

Citation: *R. v. Captain M.D. Rafuse*, 2007 CM 1008

Docket: 200690

**STANDING COURT MARTIAL
CANADA
MANITOBA
17 WING WINNIPEG**

Date: 3 April 2007

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

**CAPTAIN M.D. RAFUSE
(Accused)**

FINDING

(Rendered orally)

INTRODUCTION

[1] Captain Rafuse is charged under section 129 of the *National Defence Act* for an act to the prejudice of good order and discipline. The particulars of the charge allege that on or about 14 March 2006 at the Rock Bottom Café, Dubai, United Arab Emirates, he consumed alcohol that was neither wine nor beer, contrary to Theatre Support Element Standing Order 206.10.

THE EVIDENCE

[2] The evidence before this court consists of the testimonies of Captain Phillips, Master Warrant Officer Hicks, Captain Dubé, Corporal Clemens, and Sergeant Neil. In addition, the evidence includes Exhibit 4, which contains the Theatre Support Element Standing Order 206.10, and Exhibit 3, which is a document called, "Camp Mirage/Theatre Support Element/TFSWA Host Nation Personal Conduct and Local Directive-6 Jan 06. This last document contains a statement of understanding that refers to Captain Rafuse's service number and unit as well as a signature dated 17 January 06, to the effect that the signatory has read and understands the orders referred to in the document, as well as being aware that he is subject to these directives for the duration of

his stay within the host nation. The evidence is completed with the court taking judicial notice of those facts and matters under Military Rule of Evidence section 15.

The facts

[3] The facts surrounding this case arose where Captain Rafuse was first observed by Master Warrant Officer Hicks at the Rock Bottom Café located in Dubai, United Arab Emirates, during the evening of 14 March 2006. Two female servicepersons, that were later identified as Corporal Clemens and Sergeant Neil, accompanied Captain Rafuse. Master Warrant Officer Hicks, who was sitting at approximately 10 feet from Captain Rafuse, noticed that Captain Rafuse had made eye contact with him and made a gesture in his direction. He testified that he noticed during that evening that highball glasses and Martini-type glasses were served at Captain Rafuse's table. Master Warrant Officer Hicks shared his observations with Captain Phillips, who was also present at the Rock Bottom Café with their guests. Upon their return, a quick investigation was made to determine if Captain Rafuse's actions violated the alcohol consumption policy applicable to military personnel at Camp Mirage.

[4] There is no direct evidence of the content of the drinks that were in the glasses described as Martinis. The circumstantial evidence is provided by the testimonies of Corporal Clemens and Sergeant Neil. In a nutshell, these persons had spent the whole day in Dubai at a spa. They decided later to have dinner at the Rock Bottom Café. They arrived before 1930 hours. They ordered the dinner special which included a pitcher of red wine. Corporal Clemens testified that she only had a sip or two of that wine as it was too dry. Sergeant Neil testified that she had no wine with her meal. Captain Rafuse, who had been invited by Sergeant Neil, according to her testimony, joined them later that evening. Neither Corporal Clemens, Sergeant Neil, nor Captain Rafuse, drank beer that evening. According to Corporal Clemens, she left the table to go to the bathroom and noticed on her return that someone had brought glasses on the table that she was told were Martinis. She described the glasses and said that they contained a clear liquid, which did not look like red or white wine or beer to her knowledge. She testified that she is only a wine drinker and that she does not tolerate beer. She added that she and Sergeant Neil had two of those Martinis, where Captain Rafuse had one or two.

[5] Sergeant Neil corroborates that testimony, yet she affirmed that they all had two drinks. An experienced drinker, Sergeant Neil described the glasses as a Martini glass with a stem, triangular bowl shape, which matches the description provided by other witnesses. She testified that she is not sure as to what are the ingredients found in a Martini, but that it had a clear look. She said that there was no wine or beer in the drink, but that it had an alcohol taste. In cross-examination, she was asked whether the drink could have been made from a fermented fruit, to which she

simply said that the drink was clear in colour. This completes the summary of the facts surrounding this case.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE

[6] The charge alleges that Captain Rafuse contravened section 129 of the *National Defence Act* in that on or about 14 March 2006, for an act to the prejudice of good order and discipline, in that he consumed alcohol that was neither wine nor beer, contrary to Theatre Support Element Standing Order 206.10, at the Rock Bottom Café, Dubai, United Arab Emirates. The elements of this offence are:

- a. the identity of the accused, Captain Rafuse;
- b. the date and place, that is, on or about 14 March 2006 at the Rock Bottom Café, Dubai, United Arab Emirates;
- c. the impugned act of the accused, that is, the consumption of alcohol that was neither wine nor beer;
- d. the prejudice to good order and discipline resulting from the act; and
- e. the blameworthy state of mind of the accused at the time of the alleged act.

PRESUMPTION OF INNOCENCE AND REASONABLE DOUBT

[7] Let me first deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with that principle fundamental to all criminal trials. Of course these principles are well known to counsel, but other people in this courtroom may well be less familiar with them.

[8] It has been stated numerous times that the presumption of innocence is perhaps the most fundamental principle in our criminal law, and that the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his guilt beyond a reasonable doubt. An accused person does not have to prove that he is innocent. It is up to the prosecution to prove its case on each element of the offence, and that, beyond a reasonable doubt.

[9] The standard of proof beyond a reasonable doubt does not apply to the

individual items of evidence or to separate pieces of evidence that makes up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and never shifts to the accused person.

[10] A court must find an accused person not guilty if it has a reasonable doubt about his guilt after having considered all of the evidence. The term, "beyond a reasonable doubt," has been used for a very long time. It is part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and Appellate Court subsequent decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt that is based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case, based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[11] In *R. v. Starr*, [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court held that an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities. On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty, and the prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Captain Rafuse, beyond a reasonable doubt. To put that in perspective, if the court is convinced that the accused is probably or likely guilty, then the accused shall be acquitted, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[12] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did, documents, photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice.

[13] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has then to determine what evidence it finds credible and reliable. Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious and it may well tint a witness's entire testimony, and I must say that this is not the case here.

[14] The court is not required to accept the testimony of any witness except to the extent it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason to disbelieve that evidence. The rule of reasonable doubt also applies to the issue of credibility, and the court is not required to definitely decide on the credibility of a witness or a group of witnesses, nor does the court need to fully believe or disbelieve one witness or a group of witnesses.

QUESTION IN ISSUE

[15] Counsel for the defence suggests that the only issue before the court is limited to the sufficiency of the evidence adduced by the prosecution with regard to the content of the one or two drinks referred to as Martini by Corporal Clemens and Sergeant Neil, that was or were ingested by Captain Rafuse at the Rock Bottom Café in Dubai on 14 March 2006, and whether this evidence is sufficient to prove beyond a reasonable doubt the violation of the TSE Standing Order 206.10. I agree with the statement of the issue at trial, and I will frame the issue in the following manner: Firstly, does the evidence raise a reasonable doubt with regard to the nature of the substance drank by the accused; and secondly, does the act of the accused established by the evidence prove beyond a reasonable doubt a violation of the TSE Standing Order 206.10?

[16] The prosecution has established beyond a reasonable doubt the elements of the offence that relate to the identity and date and place of the offence. As to the third element, the act of the accused described as the consumption of alcohol that was neither wine nor beer, the evidence of Corporal Clemens and Sergeant Neil indicates that Captain Rafuse and themselves drank Martinis. Their testimony leaves no doubt that these drinks did not contain beer or what they perceived as wine, but that it had alcohol content. There is no evidence, however, as to what ingredients or substances are included in this beverage generally, or that what these Martinis contained the evening in question.

[17] In regards to the fourth element of the charge, the prejudice to good order and discipline, the charge alleges the contravention of an order; namely, the Theatre Support Element Standing Order 206.10. That being the case, the provisions of 129 (2) of the *National Defence Act* apply; therefore, the contravention of the order is deemed to be prejudicial to good order and discipline. The nature and existence of the order is not an issue and was accepted as Exhibit 4. The manner of the accused's knowledge of this order is also not an issue. Defence counsel conceded that there is ample evidence that TSE Standing Order 206.10 was published and sufficiently notified to persons serving at Camp Mirage, including to Captain Rafuse.

DECISION

[18] The prosecution submits, that in order to meet its burden of proof, it only had to prove that the drinks ingested by Captain Rafuse were neither wine nor beer as the TSE Standing Order 206.10 excludes any other types of alcoholic beverage. This particular interpretation is, according to the prosecution, consistent with Exhibit 3 called, "Camp Mirage/Theatre Support Element/TFSWA Host Nation Personal Conduct and Local Directive-6 Jan 06," that partly states, at page 3, "Alcohol Consumption: maximum two drinks per person within a 24-hour period. Only beer and wine are authorized."

[19] The prosecution submits that not only Exhibit 3 provides a clear guidance to the policy contained in the TSE Standing Order 206.10, it amplifies the order. And this order provides:

TSE SO 206.10 Alcohol Policy.

1. Alcohol is not authorized on the HN base proper. No personnel shall have alcoholic beverages within the confines of Camp Mirage;
2. Drunkenness is a crime in the HN. Alcoholic beverages are a controlled substance in the HN. Local law states that no one is permitted to purchase alcohol without a government permit. Personnel are not authorized to acquire HN alcohol permits, but alcohol may be consumed in HN licensed establishments. Police have zero tolerance towards those exhibiting signs of drunkenness, especially in motor vehicles (either as driver or passenger). If police suspect a driver of having any alcohol on his breath, he will be arrested. In some cases, police officers have requested blood samples. The HN laws are very strict, and punishments for drivers who have been found to have alcohol samples in their blood are most severe; therefore, all TSE personnel are forbidden to consume alcohol 12 hours prior to driving;
3. Personnel on recreational outings off Camp Mirage are authorized two drinks per person per day. A drink is equal to one 12-ounce beer (355 millilitre or normal Canadian sized can), or one 5-ounce glass of wine. Hard liquor, shooters, or coolers of any kind, are expressly prohibited. The only authorized locations to drink are HN licensed establishments. Alcohol shall not be consumed eight hours before commencement of duties (for non-flying personnel) and 12 hours for flying ops personnel.

[20] The court notes that the policy does not define beer or wine. The policy clearly indicates that only two drinks are authorized per day. It provides that a drink is equal to one 12-ounce beer or five-ounce glass of wine. A plain reading of the statement enables a person to determine the permissible quantity of an authorized drink. The prosecution submits that it also limits the type of alcoholic beverage to wine or beer because the policy also states, "hard liquor, shooters, or coolers of any kind, are expressly prohibited."

[21] Although I was highly impressed with the eloquence expressed by the prosecutor on this issue, such interpretation is not supported by the evidence and, therefore, it fails on the merits. First, the policy does not provide any definition of what constitutes wine or beer. In the context of this case, it must be fatal. For example, the prosecutor conceded that port was permitted under the policy as it is wine. This approach raises enormous difficulties. The *Concise Oxford Dictionary* defines port as, "A sweet dark red (occasionally brown or white) fortified wine, originally from Portugal." *Le Petit Robert* french dictionary defines *porto* as, "*Vin de liqueur portugais*." These simple definitions outline the fact that port wine is fortified by another type of alcoholic beverage, although it retains its wine appellation.

[22] These concerns are aggravated when someone uses the common meaning of simple words such as the definition of wine. Counsel for the defence provided the court with the *Oxford* definition of the words Martini, vermouth, and wine. Martini is the trademark of a vermouth produced in Italy, but it can also be a cocktail made from gin and dry vermouth. The *Oxford Dictionary* defines vermouth as, "A red or white wine flavoured with aromatic herbs, chiefly drunk mixed with gin." Finally, it defines wine as, "An alcoholic drink made from fermented grape juice. A fermented alcoholic drink made from other fruits or plants."

[23] The court looked also at the same definitions but using *Le Petit Robert* french dictionary. Firstly, it defines Martini as, "*Vermouth produit pas la firme Martini et Rossi*." It means vermouth produced by the firm Martini and Rossi; secondly, *Le Petit Robert* defines vermouth as, "*Apéritif à base de vin aromatisé de plantes amères et toniques (absinthe, gentiane, écorce d'oranges, quinquina, genièvre)*."

[24] More importantly, it is worth noting that *Le Petit Robert* provides an extensive definition of the word wine. It provides, in part, that the word "*vin*", wine in the french language, is a, "*Boisson alcoolisée provenant de la fermentation du raisin*." It further indicates that wine includes what is referred as, "*Vins doux naturels et vins de liqueur: vins très chargés en sucre, auxquels on ajoute de l'alcool de raisin en cours de fermentation (muscat, porto)*." Roughly translated, sugar is added to those wines, to which we add also fermented alcohol. Further in the definition, they talked about, "*Vin aromatisés, utilisés comme apéritifs*," used as *apéros*, such as vermouth.

[25] These definitions clearly illustrate for the court that what can be considered wine is not limited to your normal and typical beverage that the average person would describe as simply red, white, or even *rosé*, sparkling or not sparkling. It may well be that the drafting of a policy that would limit alcoholic beverage consumption to beer and wine is justifiable, although this court does not have to address this issue. However, if the purpose of the policy is to restrict or limit the meaning of what is acceptable, beer or wine for the purposes of the policy, it must expressly do it, otherwise, one can only rely on the preferred and unexpressed meaning of the policy maker, or simply leave it to the interpretation of the person subject to the policy.

[26] In the case at bar, if these terms had been properly defined in the policy, amplified or not in other instruments, the court would be more receptive to the approach put forward by the prosecution to the effect that it only had to prove that Captain Rafuse drank something that was neither wine or beer. The evidence that Captain Rafuse had a Martini, which tasted of alcohol according to Sergeant Neil, does not establish that the accused contravened the alcohol consumption policy in absence of more specific evidence as to the content of the drink. It is obvious that the main characteristic of any alcoholic beverage is the taste of alcohol. The fact that the definition of a Martini could simply mean or include a glass of vermouth raises a reasonable doubt because vermouth is a type of wine normally serve as an *apéritif*. Whether Sergeant Neil knew what is the taste of vermouth or if vermouth is a type of wine, is unknown to the court. Whether Sergeant Neil knew that the drink contained any other alcoholic substance is also unknown to the court.

[27] Nevertheless, it is not for the accused to prove that what he drank constituted wine or beer. He only had to raise a reasonable doubt, and I conclude, that based on the evidence before me, the prosecution has not met its burden of proof. Therefore, Captain Rafuse must be acquitted. The court arrives at this conclusion even if it was to accept the theory of the prosecution that the policy restricts the alcohol consumption to wine and beer. However, I am far from being convinced that TSE Standing Order 206.10 supports such a policy statement, and I would even add that such a restrictive policy would raise even more issues if challenged. For now, the court will leave these questions with and for the makers of the policy.

[28] Policymaking and the drafting of regulations and orders are complex. They require a great deal of competence and dedication. It is fair to say that the drafting skills and scrutiny required to make orders should not be equal to the level expected for statutes and regulations; however, when someone may be facing criminal or disciplinary charges for the contravention of a regulation, an order, or a directive, the instrument should speak with clarity and precision. Otherwise, not only is it difficult to apply and enforce the policy, it fails to provide the subject of the policy with sufficient guidance to comply with such a policy.

CONCLUSION AND DISPOSITION

[29] Captain Rafuse, please stand up. For all these reasons, Captain Rafuse, the court finds you not guilty of the charge. Officer of the Court, please provide the headdress to Captain Rafuse.

[30] Captain Rafuse, please step forward and pay your respects to the court. You are dismissed. You may leave this courtroom.

[31] The proceedings of this court martial in respect of Captain Rafuse are terminated. Thank you.

COLONEL M. DUTIL, C. M. J.

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