Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20100316

Docket: CMAC-527

Citation: 2010 CMAC 2

CORAM: **DAWSON J.A.**
LAYDEN-STEVENSON J.A.
CUNNINGHAM J.A.

BETWEEN:

PO1 BRADT B.P.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario on Friday, March 5, 2010

JUDGMENT delivered at Ottawa, Ontario on March 16, 2010

REASONS FOR JUDGMENT BY: **DAWSON J.A.**

CONCURRED IN BY: **LAYDEN-STEVENSON J.A.**
CUNNINGHAM J.A.

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] This is an appeal against conviction on two charges of breach of a public trust by a public officer, and a cross-appeal against acquittal on one charge of conduct to the prejudice of good order and discipline.

Introduction

[2] The appellant, Petty Officer 1st Class Bradt, was tried by Standing Court Martial on seven charges laid under the *National Defence Act*, R.S.C. 1985, c. N-5 (Act). The charge sheet alleged that the appellant had committed the following offences:

FIRST CHARGE (Alternative to Second Charge) Section 112(a) of the Act	USED A VEHICLE OF THE CANADIAN FORCES FOR AN UNAUTHORIZED PURPOSE Particulars: In that he, between September 2006 and May 2007, at or near Ottawa, Ontario, without authority used one or more vehicles of the Canadian Forces for his personal use.
SECOND CHARGE (Alternative to First Charge) Section 130of the Act	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY BREACH OF PUBLIC TRUST BY PUBLIC OFFICER CONTRARY TO SECTION 122 OF THE CRIMINAL CODE Particulars: In that he, between September 2006 and May 2007, at or near Ottawa, Ontario, being an official holding a position or an employment in a public department did commit a breach of trust in connection with the duties of his office by using one or more vehicles of the Canadian Forces for his personal use.
THIRD CHARGE (Alternative to Fourth Charge) Section 117(f) of the Act	AN ACT OF A FRAUDULENT NATURE NOT PARTICULARLY SPECIFIED IN SECTIONS 73 TO 128 OF THE NATIONAL DEFENCE ACT Particulars: In that he, on or about 23 March 2007, at or near Ottawa, Ontario, did have firewood chopped by his subordinates at his residence during work hours.
FOURTH CHARGE (Alternative to Third Charge) Section 130 of the Act	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY BREACH OF PUBLIC TRUST BY PUBLIC OFFICER CONTRARY TO SECTION 122 OF THE CRIMINAL CODE Particulars: In that he, on or about 23 March 2007, at or near Ottawa, Ontario, being an official holding a position or an employment in a public department did commit a breach of trust in connection with the duties of his office by having firewood chopped by his subordinates at his residence during work hours.
FIFTH CHARGE (Alternative to Sixth	AN ACT OF A FRAUDULENT NATURE NOT PARTICULARLY SPECIFIED IN SECTIONS 73 TO 128 OF THE NATIONAL

Charge) Section 117(f) of the Act	DEFENCE ACT Particulars: In that he, on or about 16 February 2007, at or near Ottawa, Ontario, did order a subordinate to purchase with public funds and deliver to his residence a propane heater and two propane tanks.
SIXTH CHARGE (Alternative to Fifth Charge) Section 130 of the Act	AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY BREACH OF PUBLIC TRUST BY PUBLIC OFFICER CONTRARY TO SECTION 122 OF THE CRIMINAL CODE Particulars: In that he, on or about 16 February 2007, at or near Ottawa, Ontario, being an official holding a position or an employment in a public department did commit a breach of trust in connection with the duties of his office by having a propane heater and two propane tanks purchased with public funds and delivered at his residence by a subordinate.
SEVENTH CHARGE Section 129 of the Act	CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE Particulars: In that he, between September 2006 and May 2007, at or neat Ottawa, while employed as the Kitchen Officer (KO) of his unit, did use subordinates to perform tasks for his personal benefit.

[3] The Military Judge, Lieutenant-Colonel Perron, found the appellant guilty of charges 2 and 4. The Military Judge stayed charges 1 and 3 because of the finding of guilt on the related charges. The Military Judge found the appellant not guilty of charges 5, 6 and 7.

[4] In consequence of the conviction upon two charges, the Military Judge sentenced the appellant to a severe reprimand and a fine of $3,000.00.

The Issues

[5] In order to fully understand the issues raised on the appeal, I begin by noting that it is settled law that in order to convict an individual of the offence of breach of a public trust by a public officer, five elements must be proven beyond a reasonable doubt. They are:

1. The accused is an official.
2. The accused was acting in connection with the duties of his or her office.
3. The accused breached the standard of responsibility and conduct demanded of him or her by the nature of the office.
4. The conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust.
5. The accused acted with the intention to use his or her public office for a purpose other than the public good, for example, for a dishonest, partial, corrupt or oppressive purpose.

See: *R. v. Boulanger*, [2006] 2 S.C.R. 49 at paragraph 58.

[6] No issue is taken with respect to the Military Judge's conclusion that elements 1 and 2 were established. The appellant appeals his conviction on the following grounds:

1. The Military Judge erred by finding the element of the offence relating to a breach of the standard of responsibility and conduct demanded by the nature of the appellant's office was proven beyond a reasonable doubt.

2. The Military Judge erred by finding the element of the offence relating to a serious and marked departure from the standards expected of an individual in the appellant's position of public trust was proven beyond a reasonable doubt.

3. The conviction is unreasonable and not supported by the evidence.

[7] The respondent cross-appeals the finding of not guilty on the charge of conduct to the prejudice of good order and discipline, charge 7, on the ground that the Military Judge erred by finding that the prosecution had failed to prove beyond a reasonable doubt that the appellant's conduct was prejudicial to good order and discipline.

[8] After hearing oral submissions with respect to the appeal and the cross-appeal, the Court advised counsel that, for reasons to be delivered in writing, both the appeal and the cross-appeal would be dismissed. These are the reasons for those conclusions.

Facts

[9] The following facts are not in dispute.

[10] At the material time, the appellant was posted at the Dwyer Hill Training Centre (DHTC) near Ottawa. There, he served as the Kitchen Officer. As Kitchen Officer, the appellant was the direct supervisor and section head of the kitchen staff. He was responsible for three subordinate military personnel and for the equipment assigned to the DHTC food services section, which equipment included military vehicles.

[11] At the time the appellant joined the section, it was dysfunctional and suffering from low morale.

[12] The appellant lived on a farm with his wife where his wife operated a horse boarding business. The farm was about a 40 minute drive from the DHTC.

[13] In early March 2007, the appellant drove one of the kitchen section's trucks to his farm. He was accompanied by one of his subordinates. On their way to the farm they stopped to buy horse feed and woodchips. The subordinate helped load and unload the truck and then drove the truck back to the DHTC.

[14] On March 23, 2007, during working hours, at the appellant's request, the three subordinates went to the appellant's farm and chopped firewood.

[15] The appellant testified at the Standing Court Martial. He explained that he used the truck because he believed he needed the truck the next day to travel to C.F.B. Petawawa for work purposes. He organized the wood chopping because he believed it would be a sports day which would improve the section's morale. The prosecution adduced evidence that the appellant told his subordinate to drive home with him, to help him load and unload the truck and to then take the truck back to the DHTC, and that the appellant's subordinates had felt obliged to chop firewood.

The Decision of the Military Judge

[16] In comprehensive and considered reasons, the Military Judge began by instructing himself on the onus and standard of proof and by discussing the factors that influence a court's assessment of credibility. He then reviewed the evidence before him.

[17] The Military Judge considered the evidence given by the appellant. He explained why he was puzzled by the explanations the appellant had provided for his conduct. The Military Judge went on to state:

> The Court does not find PO1 Bradt to be a credible witness. His explanations concerning the wood chopping afternoon and the trip to his house with Corporal Newton are at best puzzling. He states that the plan had changed concerning the trip to Petawawa the next day. He did not mention when this change of plan occurred. One would have to assume that the change occurred after they left DHTC. His explanation for this change of plan for the trip to Petawawa is extremely suspect. His stated concern for the morale of his troops and his description of his discussion with Sergeant Pernitzky is also quite suspect. His demeanour and his testimony do not support his assertion that his personnel was his main focus. I gather from his testimony that his main focus was himself and his farm.
>
> Because I do not consider PO1 Bradt a credible witness, I do not believe his testimony unless it is corroborated by some other evidence.

[18] That credibility finding is not directly challenged by the appellant.

[19] The Military Judge went on to review the evidence given by the other witnesses. All three subordinates testified and all were found to be credible witnesses.

[20] The Military Judge found all of the elements of charges 2 and 4 to be established. Of relevance to this appeal are the following findings.

[21] With respect to the required element that the accused must breach the standard of responsibility and conduct demanded of him by the nature of his office, the Military Judge wrote:

> It is clear from the evidence of Master Warrant Officer Hanna that CF vehicles were not to be used for personal purposes. Sergeant Pernitzky, Sergeant Sawyer and Corporal Newton also testified that CF vehicles could not be used for personal purposes. Only PO1 Bradt testified that personal use was permitted. The Court has already declared that it does not believe PO1 Bradt's explanation for his use of the section truck that day. The Court concludes that the evidence the Court accepts, proves beyond a reasonable doubt that PO1 Bradt intentionally used a section vehicle to drive to his residence that day, and that this use was not authorized by a superior or by unit policy. To make matters worse, PO1 Bradt ordered Corporal Newton to accompany him so he would have some help in the loading and unloading of the feed and the wood chips, and he would have someone return the truck to DHTC.
>
> […]
>
> I will now deal with the fourth element of this offence, specifically that the accused breached the standard of responsibility and conduct demanded of him or her by the nature of his or her office. Chapter 5 of Queen's Regulations and Orders require a non-commissioned member to become acquainted with, observe, and enforce the *National Defence Act, Security of Information Act*, Queen's Regulations and Orders, and all other regulations, rules, orders and instructions that pertain to the performance of the member's duties. Non-commissioned members must also promote the welfare, efficiency and good discipline of all who are subordinate to the member, and ensure the proper care and maintenance and prevent the waste of all public and non-public property within the member's control. As a petty officer 1st class in charge of the food services section, he was entrusted with proper care and maintenance of the vehicle and equipment of that section. He was also responsible for the welfare and discipline of his subordinates.
>
> With regard to charge No. 2, the policy on the use of CF vehicles for personal purposes was well known amongst the group.

> The standard of responsibility and conduct is obvious, in that he is to perform the duties and responsibilities enumerated in Chapter 5 of Queen's Regulations and Orders, as well as the added duties and responsibilities of every senior non-commissioned member who is in charge of subordinates. He had to respect the policy on the use of CF vehicles and enforce this policy. He breached that standard of responsibility when he used a CF vehicle for his personal benefit and by ordering a subordinate to accompany him after working hours to return the vehicle to DHTC.
>
> With regard to charge No. 4, every person knows that activities performed during working hours must be to the benefit of the organisation that ultimately pays that person a wage for these working hours. Every member of the CF knows that military duties must be performed during work hours; common sense tells us that. As the head of the food services section, PO1 Bradt was responsible for the efficient use of the resources assigned to his section to accomplish the tasks assigned to this section. This includes the personnel assigned to the food services section. He failed to do this by having them chop his firewood for his personal benefit during working hours on 23 March 2007.

[22] With respect to the required element that the accused's conduct must represent a serious and marked departure from the expected standards, the Military Judge wrote:

> I will now deal with the fifth element of this charge, specifically that the conduct of the accused represented a serious and marked departure from the standards expected of an individual in the accused's position of public trust.
>
> For charge No. 2, it seemed clear to every witness except PO1 Bradt that CF vehicles could not be used for personal use, unless specific authority had been granted for such use. Common sense use, such as dropping by the bank or some other short stop while on an official trip would be acceptable. Using a CF vehicle to go to a course in Borden would be deemed acceptable under certain circumstances and with the proper authority. Using a CF vehicle to drive home after a day's work without having received the authority to do so and without any reasonable explanation is a serious and marked departure from the standards expected of an individual in the accused's position. The public must trust CF members to only use CF vehicles for official business and not as their own property.

> For charge No. 4, the evidence of PO1 Bradt was to the effect that they were four people doing the work of 10 to 12 people. Sergeant Pernitzky, Sergeant Sawyer and Corporal Newton all testified that they were extremely busy in March 2007. In such circumstances, PO1 Bradt had to ensure that his personnel were employed with the goal of accomplishing the myriad of tasks they had to complete during that period of time. Having subordinates perform work such as chopping firewood for the superior's personal benefit during work hours is a serious and marked departure from the standards expected of an individual in the accused's position of public trust. Again, the public must trust the Canadian Forces to only employ its personnel for official business and for the public good, and not for the personal benefit of superiors.

[23] With respect to charge 7, the Military Judge found that the prosecution had failed to prove one required element of the offence, namely that there be proof of prejudice to good order and discipline resulting from the wrongful conduct. The Military Judge wrote:

> Proof of prejudice can be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of the proven act. The standard of proof is proof beyond a reasonable doubt.
>
> Prejudice is not defined in Queen's Regulations and Orders or in the *National Defence Act*. Queen's Regulations and Orders instruct us to use the Concise Oxford Dictionary in such cases. Prejudice is defined as: "harm or injury that results or may result from some action or judgment."
>
> The prosecution has not provided this Court with evidence that demonstrates what prejudice was caused by the actions of PO1 Bradt. The Court was told the section was quite busy, that the members of the section did not enjoy or benefit from the wood chopping afternoon. The Court was not provided with any evidence of any prejudice caused to the section or to the unit by the conduct of the accused.
>
> The prosecutor cannot just present a sentencing decision on a guilty plea before a Standing Court Martial and assume that another court martial may accept that sentencing decision as evidence of prejudice or as a precedent on the issue of prejudice. The sentencing decision of a court martial has no binding authority on any other court martial. A statement that this charge is a "catch all charge"

> does not assist this Court in any way. Evidence is required to prove an essential element of the offence.
>
> I find that the prosecutor has not provided this Court with the necessary evidence that would lead the Court to conclude there was prejudice as a natural consequence of the proven conduct. I find the prosecutor has not proven this last element of this offence beyond a reasonable doubt.

Consideration of the Issues raised on the appeal

(a) Did the Military Judge err by finding that the prosecution had proven beyond a reasonable doubt that the appellant breached the standard of responsibility and conduct demanded of him by the nature of his office?

(i) Charge 2

[24] The appellant argues that his use of the truck was based on the fact that he and his subordinate planned to leave from the appellant's home the following day on a temporary duty trip to C.F.B. Petawawa. He believed this would allow them to leave the next day for C.F.B. Petawawa without having to double back to the DHTC to pick up a vehicle. This is said to have been a reasonable use of the truck.

[25] The appellant further argues that the Military Judge did not clearly articulate what evidence was relied upon to prove this element of the breach of trust offence.

[26] As noted above, the appellant does not directly challenge the credibility findings of the Military Judge. The appellant's submission ignores the Military Judge's finding that the appellant was not a credible witness. No evidence was tendered to corroborate the appellant's evidence that there was a planned trip to C.F.B. Petawawa. His subordinate had no clear memory that the trip was

scheduled, or that the purpose of the drive to the appellant's farm was to facilitate a trip to C.F.B. Petawawa. The subordinate was not cross-examined about any invitation to sleep over at the appellant's home, an event that he might have been expected to recall.

[27] The evidence accepted by the Military Judge does not support the appellant's submission that his use of the truck was reasonable and permissible.

[28] Contrary to the appellant's second assertion, the Military Judge did clearly articulate the evidence he relied upon to establish a breach of the standard of responsibility and conduct. The relevant passages from the Military Judge's reasons are quoted at paragraph 21 above.

(ii) Charge 4

[29] The appellant maintains that, in order to fulfill his duty, he organized a sports day to develop team spirit. He submits that while, with the power of hindsight, the wood chopping event was "rather 'gauche'" and a "most certainly inappropriate venue and occasion," it was an exercise of faulty judgment. The appellant argues his conduct should not be seen as a breach of trust.

[30] Again, the appellant's submission ignores the Military Judge's credibility finding, and particularly the express rejection of the appellant's evidence that his personnel were his main focus. The unchallenged findings of the Military Judge do not support the argument advanced by the appellant.

(b) Did the Military Judge err by finding that the prosecution had proven beyond a reasonable doubt that the appellant's conduct represented a serious and marked departure from the expected standards?

[31] The appellant submits that even if the impugned conduct represents a serious and marked departure from the expected standards, the Court must also be satisfied that the appellant acted with the intention to use his public office for a purpose other than the public good. Reliance is placed upon the decision of the Supreme Court of Canada in *Boulanger*.

[32] The appellant argues that the Military Judge erred in finding that the requisite *mens rea* was established because the appellant had no intention to use his office other than for the public good. His intention when taking the truck home was to use it for work the next morning. His intention when organizing the firewood chopping was to raise morale.

[33] Further, the appellant submits that, as noted in *Boulanger* at paragraph 52, errors in judgment do not lead to criminal culpability.

[34] In *Boulanger*, at paragraphs 56 and 57, the Supreme Court explained that the *mens rea* of the crime of breach of trust by a public officer lies in the intention to use the public office for purposes other than the benefit of the public. The *mens rea* is inferred from the circumstances.

[35] The appellant's submissions are again based upon acceptance of his version of events. However, the Military Judge rejected the appellant's testimony.

[36] The Military Judge found that no public good could flow from the appellant's use of the truck and that he used the truck "to serve his personal purpose and not for a public good." The Military Judge went on to find that the appellant had been dishonest in organizing the wood chopping because he did not inform his superiors of the activity. Further, the appellant "used his position as Kitchen Officer to have members of his section chop his firewood during normal working hours. He is the only one who benefited from this activity, […]. It is clear from the evidence accepted by this Court that PO1 Bradt intentionally used his office for a purpose other than public good."

[37] The facts found by the Military Judge supported the inference that the appellant intended to use his office for his own benefit and not the public benefit. Based upon the explanation of the required *mens rea* in *Boulanger*, the appellant has failed to establish any error on the part of the Military Judge.

(c) Was the conviction unreasonable?

[38] During oral argument, counsel for the appellant confirmed that this ground of appeal is based solely upon the errors asserted in the first two grounds of appeal. As I have found no merit in those grounds, there is nothing further to consider with respect to this ground of appeal.

Consideration of the issue raised on the cross-appeal

(a) Did the Military Judge err by finding that the prosecution had failed to prove beyond a reasonable doubt that the appellant's conduct was prejudicial to good order and discipline?

[39] Charge 7 was laid under section 129 of the Act. Subsections 129(1) and (2) are as follows:

129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.	129 (1) Tout acte, comportement ou négligence préjudiciable au bon ordre et à la discipline constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.
(2) An act or omission constituting an offence under section 72 or a contravention by any person of	(2) Est préjudiciable au bon ordre et à la discipline tout acte ou omission constituant une des infractions prévues à l'article 72, ou le fait de contrevenir à :
(*a*) any of the provisions of this Act,	*a*) une disposition de la présente loi;
(*b*) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or	*b*) des règlements, ordres ou directives publiés pour la gouverne générale de tout ou partie des Forces canadiennes;
(*c*) any general, garrison, unit, station, standing, local or other orders, is an act, conduct, disorder or neglect to the prejudice of good order and discipline.	*c*) des ordres généraux, de garnison, d'unité, de station, permanents, locaux ou autres.

[40] The appellant was charged under subsection 129(1) of the Act. It followed that the prosecution could not rely upon the deeming provision contained in subsection 129(2) of the Act. Instead, the prosecution was obliged to either prove actual prejudice or persuade the Court that it should draw an inference of prejudice from the matters proven in evidence.

[41] At its core, the cross-appeal asserts that the Military Judge erred by failing to infer prejudice from the facts he found that supported the convictions under charges 2 and 4.

[42] The Military Judge, citing the decision of this Court in *R. v. Jones*, [2002] C.M.A.J. No. 11, correctly noted that proof of prejudice can be inferred from the circumstances if the evidence clearly points to prejudice as a natural consequence of a proven act. As quoted above at paragraph 23, the Military Judge then considered the evidence, but concluded that he had not been provided "with the necessary evidence that would lead the Court to conclude there was prejudice as a natural consequence of the proven conduct."

[43] In oral argument, counsel for the respondent agreed, as a matter of law, that evidence that would support a conviction for breach of trust would not always support a conviction for conduct to the prejudice of good order and discipline. It is a factual inference to be drawn in each case by the trial judge. As such, this Court may only intervene if the factual inference drawn, or not drawn, by the trial judge was clearly wrong, unsupported by the evidence, or otherwise unreasonable. See: *R. v. Clark*, [2005] 1 S.C.R. 6 at paragraph 9.

[44] The conduct found by the Military Judge constituted a serious and marked departure from the conduct expected of the appellant. The Military Judge was unable, however, to find that the natural consequences of such conduct established harm or injury to good order and discipline. We have not been shown how that conclusion was clearly wrong or unreasonable.

Conclusion

[45] For these reasons, I would dismiss both the appeal and the cross-appeal.

"Eleanor R. Dawson"

J.A.

I agree.

"Carolyn Layden-Stevenson"

J.A.

I agree.

"J. Douglas Cunningham"

J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA
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