

Citation: *R. v. Master Corporal T.J. Mills*, 2008 CM 4012

Docket: 200819

**STANDING COURT MARTIAL
CANADA
ALBERTA
4 WING COLD LAKE**

Date: 24 September 2008

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, MILITARY JUDGE

HER MAJESTY, THE QUEEN

v.

**MASTER CORPORAL T.J. MILLS
(Accused)**

**FINDING
(Rendered Orally)**

INTRODUCTION

[1] The accused, V19 573 631 Master Corporal Mills, stands accused of one charge under section 130 of the *National Defence Act* of having committed an assault with a weapon contrary to section 267 of the *Criminal Code of Canada*. Master Corporal Mills was also accused of one charge under section 86 of the *National Defence Act* of having used provoking gestures towards a person subject to the Code of Service Discipline tending to cause a disturbance, but this charge was withdrawn by the prosecution with leave of the court pursuant to section 165.12(2) of the *National Defence Act*.

[2] The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt every element of the alleged offence. Defence counsel requested the court to come to the conclusion disclosed by the facts.

THE EVIDENCE

[3] The evidence before this court martial is composed of judicial notice taken by the court of the facts and issues under rule 15 of the Military Rules of Evidence

and of facts contained in an agreed statement of facts presented pursuant to Military Rule of Evidence 37(b).

THE APPLICABLE LAW

[4] Before this court provides its legal analysis of the charge, it is 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 principal fundamental to all criminal trials. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[5] It is fair to say that the presumption of innocence is most likely the most fundamental principle in Canadian 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 the cases dealt with 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.

[6] 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.

[7] 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. The term "beyond a reasonable doubt" has been used for a very long time, and it is a part of our history and traditions of justice.

[8] The Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out by the Supreme Court of Canada have been applied in a number of cases dealt with by the Supreme Court and by appellate courts. In substance, a reasonable doubt is not a far-fetched or a 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 also on what that evidence does not tell the court. The fact that a person has been charged is in no way indicative of his or her guilt.

[9] The Supreme Court held that an effective way to define the reasonable doubt standard 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 Master Corporal Mills, 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] I will now turn to the questions in issue before the court.

THE FACTS

[11] The facts of this case are contained in the agreed statement of facts found at Exhibit 3. Master Corporal Mills was serving in Kandahar, Afghanistan, between October 2005 and February 2006. Following the soldiers' Christmas dinner on 24 December 2005, he became intoxicated from the consumption of alcoholic beverages. At around 0100 on 25 December, Master Corporal Mills and Corporal Ngoviky got into horseplay and Master Corporal Mills hurt his elbow. About an hour later Master Corporal Mills repeated that he had hurt his elbow and he became annoyed and aggressive at Corporal Ngoviky's response to him. Master Corporal Mills pushed Corporal Ngoviky, and Corporal Ngoviky threw Master Corporal Mills onto a vehicle and told him to go to bed.

[12] While Corporal Ngoviky had turned his back to Master Corporal Mills, Master Corporal Mills retrieved his weapon. When Corporal Ngoviky turned to face Master Corporal Mills, Master Corporal Mills was standing approximately 3 to 5 feet away, facing him, while holding his C8 rifle.

[13] Master Corporal Mills cocked the rifle. Corporal Ngoviky thought Master Corporal Mills was about to shoot him and he feared for his life. He took the rifle from Master Corporal Mills by grabbing him by the throat and kneeling him in the ribs. Corporal Ngoviky then released the magazine from the weapon, cleared the weapon, and returned the ejected round to the magazine.

[14] Later, as Master Corporal Mills was walking away from the area, he was ordered to put his weapon on the ground by Master Corporal Bradley. There was no magazine on the weapon and no round in the chamber.

[15] The next morning Master Corporal Mills and Corporal Ngoviky were brought to Warrant Officer Dearing's office. Master Corporal Mills apologized to

Corporal Ngoviky. Corporal Ngoviky accepted the apology, and he informed Warrant Officer Dearing he did not want the matter to go any further because he did not want to cause any more stress than they already had. Corporal Ngoviky also told Master Corporal Mills that he did not want to see him lose his career or get kicked off the tour. He also told Master Corporal Mills that he hoped Master Corporal Mills would live with the incident on his shoulders as a reminder of his actions. Corporal Ngoviky has nightmares about this incident, his marriage has suffered, and he is presently following a therapy to help him deal with the trauma caused in part by having an intoxicated fellow soldier confront him with a loaded weapon.

[16] The incident was brought to the attention of the CFNIS in mid 2006 after some members of the maintenance team had expressed concerns about deploying with Master Corporal Mills in light of their knowledge of the incident involving Corporal Ngoviky.

ANALYSIS

[17] The particulars of the charge read as follows:

... In that he, on or about 25 December 2005, at or near Kandahar, Afghanistan, did in committing an assault on Corporal Ngoviky, F.A., use a weapon, to wit: a C8 rifle.

[18] 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;
- B. The date and place as alleged in the charge sheet;
- C. That the accused threatened or attempted, by act or gesture, to apply force to Corporal Ngoviky. That the accused had the ability at the time to carry out the application of force, or that he caused Corporal Ngoviky to believe on reasonable grounds that he had that ability; and
- D. That the accused carried, used or threatened to use a weapon, his C8 rifle, when he applied force to Corporal Ngoviky.

[19] The facts prove beyond a reasonable doubt that Master Corporal Mills is the offender and that the alleged offence occurred in Kandahar, Afghanistan, on 25 December 2005.

[20] I will now examine the third element of this offence. Section 265 of the *Criminal Code* defines assault. It reads as follows:

A person commits an assault when

(a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;

(b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has present ability to effect his purpose; or

(c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

That was paragraph (1) of section 265. Paragraph (2) reads as follows:

This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.

There is more than one way to commit an assault as defined by the *Criminal Code*. Subsection 265(1)(b) of this definition applies specifically to the facts of this case.

[21] Master Corporal Mills and Corporal Ngoviky had been involved in an altercation that saw Master Corporal Mills initially push Corporal Ngoviky because Master Corporal Mills was intoxicated and he was annoyed that Corporal Ngoviky was not showing any sympathy for the pain Master Corporal Mills was feeling after having hit his elbow during the earlier horseplay with Corporal Ngoviky. Corporal Ngoviky had responded to that push from Master Corporal Mills by grabbing him by the arms, lifting him, and by throwing him against a vehicle and telling him to go to bed. Master Corporal Mills then walked to the weapons rack, took his C8 rifle in his hands, and told Corporal Ngoviky again that he had hurt his elbow. While standing approximately 3 to 5 feet from Corporal Ngoviky, Master Corporal Mills then cocked his C8 rifle.

[22] Intent to commit an act is a state of mind. A person usually intends the natural and probable consequences of his or her voluntary actions. The court has to use common sense to infer from all the evidence what Master Corporal Mills intended when he cocked his C8 rifle. It is no excuse to the offence of assault with a weapon if a person knowingly and willingly consumes alcohol and thereby deprives himself or herself of the ability to exercise self-control or to foresee or intend the consequences of what he or she is doing or to be conscious of what he or she is doing. Thus the court must ignore the evidence of intoxication in regard to this offence since it is not in any way a defence to that offence, (see section 33.1 of the *Criminal Code*).

[23] The offence of assault is committed when a threat is intentionally made to apply force to another person and there is the ability to carry out that threat. Neither the degree of alarm felt by the person threatened nor the intent of the accused to carry out that threat are involved in the determination of the guilt of the accused, (see *R. v. MacKay*, (2004) 188 C.C.C. (3d)181, a decision of the New Brunswick Court of Appeal). Master Corporal Mills purposefully cocked his C8 rifle while facing Corporal Ngoviky immediately after their brief altercation. The cocking of a rifle in this situation does lead a person to reasonably believe that the person cocking the rifle is doing so for a specific purpose. In the circumstances of this case, the cocking of the C8 rifle can be seen as an intentional threat to use the C8 rifle. Using a firearm against another person is an application of force.

[24] I will now examine the fourth element of the offence. Master Corporal Mills had a loaded C8 rifle in his hands. He had the ability to apply force to Corporal Ngoviky. Master Corporal Mills was intoxicated and had just fought with Corporal Ngoviky. Corporal Ngoviky did have reasonable grounds to believe that Master Corporal Mills had the ability at the time to carry out the application of force.

[25] I will now examine the last element of the offence. The *Criminal Code* defines a weapon as:

... [A]ny thing used, designed to be used or intended for use

(a) in causing death or injury to any person, or

(b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm;

Section 2 of the *Criminal Code* also defines the term "firearm." A C8 rifle is a firearm. Master Corporal Mills was in possession of his loaded and cocked C8 rifle when he confronted Corporal Ngoviky.

[26] The prosecution's duty was to provide this court with evidence to prove beyond a reasonable doubt the guilt of the accused. The court finds that the prosecution has accomplished that task.

FINDING

[27]Master Corporal Mills, the court finds you guilty of charge No. 1.

LCol J-G Perron, M.J.

COUNSEL:

Major S. MacLeod, Directorate of Military Prosecutions 3-2
Counsel for Her Majesty, The Queen

Lieutenant-Commander P. Desbiens, Directorate of Defence Counsel Services
Counsel for Master Corporal T.J. Mills