**Citation :** *R. v. Chief Petty Officer Second Class F.B. Bouvet,* 2007 CM 1013

**Docket:** 200708

**STANDING COURT MARTIAL**
**CANADA**
**BRITISH COLUMBIA**
**CANADIAN FORCES BASE ESQUIMALT**

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**Date:** 20 June 2007

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**PRESIDING: COLONEL M. DUTIL, CMJ**

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**HER MAJESTY THE QUEEN**
**v.**
**CHIEF PETTY OFFICER SECOND CLASS F.B. BOUVET**
**(Accused)**

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**FINDING**
**(Rendered orally)**

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**Introduction**

[1] Chief Petty Officer 2nd Class Bouvet is charged with an offence punishable under section 130 of the *National Defence Act*; that is to say, assault with a weapon contrary to paragraph 267 (a) of the *Criminal Code*. The facts supporting this charge occurred in the early morning of 14 August 2006 in building 250 at Canadian Forces Base Esquimalt, Victoria, British Columbia.

**The Evidence**

[2] The evidence before this Court consists of the following:

a. the testimonies heard during the trial of Petty Officer 1st Class Lone, Petty Officer 1st Class Plonka, and Chief Petty Officer 2nd Class Bouvet; and,

b. the Court taking judicial notice of those facts and matters under Military Rule of Evidence 15.

**The Facts**

[3] The facts surrounding this case took place shortly after 0800 hours on 14 August 2006 at Building 250 here at CFB Esquimalt. Since they were both returning to work after their summer holidays, Petty Officers 1st Class Lone and Plonka were talking and laughing about what they had done during this period. Petty Officer 1st Class Plonka was in his cubicle, mostly sitting, where Petty Officer 1st Class Lone was about 3 feet outside his friend's place of work, standing by a three-sided divider. Lone testified that Plonka was standing in his cubicle where the latter said that he was sitting.

[4] As they were having fun telling each other stories about their holidays, they saw Chief Petty Officer 2nd Class Bouvet approaching in their direction walking with a cane. Lone and Plonka were both aware that Chief Petty Officer 2nd Class Bouvet was returning to work that morning after a knee surgery that kept him away from the workplace for eight weeks. They were all very happy to see each other. According to the testimony of Petty Officer 1st Class Lone, as Chief Petty Officer 2nd Class Bouvet was about 30 yards from him, he made a comment to Petty Officer 1st Class Plonka regarding Chief Bouvet's cane and knee surgery. As Chief Petty Officer 2nd Class Bouvet continued to approach towards them, Petty Officer 1st Class Lone would have asked him how he was feeling. Petty Officer 1st Class Lone testified that Chief Petty Officer 2nd Class Bouvet giggled and made some gestures as he continued to approach towards him. Chief Petty Officer 2nd Class Bouvet seemed to be happy and certainly not upset at the Petty Officers 1st Class or offended in any way.

[5] According to Petty Officer 1st Class Lone, as Chief Petty Officer 2nd Class Bouvet was getting closer; that is, within a few feet from him, he raised his cane that he held in his right hand from the floor up, and straight up and caught his left testicle. Petty Officer 1st Class Lone was surprised by the gesture and felt immediate pain to the extent that he had to lean over and walk towards the divider to support himself and ease the pain. Petty Officer 1st Class Plonka saw Chief Petty Officer 2nd Class Bouvet lift his cane in an upward manner in a tapping or tagging manner, but could not see the tip of the cane hit his colleague Lone.

[6] Both Plonka and Lone could not testified as to the degree of force that would have been used. However, Plonka's testimony indicates that he was shocked at his friend's reaction and realized that Petty Officer 1st Class Lone had been hit by the cane between the legs and was in pain. Plonka also testified that Lone immediately retaliated with his hand. Petty Officer 1st Class Lone testified that Chief Petty Officer 2nd Class Bouvet offered some comments that seemed to be an apology in a joking matter. Petty Officer 1st Class Lone did not feel that the apology was sympathetic or sincere. He said that he assumed that Bouvet had hit him on purpose, although Bouvet did not appear to be upset at him. According to Lone, Bouvet followed him on the side of the divider. Petty Officer 1st Class Lone testified that he does no recall if Bouvet asked him if he had hit him or if he was hurt as Lone was focused, understandably, on his pain.

[7] According to the evidence, the three continued to talk about their return to work and other small talk for a few minutes after the incident, but they did not discuss the cane incident. Petty Officer 1st Class Lone did not express anger after the incident. According to Lone and Plonka, they would not have made derogatory comments or remarks concerning Chief Petty Officer 2nd Class Bouvet's condition immediately prior to the incident or at least they could not recall that they did. However, Petty Officer 1st Class Plonka testified that he may have said to the accused, in a joking manner, "where is your walker?" or words to that effect as Chief Bouvet was of a good nature and that they were on friendly terms. They then departed their own way after the short discussion after the incident, but Petty Officer 1st Class Lone had to go home in the afternoon because of he pain and swelling. He also had to take medication during the following days.

[8] Chief Petty Officer 2nd Class Bouvet testified that he was happy to see both Lone and Plonka that morning as he was returning himself to work after his knee surgery. As they were carrying a conversation, he wanted to participate. He then walked in their direction and heard "where is your walker?" He was not offended by that comment according to his testimony. He would have replied by saying to Petty Officer 1st Class Lone "bugger you, Jamie" in approaching towards Petty Officer 1st Class Lone. He then motioned his cane upwards aiming directly at Petty Officer 1st Class Lone's groin area in order to shoo him away. Chief Petty Officer 2nd Class Bouvet testified that he had no intent to hit or to have physical contact with Petty Officer 1st Class Lone when he raised his cane. Chief Petty Officer 2nd Class Bouvet was surprised when he saw Lone almost immediately bend over. Still to date, he does not believe that he hit Lone with his cane but recognizes that it is a possibility. This is consistent with the fact that Chief Petty Officer 2nd Class Bouvet would have asked Lone if he had hit him and had apologized for doing so. This concludes the brief summary of the evidence before the court.

**The Law and the Essential Elements of the Charge: The first Charge (Section 130 of the *National Defence Act* Paragraph 267 (a) of the Criminal Code)**

[9] The charge alleges a contravention of section 130 of the *National Defence Act* contrary to paragraph 267 (a) of the *Criminal Code* for an assault using a weapon. The particulars of that charge reads:

> In that he, on 14 August 2006, at Canadian Forces Base Esquimalt, Victoria, British Columbia, did, in committing an assault on Petty Officer first class James Andrew Lone, use a weapon to wit a walking cane.

[10] In addition to the elements of the offence dealing with the identity of the offender as well as the date and place where the alleged offence was committed, the prosecution must prove beyond a reasonable doubt:

a. that Chief Petty Officer 2nd Class Bouvet intentionally applied force to Petty Officer 1st Class James Andrew Lone;

b. that Petty Officer 1st Class James Andrew Lone did not consent to the force that Chief Petty Officer 2nd Class Bouvet intentionally applied;

c. that Chief Petty Officer 2nd Class Bouvet knew that Petty Officer 1st Class James Andrew Lone did not consent to the force that Chief Petty Officer 2nd Class Bouvet intentionally applied; and finally,

D. that a weapon was involved in assault.

**Presumption of Innocence and Reasonable Doubt**

[11] Before this Court provides its legal analysis, it is appropriate to deal the presumption of innocence and the standard of proof beyond a reasonable doubt. Of course these principles are well known to counsel, but other people in this courtroom may well be less familiar with them.

[12] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law and 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 who is 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, beyond a reasonable doubt.

[13] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies to prove guilt. The burden, or the onus, of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and never shifts to the accused person.

[14] 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 charge on reasonable doubt. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt 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 a court.

[15] 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. The prosecution is not required to do so. Absolute certainty is a standard of proof that simply does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Chief Petty Officer 2nd Class Bouvet, beyond a reasonable doubt. To put it 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.

[16] It is certainly not unusual that some evidence presented before the court may be contradictory. Often witnesses may have different recollections of events and the court has to determine what evidence it finds credible and reliable.

[17] Credibility is not synonymous with telling the truth and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness' opportunity to observe, a witness's reasons to remember, for example, like were the events noteworthy, unusual and striking, or relatively unimportant and, therefore, understandably more difficult to recollect? Does a witness have any interest in the case; that is, a reason to favour one party over another? Was the witness impartial? However, this last factor applies in a somewhat different light or in a different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where the accused chooses to testify.

[18] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility; that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant or argumentative? Finally, was the witness's testimony consistent within itself and with the uncontradicted facts? 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 may well tint a witness's entire testimony.

[19] A 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.

[20] As the rule of reasonable doubt also applies to the issue of credibility, the court is not required to definitely decide on the credibility of a witness or a group of witnesses, nor does the court need not fully believe or disbelieve one witness or a group of witnesses. In a case such as this one, where the accused testified on his own behalf, the law requires that a court find the accused person not guilty, first, if the court believes the accused, and, second, even if the court does not believe the accused, but the court still has a reasonable doubt as to the accused's guilt after considering the accused's evidence in the context of the evidence taken as a whole. Finally, if, after a careful consideration of all the evidence, the court is unable to decide whom to believe, the court must find the accused not guilty.

[21] Having instructed myself as to the onus and standard of proof, I will now examine the facts of this case as revealed by the evidence put before this court in light of the applicable legal principles.

**Questions in Issue**

[22] Counsel for the defence raised the defence of accident as Chief Petty Officer 2nd Class Bouvet never intended to make physical contact with Petty Officer 1st Class Lone when he raised his cane upwards towards the victim's groin area and hit his testicles. The defence suggests that the outcome was clearly an unintended consequence of the act made by the accused of raising his cane within a few feet from Petty Officer 1st Class Lone. According to the defence, the prosecution would have failed to establish beyond a reasonable doubt that Chief Petty Officer 2nd Class Bouvet intentionally applied force to Petty Officer 1st Class Lone.

**Issues of Credibility**

[23] The nature of the evidence in this case requires this court to make certain findings as to the credibility of various witnesses. Although there is some inconsistencies in their recollection of the incident, the various testimonies are not incompatible. They all testified in an honest and straightforward manner to the best of their knowledge. Petty Officer 1st Class Lone's recollection of events is definitely tainted by the fact that the act committed by Chief Petty Officer 2nd Class Bouvet caught him by surprise and caused him significant pain at the time. This would explain the inconsistencies between his testimony and that of his friend Plonka with regard to their respective positions, the words spoken immediately prior to the incident, and the prompt gesture of retaliation described by Petty Officer 1st Class Plonka. But for his assertion that he does not believe that he touched Petty Officer 1st Class Lone, Chief

Petty Officer 2nd Class Bouvet's testimony is credible and reliable when he concedes that it is possible. He readily recognized that he may have touched the victim with his cane which is certainly consistent with his reaction at the time which translated into an immediate inquiry and apology towards Petty Officer 1st Class Lone at the time.

**Decision**

[24] The court will now answer the following question: Did Chief Petty Officer 2nd Class Bouvet intentionally applied force to Petty Officer 1st Class Lone? . In the context of an unlawful assault, it must be said that the application of force may be direct, for example, by Chief Petty Officer 2nd Class Bouvet using a part of his body such as a hand or foot, or indirect, for example, by Chief Petty Officer 2nd Class Bouvet using an object such as a stick or club, or as alleged in the charge, using a walking cane. The force applied may be violent or even gentle. To be an assault, however, Chief Petty Officer 2nd Class Bouvet must have applied the force intentionally and against Petty Officer 1st Class Lone's will. An accidental touching is not an intentional application of force.

[25] The word "intentionally" refers to Chief Petty Officer 2nd Class Bouvet's state of mind when he applies the force. Intentionally means on purpose, in other words, not by accident. The court must consider all the circumstances surrounding the application of force. Taking into account the nature of the contact and any words or gestures that may have accompanied it along with anything else that indicates Chief Petty Officer 2nd Class Bouvet's attitude or state of mind at the time he applied force to Petty Officer 1st Class Lone, the court concludes that there was no anger or animosity that could have influenced Chief Petty Officer 2nd Class Bouvet's state of mind prior to the touching of Petty Officer 1st Class Lone's groin area with the cane. They were all happy to see each other and all surprised of the outcome based on Petty Officer 1st Class Lone's reaction. No direct or indirect threats were offered by Chief Petty Officer 2nd Class Bouvet and he seemed to be genuinely happy at all times as he was approaching the victim.

[26] The lifting of the cane in direction of the victim's groin area in order to shoo him off, according to Chief Petty Officer 2nd Class Bouvet's testimony, is not sufficient, in light of the total body of evidence, to establish beyond a reasonable doubt the state of mind of the accused that he intended the touching. Everyone was surprised by the touching, including the accused.

[27] The prosecution suggests that the evidence supports its theory that the accused deliberately lifted his cane with the intent to make contact with the victim and that it was not a reckless gesture, however it also suggests that the accused knew or ought to have known that his cane would connect with Petty Officer 1st Class Lone's groin area when he made his upward motion. The defence, however, submits that, although Chief Petty Officer 2nd Class Bouvet lifted his cane and aimed in the direction of the groin area Petty Officer 1st Class Lone as he was getting within a few

feet from him, the accused never intended to touch him and the ultimate outcome was unintended.

[28] Based on the totality of the evidence, the court accepts that the defence of accident possesses an air of reality. As the law applies, Chief Petty Officer 2nd Class Bouvet does not have to prove that the indirect application of force in tapping Petty Officer 1st Class Lone's testicles with his walking cane was accidental. It is up to prosecution counsel to satisfy the court beyond a reasonable doubt that the touching was not an accident. In other words, the prosecution must prove beyond a reasonable doubt that this defence does not apply. If the court is left with a reasonable doubt about whether this defence applies the prosecution has not proven its case beyond a reasonable doubt.

[29] According to the Concise Oxford Dictionary an accident is an unfortunate incident that happens unexpectedly and unintentionally. Based on the evidence, everyone was surprised that the touching occurred which caused the victim instant pain. This event was clearly unexpected. No words were spoken after the incident with regard to the touching. Petty Officer 1st Class Lone showed no signs of anger towards Chief Petty Officer 2nd Class Bouvet who could not believe that he had touched Petty Officer 1st Class Lone as he inquired and apologized immediately to the victim when he realized that he was in pain. These facts are consistent with the defence of accident, or at least they do not exclude it. Even if the court would not believe the evidence of the accused in support of the defence of accident, the court would be left with a reasonable doubt by it and this doubt must benefit the accused. Therefore, the prosecution has failed to meets its burden of proof.

**Conclusion and Disposition**

[30] Chief Petty Officer 2nd Class Bouvet, please stand up. For the reasons stated by the court, Chief Petty Officer 2nd Class Bouvet, the court finds you not guilty of the charge.

COLONEL M. DUTIL, CMJ

Counsel :

Captain Henderson, Director of Military Prosecutions
Counsel for Her Majesty The Queen
Major S. Turner, Director of Defence Counsel Services
Counsel for Chief Petty Officer 2nd Class Bouvet