Citation: *R. v. Sergeant S. Gardiner,* 2008 CM 3021

Docket: 2007-83

DISCIPLINARY COURT MARTIAL
CANADA
ONTARIO
HER MAJESTY'S CANADIAN SHIP STAR

Date: 19 June 2008

PRESIDING: LIEUTENANT-COLONEL L-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
v.
SERGEANT S. GARDINER
(Accused)

DECISION ON NO PRIMA FACIE MOTION
(Rendered orally)

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[1] Sergeant Gardiner is charged under section 129(1) of the *NDA* for a neglect to the prejudice of good order and discipline because he allegedly failed to carry at all times the weapon issued to him (C7) while traveling in a Bison vehicle near Kandahar City in Afghanistan, as it was his duty to do so.

[2] As set out in the Queen's Regulations & Orders ,QR&Os, at the close of the prosecution's case, the defence is entitle to move for a non-guilty verdict on the basis that the prosecution has not presented a *prima facie* case: i.e., a case containing evidence on all essential points of a charge that, if believed by the trier of fact and unanswered, would warrant a conviction.

[3] Then, on 18 June 2008, at the close of the prosecution's case, and pursuant to QR&O article 112.05(13), the accused presented a motion of non-*prima facie,* with regard to the only charge on the charge sheet, on the basis that the prosecution had failed to introduce before this Disciplinary Court Martial any evidence concerning two essential elements of the offence laid under section 129 of the *National Defence Act*.

[4] The evidence introduced by the prosecutor before this court martial is composed essentially of the following facts:

a. the testimonies heard; in the order of their appearance before the court, the testimony of Sergeant Robinson, Sergeant Lalonde and Master Warrant Officer Van Houtte; and

b. the judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

[5] This type of motion at the close of the prosecution's case is different from a request for an acquittal based on reasonable doubt. The latter argument is that there may be some evidence upon which a jury, properly instructed, might convict, but that it is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt is not called into play until all the evidence is in, reasonable doubt cannot be considered unless the accused has either elected not to call evidence or has completed his evidence.

[6] 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 the charge so that a reasonable jury, properly instructed, could convict: not "would" or "should", but simply "could".

[7] The governing test for a directed verdict is set out by Ritchie J. in *United States of America* v. *Shephard*, [1977] 2 S.C.R. 1067 at p. 1080, as follows:

> ... whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

[8] Also, the burden of proof rests on the accused to demonstrate, on a balance of probabilities, that this test is met.

[9] The test is the same whether the evidence is direct or circumstantial. The application of this test varies according to the type of evidence in the prosecution's case. Where the prosecution's case is based entirely on direct evidence, application of the test is straightforward. If the judge determines that the prosecution has presented direct evidence as to every element of the offence, the application must be denied. The only issue will be whether the evidence is true, and that is for the trier of fact. Where proof of an essential element depends on circumstantial evidence, the issue at trial is not simply whether the evidence is true. Rather, if the evidence is accepted as true, is the inference proposed by the prosecution the correct inference? The judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the Prosecution. The judge neither asks whether he would draw those inferences, or assesses credibility. The issue is only whether the evidence, if believed, could reasonably support an inference of guilt.

[10] The essential elements of the offence under section 129(1) *NDA* are:

a. the identity of the accused;

b. the date and place;

c. the omission alleged in the charge really occurred;

d. that the omission amounted to blameworthy negligence; and

e. the prejudice to good order and discipline.

[11] In order to prove the prejudice to good order and discipline under section 129(1) *NDA*, the prosecution had to adduce evidence:

a. on the standard of conduct required;

b. on the fact that the accused knew or ought to have known the standard of conduct required;

c. on the fact that the omission of the accused amounted to a contravention of the standard of conduct; and

d. on the fact that this breach to the standard of conduct was prejudicial to good order and discipline.

[12] Defence counsel conceded that there is some evidence before this court martial on the essential elements of the offence concerning the identity of the accused, the date and place. However, she suggested that there is no evidence supporting the neglect alleged in the particulars of the charge, and on the fact that the neglect is blameworthy. Additionally, she suggested that concerning the prejudice to good order and discipline, there is no evidence supporting this essential element of the offence.

[13] Concerning the essential element of neglect, the court has to find out if some evidence has been adduced by the prosecution concerning the conduct of the accused itself, which is the *actus reus*, and the requisite mental element of it, which is the *mens rea*. First, the negligence concept under section 129 of the *National Defence Act* must be addressed as a penal concept. Generally speaking, conduct which constitutes a departure from the norm expected of a reasonably prudent person forms the basis of both civil and penal negligence. However, unlike civil negligence, which is concerned with the apportionment of loss, penal negligence is aimed at punishing blameworthy conduct. Fundamental principles of military law justice require that the law on penal negligence concern itself not only with conduct that deviates from the norm, but also with the offender's mental state. As established in *R. v. Beatty*, 2008

SCC 5, at paragraph 7, the modified objective test established in *R. v. Hundal*, [1993] 1 S.C.R. 867 remains the appropriate test to determine the requisite *mens rea* for negligence-based military service offences under the Code of Service Discipline.

[14] Concerning the *actus reus*, it must be defined by the applicable standard and the fact that the conduct of the accused did not respect it. It is the conclusion of this court that some evidence has been adduced by the prosecution about the applicable standard, which would be the fact that for military members going out of the Kandahar Air Field, it was necessary to carry on all time their personal weapon, which included the C7 rifle. Also, some evidence was adduced by the prosecution that the conduct of the accused was contrary to the applicable standard, considering that evidence put before the court was to the effect that the accused left Kandahar Air Field in the Bison with his C7 and travelled back without it on his return from the destination for the mission.

[15] Concerning the *mens rea* for negligence under section 129 of the *National Defence Act*, the remarks of the Supreme Court of Canada decision in *Beatty*, quoted above, at paragraph 48 and 49 are very relevant to our case, and I quote:

> [48] However, subjective *mens rea* of the kind I have just described need not be proven to make out the offence because the mischief Parliament sought to address in enacting s. 249 encompasses a wider range of behaviour. Therefore, while proof of subjective *mens rea* will clearly suffice, it is not essential. In the case of negligence-based offences such as this one, doing the proscribed act with the absence of the appropriate mental state of care may instead suffice to constitute the requisite fault. The presence of objective *mens rea* is determined by assessing the dangerous conduct as against the standard expected of a reasonably prudent driver. If the dangerous conduct constitutes a "marked departure" from that norm, the offence will be made out. As stated earlier, what constitutes a "marked departure" from the standard expected of a reasonably prudent driver is a matter of degree. The lack of care must be serious enough to merit punishment. There is no doubt that conduct occurring in a few seconds can constitute a marked departure from the standard of a reasonable person. Nonetheless, as Doherty J.A. aptly remarked in *Willock*, "conduct that occurs in such a brief time frame in the course of driving, which is otherwise proper in all respects, is more suggestive of the civil rather than the criminal end of the negligence continuum" (para. 31). Although *Willock* concerned the offence of criminal negligence, an offence which is higher on the continuum of negligent driving, this observation is equally apt with respect to the offence of dangerous operation of a motor vehicle.
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> [49] If the conduct does not constitute a marked departure from the standard expected of a reasonably prudent driver, there is no need to pursue the analysis. The offence will not have been made out. If, on the other hand, the trier of fact is convinced beyond a reasonable

> doubt that the objectively dangerous conduct constitutes a marked departure from the norm, the trier of fact must consider evidence about the actual state of mind of the accused, if any, to determine whether it raises a reasonable doubt about whether a reasonable person in the accused's position would have been aware of the risk created by this conduct. If there is no such evidence, the court may convict the accused.

[16] I then conclude, that for an offence of negligence under section 129 of the *National Defence Act*, it is only necessary to establish an objective *mens rea,* and a subjective one is not necessary in order to prove this offence.

[17] Then, for doing so, it is necessary to establish a marked departure in this case. It means that it would have been necessary for the prosecution to adduce some evidence on the standard expected of a reasonably prudent crew commander. This standard must be established in order for the panel to determine if the conduct of the accused in the circumstances of the case constitutes a marked departure to the extent that it is a blameworthy conduct. The context of the mission itself does not constitute evidence on the expected standard, it just prove that a higher degree of care would have been required.

[18] It is my conclusion that no evidence at all has been adduced by the prosecution concerning the expected standard. As the applicable standard requires, it is the manner in which the accused carried his C7 rifle while traveling in the Bison vehicle that is at issue, not the consequence of not doing so. In making the objective assessment, the panel should be satisfied, on the basis of all the evidence, that the conduct amounted to a marked departure from the standard of care that a reasonable person would observe in the accused's circumstances. Without any evidence on the expected standard, then it makes impossible for a reasonable panel properly instructed that it could return a verdict of guilty.

[19] I would like to add, that despite I had concluded that there was evidence on the essential element of negligence for the offence before this court, it's still my conclusion that there is no evidence on the essential element of prejudice to good order and discipline. There is nothing in the evidence adduced by the prosecution that would permit to infer from the circumstances a prejudice to good order and discipline that constitutes a natural consequence of the proven act, as stated at paragraph 7 of *Sergeant B.K. Jones and Her Majesty the Queen*, 2002 C.M.A.C. 11.

[20] Moreover, there is no direct or circumstantial evidence whatsoever concerning any prejudice to good order and discipline that the court is able to find in the evidence adduced by the prosecution. In fact, there is no evidence that harm to order and discipline resulted from the accused's negligence.

[21] Then, the court concludes that the accused proved on a balance of probabilities that on the first charge, there was no evidence to prove the essential elements concerning the negligence and the prejudice to good order and discipline.

[22] Sergeant Gardiner, please stand up. It is my decision that a *prima facie* case has not been made out against you on the first charge on the charge sheet, and this court martial finds you not guilty of that charge.

LIEUTENANT-COLONEL L-V. D'AUTEUIL, M.J.

COUNSEL:

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