COURT MARTIAL

Citation: *R.v. Farrant*, 2015 CM 4008

Date: 20150511
Docket: 201436

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal L.J. Farrant, Accused

Before: Commander J.B.M. Pelletier, M.J.

DECISION RESPECTING A MOTION THAT A NO *PRIMA FACIE* CASE HAS BEEN MADE AGAINST THE ACCUSED ON A CHARGE

(Orally)

INTRODUCTION

[1] In this trial, Corporal Farrant is facing one charge of Absence without Leave (AWOL) under section 90 of the *National Defence Act* (*NDA*) for not reporting to his place of duty at building Y-101 at Garrison Petawawa on 7 May 2014. He remained absent until 0745 hours the next day, 8 May 2014.

THE EVIDENCE

[2] The prosecution called four witnesses before informing the Court that its case was closed. Supervisors testified that on 6 May 2014, the day prior to the absence,

Corporal Farrant had indicated that he would not be present at the unit in Petawawa the next day, on 7 May 2014, as he had an appointment at the Ottawa Heart Institute. On the basis of that statement, Corporal Farrant's absence was authorized and he did not need to be present at 0800 hours on 7 May at building Y-101. However, later that morning a provincial official contacted the unit adjutant to enquire about the whereabouts of Corporal Farrant as he had information to the effect that Corporal Farrant was in Smiths Falls, Ontario. That information prompted verifications by unit personnel with various officials by phone in the course of which information was conveyed to the chain of command to the effect that Corporal Farrant had not taken the daily shuttle run from Garrison Petawawa to Ottawa and to the effect that there were no records of his attendance at the Ottawa Heart Institute. At that point, the fact-finding exercise morphed into a unit disciplinary investigation. Corporal Farrant was interviewed under caution by one supervisor on 8 May and asked a number of questions which he refused to answer on advice of counsel. On 9 May 2014 he was asked by another supervisor for explanations and proof of his attendance at an appointment on 7 May. Once again he said that he refused to discuss the matter on the advice of counsel. He was subsequently ordered by the same supervisor to present evidence of attendance at an appointment, an order to which he would have replied to the effect that he did not have an appointment.

THE ESSENTIAL ELEMENTS OF THE CHARGE

[3] The essential elements of a charge of Absence without Leave under section 90 of the *NDA* are as follows:

(a) the identity of the accused as the author of the offence;

(b) date, time and the place of duty;

(c) the accused knew or should have known where and when the duty took place;

(d) the accused was absent and the length of the absence and; and

(e) the absence was not authorized, i.e., without leave.

POSITION OF THE PARTIES

[4] At the close of the prosecution's case, and pursuant to QR&O 112.05 paragraph (13), the accused presented a non *prima facie* motion with regard to the charge on the basis that the prosecution had failed to introduce any evidence concerning the essential element of identity of Corporal Farrant as the offender. Indeed, the defence argues that none of the witnesses identified the Corporal Farrant they were talking about in their testimony as being the person sitting in the courtroom beside defence counsel.

[5] The prosecution very briefly replied that, indeed, no witness had pointed to the accused sitting next to counsel as being Corporal Farrant but added that this exercise is simply a technicality and not formally needed. The prosecutor added that granting the non *prima facie* motion and acquitting the accused on that basis would bring the administration of justice into disrepute.

[6] Following this argument by the prosecutor, the court, on its own motion, asked the prosecution for arguments as to whether a *prima facie* case has been made out against the accused on the fifth essential element of the offence; namely, the fact that the absence was authorized, or more appropriately in this case, whether any authorization given to attend the Ottawa Heart Institute on 7 May 2014 was void by virtue of the fact that the accused did not attend the Heart Institute in Ottawa on 7 May 2014. The Court was concerned by the lack of evidence as to whether the accused attended at the Ottawa Heart Institute. The prosecution did not have comments to offer on that point.

THE APPLICABLE LAW

[7] As mentioned, the law applicable to courts martial relating to non *prima facie* motions is found in QR&O 112.05, paragraph 13. Note (B) to article 112.05 deals with the issue and provides as follows:

> (B) 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 determination.

[8] That note substantially captures the rule that applies with respect to directed verdicts of not guilty at the close of the evidence for the prosecution, as accepted by the Supreme Court of Canada. The test to be applied was mentioned by Judge Fish, who delivered the decision for the Supreme Court in *R. v. Fontaine*, 2004 SCC 27 at paragraph 53:

> [T]he case against the accused cannot go to the jury unless there is evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty beyond a reasonable doubt.

That rule was more recently reiterated from a different perspective by Justice Binnie, speaking for a majority of the Supreme Court in *R. v. Barros*, 2011 SCC 51, at paragraph 48 to the effect that:

> A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction.

[9] 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 properly instructed jury could reasonably decide on the issue: not "would" or "should", but simply "could".

ISSUE

[10] I find that the prosecution has introduced evidence proving the date, time and the place of duty; that the accused knew about where and when the duty took place and that the accused was absent from his unit until the next day.

[11] Then, the only question this Court has to answer is whether there is evidence in the record upon which a properly instructed panel at a General Court Martial could rationally conclude that the accused is guilty beyond a reasonable doubt, regarding the essential element of identity, as argued by defence.

[12] As far as the element of absence of authorization, raised by the court, to the effect that the accused was authorized to be absent as long as he did go to the Ottawa Heart Institute, the prosecution was obliged to prove that this authorisation was rendered invalid by the failure of the accused to go to the Institute. The question becomes whether a properly instructed panel at a General Court Martial could conclude that the accused was absent from the Ottawa Heart Institute.

ANALYSIS

[13] In order to make a determination on the issue put before me by the defence, I must determine if the defence demonstrated on a balance of probabilities, that no evidence was introduced to link the person about whom witnesses were referring to as Corporal Farrant and the accused sitting in the courtroom. Although that element is known as identification, what is really the subject of discussion in this case is recognition, as all four prosecution witnesses would have been in interaction with Corporal Farrant prior to the alleged offence and knew him. It remains that the Court has not heard any of those witnesses state that they recognize Corporal Farrant as the man sitting next to defence counsel. That absence of evidence is not denied by the prosecution. It is clear therefore that the defence has met its burden on the lack of identification evidence.

[14] The prosecution argues that acquitting the accused on the basis of such a technical issue would bring the administration of justice into disrepute. If that is the case, then it is because more efforts are required to make the military community aware of the stringent requirements of proof beyond reasonable doubt of offences before military tribunals. The fact of the matter is that there is no evidence on one of the essential elements in this case. This total absence of evidence does not give any choice to the court, if it is to fulfil its duty to rule in strict accordance with the law. It is by

acting otherwise, that the court would risk bringing the administration of justice into disrepute.

[15] Indeed, in this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent. That is a fundamental principle, not a mere technicality.

[16] The difficulties faced by unit authorities in this case are acknowledged. Unit officials were provided with troubling information concerning the whereabouts of Corporal Farrant, which required action. An investigation was conducted which allowed confronting Corporal Farrant with a credible allegation that he had obtained the authorization to be absent from his duty under false pretence. The testimony heard by the court reveals that efforts were made to obtain information from various sources and to provide Corporal Farrant with his right to counsel and his right to remain silent, which some misinformed persons may qualify as technicalities but are, in fact, fundamental rights. Here, the accused exercised those rights and decided to remain silent.

[17] It is clear that the lack of confession from the accused provided the prosecution with a difficult task: to prove beyond a reasonable doubt that the accused did not attend the Heart Institute. Yet, that is not an impossible task. Witnesses who were called to testify were not able to present admissible evidence to the effect that the accused was not at the Heart Institute as they simply heard this information from other sources over the phone. The persons at the other end of the phone could have given statements. In all likelihood, they had custody of records showing that the accused was not where he said he was, they could have been called to testify and introduce these records. That evidence was not presented. As a consequence, even if there was some evidence in the form of a statement by the accused to the effect that he could not obey the order of showing proof of an appointment because there were no appointments, there was absolutely no admissible evidence of the accused's failure to attend the Ottawa Heart Institute, appointment or not.

CONCLUSION

[18] I conclude that Corporal Farrant has demonstrated on a balance of probabilities that no evidence was adduced to prove that he was the person who committed the offence. Furthermore, the lack of evidence relating to the accused's absence from the Ottawa Heart Institute means that there is no evidence that the authorization obtained by the accused to be away from his place of duty at building Y-101 was no longer valid.

[19] Corporal Farrant, please stand up. It is my decision that a *prima facie* case has not been made out against you on the only charge on the charge sheet.

FOR THESE REASONS, THE COURT:

[20] **GRANTS** the application;

[21] **FINDS** you not guilty of the charge.

Counsel:

The Director of Military Prosecutions as represented by Major V. Ohanessian

Major D. Hodson, Defence Counsel Services, Counsel for Corporal Farrant