

Citation: *R. V. Corporal A. Farmakoulas, Master Corporal W.P. Hayden & Master Corporal K.L. Smith*, 2004 CM 34

Docket: D200434

**STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA**

Date: 17 November 2004

PRESIDING: COMMANDER P. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

**CORPORAL A. FARMAKOULAS, MASTER CORPORAL W.P. HAYDEN,
MASTER CORPORAL K.L. SMITH
(Accused)**

**DECISION RESPECTING NO PRIMA FACIE CASE APPLICATION
BROUGHT PURSUANT TO QUEEN'S REGULATIONS AND ORDERS
112.05(13).
(Rendered Orally)**

[1] This is an application called a No *Prima Facie* Case Application, brought pursuant to Queen's Regulations and Orders 112.05(13). That article reads—in its material, that article reads:

When the case for the prosecution has closed the judge may, of the judge's own motion or upon the motion of the accused, hear arguments as to whether a *prima facie* case has been made out against the accused, and:

(a) if the judge decides that no *prima facie* case has been made out in respect of a charge, the judge shall pronounce the accused not guilty on that charge; or

(b) if the judge decides that a *prima facie* case has been made out in respect of a charge, the judge shall direct that the trial proceed on that charge.

[2] This application then, is brought at the conclusion of the evidence for the

prosecution. The defence has not, at this stage, been put to their election as to whether or not they intend to call evidence in their defence.

[3] A *prima facie* case is described in Note B to Queen's Regulations and Orders 112.05. The note reads:

... A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case ...

[4] At this stage therefore, an application under this provision will not succeed if there is some evidence with respect to each of the essential elements of the offence charged against the accused.

[5] The elements of the offence contrary to section 129 of the National Defence Act charged against the accused are as follows: first of all, there must be evidence identifying each of the accused as being the offender; second of all, there must be evidence with respect to the date and place of the offence as it is particularized in the charge; thirdly, there must be evidence of conduct that is as particularized in the charge.

[6] In this case, the conduct that is alleged is failing to follow the noise discipline during silent hours, prescribed by paragraph 32 of the Camp Black Bear Standing Orders. Next, it must be established that the conduct was indeed contrary to a regulation, order, or instruction. The next element is that there must be publication and sufficient notification to the accused of the regulation, order, or instruction under Queen's Regulations and Orders 1.20 or 1.21. Lastly, there must be evidence of a blameworthy state of mind on the part of the accused, that state of mind will vary according to the wording of the regulation, order, or instruction that is said to have been breached.

[7] In this case, it is the theory of the prosecution that all three accused are in breach of Article 32, the noise discipline provision of the Camp Black Bear Standing Orders. Specifically, the provision that states:

... During silent hours, from 2300 hours to 0600 hours, all personnel shall keep noise to a minimum...

[8] The evidence discloses that during the silent hour period, overnight February 28/29, 2004, Master Seaman Gouin was disturbed in his sleep while in his quarters in ISO 147. He was awakened by noise, which he determined to be caused by a number of civilian persons outside a nearby ISO, No. 153. A complaint was apparently

made, and the police attended. There is, in my opinion, no evidence with respect to the *actus reus* that is charged against each of the three accused in the charge sheet before the court. In particular, there is no evidence with respect to any noise that was produced by any of the three accused. It is said by the prosecution that noise was produced by a party which was proceeding inside ISO 153 and that each of the three accused were present. It is important to point out that under our system of law, guilt is individual, there is no such thing as collective guilt. Therefore, the evidence of the prosecution must show the individual acts of the accused before the *actus reus* of the offence can be said to be established in the evidence. There is, in my view, no evidence of any noise at all, made by any of the three accused before the court.

[9] It is said by the prosecution, that there was an obligation on the accused, at least with respect to Master Corporal Smith, to withdraw from the, what is said to be the noisy party atmosphere, and that that obligation is derived from the wording of Article 32, of the standing orders.

[10] I agree with the submission of the defence, that there is no obligation that can be found within the four corners of the terms of Article 32. It follows then that there is no evidence with respect to the *actus reus* of the offence charged against the accused. The application, based on a *no prima facie* case, is granted.

[11] Officer of the Court, return Corporal Farmakoulas's headdress to him.
Corporal Farmakoulas—

[12] ACCUSED: Yes, Your Honour.

[13] MILITARY JUDGE: —put your headdress on. This court finds you not guilty. You may offer your compliments to the court and withdraw.

[14] ACCUSED: Thank you, Your Honour.

[15] MILITARY JUDGE: Officer of the Court, return Master Corporal Hayden's headdress to him. Put your headdress on. Master Corporal Hayden, this court finds you not guilty. You may offer your compliments to the court and withdraw.

[16] Officer of the Court, return Master Corporal Smith's headdress to her. Master Corporal Smith, this court finds you not guilty, restore your headdress. You may offer your compliments to the court and withdraw.

[17] This court martial, in respect of Corporal Farmakoulas, Master Corporal Hayden, and Master Corporal Smith, is hereby terminated.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major M. Trudel, Regional Military Prosecutions Eastern
Counsel for Her Majesty the Queen

Captain M.J. Dow, Directorate of Law/Intelligence and Info Operations
Assistant Counsel for Her Majesty the Queen

Major A. Appolloni, Directorate of Defence Counsel Services
Counsel for Corporal A. Farmakoulas

Major L. Boutin, Directorate of Defence Counsel Services
Counsel for Master Corporal W.P. Hayden

Lieutenant-Colonel D. Couture, Directorate of Defence Counsel Services
Counsel for Master Corporal K.L. Smith