Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20220810

Docket: CMAC-620

Citation: 2022 CMAC 7

CORAM: **CHIEF JUSTICE BELL**
SCANLAN J.A.
PARDU J.A.

BETWEEN:

BDR CHELSEA H.M. COGSWELL

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on May 31, 2022.

Judgment rendered from the Bench at Toronto, Ontario, on May 31, 2022, with reasons to follow. These are those reasons.

REASONS FOR JUDGMENT BY: SCANLAN, J.A.

CONCURED IN BY: BELL, CHIEF JUSTICE
PARDU, J.A.

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REASONS FOR JUDGMENT

SCANLAN J.A.

I. Introduction

[1] On August 18, 2021, Bombardier (Bdr) Cogswell (the Appellant) was found guilty on nine charges, all related to incidents occurring on July 21, 2018 at Canadian Forces Base (CFB) Gagetown, New Brunswick. The Military Judge found that the Appellant prepared and

distributed cupcakes containing cannabis to members of the armed forces during a live fire exercise. She appeals from her conviction and sentence. The Crown did not cross appeal the sentence.

[2] On May 31, 2022, after hearing submissions from the Appellant, this Court dismissed the appeal from the convictions. Although the Court granted leave to appeal the sentence, the appeal from sentence was also denied. The parties were advised that reasons would follow. These are those reasons.

II. Grounds of appeal

[3] The Appellant asserts the verdict was unreasonable. She asks this Court to set aside the convictions and enter acquittals. In the alternative, she seeks a new trial, arguing the Military Judge erred in her appreciation of the evidence. The Appellant also asserts that the Military Judge erred in refusing to exclude evidence related to laboratory analyses, which confirmed the presence of tetrahydrocannabinol (THC) on a wrapper of one of the cupcakes. This argument is based on the assertion that there was a breach of her rights under section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act, 1982* (UK), 1982, c 11 (Charter). Finally, should the conviction appeal be dismissed, the Appellant seeks to appeal her sentence on the basis of an error of principle and requests her sentence be varied to a non-custodial one.

III. Facts

[4] A military exercise; “Exercise COMMON GUNNER” was held at the training area of CFB Gagetown, New Brunswick, over a period of two and a half weeks in July of 2018. It was a complex operation with as many as 150 personnel participating in the exercise.

[5] On July 21, 2018, members of W (Whiskey) Battery, Royal Canadian Artillery School (RCAS) were scheduled to conduct a live fire portion of exercises. The Battery was broken down into troops under which there were three detachments, two of which were involved in the incident giving rise to the charges in this case. One detachment was led by Master Bombardier (MBdr) Vallerand and the other was led by MBdr Diggs.

[6] The Appellant and one other individual, Gunner (Gnr) McLandress, were operating a mobile canteen providing snacks and supplies to soldiers while in the field. The canteen moved to different areas on the training grounds in order to support the various troop activities. Her duties included selling snacks and food to the two detachments whose members unwittingly became intoxicated by cannabis during the live fire exercise.

[7] The source of the cannabis was cupcakes the Appellant baked and distributed to the troops. They were laced with cannabis. The cupcakes were chocolate, approximately two inches by two inches in size, with chocolate icing and a jellybean on top. Each cupcake was in a wrapper.

[8] The mobile canteen truck arrived at approximately 1030 to 1100 hours. MBdr Diggs told his troop to go to the canteen. Three members of the troop attended the canteen. Each consumed a cupcake given to them by the Appellant. One of them also brought a cupcake back from the canteen for another member of the detachment. Not long after consuming the cupcakes, three of the members displayed symptoms consistent with ingestion of cannabis. MBdr Diggs also consumed a cupcake, but aside from having a dry mouth, did not exhibit any symptoms.

[9] The canteen then moved to a location where MBdr Vallerand's detachment was located. At this location, four members of the detachment attended the canteen and consumed cupcakes made by the Appellant. A fifth member of the troop, Gnr Penner, also attended the canteen but did not take a cupcake. Approximately 15 minutes later, Gnr Penner ate the remaining piece of a cupcake that another member of the detachment left unfinished in the cab of the truck.

[10] The detachment, then in their truck, started to move to Airstrip 1 where the artillery was located. While en route, the driver, who had consumed a cupcake, started to feel mind-altering symptoms and nearly collided with another vehicle. Similarly, three others who had consumed cupcakes experienced symptoms which manifested themselves during the drive to Airstrip 1. A fourth member who consumed a cupcake fell asleep in the back of the vehicle during the drive and testified he felt very foggy, lethargic, incoherent and slow when he awoke.

[11] When the two detachments met at the gun line, they began comparing their symptoms and came to the conclusion they were all feeling unusual and had similar symptoms. Some

members began to suspect they were high and, upon further discussion, they identified the common source of their symptoms as the cupcakes. At least one cupcake wrapper was retained and eventually turned over to the Military Police.

[12] The Commandant of RCAS contacted the military police through Captain (Capt) Kaempffer to investigate. Corporal (Cpl) Whitehall, a military police officer, attended and began an official investigation. He received a single cupcake wrapper in a Ziploc bag from Capt Kaempffer, which was eventually sent for testing by Health Canada. Testing revealed the presence of THC on the wrapper. In an Agreed Statement of Fact, the Certificate of the Analyst, dated 4 October 2018 and signed by Vincent Levasseur, was admitted into evidence.

[13] Capt Kaempffer also collected five urine samples pursuant to the Canadian Forces Drug Control Program from five different members involved in the incident. They had voluntarily submitted to drug testing. Three members did not provide urine samples. All samples tested positive for marihuana metabolite. The fact marihuana metabolite was detected in the urine samples means the members who provided the samples consumed marihuana within 28 days prior to the date the sample was provided.

[14] Eighteen charges were ultimately laid against Bdr Cogswell in relation to this incident. The prosecution withdrew eight charges prior to the start of the court martial. The remaining 10 charges were for disgraceful conduct (s. 93 of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA)), an act to the prejudice of good order and discipline during military training (s. 129

NDA and an alternate charge to the s.93 charge), and eight charges of administering a noxious thing contrary to s. 245(1)(b) of the *Criminal Code*, R.S.C. 1985, c. C-46 (Criminal Code) (s. 130 NDA).

IV. Section 7 Charter Application

[15] A blended *voir dire* was held during the court martial on a lost evidence application brought by the Appellant. She argued that more than one cupcake wrapper had been collected and that her s. 7 rights had been breached as a result of the loss of cupcake wrappers. The Appellant sought exclusion of the Health Canada analysis done on a single wrapper as a remedy for the alleged loss of other wrappers. The Military Judge dismissed this application.

[16] The Military Judge found that there was no real evidence lost in the course of the investigation. She noted that MBdr Diggs could have been wrong in his estimate of the number of wrappers he collected (4-6). There were only three persons in his detachment that got sick. Also, there was no evidence that anyone else in the chain of command collected wrappers. She noted the other detachment members consumed their cupcakes prior to arriving at the airstrip, where the discussion as to the possible problem with the cupcakes occurred. The Judge said it seemed: "nonsensical to suggest that cupcake wrappers that were discarded as garbage at the time the cupcakes were consumed when the importance of that evidence was not known, now constitutes alleged negligence committed by the prosecution and the military police." (*R. v. Cogswell*, 2021 CM 2016 at para 74)

[17] Even if wrappers were lost, the Military Judge determined they were not lost because of unacceptable Crown negligence. She found the evidence would have been lost before the military police were involved and the chain of command was not part of the investigation team. It was reasonable for those involved in the exercises on a hot day to first assume the symptoms were the result of heat and dehydration. Any decision not to drive around and collect or retain wrappers was prior to the call to military police.

[18] The Military Judge concluded the prosecution had satisfactorily explained the loss (if any) and found the prosecution had met its obligation to preserve evidence, holding s. 7 of the Charter had not been breached. I agree.

[19] In addition, the Military Judge also found that there were no extraordinary circumstances justifying a stay on the basis of prejudice resulting from any loss of evidence. The Military Judge rejected the Appellant's submission that the cupcake wrappers were the only real evidence of the *actus reus* of the offences. I agree.

[20] There was other evidence, in addition to the wrapper, that confirmed the *actus reus*. The Military Judge found any loss of cupcake wrappers did not prejudice the Appellant, finding instead any loss of wrappers impaired the prosecution's case more than the Appellant's. The Crown was left to rely mainly on circumstantial evidence as to the source of intoxication for those cupcakes where wrappers were not retained. Had other wrappers confirmed any presence of THC, it would have prejudiced the Appellant.

[21] As noted by the Supreme Court of Canada in *R. v. Carosella*, [1997] 1 S.C.R. 80, 112 C.C.C. (3d) 289, para 76:

> […] what must be demonstrated "on a balance of probabilities is that the missing evidence creates a prejudice of such magnitude and importance that it can be fairly said to amount to a deprivation of the opportunity to make full answer and defence"
>
> [Citations omitted.]

[22] The most that could be said in this case is that it is possible that additional wrappers, if tested, may not have had THC. While there was a lack of clarity with the chain of custody, the evidence suggested that the people who handled the Ziploc bag were trusted members of the chain of command who understood the need to safeguard the wrapper as evidence. There was considerable evidence aside from the wrappers supporting the inferences and findings that the other cupcakes, baked and delivered by the Appellant, contained THC. The fact that several persons in the two troops exhibited symptoms of intoxication and five had urine samples which confirmed the presence of marihuana metabolite, speaks volumes on this point.

[23] I am not convinced the Military Judge erred in determining the military police and prosecution services had not lost any evidence. The evidence supports the finding that only one wrapper was turned over to the military police. If there were any additional wrappers collected, the record does not support an assertion that they were turned over to, or lost by the military police or prosecutors.

[24] Finally, as suggested by the Military Judge, there was no demonstrated abuse of process violating the fundamental principles underlying the community's sense of decency and fair play and accordingly there was no need to consider a remedy.

V. Appeal from convictions

[25] I have already referred to the various offences for which the Appellant was convicted. For clarity they are set out again: the Military Judge convicted the Appellant of behaving in a disgraceful manner contrary to s.93 of the NDA and eight counts of administering a noxious thing with the intent to aggrieve or annoy contrary to s. 130 of the NDA and 245(1)(b) of the Criminal Code.

[26] The Military Judge's analysis and decision were a model of thoroughness, thoughtfulness and clarity. Throughout her decision she explained her weighing of the evidence, referencing any shortcomings or limitations in relation to that evidence. For example, she found all complainants credible and without animosity, incentive to lie or embellish. In spite of her finding of credibility, she expressed caution as to their reliability given the state of their intoxication.

[27] The record supports her finding that the complainants had ingested cannabis as their symptoms suggested, and confirmed in the available urine tests. The tests confirmed that of those tested, they had been exposed to cannabis within 28 days prior to the testing. Of those not tested, for most, their symptoms were consistent with their peers. The onset of symptoms for all affected detachment members was proximate to the ingestion of the cupcakes made by the Appellant. The

Judge found the cannabis came form the cupcakes and not the water as suggested by the Appellant at trial.

[28] The Military Judge found that the Appellant had put cannabis in the cupcakes. In her reasoning, she noted the Appellant's two police statements were inconsistent and indicated animosity toward her unit. She also rejected the defence theory that one of the members may have administered the cannabis themselves.

[29] On appeal, the Appellant made much of the fact that one of the members showed symptoms, after eating only a leftover portion of a cupcake, which had been otherwise consumed by another member. The issue, according to the Appellant, was that there was no clear evidence as to how the cupcake had been eaten; was the top consumed and the bottom left; was the cupcake consumed from the side leaving both members as having consumed a portion of the top.

[30] The Appellant suggests the Judge misapprehended, or was mistaken, regarding the evidence as to how that one cupcake had been eaten; hence relying too much on the certificate of analysis for proof that the cannabis was in the batter and not on top.

[31] A misapprehension of evidence can include a mistake as to the substance of relevant evidence, a failure to consider evidence relevant to a material issue or a failure to give proper effect to evidence: *R. v Morrissey*, 1995 CANLII 3498 (ON CA), 97 C.C.C. (3d) 193 at p.218; *R. v. Sinclair*, 2011 SCC 40, [2011] 3 S.C.R. 3 at para 13. An appellant must demonstrate the judge

made a palpable and overriding error: *R. v. Clark*, 2005 SCC 2, [2005] 1 S.C.R. 6, para 9 and the misapprehension of evidence "must play an essential part … 'in the reasoning process resulting in a conviction'": *R. v. Lohrer*, 2004 SCC 80, [2004] 3 S.C.R. 732, para 2. It is a stringent standard and requires more than simply showing a different possible interpretation of the evidence: *R. v. Lee*, 2010 SCC 52, [2010] 3 S.C.R. 99, at para 4. In order to direct a new trial, the error must be readily obvious: *Sinclair*, para. 53.

[32] The evidence does not lead me to conclude the Judge was clearly wrong in finding the leftover portion of the cupcake eaten did not include the top portion. As noted in *Lee*, *supra*, the standard is more than simply showing a different interpretation of the evidence. This was an important point for the Appellant as she argued, at trial and on appeal, that it was possible someone other than the Appellant had added drugs to the top of the cupcakes after they had been baked. The evidence does not say the leftover portion of the cupcake did not include the top but the evidence was that Gnr Penner ate approximately "one quarter" of a cupcake and he ate it "off the wrapper". I refer to the comments of the Judge on this issue:

> In assessing whether the cupcakes were the only source of the cannabis in the cupcakes, the court accepted the testimony of then-Gunner Penner's when he went to the canteen, he did not take a cupcake. However, he also told the court that he later ate the leftovers of then-Gunner Jarbeau's cupcake that he found in the cab of their truck. He said that he ate approximately a quarter of the leftover cupcake from inside the wrapper. Given that both then-Gunners Penner and Jarbeau displayed symptoms of intoxication, and only one of them would have eaten the top and/or the jelly bean, this fact dispels the possibility that someone might have dropped a cannabis source onto the top of the cupcakes or, alternatively, that the source of the cannabis might have come from the jelly bean on the top. If there were only drops added to the top of the cupcake, it is highly unlikely that then-Gunner Penner would

> have been affected, but the fact that he experienced symptoms of cannabis intoxication strengthens the inference that the THC was in the actual cupcake mix itself.
>
> (*Cogswell*, *supra*, at para 184(e))

[33] I am not satisfied the Judge was "clearly wrong" in finding that the evidence supported a determination that only one of the members had eaten the top of that cupcake. The member, as noted, said he ate one-quarter of the cupcake "off the cupcake wrapper". The Judge used the words "[…] from inside the wrapper." The record does not show the Judge was "clearly wrong" in finding that only one member ate the top. On that point, she determined that if only one member consumed the top of the cupcake it: "[…] strengthens the inference that the THC was in the actual cupcake itself." That said the Judge also said she did not require the Health Canada Certificate for one of the cupcake wrappers to satisfy her as to the source of the cannabis.

[34] The alternative suggestion by defence that someone else may have put THC on the top of the cupcakes did not raise a reasonable doubt in the Judge's mind. In a case based on circumstantial evidence, as noted in *R. v. Dipnarine*, 2014 ABCA 328, 316 C.C.C. (3d) 357:

> [22] Circumstantial evidence does not have to totally exclude other conceivable inferences. If the trier of fact infers guilt because the alternatives do not raise a doubt in his or her mind, the verdict is not thereby rendered unreasonable, *ipso jure*. It is still fundamentally for the trier of fact to decide if any proposed alternative way of looking at the case is reasonable enough to raise a doubt in the mind[s] of that trier.

[35] As noted in *R. v. Villaroman*, 2016 SCC 33, [2016] 1 S.C.R. 1000, para 55, where a case is based on circumstantial evidence the question is "[…] whether the trier of fact, acting judicially, could reasonably be satisfied that the accused's guilt was the only reasonable conclusion available on the totality of the evidence."[Citations omitted]

[36] I am satisfied the Judge here considered the totality of the evidence in deciding she was satisfied beyond a reasonable doubt the Appellant had put the cannabis in the cupcakes. As noted by the Judge, the Appellant's two statements to the police were inconsistent and indicated animosity towards her unit. She found the Appellant had opportunity, knowledge and ready access to the drug. The Appellant had a medical prescription for marijuana. She also found that it would have been next to impossible for an interloper to intercept the cupcakes and apply drugs.

[37] The Judge also reviewed conversations the Appellant had with every member to whom she handed a cupcake. Some she warned that the cupcakes had coconut or avocado oil in them and may "taste weird". There was also evidence of a conversation between the Appellant and one member when he asked the Appellant if there was anything in the cupcakes because he was in recovery for alcoholism. The Appellant raised her hands in an "I don't know" gesture. When pressed during her second statement to the police, upon being advised that the investigation may have to involve international criminal investigators, the Appellant said she did not lace the cupcakes with cannabis but she knew who did, offering to name members who had edibles in the field the day of the incident. There was no evidence of any member being in possession of an edible in the field that day.

[38] The Judge considered and dismissed the possibility that another soldier working in the canteen could have administered the cannabis. She also considered the fact that one soldier who consumed a cupcake had no symptoms other than a dry mouth. This was consistent with expert evidence that different symptoms are possible with different people.

[39] The Judge was aware of the fact forensic testing of the wrapper from one cupcake does not alone prove the cannabis was in the batter. Opportunity, *animus* as distinct from motive, high degree of exclusivity, evidence of the toxins in the cupcakes all point to the Appellant. The Military Judge was entitled to make inferential findings based on the direct and circumstantial evidence at trial.

[40] A reasonable verdict is one that a properly instructed jury or a judge alone could have rendered: see, *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746, para 9; *R. v. Yebes*, [1987] 2 S.C.R. 168, 36 C.C.C. (3d) 417; *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, para 36.

[41] I am not satisfied the Military Judge erred in her findings or conclusions. There was evidence of significant harm in terms of the effects suffered by the complainants and interference with their bodily integrity. The training exercise was disrupted and the danger of conducting a live fire artillery exercise while intoxicated, was high. Cannabis was found to have been a noxious thing based on its mind-altering effects, including impairment of cognitive ability, lethargy and drowsiness. The findings of the Judge were well-anchored in the evidence and the

law, warranting convictions under s.93 of the NDA and s. 130 of the NDA, as set out in s. 245 of the Criminal Code.

[42] The appeals from convictions should be dismissed.

VI. Appeal from sentence

[43] It is noted again, the Respondent has not cross-appealed the sentence. The Military Judge sentenced the Appellant to imprisonment for a period of 30 days, dismissal her from Her Majesty's service and ordered a reduction in rank to that of a gunner. The prosecution had asked for 12 months imprisonment. Defence requested a non-custodial sentence.

[44] As noted by the Supreme Court of Canada in *R. v. Lacasse*, 2015 SCC 64, [2015] 3 S.C.R. 1089, a high degree of deference is owed to a sentencing judge except where there is an error in law or an error in principle that has an impact on the sentence. An appellate court may not vary a sentence unless it is demonstrably unfit, nor may an appellate court intervene simply because it would have weighed the relevant factors differently.

[45] In *R. v. Boire*, 2015 CM 4010, para 23, the court referenced two requirements to obtain a suspension of custodial punishment: on the balance of probabilities, the offender's circumstances justify a suspension, and whether a suspension of the punishment would undermine the public trust in the military justice system, considering the circumstances of the offences and the

offender. I would add to that the requirement that a suspension be related to imperative military operations when a suspension does not relate to the offender's welfare.

[46] I have had the benefit of reviewing the Appellant's sealed health related files and consider the contents thereof together with the entire record before the court below. The Appellant emphasizes the welfare of the Appellant and sentencing principles in general as justification for the suspension of the custodial portion of the sentence.

[47] I am satisfied the Military Judge properly considered the circumstances of the offender, including PTSD related to a prior incident which occurred while the Appellant was in the Canadian Armed Forces. As was pointed out by the Judge, a fundamental purpose of sentencing in a court martial is to promote the operational effectiveness of the CAF by contributing to the maintenance of discipline, efficiency and morale and to contribute to respect for the law and maintenance of a just, peaceful and safe society. The Judge found that in the circumstances of this case the purpose of general deterrence must take precedence over individual deterrence with respect to the Appellant and that the principle of denunciation must be given priority.

[48] There were no similar cases to set the parameters of parity. Comparing this case to *R. v. Ravensdale*, 2013 CM 1001, the Judge determined that a sentence that fell short of imprisonment would not be a fit sentence and she refused to suspend the sentence pursuant to s. 215 of the NDA. She indicated that she had already considered the Appellant's mental health issues in

reducing the sentence and that she was not convinced the Appellant was unable, by reason of her illness, to serve her sentence.

[49] What the Appellant did had a direct impact on the entire operation involving 150 armed forces members. One of the members had a near collision as he drove heavy equipment after eating a cupcake. Both detachments were headed to a live fire exercise, using extremely dangerous equipment. Artillery is designed as an instrument of death and destruction. The degree of their intoxication was reflected in some of their behaviours. They were in no condition to be firing high-powered artillery. What the Appellant did presented a danger to all troops involved in this large-scale training exercise.

[50] Part of the military ethos is built on trust in fellow soldiers, knowing they have your back and you have theirs. That trust is severely undermined when a soldier actively does something which they know, or should know, endangers colleagues. Clearly, what was done here, in the context of a live fire exercise, endangered all involved and undermined that trust in the extreme. There was evidence from the victims suggesting the incident had an enduring effect on some of the complainants in this case.

[51] The Judge considered the circumstances of the offender, including her PTSD condition and treatment. She also considered the nature of the offences committed, and all relevant principles of sentencing, deciding these offences justified a jail sentence.

[52] I am satisfied the sentence of 30 days in jail is not excessive.

VII. Conclusion

[53] I am of the opinion that the appeal of convictions should be dismissed.

[54] While this Court granted leave to appeal the sentence, I am of the opinion that the appeal of sentence should be dismissed.

"J. Edward Scanlan"
J.A.

"I agree.
B. Richard Bell, Chief Justice"

"I agree.
Gladys I. Pardu, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	BELL, CHIEF JUSTICE PARDU, J.A.
DATED:	AUGUST 10, 2022

APPEARANCES:

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