he was involved in a personal relationship with ex-Private Temple. The nature and content of the text message he sent to ex-Private Temple, as related by Private Hiscock, and the nature and content of the personal email he sent to ex-Private Temple, as related by Warrant Officer Warren and Corporal Temple, both constitute some evidence to that effect. However, there is no evidence whatsoever concerning the fact that this personal relationship could be qualified as “adverse” concerning Master Corporal Steeves. There is no evidence that the instructor/student relationship was compromised at all level in the platoon. There is no evidence that the confidence of the students in the lawful authority of their superiors was eroded.

[16] The prosecution suggested that there is evidence from which this court could infer the fact that the personal relationship involving Master Corporal Steeves and ex-Private Temple was adverse. The court does not agree with this proposition. It is true that witnesses who were students on the platoon denounced before this court martial some situations involving ex-Private Temple, like the fact that she occupied two rooms for a period of time but that only the one where she was not sleeping was used for the daily inspection, that she was not wearing on all time after supper her coverall, that she was excused for physical training at the pool, that she got a question sheet after a review for a test when an other student did not even though he made a request for it, and that she walked outside Building M-5 with Master Corporal Steeves on two different occasions. However, the evidence adduced before this court by the witnesses clearly demonstrated that they were not unusual or abnormal situations. Then, the court conclusion is that this evidence is not reasonably capable of supporting the inference proposed by the prosecution that these situations were the result of the existence of an adverse personal relationship involving both accused.

[17] For the very same reasons just mentioned above, there is no evidence whatsoever that supports that the conduct of Master Corporal Steeves amounted to a contravention of DAOD 5019-1. Then, the court concludes that there is no evidence supporting the existence of a prejudice to good order and discipline.

[18] As a matter of clarification, it is important to say that LFCO 11-84 had no application in this case. This order prohibits clearly instructor/student personal relationship on a course. However, both accused were not charged for having a conduct contrary to this order, and it is outdated because it refers to CFAO 19-38 on Personal Relationships, a publication that is not in force anymore.

[19] Concerning ex-Private Temple, there is some evidence that she was involved in a personal relationship with Master Corporal Steeves. In addition to the evidence I referred earlier on that specific matter for Master Corporal Steeves, I would

add that there is evidence that she was text messaging Master Corporal Steeves in class during the day, as related by Private Hiscock, which constitute additional evidence on that issue. However, there is no evidence whatsoever concerning the fact that this personal relationship could be qualified as “adverse” concerning her. There is no evidence that the instructor/student relationship was put at risk at all level in the platoon. There is no evidence that the confidence of the students in the lawful authority of their superiors was eroded.

[20] Concerning the inferences that could be made by this court martial on the fact that the personal relationship could be qualified as “adverse,” as suggested by the prosecutor on the basis of the evidence he adduced, it is the conclusion of this court that the reasons enunciated above for the same issue concerning Master Corporal Steeves apply here concerning ex-Private Temple.

[21] Both defence counsel claimed that the prosecution failed to introduce any evidence concerning the second charge on the existence of an inappropriate instructor/student relationship between both accused.

[22] The essential elements of the offence under section 129(1) *NDA* are:

- a. the identity of the accused;
- b. the date and place;
- c. the standard of conduct;
- d. the conduct alleged in the particulars of the charge really occurred;
and
- e. the prejudice to good order and discipline.

[23] Both defence counsels conceded that there is some evidence before this court martial on the essential elements of the offence concerning the identity of both accused, the date, and place. However, they suggested that there is no evidence supporting the conduct alleged in the particular of the charge, which is the fact that both accused were involved in an inappropriate instructor/student relationship.

[24] The court also still questions the fact that there is evidence or not concerning the essential elements about the standard of conduct and the prejudice to good order and discipline.

[25] About the standard of conduct, there is no evidence whatsoever about this issue. In using the term “inappropriate” in the wording of the charge, the prosecution suggested the existence of an appropriate instructor/student personal

relationship. Nothing was introduced before this court to demonstrate what was the standard for an appropriate and/or inappropriate instructor/student relationship. Through Warrant Officer Warren, the prosecution adduced evidence on the impact of an instructor/student relationship and on the fact that instructors and students on a basic military qualification course should avoid such concept in order to stay away from any perception of favouritism. However, no evidence was adduced to determine what was the standard for the right conduct in order to identify the wrong one.

[26] As stated earlier on the analysis of the first charge, there is some evidence that both accused were involved in an instructor/student relationship. However, there is no evidence whatsoever concerning the fact that this instructor/student relationship could be qualified as “inappropriate.” It is true that witnesses who were students on the platoon denounced before this court martial some situations involving both accused, as identified by this court earlier. However, the evidence adduced before this court by those witnesses clearly demonstrated that they were not unusual or abnormal situations from which the court could reasonably infer that the conduct of one or both accused was inappropriate.

[27] Finally, concerning the prejudice to good order and discipline, the conclusion of the court is that there is no evidence supporting this essential element of the offence. The court accepts that it may well be reasonable to conclude that the existence of an inappropriate instructor/student relationship, assuming that it has been proven, which is not the case here, could have harmed discipline of individuals, and in certain circumstances, might have harmed the good order and discipline of a platoon. The court conclusion is that the evidence that established the existence of an hostile atmosphere and animosity in the platoon and that the platoon members were upset and angry, is not reasonably capable of supporting the inference proposed by the prosecution that these feelings constitute a prejudice to good order and discipline and that they were the result of the existence of a personal relationship involving both accused. It is interesting to note that there is no evidence whatsoever about what was really known by other members of the platoon to provoke this kind of feeling. There is also no evidentiary basis that could reasonably allow the court to infer what was really known by those who did not witness anything about the alleged inappropriate instructor/student relationship involving both accused.

[28] Then, the court concludes that both accused proved on a balance of probabilities that on the first charge, there was no evidence to prove the essential element concerning the alleged conduct, which is the fact that they had an adverse personal relationship, and that there was a prejudice to good order and discipline, i.e., that their conduct amounted to a contravention of DAOD 5019-1. On the second charge, it is also the conclusion of this court that there was no evidence on the essential element about the conduct alleged in the particulars of the charge, which is the fact that both accused were involved in an inappropriate instructor/student relationship, and that

there was no evidence on the essential elements concerning the standard of conduct and the prejudice to good order and discipline.

[29] Master Corporal Steeves and ex-Private Temple, please stand up. It is my decision that a *prima facie* case has not been made out against both of you on the first and second charge on the charge sheet, and this court martial finds you both not guilty of both charges.

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

Counsel:

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