

Citation: *R. v. ex-Corporal D.D. Beek*, 2007 CM 2012

Docket:200532

**STANDING COURT MARTIAL
CANADA
EDMONTON, ALBERTA
1 COMBAT ENGINEER REGIMENT**

Date:4 May 2007

PRESIDING:COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

**EX-CORPORAL D.D. BEEK
(Accused)**

FINDING

(Rendered verbally)

[1] Stand up, please, Mr Beek. This court finds you guilty on charges two through to seven inclusive, and not guilty on charge number eight and not guilty on charge number nine. You may be seated.

[2] Former Corporal Derek David Beek is charged with nine counts of trafficking in a controlled substance contrary to section 5(1) of the *Controlled Drugs and Substances Act* which is a service offence contrary to section 130 of the *National Defence Act*. Upon the prosecution intimating that they would lead no evidence respecting charge number one, the accused was found not guilty of that charge.

[3] The theory of the prosecution is that on three different days in June of 2004, referred to in counts two to seven inclusive, the accused sold small quantities of controlled substances, methylenedioxyamphetamine, cocaine, and methamphetamine to Constable Wing, a member of the Edmonton City Police, acting in an undercover capacity. In the eighth charge, it is alleged that the accused trafficked in methylenedioxyamphetamine during the period 28 July 2004 to 28 September 2004. In the ninth charge, it is alleged that the accused trafficked in cocaine during the period 30 September 2003 to 28 September 2004.

[4] The prosecution at court martial, as in any criminal prosecution in a

Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context this is a term of art with an accepted meaning; if the evidence fails to establish the guilt of accused the beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed, the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt. Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt and the accused must therefore be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt. But reasonable doubt is not a frivolous or imaginary doubt. It is not something based on sympathy or prejudice. It is a doubt based on reason and common sense that arises from the evidence or the lack of evidence. The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty. The rule of reasonable doubt also applies to the issue of credibility. If there is a reasonable doubt as to the guilt of the accused arising from the credibility of witnesses, the accused is to be found not guilty.

[5] I accept the submission of counsel on behalf of Mr Beek in the course of his address that credibility of the various witnesses in this case is an important issue and in this context credibility refers not only to the truthfulness of a witness but also the reliability of the evidence given by the witness. In other words, the court must assess not only whether the witness is attempting to give a full and candid account of the facts but also whether, in so doing, the witness is giving an accurate and reliable account of the facts known to them.

[6] I have no hesitation accepting and relying upon the evidence of both Sergeant Marinakos and Petty Officer Holt. Both these witnesses appear to have acted professionally in discharging their duties in this investigation and gave evidence in a forthright and clear manner that was responsive to the questions of counsel. It is true that Petty Officer Holt incorrectly testified that the drug exhibit locker did not contain any other exhibits when in fact there was an unrelated marijuana exhibit kept in the same locker. To my mind, this simple error does not detract from his credibility.

[7] I have closely examined the evidence of the undercover operator, Constable Wing. He is a peace officer with the Edmonton City Policy. He has been trained as an undercover operator and has taken part in many undercover purchases of illegal drugs. He appears to have recognized the importance of notes made during an investigation by an undercover operator, but I find on all the evidence that the notes the

witness made were unreliable in many respects. The witness made many changes to his notes at unknown times and, more importantly, for reasons that he cannot now remember. It is not clear whether he kept his notes in chronological order, nor did he clarify in many instances in his notes what information he received from others and what information recorded observations he made and events in which he participated. I am satisfied that in giving his evidence Constable Wing had a good recollection of the central events to which he testified and that he honestly answered the questions put to him to the best of his ability, but I have concluded that his evidence cannot be relied upon for matters such as the timing of certain events or the details of specific conversations that may have taken place. I have also examined the evidence closely to determine the extent to which his evidence of the important aspect of the case is confirmed or refuted by other evidence before the court.

[8] I have also considered the evidence of Shawn Cooper and Corporal Smithers. These two witnesses gave evidence in support of charge number nine. For various reasons, I find the evidence given by them to be unreliable. In examination-in-chief, both of them admitted to the extensive use of cocaine during the period referred to in the charge. Both had difficulty recalling much detail with respect to their use of drugs and I was left with the impression that either their use of drugs has affected their memory or they were reluctant to give any details of their drug use which occurred, both admitted, during a time they would prefer to forget. These considerations seriously undermine the confidence the court can have that these witnesses have told the full truth. One of the elements of the offence of trafficking is, of course, the nature of the specific substance that is particularized in the charge. The only evidence before the court on this element of charge number nine is the evidence of both Cooper and Smithers that the substance they obtained from the accused, on perhaps eight to ten occasions in the case of Cooper and perhaps fifteen occasions in the case of Smithers, and consumed was cocaine. I am invited by the prosecution to find on the strength of this evidence that the substance was, indeed, cocaine.

[9] I agree with the submission on the part of the prosecution that the nature of the prohibited substance can be proven in some cases by evidence other than the certificate of a qualified drug analyst entered into evidence under section 51 of the *Controlled Drugs and Substances Act*. The cases of *R. v. Daniels* and *R. v. O'Quinn* from the British Columbia Court of Appeal illustrate the point. But the quality of the evidence in the present case as to the nature of the substance sold to Cooper and Smithers on the occasions to which they testified does not satisfy me beyond a reasonable doubt that the substance was indeed cocaine as alleged. The accused is not guilty on charge number nine.

[10] Charge number eight alleges trafficking in methylenedioxyamphetamine between 28 July and 28 September 2004. The prosecution relies on the evidence of Constable Wing as to a series of conversations he testified he had with the accused over

the telephone beginning on 27 July 2004. According to Constable Wing, on that date, the accused agreed to deliver a quantity of 30 Ecstasy tablets at a price of \$15 per pill. The arrangement was that Constable Wing was to send the purchase money to the accused by mail with a birthday card to an address to be supplied later by the accused. Then the accused would mail the drugs to an address specified by Constable Wing. There followed a series of telephone discussions in August of 2004 during which the details were said to have been finalized. Constable Wing testified that he sent \$450 by mail as specified, but did not receive any drugs as promised. Constable Wing was in further telephone contact with the accused on several occasions until the day of his arrest on 28 September 2004. These discussions centred on the apparent failure of the accused to deliver the drugs by mail as promised.

[11] The theory of the prosecution on charge number eight is that the offence of trafficking was committed when the accused offered to sell a quantity of Ecstasy tablets on 27 July 2004, and the offer was implicitly reiterated during the subsequent telephone contacts with Constable Wing. As well, it is argued that even if the accused did not actually deliver the drugs, the accused attempted to traffic Ecstasy to Constable Wing during the time period alleged and is therefore guilty of the offence.

[12] The definition of traffic in section 2 of the *Controlled Drugs and Substances Act* means:

(a) to sell, administer, give, transfer, transport, send or deliver the substance, or

(...)

(c) to offer to do anything mentioned in paragraph (a)....

[13] There is no evidence confirming the evidence of Constable Wing as to the dates of his telephone conversations with the accused and, more importantly, no evidence confirming the substance or detail of what was said by either Constable Wing or the accused in the course of the conversations. I find that the uncorroborated evidence of Constable Wing as to these matters is not sufficient to remove all reasonable doubt as to whether the accused offered or attempted to sell the drugs and I therefore find the accused not guilty with respect to charge number eight. I should add that in the event I were satisfied beyond a reasonable doubt that the arrangements were made and unfolded in the manner to which Constable Wing testified, the offence of trafficking by offering for sale would have been established and I would not have hesitated to make a special finding of guilty on this count for the period 27 July to 28 September inclusive pursuant to section 138 of the *National Defence Act*.

[14] With respect to charges two through seven inclusive, Constable Wing testified that, acting in an undercover capacity, he was directed by someone he referred to as a cover manager to attend a residence in Edmonton on three occasions in June of

2004. There, he met the accused and on each occasion received from him quantities of two different drugs; that is, Ecstasy and cocaine on 15 June; Ecstasy and cocaine on 17 June; and Ecstasy and methamphetamine on 18 June. On each occasion Constable Wing testified he received the substances by direct hand-to-hand transfer from the accused and paid some money in cash which he gave to the accused. At a later point following each transaction, in the safety of a police facility, Constable Wing gave the substances he received from the accused to Sergeant Marinakos, whose role in the investigation was surveillance and handling of exhibits. It is formally admitted by the parties in an agreed statement of facts, exhibit 7, that the substances that Sergeant Marinakos sent away for analysis are the prohibited substances named in charges two through seven inclusive in the charge sheet. I accept the evidence of Sergeant Marinakos and Petty Officer Holt as to their dealings with the items that Sergeant Marinakos received from Constable Wing and I conclude that the items that Constable Wing gave to Sergeant Marinakos are the same items that were analysed as being the specified controlled drugs. I also accept the evidence of Constable Wing as to the three transactions he had with the accused in June of 2004. His evidence that the transactions occurred was not seriously challenged in cross-examination. His evidence as to the date of the transactions is confirmed by the evidence of Sergeant Marinakos who dealt with the drug exhibits he received. Sergeant Marinakos recorded on the police exhibit bag, part of exhibits 8, 9, and 10, what he received from Constable Wing and when Constable Wing had received the items from the accused. I accept the evidence of Constable Wing that as part of his cover story, he portrayed himself to the accused as being a dealer in illegal drugs and I find that the accused knew of the illicit nature of the substances he sold to Constable Wing. He is accordingly guilty on charges 2, 3, 4, 5, 6, and 7.

COMMANDER P.J. LAMONT, M.J.

Counsel:

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