Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20130920

Docket: CMAC-554

Citation: 2013 CMAC 3

CORAM: **VEIT J.A.**
HANSEN J.A.
MAINVILLE J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL J.H. COURNEYEA

Respondent

Heard at Edmonton, Alberta, on June 14, 2013.

Judgment delivered at Ottawa, Ontario, on September 20, 2013.

REASONS FOR JUDGMENT OF THE COURT BY: THE COURT

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REASONS FOR JUDGMENT OF THE COURT

[1] The respondent was tried by Standing Court Martial on the following three charges:

(a) An offence punishable under section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5, that is to say, assault with weapon contrary to section 267(*a*) of the *Criminal Code*, R.S.C. 1985, c. C-46, in that he, on or about 15 July 2011, at or near Kandahar Airfield, Afghanistan, did in committing an assault upon Corporal Kehler, A.R., use a weapon to wit a C7 rifle.

(b) An offence punishable under section 130 of the *National Defence Act*, that is to say, pointing a firearm contrary to section 87 of the *Criminal Code*, in that he, on or about 15 July 2011, at or near Kandahar Airfield, Afghanistan, did, without lawful excuse point a firearm to wit a C7 rifle at Corporal Kehler, A.R.

(c) An offence punishable under section 130 of the *National Defence Act*, that is to say, uttering threats contrary to section 264.1(1)(*a*) of the *Criminal Code*, in that he, on or about 15 July 2011, at or near Kandahar Airfield, Afghanistan, did knowingly utter a threat to Corporal Kehler, A.R., to shoot said Corporal Kehler.

[2] The respondent pleaded not guilty to all the charges. At trial he presented a defence of automatism based on a post traumatic stress disorder resulting from two IED strikes on the tank he was driving in Afghanistan.

[3] On the first charge (assault with a weapon), the military judge "concluded that Corporal Courneyea has convinced [me] on an a balance of probabilities that his consciousness was so impaired that he had no voluntary control over his actions when he loaded and cocked his C7 rifle.": Appeal Book (AB) at p. 303, lines 32 to 36.

[4] On the second charge (pointing a firearm at Corporal Kehler), the military judge found that "Corporal Courneyea never pointed his C7 rifle directly at Corporal Kehler…[he] always kept his C7 pointed at the ground in front of Corporal Kehler when he loaded and cocked the weapon": AB at p. 304, lines 4 to 8.

[5] On the third charge (threatening to shoot Corporal Kehler), the military judge found that "Corporal Kehler did not feel threatened and none of the witnesses testified he thought Corporal Courneyea was threatening Corporal Kehler by saying these words. Examining these words within

the context of the conversations and events in which they occurred and in taking into account the situation of the recipient of the alleged threat, the court concludes that the evidence does not prove beyond a reasonable doubt that, considered objectively, those words conveyed a threat to cause death o[r] serious bodily harm to Corporal Kehler": AB at p. 305, lines 31 to 41.

[6] The appellant appeals with respect to the verdict on the first and third charges only. The appellant submits that the military judge erred in law (a) in determining that the respondent had discharged the evidentiary burden of putting the defence of automatism in play; (b) by finding the respondent not responsible on account of mental disorder with respect to the first charge of assault with a weapon; and (c) in acquitting the respondent on the third charge of threatening to shoot.

[7] The law presumes that people act voluntarily. A defence of automatism amounts to a claim that the actions of the accused were not voluntary. As a result, "the legal burden in cases involving claims of automatism must be on the defence to prove involuntariness on a balance of probabilities to the trier of fact": *R. v. Stone*, [1999] 2 S.C.R. 290 (*Stone*) at para. 179; see also subsections 202.13(1) to (3) of the *National Defence Act*.

[8] Moreover, a proper foundation must be established to determine whether, to begin with, the defence should even be put to the trier of fact. The burden at this stage is to determine "whether there is evidence upon which a properly instructed jury could reasonably decide the issue": *R v. Fontaine*, 2004 SCC 27, [2004] 1 S.C.R. 702 (*Fontaine*) at para. 12; see also para. 54. The language used in *Stone* could be understood as requiring some form of weighing of the evidence at this stage. That approach was however discarded in *Fontaine*, in which Fish J. rather found that in

light of the decisions of the Supreme Court of Canada in *R. v. Arcuri*, 2001 SCC 54, [2001] 2 S.C.R. 828 and *R. v. Cinous*, 2002 SCC 29, [2002] 2 S.C.R. 3, the "evidential burden is discharged if there is some evidence upon which a properly instructed jury could reasonably decide the issue" (emphasis in original): *Fontaine* at para. 14; see also para. 57. The burden, therefore, is to "put the issue in play": *Fontaine* at paras. 64 to 74.

[9] The evidential burden at issue here, namely whether the foundation for the defence of mental disorder automatism is such that it should be left to the trier of fact, is a matter of law subject to review in appeal on a standard of correctness: *Fontaine* at paras. 11-12; *R. v. Tran*, 2010 SCC 58; [2010] 3 S.C.R. 350 at paras. 40-41.

[10] In this case, the psychiatrist retained by the defence, Dr. Girvin, diagnosed Corporal Courneyea as suffering from post traumatic stress disorder (PTSD) at the time the incident took place (Psychiatric opinion at p. 4, AB at p. 320), and concluded (a) that "it is unlikely that he [Corporal Courneyea] had a dissociative episode at the time of allegedly uttering threats"; (b) that "it is more likely that he had a dissociative episode in readying his weapon and posture than in making threatening comments, although both are possible" and (c) "it is most plausible that the alleged offences were the product of the combined effects of exhaustion, persistent hyperarrousal symptoms of PTSD, and possible dissociation with exaggerated and inappropriate threat response including assuming the ready position" (Psychiatric opinion at pp. 4-5, AB at pp. 320-321).

[11] The psychiatrist was also of the opinion that Corporal Courneyea had a history of dissociative episodes resulting from post traumatic stress disorder (Psychiatric opinion at p. 4, AB at

p. 320). She further testified that in appropriate circumstances, a dissociative episode can affect the voluntary nature of actions (Transcript, AB at pp. 209-210).

[12] In light of the overall circumstances of this case, we are all of the view that this Court should not interfere with the military judge's decision to put into play the defence of automatism.

[13] Furthermore, the military judge's finding that Corporal Courneyea was not responsible on account of mental disorder with respect to the first charge of assault was one based on his assessment of the facts once the defence of automatism had been put into play. The appellant has failed to convince us that the military judge committed a reviewable error in his findings with respect to that defence.

[14] Finally, having found that Corporal Courneyea was in a state of automatism and acted involuntarily, the military judge was bound not to consider his actions in loading and cocking his weapon as evidence of his intent with respect to the alleged threat he would have uttered. As for the words used by Corporal Courneyea, the military judge considered objectively the entire context in which the events occurred and the overall circumstances to conclude that the evidence did not prove beyond a reasonable doubt that these words conveyed a threat to cause death or serious harm. This was essentially a finding of fact. In any event, there was ample evidence on which the military judge could base this finding. The appellant has failed to convince us that there is a ground on which we should intervene so as to overturn the acquittal on this charge.

[15] As a result, we would dismiss the appeal.

"Joanne B. Veit"
J.A.

"Dolores M. Hansen"
J.A.

"Robert M. Mainville"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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