

Date: 20090415

Docket: CMAC-512

Citation: 2009 CMAC 3

**CORAM: DAWSON J.A.
BARNES J.A.
SHORE J.A.**

BETWEEN:

MCpl MATUSHESKIE, C.A.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario on Friday, March 27, 2009

JUDGMENT delivered at Ottawa, Ontario on April 15, 2009

REASONS FOR JUDGMENT BY:

DAWSON J.A.

CONCURRED IN BY:

**BARNES J.A.
SHORE J.A.**

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REASONS FOR JUDGMENT

DAWSON J.A.

[1] A Military Judge convicted Master Corporal Matusheskie of disobeying a lawful command of a superior officer, contrary to section 83 of the *National Defence Act*, R.S.C. 1985, c. N-5. We agree with the parties that this conviction must be set aside because the Military Judge erred in law. The only issue raised on the appeal is whether the Court should substitute a finding of not guilty, or order a new trial.

[2] After hearing argument on that issue the Court advised the parties that, for reasons to be delivered in writing, the Court would quash the finding of guilt and substitute in its stead a finding of not guilty. These are the Court's reasons for that conclusion.

Facts

[3] Master Corporal Matusheskie is a Weapons Technician. He was charged with disobeying an order given to him by Sergeant Mercredi. The order directed Master Corporal Matusheskie to not install tactical latches on certain C-7 assault rifles.

[4] At his trial, Master Corporal Matusheskie admitted that he had disobeyed Sergeant Mercredi's order. However, he defended the charge on the basis that he had installed the tactical latches pursuant to a subsequent, conflicting order given by Warrant Officer Green.

[5] The Military Judge made a number of findings of fact that are not challenged on this appeal. Specifically, he found that:

- After Sergeant Mercredi ordered Master Corporal Matusheskie not to install the tactical latches, Master Corporal Matusheskie was ordered to install the latches by Warrant Officer Green.
- Master Corporal Matusheskie advised Warrant Officer Green that his order conflicted with an order previously given to the Master Corporal by Sergeant Mercredi.

- After being so advised, Warrant Officer Green directed Master Corporal Matusheskie to obey his order to install the tactical latches.

The Military Judge's Error

[6] Article 19.02 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os)

deals with "Conflicting Lawful Commands and Orders." It provides:

- | | |
|---|---|
| <p>(1) If an officer or non-commissioned member receives a lawful command or order that he considers to be in conflict with a previous lawful command or order received by him, he shall orally point out the conflict to the superior officer who gave the later command or order.</p> | <p>(1) Si un officier ou militaire du rang reçoit un commandement ou un ordre légitime qu'il juge incompatible avec un commandement ou un ordre qu'il a déjà reçu, il signale l'incompatibilité de vive voix au supérieur qui a donné le dernier commandement ou ordre.</p> |
| <p>(2) If the superior officer still directs the officer or non-commissioned member to obey the later command or order, he shall do so.</p> | <p>(2) Si le supérieur lui donne encore instruction d'obéir au dernier commandement ou ordre, l'officier ou militaire du rang doit l'exécuter.</p> |

[7] As noted above, the Military Judge found that Master Corporal Matusheskie was ordered by Warrant Officer Green to proceed with the weapon modifications. However, the Military Judge concluded that Master Corporal Matusheskie failed to prove, on a balance of probabilities, that Warrant Officer Green's order was lawful. Therefore, the Military Judge refused to apply the conflicting lawful order defence.

[8] The Military Judge failed to consider Article 19.015 of the QR&Os. That Article, and the accompanying Notes B and C state:

Every officer and non-commissioned member shall obey lawful commands and orders of a superior officer.

Tout officier et militaire du rang doit obéir aux commandements et aux ordres légitimes d'un supérieur.

[...]

[...]

(B) Usually there will be no doubt as to whether a command or order is lawful or unlawful. In a situation, however, where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful.

(B) D'ordinaire il n'y a pas à se demander si un commandement ou un ordre est légitime ou non. Toutefois, lorsque le subordonné ignore la loi ou n'en est pas certain, il obéira au commandement même s'il doute de sa légitimité, sauf si celui-ci est manifestement illégal.

(C) An officer or non-commissioned member is not justified in obeying a command or order that is manifestly unlawful. In other words, if a subordinate commits a crime in complying with a command that is manifestly unlawful, he is liable to be punished for the crime by a civil or military court. A manifestly unlawful command or order is one that would appear to a person of ordinary sense and understanding to be clearly illegal; for example, a command by an officer or non-commissioned member to shoot a member for only having used disrespectful words or a command to shoot an unarmed child.

(C) Un officier ou militaire du rang n'est pas justifié d'obéir à un commandement ou à un ordre qui est évidemment illégitime. En d'autres termes, le subordonné qui commet un crime par soumission à un commandement qui est évidemment illégitime est passible de punition pour le crime par un tribunal civil ou militaire. Un ordre ou un commandement qui apparaît à une personne possédant un jugement et une compréhension ordinaires comme étant nettement illégal constitue un acte manifestement illégitime; par exemple, un commandement donné par un officier ou militaire du rang d'abattre un autre militaire qui

s'est adressé à lui en termes
irrespectueux ou le
commandement de tirer sur un
enfant sans défense.

[9] The Military Judge erred in law by imposing upon Master Corporal Matusheskie the burden of proving, on a balance of probabilities, that Warrant Officer Green's order was lawful.

[10] We agree with the respondent that the Military Judge could only impose that burden upon Master Corporal Matusheskie if the Military Judge concluded that Warrant Officer Green's order was "manifestly unlawful." The Military Judge made no such finding (nor would such a finding have been open to the Military Judge on the evidence).

The Appropriate Remedy

[11] On the basis of the Military Judge's findings of fact, all of the elements of Article 19.02 of the QR&Os were established.

[12] While the Military Judge was not satisfied that the second order was a lawful order, the Military Judge failed to have regard to Notes B and C of Article 19.015 of the QR&Os. Those Notes are clear that a command is to be obeyed, unless the command is manifestly unlawful. This reflects the fact that obedience to orders is the fundamental rule of military life. There must be prompt obedience to all lawful orders.

[13] The threshold for finding an order to be manifestly unlawful is, properly, very high. In *R. v. Finta*, [1994] 1 S.C.R. 701 at pages 834-835, the Supreme Court of Canada explained what a “manifestly unlawful” order is in the following terms:

239. The manifest illegality test has received a wide measure of international acceptance. Military orders can and must be obeyed unless they are manifestly unlawful. When is an order from a superior manifestly unlawful? It must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong. For example the order of King Herod to kill babies under two years of age would offend and shock the conscience of the most hardened soldier. A very helpful discussion as to when an order is manifestly unlawful can be found in the decision of the Israel District Military Court in the case of *Ofer v. Chief Military Prosecutor (the Kafr Qassem case)* [Appeal 279-283/58, Psakim (Judgments of the District Courts of Israel), vol. 44, at p. 362], cited in appeal before the Military Court of Appeal, Pal. Y.B. Int'l L. (1985), vol. 2, p. 69, at p. 108, and also cited in Green "Superior Orders and Command Responsibility", *supra*, at p. 169, note 8:

The identifying mark of a 'manifestly unlawful' order must wave like a black flag above the order given, as a warning saying: 'forbidden'. It is not formal unlawfulness, hidden or half-hidden, not unlawfulness that is detectable only by legal experts, that is the important issue here, but an overt and salient violation of the law, a certain and obvious unlawfulness that stems from the order itself, the criminal character of the order itself or of the acts it demands to be committed, an unlawfulness that pierces and agitates the heart, if the eye be not blind nor the heart closed or corrupt. That is the degree of 'manifest' illegality required in order to annul the soldier's duty to obey and render him criminally responsible for his actions. [emphasis added]

[14] Unquestionably, Warrant Officer Green's order was not manifestly unlawful. Warrant Officer Green was outside of Master Corporal Matusheskie's chain of command. However, as conceded by the respondent, an order issued by a superior officer outside of a person's chain of command is not *per se* a manifestly unlawful order.

[15] Master Corporal Matusheskie discharged his responsibility to inform Warrant Officer Green of the prior inconsistent order given by Sergeant Mercredi. When Warrant Officer Green directed Master Corporal Matusheskie to obey his later order, Master Corporal Matusheskie was obliged to obey that order.

[16] The Military Judge found that Master Corporal Matusheskie was complying with a second, inconsistent order when he installed the tactical latches. The second order was not manifestly unlawful. On those facts, no properly instructed trier of fact could conclude beyond a reasonable doubt that Master Corporal Matusheskie had the necessary intent to disobey Sergeant Mercredi's order.

[17] Intent is a constituent element of the offence of disobeying a lawful order contrary to section 83 of the *National Defence Act*. Absent proof of the requisite intent, the offence has not been proven.

[18] For these reasons, judgment will enter allowing the appeal, setting aside the finding of guilt and directing that a finding of not guilty be entered.

“Eleanor. R. Dawson”

J.A.

I agree:

“Robert L. Barnes”

J.A.

I agree:

“Michel M.J. Shore”

J.A.

COURT MARTIAL APPEAL COURT OF CANADA
SOLICITORS OF RECORD

DOCKET: CMAC-512

STYLE OF CAUSE: MCpl MATUSHESKIE, C.A., Appellant
HER MAJESTY THE QUEEN, Respondent

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 27, 2009

REASONS FOR JUDGMENT: DAWSON, J.

DATED: APRIL 15, 2009

APPEARANCES:

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