Date: 20041122

Docket: CMAC-476

Citation: 2004 CMAC 2

CORAM: **CHIEF JUSTICE BLANCHARD**
JUSTICE HUGESSEN
JUSTICE HANSEN

BETWEEN:

LIEUTENANT (N) G.D. SCOTT

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 8, 2004.

REASONS FOR JUDGMENT BY THE COURT:

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REASONS FOR JUDGMENT

BY THE COURT

[1] The appellant appeals his conviction by a military judge (standing Court Martial) of refusing to obey a lawful order, an offence under s. 83 of the *National Defence Act*, R.S.C. 1985, c. N-5. He also seeks leave to appeal the sentence of a severe reprimand and a fine of $3,000 imposed on him.

[2] The essential facts are not in dispute. The appellant was ordered to attend a Divisions parade at Canadian Forces Base Esquimalt on November 28, 2002. As part of the routine usually followed on such occasions, the chaplain of the unit was on hand and at one point pronounced a short prayer which was followed by the playing of the naval hymn. Prior to the prayer, the parade commander had sought from the reviewing officer “permission to carry on with prayers” and had duly received such permission. The order was given for the parade to “remove headdress,” but the appellant, who says that he has no religious belief, did not do so. That is the act for which he was charged and convicted.

[3] At his trial the appellant said that his *Charter* right to freedom of religion had been violated by his enforced participation in a religious ceremony with which he did not agree and in which he did not believe. Some one to two months prior to the parade in question, he had expressed his concerns in this regard to a superior officer and had received the reply that he must nevertheless attend the parade and remove his headdress when ordered to do so.

[4] The military judge's finding of guilt was predicated on his finding of fact that the order to remove headdress did not have a religious connotation. The judge purported to base that finding on his acceptance of the opinions given by the parade commander and a senior non commissioned officer who had been present at the parade. He also seems to have attached some importance to his finding that the prayer was "non-denominational."

[5] With respect, we think that the judge's finding was unreasonable and is not supportable on the whole of the evidence. The "non-denominational" character of the prayer was wholly irrelevant except, of course, to the extent that it served to undermine the judge's view that the order to remove headdress did not have a religious connotation. The order was only given once that day and immediately preceded the saying of the prayer. A prayer is always and by definition religious. That character does not change depending upon the organized religion with which it may or may not be associated. In finding that the order to remove headdress did not have a religious connotation, the judge relied on the opinions of lay witnesses who had no particular qualifications on the question. However, the judge does not appear to have taken into account the opinion of another prosecution witness, the chaplain himself, who clearly was qualified, and who said that what he had conducted was a "short" service "of a religious nature." The judge's disregard of that evidence is not explained.

[6] Even more significantly the judge had before him a full account of the circumstances surrounding the occasion: the asking and receiving of “permission to carry on with prayers”; the fact that what was pronounced was in fact a prayer; the further fact that the chaplain was dressed in ecclesiastical garb, and that the prayer was followed by the playing of what is generally recognized as a hymn; and finally, the evidence of both the witnesses on whom the judge relied to the effect that the order to remove headdress would not have been given had the prayers not been the next order of business. Indeed, paragraph 13 of the *Canadian Forces Dress Instructions*, A-AD-265-000/AG-001 itself seems to recognize the religious nature of the order to remove headdress for prayers in that it provides specific exemptions for persons whose

religious beliefs require that their heads remain covered, notably adherents of the Jewish and Sikh religions.

[7] It is simply impossible in these circumstances not to see both the order itself and the prayer that followed as having a religious connotation that required all those present at least to appear to participate in the sentiments expressed. There was no room for dissent, reservation, or abstention.

[8] The fact that the appellant kept his hat on not because of religious convictions, but because of a lack of them, seems to us to be quite irrelevant. The order that was given and that he knowingly disobeyed was one with the acknowledged purpose, according to both prosecution witnesses and section 3 of the *Canadian Forces Dress Instructions* was to show "respect" for what was being done and not mere passive toleration. That is to say, it was designed to constrain him to make a public gesture of approval for a religious ceremony in which he did not believe. Since that is a purpose which is clearly inimical to the freedom of religion guaranteed by paragraph 2(a) of the *Charter*, the order given fails the first branch of the test laid down in *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295.

[9] In these circumstances, it is not necessary to consider the further questions of the effect of the order or the possible availability to the Crown of a section 1 plea. We note parenthetically, however, that such a plea would almost certainly founder on the proportionality test, the military having already demonstrated the ease with which it can accommodate those whose religious scruples forbid them from removing their headdress.

[10] We also note that the appellant's action in speaking to his superior officer well ahead of time and in revealing his concerns about being made to participate in a prayer service in which he did not believe – in his words, a "heads up" to his superiors – far from being, as the judge viewed it, an aggravating circumstance, clearly put the authorities on notice that an effort must be made to accommodate non-believers. It should not be difficult to craft an order that would make provision for non-participation in prayers by such persons or to accommodate them by Regulation, as had already been done for some members of other religious beliefs. The provision of paragraph 13 of section 3 of the Canadian Forces Dress Instruction respecting adherents of the Jewish religion is particularly apposite: such a member who wishes to wear a yarmulke "... may be authorized to retain normal headdress on parade when others remove theirs ...". There is no explanation as to why such an accommodation was not extended to the appellant. The fact that the practice of pronouncing prayers at parades and requiring some form of public assent thereto has been hallowed by a tradition of many years in the military as well as other circles cannot justify a breach of the appellant's *Charter* rights. We emphasize that what was required of the appellant was active participation in the religious ceremony with which he disagreed. The

question of enforced passive participation by mere presence is an entirely different issue and one that we do not reach today.

[11] While we recognize that military exigency may serve to justify the giving of many orders that might otherwise result in *Charter* breaches (an order to advance under fire is an obvious example), the present is not such a case. Orders placing troops in harm's way will generally have a clear military purpose that will take them past the first branch of the *Big M. Drug Mart, supra,* test and their legality will stand or fall (more generally, one would expect, the former) on a section 1 justification. We also recognize that such orders may not necessarily be limited to circumstances where troops are engaged in combat. Obedience to lawful orders is essential to maintaining necessary discipline in the military. Here, however, there was no clearly military purpose, but simply the impermissible one of having the entire parade show some level of participation in and assent to the prayers that followed. The order was not lawful and the appellant's disobedience of it was justified.

[12] The conviction will be set aside and a finding of not guilty will be entered. The appeal against sentence being moot, leave will be granted, but the appeal will be dismissed.

[13] On the question of costs, the appellant has had to defend himself against a breach of a fundamental freedom guaranteed by the *Charter*. He was very competently represented both here and below by military counsel. At first instance, we understand that counsel's fees were paid from public funds. On appeal, he applied for financial assistance under Article 101.21 of the

Queen's Regulations and Orders for the Canadian Forces, but his application was refused. Since his appeal succeeds, he should have his costs on the appeal on the same scale as if his application had been granted.

"Edmond P. Blanchard"
C.J.

"James K. Hugessen"
J.A.

"Dolores M. Hansen"
J.A.

COURT MARTIAL APPEAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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