Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20110624

Docket: CMAC-543

Citation: 2011 CMAC 3

CORAM: **BLANCHARD C.J.**
WEILER J.A.
MARTINEAU J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN T.F.W. DAY

Respondent

Heard at Ottawa, Ontario, on May 20, 2011.

Judgment delivered at Ottawa, Ontario, on June 24, 2011.

REASONS FOR JUDGMENT BY: WEILER J.A.

CONCURRED IN BY: BLANCHARD C.J.
MARTINEAU J.A.

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REASONS FOR JUDGMENT

WEILER J.A.

[1] The overarching issue on this appeal is whether the military judge erred in holding that evidence of an accused's rank, status and training is required to prove the objective standard of care for negligence. For the reasons that follow I would hold that he did.

Background

[2] The facts are largely not in dispute. The respondent, Captain T.F.W. Day, was the duty officer at the Command Post (CP) at Forward Operating Base (FOB) Ma'sum Ghar in Afghanistan on January 23, 2009. On that day, a Canadian infantry patrol led by Captain Corey, from another nearby base, FOB Wilson, arranged to destroy some improvised explosive device-making materials in a controlled explosion in the area of operation of FOB Ma'sum Ghar.

[3] Captain Day had been alerted to the fact that there was a Canadian infantry patrol operating in his area of operations by his tank crew operating in the same area. Master Corporal Dickison, who was in the tank crew, requested details of the infantry patrol. The radio operator at command post FOB Ma'sum Ghar received the request and passed it on to Captain Day. Despite the fact that information regarding the infantry patrol's planned destination, objectives and progress had been made available to Captain Day by way of the daily situation report, as well as from updates on the computer-based chat program (MIRC) monitored by Captain Day, he failed to obtain any specific information about the patrol. The tank crew was advised by the radio operator at FOB Ma'sum Ghar CP that no details were available.

[4] The FOB Wilson duty officer, Captain Lloyd, posted a notice and a five-minute warning on the MIRC that the patrol was going to perform a controlled explosion. This information was available to Captain Day, as he was monitoring and regularly posting his entries in the same computer chat room on the MIRC at the relevant time. It was critical that FOB Ma'sum Ghar communicate this information to the tank crew in the area. This did not happen.

[5] When the explosion occurred, the tank crew operating under Captain Day's control mistook the explosion for an incoming rocket attack and returned fire, narrowly missing the friendly force infantry patrol and civilians in a nearby village.

[6] As soon as this happened, Captain Day was advised that the tank crew was engaging friendly forces. He looked at the MIRC, on which he had been making postings shortly before and after notice of the explosion had been given, and said, "I missed it". He repeated that phrase or words to that effect twice more.

[7] As a result of the incident, Captain Day was charged with two counts of negligent performance of a military duty contrary to section 124 of the *National Defence Act* (NDA), or in the alternative, two counts of neglect to the prejudice of good order and discipline contrary to section 129(1) of the NDA.

[8] Captain Day was tried by a Standing Court Martial. As part of its case, the prosecution led evidence from Captain von Finckenstein[1] that a priority task of a duty officer, such as Captain Day, is to manage friendly positional awareness by maintaining awareness of the location and activities of friendly forces and ensuring that that information is passed on to the forces under the CP's control. His evidence was generally supported by that of Captains Corey and Lloyd.

[1] Captain von Finckenstein was not in Afghanistan at the relevant time. The military judge refused the prosecution's request to have him qualified as an expert witness, but allowed him to testify as an ordinary witness instead.

[9] At the conclusion of the prosecution's case, the defence moved for a ruling that the prosecution had failed to establish a *prima facie* case against the respondent. That motion is the subject of this appeal. The essence of the military judge's decision is captured in the following paragraphs from his reasons:

> [13] I come to the conclusion that there is some evidence upon which a reasonable panel, properly instructed, could return a verdict of guilty concerning the military duty imposed to Captain Day for the offences laid under section 124 of the *National Defence Act*. Captains Corey, Lloyd, and von Finckenstein provided some evidence about the role and responsibilities of a duty officer for a combat unit in an operational theatre like Afghanistan, which specifically include the duty of being aware of the location and situation of subunits and other friendly forces in the combat unit's area of operation. In order to do so, there is some evidence from the same witnesses that the duty officer has various communication means to receive and pass relevant information to that effect at the lower and higher level of responsibilities….
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> …
>
> [22] I do agree with the prosecution that there is some evidence about what is expected from the A Squadron duty officer in the command post at Ma'sum Ghar on the day of the alleged offences. Through all witnesses and the publication entitled "Staff Duties for Land Operations," some evidence was put before the court.
>
> [23] However, there is no evidence whatsoever, direct or circumstantial, that was adduced by the prosecution concerning the circumstances of the accused. Other than having introduced evidence on the rank of the accused, no evidence was introduced about the knowledge, training, and experience Captain Day had to perform as the A Squadron's duty officer in the command post at Ma'sum Ghar at the time of the alleged offences, in order to allow the court to determine the standard of care for a duty officer in all the circumstances of the accused.

[10] Accordingly, the military judge found Captain Day not guilty of all four charges.

Analysis

[11] The prosecution submits that the military judge recognized that the standard of care was an objective one, namely, that of a reasonable person in all the circumstances of the case, but that the approach adopted by the military judge personalized the test. He erred in requiring the prosecution to lead evidence of Captain Day's knowledge, training and experience.[2] This, the prosecution submits, was rejected by the Supreme Court of Canada in *R. v. Creighton*, [1993] 3 S.C.R. 3.

[12] I agree with this submission. In *Creighton* at pages 41, 58, 60 and 73, the Supreme Court held that for an offence based on negligence, the standard is a "marked departure" from the conduct of a reasonable person in all the circumstances of the case. The Supreme Court recognized that some activities may impose a higher *de facto* standard than others. This flows from the circumstances of the activity, not from the expertise of the actor. It is a uniform standard regardless of the background, education, or psychological disposition of the actor. The Supreme Court expressly rejected the argument that the standard of care in crimes of negligence would vary with the degree of experience, education, and other personal characteristics of the accused. *Creighton* was applied by this court in the military context in *R. v. Mathieu* (1995), 5 C.M.A.R. 363, at pp. 373-374.

[13] The respondent submits that evidence of Captain Day's knowledge, training and experience was necessary to establish the objective standard of care. In support of his position, he relies on *R. v. Brocklebank* (1996), 5 C.M.A.R. 390 at pp. 403-404, where the Court held that "the panel could consider the rank, status and training of the respondent as these were

[2] Captain Day's rank is admitted and is not in issue.

characteristics which the panel would otherwise ascribe to the reasonable person in the circumstances of the respondent."

[14] *Brocklebank* is distinguishable from the present case. In that case, Private Brocklebank was serving with the Canadian Forces on a peacekeeping mission in Somalia. On the evening in question, an unarmed sixteen-year-old Somalian was taken into custody, bound and placed in a bunker. Brocklebank, who was in his bed, was awakened and ordered to be on duty at the front gate to the camp. As he was going to his position, Master Corporal Matchee called him over and showed him the prisoner in the bunker with a flashlight. Matchee told Brocklebank that he had been instructed to give the prisoner a beating but not to kill him. Matchee ordered Brocklebank to hand over his pistol. Brocklebank did so but did not go inside the bunker. Another soldier took pictures of Matchee holding the gun to the prisoner's head. Subsequently, Matchee beat the prisoner. Matchee never ordered Brocklebank to guard the prisoner. However, Brocklebank remained outside the bunker from where he watched the gate. There was conflicting evidence as to whether a prisoner in the bunker was to be guarded as part of the gate security shift. When Brocklebank left the bunker, he did not try to stop the prisoner's ordeal by reporting the matter to any of Matchee's superiors. The prisoner died as a result of being beaten. Brocklebank was charged with the offence of aiding and abetting in the commission of torture or, in the alternative, with negligent performance of a military duty. He was acquitted of both charges.

[15] On the Crown's appeal, the Court in *Brocklebank* unanimously upheld Brocklebank's acquittal of the offence of aiding and abetting in the commission of torture, an offence of specific intent. On the charge of negligent performance of a military duty, the majority held, at p. 403,

that part of the circumstances of the offence of negligent performance of military duty included the fact that, "…the heightened state of apprehension or urgency caused by threats to the security of Canadian Armed Forces personnel or their materiel might mandate a more flexible standard than that expected in relatively non-threatening scenarios. Furthermore, in the military context, where discipline is the linchpin of the hierarchical command structure and insubordination attracts the harshest censure, a soldier cannot be held to the same exacting standard of care as a senior officer when faced with a situation where the discharge of his duty might bring him into direct conflict with the authority of a senior officer." It was in this context that the majority held the panel could consider the rank, status and training of the accused.

[16] Unlike Brocklebank, Captain Day is a senior officer. The discharge of his duty, reporting what was happening, did not bring him into direct conflict with the authority of a senior officer. More importantly, the respondent's argument elevates the exceptional situation in *Brocklebank*, namely that the panel *could* consider the rank, status and training of the accused to determine what an ordinary person would have done when confronted with information that a senior officer was torturing a prisoner, to a *requirement* that the prosecution introduce evidence of the accused's rank, status and training in every case.

[17] I would reject the respondent's submission. To accede to it would be to introduce a fluctuating standard into the standard of care which has been rejected by the Supreme Court in *Creighton* and by this court in *Mathieu*. Apart from the narrow exceptional situation in *Brocklebank*, there is no principled basis for concluding that there are factors unique to the military justice system that requires altering *Creighton*. The reason for an objective standard is

found in *R. v. Beatty,* [2008] 1 S.C.R. 49, where the Court, quoting the decision of Wilson J. in *R. v Tutton,* [1989] 1 S.C.R. 1392, observed at para. 39 that a fluctuating standard undermines the principles of equality and individual responsibility that pervade the criminal law. As stated by McLachlin J. in *Creighton* at p. 41, "The criminal law is concerned with setting minimum standards of conduct; the standards are not to be altered because the accused possesses more or less experience than the hypothetical average reasonable person."

[18] In *Creighton*, McLachlin J. also held at p. 61 that "…the maintenance of a single, uniform legal standard of care for such offences, [is] subject to one exception: incapacity to appreciate the nature of the risk which the activity in question entails." Thus, the criminal law does take into account the personal characteristics of an accused person, but only in determining whether an individual has the capacity to appreciate the risk entailed by the activity: *Creighton* at p. 69. There is no suggestion of lack of capacity in this case.

[19] I would give effect to the appellant's ground of appeal.

The respondent's additional arguments

[20] The respondent raises two additional arguments based on the test articulated in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067, at p. 1080, namely, "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty."

The test rests on direct as well as circumstantial evidence and the trier of fact is entitled to draw inferences from the evidence: see *R. v. Monteleone*, [1987] 2 S.C.R. 154, at pp. 160-161.

[21] The respondent submits that the motion to dismiss ought to have succeeded in any event as there was no admissible evidence as to the military duty imposed on Captain Day under section 124 of the NDA, the duty imposed on him under section 129 of the NDA, or the standard of care required of Captain Day under either of those duties when acting as the duty officer.

[22] The respondent challenges the admissibility of the evidence of Captain von Finkenstein on the basis that, as an ordinary witness, he was not entitled to give evidence as to the duties of a duty officer. I disagree. Captain von Finkenstein was entitled to testify as to his understanding and experience. Furthermore, as found by the Military Judge, the evidence of Captains Corey and Lloyd as to their experience would give rise to a reasonable inference that the duties of a duty officer include monitoring the MIRC and maintaining situational awareness by receiving and passing along information.

[23] Finally, the respondent submits that there was no evidence that there was any prejudice to good order and discipline under section 129 of the NDA. Again, I would disagree. Not only could prejudice be inferred from a friendly patrol being fired on by highly explosive tank munitions, there was specific evidence from Captain Corey of the effect that the incident had on his soldiers and the leadership challenges that flowed from the incident.

[24] Accordingly, I would dismiss the respondent's additional arguments.

Conclusion

[25] I would allow the appeal, set aside the directed verdicts of acquittal on all four charges and order a new trial.

"Karen M. Weiler"
J.A.

"I agree

Edmond P. Blanchard"
C.J.

"I agree

Luc Martineau"
J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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