COURT MARTIAL

Citation: *R v Ogilvie*, 2013 CM 4024

Date: 20131009
Docket: 201309

Standing Court Martial

Canadian Forces Base Trenton
Trenton, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.M. Ogilvie, Offender

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

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] The accused, Corporal Ogilvie, is charged of having disobeyed the lawful commands of a superior officer and with using insulting language to a superior officer. He has pled guilty to the first charge and the court must now render a verdict on the second charge. Before this court provides its analysis of the evidence and of the charge, 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 may be less familiar with them.

[2] The presumption of innocence is probably 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 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.

[3] 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.

[4] 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.

[5] 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 the evidence tells the court, but also on what that evidence does not tell the court. The fact that the person has been charged is no way indicative of his or her guilt. The reasonable doubt standard falls much closer to absolute certainty than to proof on a balance of probabilities.

[6] 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 Ogilvie, 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.

[7] 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.

[8] 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. 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 the accused chooses to testify.

[9] 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?

[10] 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.

[11] 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.

[12] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R v W.(D.)* [1991] 1 S.C.R. 742. This test goes as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.
>
> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[13] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court. The evidence before this court martial is composed essentially of the following: judicial notice, the testimony of Warrant Officer Duggan, Sergeant Mulvihill, Corporal Ogilvie and exhibits. 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 counsel presented four exhibits.

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

> "In that he, on or about 28 August 2012, at or near Canadian Forces Base Trenton, Ontario, said to Warrant Officer G. Duggan "Fuck this, fuck you, charge me, I don't care" or words to that effect."

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 Ogilvie said "Fuck this, fuck you, charge me, I don't care" or words to that effect;

(c) that Corporal Ogilvie said those words to a superior officer; namely, Warrant Officer Duggan;

(d) that Corporal Ogilvie was aware of his status;

(e) that those words were disrespectful and abusive in the context they were said; and

(f) the blameworthy state of mind; that is, Corporal Ogilvie's words demonstrated an insubordinate intent.

[15] Defence counsel did not indicate in her closing address there was any factual dispute on the identity of the alleged offender, the time and place of the alleged offences, the fact that Warrant Officer Duggan is a superior officer and that Corporal Ogilvie knew Warrant Officer Duggan was a superior officer. The evidence of every witness proves beyond a reasonable doubt these elements of the offence.

[16] Did Corporal Ogilvie say "Fuck this, fuck you, charge me, I don't care" or words to that effect? Corporal Ogilvie testified he did not say "Fuck you" to Warrant Officer Duggan but that he did say the other words. He also testified that it was difficult to be respectful when someone is swearing at you. He stated he was in a "meltdown mode" and that he was reciprocating the language he was hearing. He testified that Warrant Officer Duggan was aggressive and that his behaviour was a defensive mechanism and was only a reaction to Warrant Officer Duggan's approach.

[17] During his cross-examination, he could not state exactly when his "meltdown" would have started but he was upset and angry when Warrant Officer Duggan and Sergeant Mulvihill came out to see him. He felt that talking to Warrant Officer Duggan was like talking to a brick wall. He was frustrated with Warrant Officer Duggan and he decided to walk away to ensure everyone's safety. He stated he did not have a rational thought in his head at that time because of his meltdown.

[18] He agreed he had issues in the workplace in the past when he was presented with portions of Exhibit 21 but he explained those by a shooting incident that occurred at a nightclub in Edmonton. The workplace issues discussed occurred between 2005 and 2006. Exhibit 23, a psychological assessment report by Doctor Pollock, indicates the shooting in Edmonton occurred in 2007.

[19] Corporal Ogilvie stated he was not thinking clearly during the conversation with Warrant Officer Duggan. He was upset and angry. Although he testified that he takes responsibility for his actions, he consistently offers excuses for his actions and fails to truly take responsibility for anything he does. He testified that he has seen five doctors in the last three years and complains that none has offered what he described as a "plan for recovery." Exhibit 21 tells a different story; it indicates he was inconsistent in attending his counselling appointments during the period 2005-2006, declined offers of follow-up supportive counselling in 2009 and therapy to address the symptoms he reported during his assessment for PTSD in 2010. He was also discharged from the Bellwood addiction treatment programme in 2010 because he did not follow the rules and regulations and that he was not motivated for treatment. It appears he was often offered counselling and other programmes to assist him but he failed to accept these offers or pursue them fully. He consistently explains his behaviour by indicating he suffers from PTSD and tries to transfer any responsibility for his behaviour to the actions or inactions of his chain of command and to the medical system. He might be suffering from mild PTSD as indicated at Exhibit 20, but the anger management issues he has displayed since his childhood along with the other psychological disorders mentioned in Exhibits 21 and 23 are more likely the causes of his behaviour and of the actions and words that are at the heart of this matter. Corporal Ogilvie is not a reliable and credible witness.

[20] Warrant Officer Duggan and Sergeant Mulvihill both testified Corporal Ogilvie said "Fuck you" to Warrant Officer Duggan. Their Testimony was tentative at times in that they could not recall every detail because of the passage of time and Warrant Officer Duggan did indicate he had read his statement before the trial. Warrant Officer Duggan stated Corporal Ogilvie had told him "Fuck you" as he was walking away from Warrant Officer Duggan. He also stated that a corporal had never told him that before. Sergeant Mulvihill stated that Corporal Ogilvie said "Fuck you" to Warrant Officer Duggan. Warrant Officer Duggan and Sergeant Mulvihill both testified in a straightforward manner and their testimony on the key aspects of this case are consistent without being identical. They are deemed reliable and credible witnesses. The court finds the evidence proves beyond a reasonable doubt that Corporal Ogilvie did say "Fuck this, fuck you, charge me, I don't care" or words to that effect.

[21] Are those words disrespectful and abusive in the context they were said? Insulting is not defined within the *Queen's Regulations and Orders*, the *Interpretation Act* or the *National Defence Act* and it has acquired a special meaning within the Canadian Forces. The Concise Oxford Dictionary defines insult as "speak to or treat with disrespect or abuse."

[22] Corporal Ogilvie agreed with the prosecutor that "Fuck it, charge me, I don't care" are not respectful words but he stated he was not being respected by Warrant Officer Duggan. Corporal Ogilvie had lost control over his emotions. He did not obey Warrant Officer Duggan when told to button his shirt properly and to stand to attention. He was walking away from Warrant Officer Duggan when he said those words. The court agrees with Corporal Ogilvie that he was not respectful but the court does not

agree with him that he also was not respected, thus his excuse to also show a lack of respect.

[23] Corporal Ogilvie did not present any credible evidence to the court that would demonstrate Warrant Officer Duggan had treated him in a manner that could excuse Corporal Ogilvie's behaviour towards a superior officer. He referred to a "history" between them but did not clearly describe it and its relevance to this charge. The court finds the evidence proves beyond a reasonable doubt that the words "Fuck it, charge me, I don't care" are disrespectful and abusive in the context they were said. Furthermore, the court has also found that Corporal Ogilvie said "Fuck you" to Warrant Officer Duggan. Those words are also disrespectful and abusive in the context they were said.

[24] Did Corporal Ogilvie's words demonstrate an insubordinate intent? This element relates to Corporal Ogilvie's state of mind at the time he said those words. To prove this essential element, the prosecution must satisfy the court beyond a reasonable doubt that Corporal Ogilvie meant to say those words and knew that they were not respectful. To determine Corporal Ogilvie's state of mind, what he knew or meant to do, the court should consider:

(a) what he did or did not do;

(b) how he did it or did not do it; and

(c) what he said or did not say.

[25] The court must look at Corporal Ogilvie's words and conduct, before, at the time and after he said those words. All these things, and the circumstances in which they happened, may shed light on Corporal Ogilvie's state of mind at the time. They may help decide what he meant or did not mean to do or say. It is also reasonable to conclude that a sane and sober person means to do what she or he actually does. It is a conclusion that may be drawn from what Corporal Ogilvie said and did.

[26] Corporal Ogilvie has testified the words "Fuck it, charge me, I don't care" were disrespectful. Defence counsel argued Corporal Ogilvie was not guilty of this offence because he did not have any intention of being insubordinate. She stated he suffers from Cluster B personality traits and he was not rational at the time of the exchange of words and he was merely reacting to Warrant Officer Duggan's words and behaviour. She also stated the court should take his diagnosis of PTSD into account. Defence counsel is not asking the court to find Corporal Ogilvie not criminally responsible due to mental disorder but she is asking the court to find that his numerous psychological difficulties negate any intention to be insubordinate when saying these words.

[27] I fully agree with defence counsel that Corporal Ogilvie has trouble dealing with his anger and impulsiveness. I agree with her there are numerous psychological reasons involved in this matter. Corporal Ogilvie does not know how to control himself. He blames it on PTSD but the evidence clearly indicates he has been that way since his

childhood. The evidence, Exhibits 21, 21 and 23, indicates he exhibits numerous psychological difficulties and interpersonal problems. I will not quote portions of these reports or refer to the exact diagnoses or descriptions of his difficulties and problems to preserve the confidentiality of sensitive personal medical history and information, but these reports confirm the court's opinion of Corporal Ogilvie.

[28] The conversation was described by Corporal Ogilvie, Warrant Officer Duggan and Sergeant Mulvihill as casual in the beginning but that it heated up as it progressed. Warrant Officer Duggan told Corporal Ogilvie to stand up and extinguish his cigarette. Corporal Ogilvie obeyed those orders. Warrant Officer Duggan told Corporal Ogilvie to button up a button on his shirt and to stand to attention; Corporal Ogilvie did not obey these orders. Corporal Ogilvie was upset and angry with Warrant Officer Duggan and, as he testified, he walked away because he felt he might become involved in a physical altercation. I have not been presented any evidence that would indicate Corporal Ogilvie was provoked into acting in the manner he did or faced with any situation that could somehow excuse his behaviour. He lost control of himself as he has done in the past; this time it was with a superior officer. I have not been presented with any evidence that would indicate Corporal Ogilvie did not intend to say the words he said or do the things he did. I have not been presented with any evidence that would excuse his behaviour. The court finds the evidence proves beyond a reasonable doubt that those words demonstrate an insubordinate intent on the part of Corporal Ogilvie.

FOR THESE REASONS, THE COURT:

[29] **FINDS** Corporal Ogilvie guilty of charge number 4.

Counsel:

Lieutenant-Colonel K.A. Lindstein
Counsel for Her Majesty the Queen

Major S. Collins and Lieutenant (N) M. Baker, Directorate of Defence Counsel Services
Counsel for Corporal D.M. Ogilvie