



COURT MARTIAL

Citation: *R v Hosford*, 2013 CM 2001

Date: 20130109

Docket: 201230

Standing Court Martial

Canadian Forces Base Gagetown
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Master Bombardier J.M. Hosford, Accused

Before: Commander P.J. Lamont, M.J.

REASONS FOR FINDING

(Orally)

[1] Master Bombardier Hosford is charged in a charge sheet with two offences contrary to the *National Defence Act*, charged in the alternative to each other, as follows: First charge, conduct to the prejudice of good order and discipline, in that he, on or about 7 June 2011, at or near Hopewell Hill, New Brunswick, possessed CF service ammunition, to wit a 105mm howitzer propellant charge, in a manner contrary to Defence Administrative Orders and Directives 3002-5, Use of Firearms, Ammunitions and Explosives; and in the second charge, an offence contrary to section 130 of the *National Defence Act*, that is to say, unlawful possession of an explosive substance, contrary to section 82(1) of the *Criminal Code*, in that he, on or about 7 June 2011, at or near Hopewell Hill, New Brunswick, without lawful excuse did have in his possession an explosive substance to wit a 105mm howitzer propellant charge.

[2] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context this is a term of art with an accepted meaning. If the evidence fails to

establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[3] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt, and the accused must therefore be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt. But reasonable doubt is not a frivolous or imaginary doubt. It is not something based upon sympathy or prejudice. It is a doubt based upon reason and common sense that arises from the evidence, or the lack of evidence.

[4] The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[5] The evidence disclosed that the accused and other members of his unit were engaged in weekend adventure training, basically a camping trip with military exercises, at Hopewell Hill in New Brunswick. On the date alleged in the charges, Bombardier Lawrence discovered what was referred to in evidence as a "charge bag" on one of three camp or lawn chairs in the tent area. He was surprised to see this item as he recognized it as an explosive item used by the artillery for a 105mm howitzer, and as far as he was concerned should not have been brought to the adventure training weekend. He stated "Who brings a charge bag on adventure training" and brought his discovery to the attention of the accused who was a short distance away in the area of his tent. Master Bombadier Hosford said to him "What is that, we need to get ready for the day's activities. Toss it over here and we will take care of it later." Bombadier Lawrence threw the bag in the direction of the accused's tent and it landed on the ground in the area of the tent flap entrance.

[6] Warrant Officer Babineau saw and heard this exchange. He spoke to the accused at his tent and asked for the object that Bombadier Lawrence had either handed over or thrown, and found it was a bag of charge No. 7 propellant. In a raised and stern voice he required Master Bombadier Hosford to hand over the bag. Warrant Officer Babineau said, "What are you doing with a charge bag on adventure training?" and Master Bombadier Hosford said it had been misplaced on exercise and he was going to have it disposed of on adventure training by being destroyed in a fire in the camping area. Warrant Officer Babineau confiscated the charge bag and secured it as he was concerned about safety. He reported to the officer in charge of the training, Captain Logan.

[7] Captain Logan saw the conversation between Warrant Officer Babineau and Master Bombardier Hosford, and after being briefed by Warrant Officer Babineau he spoke to Master Bombardier Hosford about the charge bag to find out why he had it. Master Bombardier Hosford told him that the bag came in from the field accidentally. He thought it might help start a fire in the rain so he brought it on the adventure training weekend without thinking. Captain Logan said he would report the incident later. Master Bombardier Hosford may have asked Captain Logan if the matter could be resolved at the lowest possible level in the chain of command, but Captain Logan replied that it had to be reported.

[8] The admissibility into evidence of the statements attributed to Master Bombardier Hosford by Warrant Officer Babineau and Captain Logan was tried in the course of *voir dire* proceedings at the request of counsel in order to consider whether the prosecution had proved beyond a reasonable doubt that the statements were freely and voluntarily made. As well, the defence challenged the admissibility of the evidence on the ground of an infringement of the *Charter* rights of Master Bombardier Hosford under sections 7 and 10 of the *Canadian Charter of Rights and Freedoms*. The court embarked on a blended *voir dire* to consider all the issues.

[9] In the course of the *voir dire* Master Bombardier Hosford testified that he thought that the adventure training exercise could be cancelled if he did not answer Warrant Officer Babineau's questions. He felt compelled to answer Warrant Officer Babineau because he thought he could be charged with failing to comply with the requirement of a superior. He testified as to a conversation he had with Captain Logan when they were either preparing to return at the end of the adventure training or were actually in transit. It is not clear to me whether he was referring to the same conversation to which Captain Logan testified.

[10] Statements made by an accused person to persons in authority are not admissible against the accused unless the statement is proved beyond a reasonable doubt to have been freely and voluntarily given. This long-venerated rule of the common law is substantially captured in Rule 42 of the Military Rules of Evidence. A "person in authority" is normally someone who is formally engaged in the arrest, detention, investigation or prosecution of the accused, and for this reason the issue often arises where the accused is alleged to have made a statement to a police officer or a prison guard. Persons in these positions are conventionally considered to be persons in authority, but other persons may also be found to be persons in authority for the purposes of the rule if those persons were so reasonably regarded by the accused at the time, but in such cases the burden is upon the defence to raise the issue. After all, it is only the accused who can know that the statement was made to someone regarded by him or her at the time as being a person in authority.

[11] In the present case I am not satisfied that either Warrant Officer Babineau or Captain Logan was a person in authority with respect to Master Bombardier Hosford at the time of their brief conversations with him. Certainly, Master Bombardier Hosford did not give evidence that he considered that either of them was engaged in his arrest,

detention or investigation for the purposes of prosecution at the time of the conversation. Even if he did so consider either of them at the time, in my view it was not reasonable to consider either of them to be persons in authority. It seems to me that when both Warrant Officer Babineau and Captain Logan spoke to Master Bombardier Hosford they were simply concerned to determine why the charge bag was present at a place they considered it should not be, and perhaps to determine whether there was any threat to the safety of persons of which they should be aware. At this early stage it is doubtful that either of them was considering the possibility of charges against Master Bombardier Hosford, but even if the possibility occurred to either of them, they were not engaged in collecting evidence for the purposes of prosecution at the time. Neither of them was involved in the arrest, detention, investigation or prosecution of Master Bombardier Hosford, and accordingly they were not "persons in authority".

[12] Counsel for Master Bombardier Hosford argued that both Warrant Officer Babineau and Captain Logan were persons in authority because they were Master Bombardier Hosford's military superiors, to his knowledge, and therefore Master Bombardier Hosford was required to answer their questions. It is true that as his military superiors, both Warrant Officer Babineau and Captain Logan enjoyed a measure of personal authority over the accused for all lawful military purposes at the time, including the obviously military purpose of determining how or why a military explosive was apparently where it should not be. But of itself, the difference in rank is not sufficient to constitute a military member as a "person in authority" over another for the purposes of the voluntariness rule. On this point Rule 42(5) of the Military Rules of Evidence is clear:

A person who holds a higher service rank than the accused is not, for that reason alone, a person in authority within subsection (3).

[13] Thus in *R v Hodgson* [1998] 2 SCR 449, Cory J, speaking for the majority of the Supreme Court stated, at paragraph 36:

... A parent, doctor, teacher or employer all may be found to be a person in authority if the circumstances warrant, *but their status, or the mere fact that they may wield some personal authority over the accused*, is not sufficient to establish them as persons in authority for the purposes of the confessions rule. [My emphasis]

[14] On all the circumstances I am not satisfied that either Warrant Officer Babineau or Captain Logan was a person in authority at the time of his dealings with Master Bombardier Hosford, and therefore I need not consider whether there was in this case any hope of advantage or threat of prejudice held out by either of them that might have influenced Master Bombardier Hosford to make the statements he made. The statements are not inadmissible by reason of being involuntarily made.

[15] Counsel for Master Bombardier Hosford also sought the exclusion of the evidence of the statements on the ground of what was said to be an infringement of the rights guaranteed by sections 7 and 10 of the *Canadian Charter of Rights and Freedoms*.

[16] In my view the application invoking section 10 fails as the section 10 rights arise only where the individual is detained, and Master Bombardier Hosford was not detained at the time of his dealings with either Warrant Officer Babineau or Captain Logan.

[17] The nature of detention for *Charter* purposes was considered by the Supreme Court of Canada in two recent cases: *R v Grant* [2009] 2 SCR 353 and *R v Suberu* [2009] 2 SCR 460. Both cases involved the interaction of police officers with members of the public. The Court made it clear again that it is not every encounter between the police and a member of the public that amounts to a detention triggering the *Charter* rights in issue. These rights are not engaged by delays that involve no significant physical or psychological restraint. Detention refers to a suspension of an individual's liberty interest by virtue of a significant physical or psychological restraint at the hands of the State. Detention is clearly indicated by either physical restraint or by a legal obligation to comply with a police demand, and is also established by conduct on the part of the police that would cause a reasonable person to conclude that he or she no longer has the freedom to choose whether or not to cooperate with the police.

[18] In the present case there was no physical restraint of Master Bombardier Hosford by either Warrant Officer Babineau or Captain Logan. Counsel for Master Bombardier Hosford argued however that he was subject to a legal obligation to answer questions by reason of section 83 of the *National Defence Act* which reads:

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.

[19] The submission of counsel was to the effect that as a subordinate, Master Bombardier Hosford was bound to answer questions put to him by a superior officer or be liable to prosecution for disobedience of a command. I can find no authority for the implicit proposition that a question by a superior to a subordinate in the Canadian Forces is implicitly an order to provide an answer. The situation might be different if the subordinate is directly ordered to answer a question, but that is not the situation here. In my view, Master Bombardier Hosford was not subject to a legal obligation to comply with the request of Warrant Officer Babineau and Captain Logan to answer their questions.

[20] The question remains whether a reasonable person in the circumstances of Master Bombardier Hosford at the time would conclude that he or she had been deprived by the State of the liberty of choice as to whether to cooperate with Warrant Officer Babineau or Captain Logan. In answering this question my obligation is as stated by the Court in *Grant* at paragraph 32:

It is for the trial judge, applying the proper legal principles to the particular facts of the case, to determine whether the line has been crossed between police conduct that respects liberty and the individual's right to choose, and conduct that does not.

[21] And at paragraph 44 the Court summarizes the proper approach as follows:

In cases where there is no physical restraint or legal obligation, it may not be clear whether a person has been detained. To determine whether the reasonable person in the individual's circumstances would conclude that he or she had been deprived by the state of the liberty of choice, the court may consider, *inter alia*, the following factors:

- (a) The circumstances giving rise to the encounter as they would reasonably be perceived by the individual: whether the police were providing general assistance; maintaining general order; making general inquiries regarding a particular occurrence; or, singling out the individual for focussed investigation;
- (b) The nature of the police conduct, including the language used; the use of physical contact; the place where the interaction occurred; the presence of others; and the duration of the encounter;
- (c) The particular characteristics or circumstances of the individual where relevant, including age; physical stature; minority status; level of sophistication.

[22] In my view, Master Bombardier Hosford was not detained. In these two brief encounters, both Warrant Officer Babineau and Captain Logan were engaged in preliminary questioning to determine whether something was wrong and whether Master Bombardier Hosford could shed some light on the situation. While the questions were directed to Master Bombardier Hosford he was not the subject of a focused investigation of his responsibility for a possible offence. This was a general inquiry to determine the circumstances surrounding the discovery of the charge bag. The encounter was polite and professional, as well as brief. The language used was respectful and there was no physical contact. It would be unreasonable for Master Bombardier Hosford to conclude on these facts that he had no choice but to cooperate by answering the questions put to him by Warrant Officer Babineau and Captain Logan. In short, he was not detained.

[23] Section 7 of the *Charter* was also argued as a ground to exclude the statements. It was submitted that Master Bombardier Hosford's replies to the questions of Warrant Officer Babineau and Captain Logan were compelled by statute, and therefore on the authority of *R v White* [1999] 2 SCR 417, Master Bombardier Hosford is entitled to use immunity in respect of his replies. Again this submission rests upon the proposition that a failure to reply to the question put by a military superior is a failure to comply with a lawful order contrary to section 83. As I have already stated I do not accept this proposition. It follows that there was no infringement of the rights guaranteed by section 7.

[24] As a result, at the conclusion of the argument on the *voir dire* I ruled that the statements attributed to Master Bombardier Hosford were admissible. The evidence heard on the *voir dire* was applied to the trial proper, except for the evidence given by Master Bombardier Hosford.

[25] Charge No. 1 in the charge sheet charges the possession of service ammunition, the 105mm howitzer propellant charge, in a manner contrary to DAOD 3002-5. That instrument provides "The use of, including tampering with, CF service ammunition, commercial ammunition or explosives, for other than their designed purpose, is prohibited." I am satisfied on all the evidence that the charge bag is service ammunition. As regards charge No. 2, it is formally admitted by the defence in Exhibit 3 that the charge bag is an explosive substance as defined in the *Criminal Code*. The real issue in my view is whether the accused was in possession of the charge bag, as charged in both charges, at the time it was discovered on or about 7 June 2011. For this purpose, the definition of possession in the *Criminal Code* applies to both charges

[26] On the evidence, nobody saw Master Bombardier Hosford with the charge bag in his hands or under his control until the point at which he told Bombardier Lawrence to pass it to him after its discovery on the camp chair. It is a reasonable inference from the statement Master Bombardier Hosford made to Bombardier Lawrence that Master Bombardier Hosford did not know what the item was until Bombardier Lawrence gave it over to him. The only evidence of possession of the charge bag by Master Bombardier Hosford is contained in the statements Master Bombardier Hosford gave to Warrant Officer Babineau and to Captain Logan at the time of the discovery of the charge bag.

[27] For the following reasons I do not consider this evidence sufficient to establish beyond a reasonable doubt that Master Bombardier Hosford was in possession of the charge bag.

[28] In the first place I consider the nature of the statements themselves. The statements are very brief and without much in the way of details. Indeed, the statements seem to me to raise as many questions as they answer.

[29] Secondly, I have looked at the evidence in its entirety and I cannot find any evidence that confirms the accuracy of any part of any of the statements made by Master Bombardier Hosford.

[30] Thirdly, Master Bombardier Hosford, as a trained and experienced master bombardier in the Artillery, was familiar with the safety requirements for the handling of ammunition. In Exhibit 6, the statement given to Master Warrant Officer Bartlett on 31 January 2012, Master Bombardier Hosford explains his familiarity with the rules governing ammunition handling. He would have known that you cannot bring explosives on the adventure training, and you certainly cannot use unexploded ordinance as a fire starter. His statement to the effect that he would have so used it if required seems to me to be contrived on the spot when asked by Captain Logan.

[31] I do not know on the evidence whether Master Bombardier Hosford was attempting to protect someone else by making the statements he did to Warrant Officer Babineau and Captain Logan. That is mere speculation. But I cannot say that what Master Bombardier Hosford said to his superiors was the truth with any degree of

reliability. I am left with a reasonable doubt and he is entitled to the benefit of that doubt.

FOR THESE REASONS, THE COURT:

[32] **FINDS** Master Bombardier Hosford not guilty on both charges.

Counsel:

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Counsel for Her Majesty the Queen

Lieutenant-Commander M. Létourneau, Directorate of Defence Counsel Services
Counsel for Master Bombardier J.M. Hosford