

Date: 20101119

Docket: CMAC-537

Citation: 2010 CMAC 8

**CORAM: NADON J.A.
LEMIEUX J.A.
MOSLEY J.A.**

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

MASTER SEAMAN W.L. BOYLE

Respondent

Heard at Ottawa, Ontario, on November 19, 2010.

Judgment delivered at Ottawa, Ontario, on November 19, 2010.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT OF THE COURT

[1] This is an appeal from a Standing Court Martial decision rendered on November 17, 2009. The Military Judge, Commander Lamont (the “Judge”) found Master Seaman W.L. Boyle (the “accused”) not guilty of disgraceful conduct under the *National Defence Act*, section 93 (the “Act”) and not guilty of an act to the prejudice of good order and discipline contrary to section 129 of the Act.

[2] When filing its Memorandum of Fact and Law, the appellant abandoned the appeal on the section 129 charge set out in its Notice of Appeal and reformulated the remaining ground, related to

the section 93 charge, as follows: the Judge's reasons are insufficient to provide meaningful appellate review. The appellant also sought leave of this Court to raise and argue, in the alternative, a further ground, namely that the Judge erred in applying the law to the facts.

[3] Because we are all agreed that the appeal must succeed on the first ground, we need not address the alternate ground.

[4] The facts can be briefly stated as follows.

[5] On January 23, 2009, Leading Seaman ("LS") Crangle was eating lunch in the mess aboard the HMC Nanaimo. The accused, LS Mitchell, LS Imhoff, LS Ramsell and LS Spellisey were also in the mess at that time. LS Crangle emptied the chocolate milk. According to mess protocol, he was therefore responsible for refilling the milk. The accused told LS Crangle to refill the milk immediately. LS Crangle said he would refill the milk after finishing his meal. An argument ensued. Afterwards, LS Crangle left to refill the milk. While LS Crangle was gone, the accused took LS Crangle's glass of milk, turned his back to some or all of the remaining people in the mess and unzipped his overalls.

[6] The rest of the facts are disputed. LS Mitchell testified he saw the accused insert his penis into Crangle's milk, swirl it around, remove it, zip up his overalls, and then place the glass back down. The accused testified he wiggled his torso to give the appearance of him inserting his penis into the glass and swirling it around, but he did not actually do so. The others testified that the

accused appeared to go through the motions of inserting his penis into the glass, but from their vantage point, none of them actually saw the accused insert his penis into the glass.

[7] LS Imhoff left the mess and warned LS Crangle not to finish his milk.

[8] The accused was charged with disgraceful conduct contrary to section 93 of the Act and, in the alternative, with conduct to the prejudice of good order and discipline contrary to section 129 of the Act.

[9] The Judge found the accused not guilty on both charges. With regard to disgraceful conduct, the Judge said the issue was whether the events related by LS Mitchell were true. If so, the issue was whether the accused's conduct was disgraceful under section 93 of the Act. He then indicated that he accepted the prosecutor's view that the test for determining whether conduct was disgraceful was an objective one which required an answer to the question of "whether the accused's conduct in all of the circumstances was shockingly unacceptable".

[10] The Judge answered the question in the following terms:

In my view on all the evidence I have heard, even accepting the matter unfolded in the manner to which Leading Seaman Mitchell testified, the conduct of the accused is not shockingly acceptable [*sic*] as that and it's therefore not disgraceful behaviour as that term is understood in the *National Defence Act*. The accused is not guilty with respect to the first charge.

[11] In brief, the appellant says that the Judge's reasons are not sufficient to be reasonably intelligible to the parties and that, as a result, meaningful appellate review cannot take place, adding

that the reasons “leave serious questions as to whether he got the legal standard for disgraceful conduct correct and whether he correctly applied the standards to the facts” (Appellant’s Memorandum of Fact and Law, paragraph 2).

[12] More particularly, the appellant puts forward the following arguments. First, it argues the Judge’s Reasons were insufficient to provide meaningful appellate review. Judges in criminal trials must provide reasons. These reasons tell parties why the decision was made, provide public accountability, permit effective appellate review and facilitate the uniform development of the law.

[13] Appellate courts should take a functional approach to sufficiency of reasons, reading them as a whole in the context of all the evidence (see: *R. v. M.(R.E.)*, 2008 SCC 51 at paragraphs 11 and 12). Reasons must be “intelligible” insofar as there is a logical connection between the verdict and the basis for the verdict.

[14] Here, the Judge’s reasons failed to meet this standard because they did not address the issue of reasonable doubt. He failed to make a factual finding of what happened in the mess, even though the defence argued only this issue and made no submissions about disgraceful conduct. By using the phrase “even accepting”, the Judge completely avoided making any factual finding about the accused’s conduct. This failure renders the reasons inadequate.

[15] Further, the Judge’s statement that “the conduct of the accused is not shockingly acceptable [sic] as that” is unclear and renders his decision unintelligible. When a case turns on a legal

principle that is not well-settled, the failure to provide reasons may preclude meaningful appellate review. Here, the law of disgraceful conduct is not well-settled and so the Judge should have explained his reasoning before concluding on this issue.

[16] We are all in agreement that the Judge's reasons are insufficient, for two reasons. First, his reasons for finding that the accused's conduct did not amount to disgraceful conduct are inadequate. Second, his failure to make a finding on the issue of reasonable doubt also results in inadequate reasons.

[17] With regard to the Judge's reasons concerning disgraceful conduct, the Supreme Court of Canada in *M(R.E.)*, *supra*, held that a verdict must be "intelligible" insofar as it shows a "logical connection between the verdict and the basis for the verdict" (at paragraph 35). No such connection exists here. The Judge asserted a verdict, but provided no basis whatsoever for that verdict. He did not say *why* the accused's actions were not disgraceful conduct. Thus, it is impossible for us to find a logical connection because there is no basis for the verdict.

[18] The Judge also failed to make a finding on the issue of reasonable doubt. He said that to decide the disgraceful conduct charge, the issue was "whether or not the events occurred in the manner to which Leading Seaman Mitchell testified". Still, he made no factual finding on this issue. He merely said that "even accepting" [emphasis added] LS Mitchell's testimony, the accused's conduct was not disgraceful conduct.

[19] A judge hearing a court martial, like judges hearing a civilian criminal trial, must decide if the admissible evidence before him or her proves the accused's guilt beyond a reasonable doubt (see: *R. v. B.(H.S.)* 2008 SCC 52 at para.14; *R. v. W.(D.)* [1991] 1 S.C.R. 742 at WL para.11; *R. v. D.G.* [1996] Y.J. No.65 at QL para.4; *R. v. Wilson* [1997] O.J. No.3784; *R. v. Pearsen* [1998] O.J. No.4122). Here, the Judge failed to decide the key issue in the case: whether, on the evidence before him, the accused put his penis into LS Crangle's glass. This failure to decide if the prosecution had proven guilt beyond a reasonable doubt renders his reasoning inadequate.

[20] Similarly, in *R. v. Walker*, (2008 SCC 34), the Supreme Court said "[r]easons are sufficient if they are responsive to the case's live issues and the parties' key argument" (at paragraph 20). As noted above, the Judge correctly identified the truthfulness of LS Mitchell's testimony as a crucial issue in the case. However, his reasons failed to resolve this issue. This failure is especially troubling given that the defence focused its submissions on the issue of reasonable doubt. Thus, the Judge's reasons were not responsive to the crux of the case and are inadequate.

[21] Hence, the Judge's reasons do not provide a basis for the verdict that the accused's conduct was not disgraceful behaviour and does not allow us to properly conduct appellate review of his decision.

[22] The appeal will therefore be allowed and a new trial, limited to the section 93 challenge, will be ordered.

M. Nadon

J.A.

F. Lemieux

J.A.

R.G. Mosley

J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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BOYLE

PLACE OF HEARING: Ottawa, Ontario

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REASONS FOR JUDGMENT OF THE COURT BY: NADON J.A., LEMIEUX J.A.,
MOSLEY J.A.

DELIVERED FROM THE BENCH BY: NADON J.A.

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