Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

**Date: 20121203**

**Docket: CMAC-549**

**Citation: 2012 CMAC 4**

**CORAM:** **HENEGHAN J.A.**
**TRUDEL J.A.**
**MAINVILLE J.A.**

**BETWEEN:**

**BDR NATHAN J. TOMCZYK**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

Heard at Ottawa, Ontario, on June 22, 2012.

Judgment delivered at Ottawa, Ontario, on December 3, 2012

REASONS FOR JUDGMENT BY: HENEGHAN J.A.

CONCURRED IN BY: TRUDEL J.A.
MAINVILLE J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

**Date: 20121203**

**Docket: CMAC-549**

**Citation: 2012 CMAC 4**

**CORAM:** **HENEGHAN J.A.**
**TRUDEL J.A.**
**MAINVILLE J.A.**

**BETWEEN:**

**BDR NATHAN J. TOMCZYK**

**Appellant**

**and**

**HER MAJESTY THE QUEEN**

**Respondent**

## REASONS FOR JUDGMENT

**HENEGHAN J.A.**

[1] Bombardier Nathan J. Tomczyk (the "Appellant") appeals from his conviction by a General Court Martial on September 9, 2011, upon a charge of conduct to the prejudice of good order and discipline, pursuant to section 129 of the *National Defence Act*, R.S.C., 1985, c. N-5 (the "Act"). The impugned conduct was the failure to present himself for treatment as prescribed by his treating physician. For the reasons set out below, I would allow this appeal.

[2] Briefly stated, under existing military instructions, military personnel are usually free to consent to or refuse medical treatment. Consequently, the refusal to present oneself for medical treatment cannot constitute conduct to the prejudice of good order and discipline under the meaning of subsection 129(1) of the Act.

[3] Although military personnel are obliged to attend to medical assessments in order to ascertain their fitness for duties, and the refusal to do so may indeed constitute conduct to the prejudice of good order and discipline, this was not the charge made against the Appellant. The charge should have been amended. Since no such amendment was made, the Military Judge erred in allowing the trial to proceed.

**BACKGROUND**

[4] At all times material to this case, the Appellant was a member of the Regular Force, Canadian Forces ("CF"), and a member of the 2nd Regiment, Royal Canadian Horse Artillery, based in Petawawa, Ontario. From May 13, 2010, until November 19, 2010, he deployed to Afghanistan with the 1st Battalion, Royal Canadian Regiment Battle Group. The Appellant was deployed to Patrol Base Shoja.

[5] On September 18, 2010, the Appellant suffered a non-battle related neck injury while bench-pressing. He was seen at the Patrol Base Shoja Unit Medical Station and medevaced to the Kandahar Airfield on September 19, 2010, for an assessment at the Role 3 Unit Medical Station. He

followed up at the Role 1 Medical Station where his treating physician was Dr. Fraser. She held the rank of Captain at all times material to this case.

[6] The Appellant had a final consultation with Captain Fraser on September 23, 2010, before leaving Afghanistan for a scheduled leave commonly known as "Home Leave Travel Assistance" ("HLTA"). The Appellant left Afghanistan on September 24, 2010, for his scheduled HLTA.

[7] On September 27, 2010, Captain Fraser sent an email to Major Rodgman, Base Surgeon at Canadian Forces Base Petawawa. That email said the following:

> I'm e-mailing re a member who was seen at the Role 1 just prior to leaving on HLTA. Bdr Tomczyk, Nathan […] was transported from Shoja UAS to Role 3 on 19 Sept 10 for a neck injury. He was bench pressing and lifted his head off the bench with sudden onset of neck pain radiating down both arms. At the role 3 his CT scan was negative for fractures and he was D/C'd with dx of soft tissue injury. They gave him a soft collar, flexiril and NSAIDs. He followed up with us at Role 1. The NSAIDs bothered his stomach so I switched him to Arthopec and told him to D/C the collar. When he left for HLTA on the 26th he was still in considerable pain with very limited ROM but no signs of radiculopathy. I gave him enough T3s to get him home (Petawawa) and told him to follow up at sick parade.
>
> Could whoever sees him liase [*sic*] with us on management and prognosis? I would hate to have him show back in theatre only to require a med repat.

[8] The Appellant was on leave in Petawawa from September 28, 2010, until October 17, 2010. He did not attend the Base Medical Clinic during this time nor did he consult with a health care professional during this leave.

[9] At the end of this scheduled leave the Appellant returned to Afghanistan. He reported to the Role 1 Unit Medical Station at Kandahar Airfield on October 21, 2010, suffering from neck pain. As a result of his injury the Appellant was unable to deploy back to Patrol Base Shoja. Instead he was repatriated to Canada on November 19, 2010, approximately two weeks before his deployment in Afghanistan was scheduled to end.

[10] On December 3, 2010, the Appellant was charged with disobeying a lawful command of a superior officer, contrary to section 83 of the Act.

[11] On April 18, 2011, charges were preferred in this matter. The charge sheet, with particulars of the charges, provides as follows:

> First Charge (alternative to second charge)
> Section 83 *NDA*
> DISOBEYED A LAWFUL COMMAND OF A SUPERIOR OFFICER
> *Particulars*: In that he, between 24 September and 18 October 2010, at or near Canadian Forces Base Petawawa, Petawawa, Ontario, did not present himself for treatment at the Base Medical Clinic, as ordered by Capt Fraser on or about 23 September 2010.
>
> Second Charge (alternative to first charge)
> Section 129 *NDA*
> CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE
> *Particulars:* In that he, between 24 September and 18 October 2010, at or near Canadian Forces Base Petawawa, Petawawa, Ontario, failed to present himself for treatment at the Base Medical Clinic, as prescribed by his treating physician, Capt Fraser, on or about 23 September 2010.

[12] Captain Holly Fraser was the only witness called by the prosecution. She is a medical doctor who had treated the Appellant at the Role 1 Unit Medical Station at Kandahar Airfield. She

testified about her interaction with the Appellant between September 21, 2010, and November 19, 2010.

[13] Her testimony was that she had asked the Appellant to attend sick parade in Petawawa in order to have him assessed for redeployment in Afghanistan.

[14] Following a *voir dire*, her evidence about a statement made by the Appellant, on or about October 19, 2010, was admitted into evidence. That statement was made by the Appellant following his return to Kandahar after his HLTA. Captain Fraser had asked the Appellant why he had not reported to the clinic in Petawawa and he replied that he did not do so "because he knew they would not allow him to come back to theatre."

[15] At the conclusion of the evidence for the prosecution, Counsel for the Appellant moved for a directed verdict on both charges. The Military Judge allowed the motion of no *prima facie* case with respect to charge number one on the ground that the prosecution had failed to prove an essential element of the offence, that is, that Captain Fraser ordered the Appellant to report to the Base Medical Clinic in Petawawa. A finding of not guilty was entered with respect to charge number one.

[16] Although the Military Judge acknowledged that there was no direct evidence of prejudice to good order and discipline caused by the alleged conduct of the Appellant and concluded that there was no evidence "before this Court reasonably capable of supporting the inference of prejudice at Patrol Base Shoja" (Appeal Book, vol. I, page 185), he dismissed the motion with respect to charge

number two. He noted that Captain Fraser's evidence about the Appellant's injury before he left for his HLTA, together with his condition upon his return from the HLTA and his statement to Captain Fraser upon his return, could be weighed by the Panel and "used to infer" prejudice to good order and discipline (Appeal Book, vol. I, page 186).

## ISSUE

[17] Although the parties raise several issues, in my view, the only question I need address is whether the Appellant should have succeeded on his motion for a directed verdict.

## DISCUSSION AND DISPOSITION

i) Standard of review

[18] This is an appeal from a conviction. Section 230 of the Act sets the rights of appeal following a conviction. Subsection 230(b) is relevant and provides as follows:

| | |
|---|---|
| 230. Every person subject to the Code of Service Discipline has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters: | 230. Toute personne assujettie au code de discipline militaire peut, sous réserve du paragraphe 232(3), exercer un droit d'appel devant la Cour d'appel de la cour martiale en ce qui concerne les décisions suivantes d'une cour martiale : |
| […] | […] |
| (b) the legality of any finding of guilty; | b) la légalité de tout verdict de culpabilité; |

[19] Subsection 230(b) focuses on the "legality" of a guilty verdict. "Legality" is defined in section 228 as follows:

| | |
|---|---|
| 228. For the purposes of this Division, the expressions "legality" and "illegal" shall be deemed to relate either to questions of law alone or to questions of mixed law and fact. | 228. Pour l'application de la présente section, les termes « légalité » et « illégalité » (ou « illégal ») sont censés qualifier soit des questions de droit soit des questions mixtes de droit et de fait. |

[20] In *R. v. Barros*, 2011 SCC 51, [2011] 3 S.C.R. 368 at para. 48, the Supreme Court of Canada held that the availability of a directed verdict is a question of law that is not entitled to deference. Likewise, the provision of erroneous instructions to a jury, or a panel as in this case, raises a question of law reviewable on the standard of correctness; see *R. v. G (R.M.)*, [1996] 3 S.C.R. 362 at para. 49.

ii) Was the Appellant entitled to succeed on his motion for a directed verdict?

[21] Following the entry of evidence on behalf of Her Majesty the Queen (the "Respondent"), that is the evidence of Captain Fraser, the Appellant argued that the prosecution had not established a *prima facie* case. The motion was brought pursuant to article 112.05(13) of the *Queen's Regulations and Orders for the Canadian Forces* ("QR&Os") which directs the entry of a not-guilty verdict if the prosecution fails to establish a *prima facie* case.

[22] The parties to this appeal agree that a directed verdict is analogous to ordinary criminal law motions for a non-suit for which the recognized test is "whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty"; see *United States of*

*America v. Shephard*, [1977] 2 S.C.R. 1067 at 1080. In *R. v. Charemski*, [1998] 1 S.C.R. 679 at para. 3 the Supreme Court said the following:

> For there to be "evidence upon which a reasonable jury properly instructed could return a verdict of guilty" in accordance with the Shephard test, the Crown must adduce some evidence of culpability for every essential definitional element of the crime for which the Crown has the evidential burden (emphasis in original).

[23] The Appellant was convicted of a charge pursuant to section 129. Subsections 129(1) and (2) of the Act are relevant and provide 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, | c) des ordres généraux, de garnison, d'unité, de station, permanents, locaux ou autres. |
| is an act, conduct, disorder or neglect to the prejudice of good | contravention paraît avoir entraîné une injustice à son |

order and discipline. égard.

[24] Section 129 is a broad provision that criminalizes any conduct judged prejudicial to good order and discipline in the CF. Subsection 129(1) creates the offence while subsection 129(2) deems a number of activities to be prejudicial. In *R. v. Winters (S.)*, 2011 CMAC 1, 427 N.R. 311 at para. 24 Létourneau J.A. summarized the constituent elements of a section 129 offence as follows:

> When a charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline.

[25] Proof of prejudice is an essential element of the offence. The conduct must have been actually prejudicial (*Winters*, *supra*, paras. 24-25). According to *R. v. Jones*, 2002 CMAC 11 at para. 7, the standard of proof is that of proof beyond a reasonable doubt. However, prejudice may be inferred if, according to the evidence, prejudice is clearly the natural consequence of proven acts; see *R. v. Bradt (B.P.)*, 2010 CMAC 2, 414 N.R. 219 at paras. 40-41.

[26] Two issues are not seriously disputed. First, the charge sheet provides that the Appellant was charged under section 129 of the Act for failing to present himself for "treatment" as prescribed by Captain Fraser. Second, Captain Fraser's evidence was that she directed the Appellant to attend the clinic for "assessment". The following extract from the cross-examination of Captain Fraser is relevant:

> Q: So he can't be compelled to go. You can't force him to go because he's free to consent or refuse consent?
>
> A: "Patients must always be free to consent or refuse treatment" which is not follow-up.

> Q: Let's look at the definition of treatment […] "anything that is done for a therapeutic, preventative, palliative, diagnostic, cosmetic or other health related-purpose, and include a course of treatment or plan of treatment". So having [the Appellant] assessed at [the Clinic], that would meet this definition of treatment. Correct?
>
> A. No. Assessment and treatment are two different things medically. Treatment, medically is, for example, a course of medication or a procedure that a doctor or a medical professional's performing on you physically. You need consent to allow us to physically touch you or operate on you.
>
> Q: But you said he was going there for management and assessment. Is that correct?
>
> A: Assessment. […] we don't advise other clinicians to manage our patients, we ask them to assess them, manage them and then they will advise us or they will inform us of what their plan was for treatment.

[27] The distinction between medical treatment and assessment is important. Under paragraph 7 of the CF Medical Instruction 4030-57 entitled "Consent to Medical Treatment" (Appeal Book, vol. III, page 389), military patients must always be free to consent to or refuse treatment, except in cases when the patient is unable to consent and there is imminent threat to life or health. On the other hand, the CF must be in a position to assess the fitness of military personnel to perform their duties: see notably *Defence Administrative Order and Directive* 5023-2 "Physical Fitness Program" (Respondent's Authorities, vol. I, Tab 6). Consequently, such personnel must comply with instructions to attend medical assessments made with the purpose of determining their fitness for deployment, particularly where, as here, the deployment is in a theatre of active military engagement.

[28] In this case, the charge was deficient and, in any event, the evidence adduced by the prosecution did not establish that the Appellant was under a duty to present himself for treatment.

The appropriate course of action would have been for the prosecution to seek an amendment to the charge. In *R. v. Moore*, [1988] 1 S.C.R. 1097 at 1128, the Supreme Court of Canada observed that amendments are generally preferable to quashing charges. However, in this case, the Respondent did not seek an amendment so the charge must be examined in its original form.

[29] According to the decision in *R. v. Saunders*, [1990] 1 S.C.R. 1020, the prosecution should be held to the charge as pleaded. At pages 1023-1024 of *Saunders*, *supra*, Justice McLachlin (as she then was) writing for a unanimous Court, said the following:

> I am of the view that the appeal must be dismissed. It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. […] [T]his Court [has] decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial […] There must be a new trial in this case, not because a conviction for conspiracy to import a narcotic cannot be supported without proof of the type of narcotic involved, but rather because the Crown chose in this case to particularize the drug involved and failed to prove the conspiracy thus particularized.

[30] In my opinion, analogous principles apply in this case. The prosecution chose to particularize the charge as failing to present himself for treatment. Having chosen this specific language, the prosecution must bear the consequences of leading evidence that did not correspond to the language of the charge sheet, a document prepared by the prosecution.

[31] The prosecution was obliged to prove, beyond a reasonable doubt, that the Appellant was under a duty to act, since the charge is fundamentally premised upon an omission. What was the Appellant told to do? Was he told to report for treatment or for assessment?

[32] These questions relate to whether the Appellant was entitled to a directed verdict at the close of the prosecution's case. The charge as drafted could not be sustained and, in any event, the evidence did not support the charge of failing to obtain treatment.

[33] In light of Captain Fraser's evidence, the conclusion must be that the Respondent provided no evidence that the Appellant had to present himself for "treatment". He was entitled to succeed on the motion for a directed verdict. Since the applicable standard of review for this issue is correctness, this Court can substitute its own view and enter a verdict of not guilty. This result is based upon the circumstances of this case and should not be taken as a judgment upon the behaviour of the Appellant.

"E. Heneghan"
J.A.

"I agree."

"Johanne Trudel"
J.A.

"I agree."

"Robert M. Mainville"
J.A.

**COURT MARTIAL APPEAL COURT OF CANADA**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

| | |
|---|---|
| **DOCKET:** | CMAC-549 |
| **STYLE OF CAUSE:** | BDR NATHAN J. TOMCZYK v. HER MAJESTY THE QUEEN |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | June 22, 2012 |
| **REASONS FOR JUDGMENT BY:** | HENEGHAN, J. |
| **CONCURRED IN BY:** | TRUDEL, J.A.<br>MAINVILLE, J.A. |
| **DATED:** | December 3, 2012 |

**APPEARANCES:**

| | |
|---|---|
| Major Edmund Thomas<br>819-994-9151 | FOR THE APPELLANT |
| Commander J.B.M. Pelletier<br>Lieutenant Commander D.T. Reeves<br>613-995-2684 | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Defence Counsel Services<br>Gatineau, QC | FOR THE APPELLANT |
| Canadian Military Prosecution Service<br>Ottawa, ON | FOR THE RESPONDENT |