COURT MARTIAL

Citation: *R. v. Bell*, 1992 CM 491

Date: 19921210
Docket: 49/92

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Captain K.E.J. Bell, Accused

Before: Lieutenant-Colonel A. Ménard, M.J.

REASONS FOR FINDING

(Orally)

Introduction

[1] The accused is charged with two offences under the *National Defence Act* (*NDA*). The first offence laid under paragraph 112(a), of the *NDA* refers to using a vehicle of the Canadian Forces (CF) for an unauthorized purpose.

> "In that he, on or about 16 March 1992, at Halifax, Nova Scotia, without authority, used a Buick bearing Nova Scotia licence plate number CCY 523, a vehicle of the CF, to transport himself from his residence in the city of Dartmouth to the local civilian airport in the vicinity of that city when proceeding on leave."

[2] At the very beginning of this trial, the accused, through his counsel, made the following admission: that Captain (Capt) Bell, on or about 16 March 1992, at Halifax, Nova Scotia, used a Buick bearing licence plate number CCY 523, a vehicle of the CF,

to transport himself from his residence in the city of Dartmouth to the local civilian airport in the vicinity of that city when proceeding on leave. The defence also admitted the content of *Canadian Forces Administration Orders* (CFAO) 20-9 and the publication thereof. Finally, defence counsel admitted that the identity of the accused was not an issue in this case.

[3] The first witness called by the prosecution was Lieutenant-Colonel (LCol) Schrader, the region cadet officer. He testified to the effect that he never authorized the accused, nor anybody else, to use military transportation other than for official purposes. He said that although the policy on use of military vehicle was clear, some members were unhappy because they had to proceed to base transport to collect their vehicle.

[4] He reported one previous incident of a petty officer who made an unauthorized use of a military vehicle. That incident took place in February 1992. He had heard of a practice to the effect that when people were working on weekends, they would take Monday as compensatory time off or short leave and return their vehicle on Tuesday. Although he had heard of such a practice, he said that it was against orders.

[5] As a result of the incident involving the petty officer in question in February 1992, LCol Schrader said that a promulgation was made in the Canadian Forces Base (CFB) Halifax Standing Orders reminding CF members that the taking of military vehicles to private residences was forbidden. He said that such promulgation was nothing else than a reinstatement of regulations in effect.

[6] On 11 May 1992, he issued a memorandum within his unit reemphasizing the policy. The said memorandum is now Exhibit "D" before this Court.

[7] The second witness heard was Lieutenant-Commander (LCdr) Lowther, the accused's immediate supervisor. In cross-examination, he said that although it was not unusual to grant short leave to people working on weekends, he is not aware of any situation where somebody would have kept a military vehicle at home during short leave and return it on the next working day. He said that it is not uncommon to see a military vehicle being used, for example, to go golfing after duty hours, but on the occasion when he saw it the golf course was on a military base.

[8] As to the event that took place at Canadian Forces Station Shelburne, he is not aware or does not recall if the accused was accompanied or not when he attended the competition. Finally, in re-examination, he mentioned that the memorandum issued in May 1992, was more a clarification of the existing policy than a change in the policy.

[9] Lieutenant(N) (Lt(N)) MacIntyre testified to the effect that he is the staff officer of administration at the unit where the accused was working at the time of the alleged offence. He said that updated CFAO and more precisely CFAO 20-9 was available at the unit in February or March 1992, and that the accused had access to it.

[10] Lt(N) MacLeod, the transportation officer at Maritime Command Headquarters (MARCOM HQ), testified to the effect that the accused requested a military vehicle to

carry out his duties as he had to go out of town to visit cadets. He was given a vehicle for that purpose. He said that although such vehicle was rented by CFB Halifax from a rental company, military regulations apply to such vehicles and they are treated as Department of National Defence (DND) vehicles. He said that he did not authorize the accused to use this military vehicle other than for official business.

[11] He also explained the procedures of returning military vehicles during and after working hours. During working hours the member, who was returning a vehicle, would park the car outside of building D-14 and return the keys and the credit card to himself or Lieutenant (Lt) Thompson. After working hours, the member would park his car, return the keys on his desk or in the top drawer but would keep the credit card and return it to him or to Lt Thompson the next working day. He said that such was his expectation at the time. He did not authorize the accused to keep the car while he was on leave, neither did he authorize him to take the car to the airport.

[12] In cross-examination, he said that he was aware that some people had used a military vehicle to run errands, but that it was a breach of regulations. According to him, if a person is on temporary duty out of town and uses a military vehicle to go to the restaurant, for example, there is no problem, but otherwise it is different. He said that any member who would use a military vehicle for unofficial purposes would know that they are at risk.

[13] He said that he recalls the accused coming to his office and asking for an extension. Although he does not remember the exact words spoken by Capt Bell, he said that the accused wanted to keep the car for another two weeks because he had other inspections to make. It is for this reason that he authorized the extension. Lt MacLeod said that Capt Bell never told him that he was going on leave and that he would not have let him keep the car during his leave. In re-examination, Lt MacLeod said that he had never authorized anybody to use a military vehicle to run errands, but that he knew it happened.

[14] The defence called Lt Roussel. The latter said that while he was working under the command of LCol Schrader he drove him and other officers on official duties to CFB Cornwallis in a military vehicle. He and LCol Schrader had different schedules. After duty, one day, while LCol Schrader was doing inspections he and another officer used the vehicle to drive to the golf range.

[15] Finally, the accused testified. He said that although he was aware that military vehicles could not be used for personal purposes, he had seen several people doing it. According to his testimony, Halifax was very relaxed. For example, he would be given a military vehicle for an entire week, even when the vehicle was required for a few days only. He said that when people are working on weekends and use a military vehicle, if they get short leave on Monday, they would return their vehicle on Tuesday. He said that he was never told that he was not allowed to do that, but he admitted having read reminders on the use of military vehicles in base routine orders. He said that his use of military vehicles was even more scrupulous than what was done by his peers or superiors.

[16] As to the facts related to the first charge on Exhibit "A'', he said that he took possession of the vehicle approximately one week before going on leave.

[17] On or about 16 March 1992, the same day all his confirmations came in, he said he had a conversation with Lt MacLeod. According to him, he told Lt MacLeod that he was going out of town on leave and that he could not get the vehicle back before he returned from leave. Lt MacLeod would have accepted and would have written his authorization for extension on a yellow sticker. He said that he had no reason to believe that the authorization had not been granted and he left.

[18] Capt Bell said that he could not return the vehicle outside working hours and that he could not do so because he does not want to leave keys on desks. He said that he had never done it and was never criticized for not doing it. He said that he used the vehicle for his duties on Friday and returned home late on Saturday. He could not take the vehicle back on Saturday or Sunday, and as he did not want to leave it in his driveway for safety reasons during his leave, he used it to drive to the airport. When he came back from leave the vehicle was gone. He also said that he and others had used a military vehicle in the past to drive their dependants, and although it was not allowed by orders, it was tolerated.

[19] In cross-examination, he said that he had never received any specific authority to use his military vehicle to drive to the airport. He also admitted having been found guilty of two charges related to falsely informing a member of the hospital that blood and urine samples collected from certain individuals were no longer required. The defence raised the defence of mistake of fact. It submits that the accused should be found not guilty on the first charge because he had a mistaken but honest belief that what he was doing was not unlawful. The defence submits that as the accused was familiar with the way military vehicles were utilized by other members in his section, for example, they would be used for entertainment purposes, to go to the clothing stores, they would be kept home contrary to CFAO, etc., the accused could honestly believe that he could do what he did.

[20] The essence of the defence of mistake of fact is that the accused is not guilty because at the time the offence was committed, he had an honest belief in the existence of circumstances which, if true, would constitute a defence. As stated in the case of *R. v. Pappajohn*, [1980] 2 S.C.R. 120, before this defence can be left to the Court, there must be some evidence to support the existence of a mistaken but honest belief. The belief does not have to be reasonable, but there does have to be some evidence from or supported by sources other than the accused in order to give this belief an air of reality.

[21] I have carefully reviewed all the evidence heard in this case and I asked myself if there was any reality to this defence? When considering all the evidence and all the circumstances, I have come to the conclusion that there is no reality to this defence in these circumstances. I cannot find the belief of the accused to be honest. It is not supported by the evidence heard from other witnesses. CFAO 20-9, now Exhibit "C", stipulates at paragraph 7(b) that:

(b) MSE shall be used only for official purposes, or as prescribed in this order.

[22] There is no issue here that the accused did not use his military vehicle for official purposes. He admitted that he was on leave and that he used the vehicle to drive him and his family to the airport. Although some witnesses heard during this trial said that they have heard of some members using military vehicles for reasons other than official purposes, they said that in every case it was a breach of regulations or orders. Only one witness, other than the accused, said that he had used a military vehicle to attend a golf game when waiting for his commanding officer who was on duty. The circumstances are completely different from the circumstances of this case.

[23] Although it might be known that some members used military vehicles for purposes other than official purposes, thereby breaching CFAO 20-9, this is not a defence in this case. Neither can I conclude that the accused had an honest belief in the existence of circumstances, which, if true, would constitute a defence. I do not find such circumstances here.

[24] To the contrary, the evidence heard is to the effect that members who used military vehicles for personal purposes are well aware of the existing orders and know that they put themselves at risk when doing so. Again, I do not find that the accused had an honest belief. If he believed that he was allowed to do what he did, he must have wilfully blinded himself to the facts.

[25] I am satisfied that the prosecution has proven beyond a reasonable doubt, as it was its duty to do so, all the essential elements of the first charge, including the blameworthy state of mind of the accused.

[26] Turning now to the second charge. It is laid under paragraph 117(f) of the *NDA*. It refers to an act of a fraudulent nature, not particularly specified in sections 73 to 128 of the *NDA*. The particulars are to the effect that the accused, between 10 March 1992 and 30 April 1992, at or about Halifax, Nova Scotia, with intent to defraud, retained all copies of his duly approved request/authorization forms, CF100, by which he was authorized to take leave from 16 March 1992 until 24 March 1992, knowing that by retaining all copies of those forms the leave taken would not be recorded at CFB Halifax's, leave record section.

[27] LCol Schrader said that he was approached by the accused on or about 10 March 1992, who asked him to authorize leave for him. The accused explained to him that he had prepared two forms, CF100, as he was not certain on which date he would be allowed to travel on Priority 5 to Ottawa. LCol Schrader signed both forms quickly as he had a medical appointment shortly thereafter. Although he admitted that it was unusual to proceed the way the accused did in the circumstances, he said that it could be done that way. His expectations were that the accused would take his leave forms to the leave record section at CFB Halifax or to one of the people working at his unit.

[28] LCdr Lowther testified to the effect that he found Exhibit “E” on his desk, a minute sheet signed by the accused. That minute sheet reads as follows:

> “Referred to DRCO
>
> 1. Sir, as we discussed, RCO has approved my request for time off next week.
>
> 2. If my pri 5 bookings come through, I will be staying with my sister-in-law in the country near Ottawa, telephone is 1-613-989-2323.
>
> 3. My bookings are:
> Hfx Ott - pri 16 Mar
> sec 18 Mar
>
> Ott Hfx - pri 22 Mar
> sec 24 Mar
>
> 4. I will be back in the office either the 23rd or 25th, depending on whether or not I can get on the pri flight. Signed Captain Bell.”

He said that the accused never left a leave pass with him and that he has never seen any. He confirmed that the accused was absent on leave from 16 to 24 or 25 March 1992.

[29] Lt MacIntyre, the staff officer of administration at the accused's unit, testified to the effect that he was responsible for the administration of leave at his unit for regular Force members. He said that when an application form for leave is made, completed and approved by authorities, the member would bring it to him. He would initial it, make a copy of it and would send it to the base orderly room (BOR) to be recorded and stamped. The BOR would enter the leave remaining on the CF100 and would return two copies, one for the unit and one for the member. In the case at bar, he never saw a leave pass related to the accused for March 1992.

[30] In cross-examination, he said that he used the base internal mail to send the leave forms to the BOR. If somebody is in a hurry to have his leave authorized, he can take it directly to the base; it has been done before. In these situations, he expects the member to bring a copy back to him or the BOR, would keep its copy and return the unit's copy to him. He keeps a file on each member in which he keeps copies of all leave passes.

[31] Ms Hilstz, who works at the CFB Halifax BOR and who has been in charge of leave records for all members of CFB Halifax for the last ten and a half years, explained the procedure to record leave. She said that she can only record leave when she receives a leave pass. She produced the file held on Capt Bell, which is now Exhibit “G” before this Court, and it does not show any record for leave taken in March 1992.

[32] In cross-examination, she said that she received leave application forms either by the base mail or over the counter. When it is received over the counter, the member would either give the form to her or leave it in her basket, which sits on the counter. She said that such basket has always been on her counter since she has been in Halifax and that there is a sign on it “leave”. She said that she has used the base mail before and that the only problem that she experienced with it is that the mail was returned to her when she used an incorrect address. She said that if a member would present to her a leave pass over the counter, she would stamp it and give a copy immediately to the member.

[33] Capt Gilday, the sports officer at the accused's unit, said that there were no curling events or other unit social activities held in March 1992. The accused testified to the effect that he is familiar with the leave procedures. He said that as he intended to take some leave with his family to go to Ottawa and intended to travel by service air, he made an application to do so. Once he heard about his reservations, he went to meet with LCdr Lowther, but the latter was not in his office at the time. This would have been on the Thursday preceding 16 March 1992.

[34] He then approached LCol Schrader with two forms in case his bookings were not approved for the primary date. He said that he went to the unit orderly room at approximately 1120 hours that day, but that there was nobody there. He thought they were at curling. He said that everybody at the unit was gone. He then went to the BOR and Ms Hilstz was not there. He talked to another lady there and asked her when Ms Hilstz would be back. He noticed that her filing cabinet was opened. He waited for approximately two minutes. As he had many things to do that day, he left. He said that he did not see a basket on the BOR's counter with “leave” or something on it, but had he seen it, unless somebody specifically told him that he could drop his leave application form there, he would not have done so.

[35] He said that he knew a friend by the name of Sergeant (Sgt) Gridley, who was working at the Halifax BOR as an administrative clerk. She was familiar with all those leave procedures. He kept the top copy of his leave application form, which was required for his trip, and he placed the bottom two copies together with a note in an envelope and addressed it to BOR Halifax, attention Sgt Gridley.

[36] He later found out that Sgt Gridley had got married and was now known as Sgt During. He said that there was no return address on the envelope that he sent through internal base mail. The envelope was never returned to him. He said that he had no intention to defraud the government and that he made it well known that he was going on leave to Ottawa.

[37] In cross-examination, he said that he never said in examination-in-chief that he would not have left his pass in the basket had he seen it. He also said that he was fully aware of the consequences of a leave pass not being stamped. The defence submits that the actions of the accused were not actions of a man who wanted to deceive because he left a memorandum, Exhibit “E”, behind him to inform his superiors about his intention. It also submits that the accused gave a reasonable explanation of the fact that took place

and that there should exist a reasonable doubt as to the guilt of the accused on the second charge.

[38] I do not find the accused's testimony plausible. First, why was he in such a hurry to have his leave pass signed and stamped on that Thursday morning? He said he had many things to do that day, that Thursday. According to his testimony, it was the day he heard back about his Priority 5 reservations. If such was the case, why did he still offer two leave passes for signature? He said that nobody else was present in the unit at the time, but we also know that there were no curling or other type of unit activities that day at the unit. He said that because there was nobody at the unit, he decided to bring his leave pass directly to the BOR because he was in a hurry. But once there, he is told that Ms Hilstz is not there, that she may be back anytime. He talked to another lady working right beside her. He does not leave his leave pass with her for the attention of Ms Hilstz.

[39] Why go through such a complicated process of mailing his leave pass to a sergeant working at the BOR in a different area from where Ms Hilstz is working rather than giving it to the lady working right beside Ms Hilstz at the BOR once the accused is present at the BOR? Why run a greater risk of his pass being lost? Why wait only two minutes there? Why contradict himself in his testimony concerning the basket at the BOR?

[40] Contrary to what is submitted by the defence, I do not see in Exhibit “E” a reasonable explanation of the accused's intention. The accused said that he was fully aware of the consequences of a leave pass that is not stamped. Leaving a memo behind him with a telephone number where he could be reached and with the dates on which he would be away on leave may be interpreted various ways. It may mean that it is a way to provide his unit with information that is usually written on a leave pass, but as there was no leave pass recorded in the system it was the only way to know where to reach him.

[41] The matter of previous convictions of the accused has been raised in this trial. I wish to say here that I agree with the prosecutor that it is the type of case where the credibility of the accused is in issue. I have carefully read the caselaw on this matter and I have satisfied myself that proof of previous convictions is not proof that the accused committed the offences with which he is being tried and that it goes only to his credibility.

[42] In the case at bar, it is only one of many reasons why I do not find the testimony of the accused being credible and plausible. This Court is satisfied that the prosecution has proven all the essential elements of the second charge beyond a reasonable doubt, as it was its duty to do so.

FOR THESE REASONS, THE COURT

[43] **FINDS** the accused guilty on the first and second charges.

Counsel:

The Director of Military Prosecutions as represented by Captain V. Joshi

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