

Citation: *R. v. Leading Seaman D.J. Rochat*, 2007 CM 4008

Docket: 200707

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

Date: 20 March 2007

PRESIDING: LIEUTENANT-COLONEL J -G PERRON, M.J.

HER MAJESTY THE QUEEN

v.

LEADING SEAMAN D.J. ROCHAT

(Accused)

FINDING

(Rendered Orally)

[1] The accused, T21 387 658 Leading Seaman Rochat, is charged under section 129 of the *National Defence Act* of the offence of using without authority N - Methyl-3,4, methylenedioxyamphetamine, otherwise known as MDMA or Ecstasy, contrary to article 20.04 of the Queen's Regulations and Orders for the Canadian Forces.

[2] The prosecution and the accused, through his defence counsel, both agree that the only issue in contention in this case is whether the accused intentionally consumed this drug. In other words, did he possess the *mens rea* to commit this offence? The evidence to prove the other essential elements of this offence may be found in Exhibit No. 3, Admissions of Facts, made pursuant to articles 37 and 38 of the Military Rules of Evidence.

[3] The evidence before this court martial is composed essentially of the following: judicial notice, admission of facts, and testimonies. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. The testimonies heard in the order of their appearance before the court are: Ms Margaret Dinn who was qualified as an expert, Leading Seaman Rochat, and Leading Seaman Mick.

[4] The facts in this case are relatively simple. The event took place on 5 and 6 September 2004 at or near CFB Esquimalt. During the period of the alleged offence Leading Seaman Rochat went to the residence of Ordinary Seaman Hall and Ordinary Seaman Doyle between 2000 hours and 2100 hours on 5 September. He brought with him a bottle of alcohol and consumed an unspecified amount of alcohol. Between 2200 hours and 2300 hours on 5 September Leading Seaman Rochat and Ordinary Seamen Hall, Doyle, and Karrer went to the Evolutions night club and stayed there until it closed at 0200 hours on 6 September; again the accused consumed an unspecified quantity of alcohol. They returned to the Hall/Doyle residence where the accused consumed an unspecified quantity of alcohol. At approximately 0730 hours on 6 September Ordinary Seaman Doyle drove the accused to Ordinary Seaman Karrer's residence. The accused borrowed Ordinary Seaman Karrer's car. At approximately 0830 hours Leading Seaman Rochat returned to Ordinary Seaman Karrer's residence and took Ordinary Seaman Hall's motorcycle and helmet.

[5] Leading Seaman Rochat then drove the motorcycle at excessive speeds and tried to "pop a wheely." An accident occurred where Leading Seaman Rochat was severely injured and brought to hospital where a sample of his blood was taken at approximately 1015 hours on 6 September for medical purposes. At approximately 1500 hours on 6 September, pursuant to a warrant obtained by a City of Victoria police officer, this blood sample was seized. This blood sample was analysed by the RCMP forensic laboratory where it was determined that Leading Seaman Rochat's blood contained 227 milligrams of alcohol in 100 millilitres of blood and that it also contained 0.17 micrograms of MDMA in 1 millilitre of blood.

[6] Ordinary Seaman Hall, Doyle, and Karrer were individually interviewed by the military police and each one of them stated that they had not consumed any illicit drugs during the night of 5 to 6 September, nor had they observed anyone else consuming illicit drugs that night.

[7] Before this court provides its legal analysis of this charge it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with the principle fundamental to all criminal trials. And those principles, of course, are well known to counsel, but other people in this courtroom may be less familiar with them.

[8] 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 with cases dealt under the 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 or she is innocent. It is up to the prosecution to prove its case on each element of the offence 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 make 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 it never shifts to the accused person.

[10] A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt and after having considered all of the evidence. The term "beyond a reasonable doubt" had been used for a very long time, it is part of our history and traditions of justice.

[11] 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 based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arrives at the end of the case based not only on what evidence tells the court, but also on what 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 only charges that are faced by an accused person are those that appear on the charge sheet before a court.

[12] 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 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 does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Leading Seaman Rochat, beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would be acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[13] 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. It could be 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.

[14] 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 to determine what evidence it finds credible.

[15] 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' reason to remember, like, were the events noteworthy, unusual or striking, or relatively unimportant, and, therefore, understandably more difficult to recollect? Does a witness have any interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat 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 that accused chooses to testify.

[16] 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 testimony consistent with itself and with the uncontradicted facts?

[17] 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' entire testimony.

[18] The court is not required to accept the testimony of any witness, except to the extent that it has impressed the court as credible. However, the court will accept evidence as trustworthy unless there is a reason rather to disbelieve it.

[19] As the rule of reasonable doubt applies to the issue of credibility, the court is required to definitely decide, in this case, first on the credibility of the accused and to believe or disbelieve him. It is true that this case raises some important credibility issues, and it is one of these cases where the approach on the assessment of credibility expressed by the Supreme Court of Canada in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, can strictly be applied because the accused, Leading Seaman Rochat, testified. As established in that decision, at page 758, the text goes as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[20] Having instructed myself as to the onus and standard of proof, I will now turn to the question in issue and address the legal principles.

[21] Both parties agreed that the one critical question in issue is whether Leading Seaman Rochat voluntarily used MDMA. I find that the date, location, identity of the accused and his knowledge of the impugned regulation has been proven by the facts contained in Exhibit 3, Admission of Facts. Defence counsel argues that no evidence has been presented to demonstrate that Leading Seaman Rochat voluntarily ingested or used MDMA.

[22] The court must now make certain findings as to the credibility of witnesses.

Ms Dinn

[23] She was qualified as an expert in the analysis of body fluids for the presence of alcohol and drugs, the physiology of drugs; that is, the absorption, distribution, and elimination of drugs in the human body, the pharmacology of drugs; that is, the chemical composition of drugs and the mental and motor effects of drugs on the human body, and the current availability of drugs and the state of drug consumption and abuse in society.

[24] Ms Dinn testified in a calm and straightforward manner. She was not evasive or argumentative. She answered questions in examination-in-chief and in cross-examination in the same manner and to the best of her abilities. She analysed Leading Seaman Rochat's blood sample for the presence of drugs and she estimated that, given the concentration of MDMA found in his blood sample, Leading Seaman Rochat had ingested MDMA within the twelve hours preceding the taking of the blood sample. She also testified that she had never observed persons under the influence of alcohol and of MDMA. She opined that a social drinker with a blood alcohol level of 227 milligrams would have great difficulty in operating a motor vehicle, and that 0.17 micrograms of MDMA in individuals is consistent with levels in people using drugs socially and that it is within the range of intentionally using MDMA in a party situation. She agreed that an MDMA tablet or capsule put in a drink would not change noticeably the taste of the drink although it would cause more foam in a carbonated drink.

Leading Seaman Rochat

[25] The court does not find his testimony for the most part to be credible and reliable. He did not testify in a consistent manner regarding his total lack of recollection of events after he made his way to the residence of Ordinary Seaman Hall and Doyle. The court understands that the consumption of large quantities of alcohol in a short period of time would have an effect on his memory of events occurring when he was under the influence of alcohol, but the court is somewhat puzzled that he cannot recollect events that occurred when he was sober or slightly inebriated considering the traumatic accident that occurred on 6 September. Although he suffered a concussion, the court was not provided with any medical evidence that would indicate this injury would impair his memory; Leading Seaman Rochat even testified that he did not think that it did.

Leading Seaman Mick

[26] His demeanour throughout his testimony remained consistent. Although Leading Seaman Mick testified in a straightforward manner it is evident that he has an interest in providing evidence that would assist his friend. His reply that Leading Seaman Rochat was totally anti-drug when asked about Leading Seaman Rochat's general reputation for honesty is a clear example of his bias. Nonetheless, his testimony is not deemed to be generally credible and reliable.

Analysis

[27] In applying the test enunciated in the Supreme Court decision of *R. v. W.(D.)* quoted above, and having considered the evidence introduced before this court as a whole, the court turns itself to the first and second step of that test. The court cannot believe or disbelieve the testimony of the accused concerning the events surrounding this charge since he did not truly testify, stating that he had no recollection of these events.

[28] Now, the court is turning itself to the third step of the test enunciated in the Supreme Court decision of *R. v. W.(D.)* quoted above. The court must determine, after having considered the evidence as a whole, if it is still left with a reasonable doubt as to the voluntary ingestion of MDMA by Leading Seaman Rochat.

[29] It is settled in Canadian jurisprudence that, in instances of possession of prohibited drugs, the prosecution bears the onus of establishing that the person accused of the offence had knowledge of the presence of the forbidden substance, I refer to *R. v. Beaver*, (1957) 118 C.C.C. 129. I would apply this principle to a charge of illegal use of drugs under the Code of Service Discipline. Knowledge may be proven either by direct evidence or by proof of objective, relevant, and admissible facts from which a rational inference of knowledge emerges irresistibly. Quoting from the *Cooper* case, (1977), 37 C.R.N.S. 1 (S.C.C.) per Laskin, C.J.:

It is enough if it is made plain to the members of the jury that before basing a verdict of guilty on circumstantial evidence they must be satisfied beyond a reasonable doubt that the guilt of the accused is the only reasonable inference to be drawn from the proven facts.

I correct myself, this quote is from Ritchie at page 17 and 18.

[30] The prosecution has not provided any direct evidence concerning the voluntary use of MDMA by Leading Seaman Rochat. There is no issue with the fact that he had MDMA in his body, the question to be answered is whether he voluntarily ingested this illicit drug. Although Leading Seaman Rochat is not found to be generally credible or reliable concerning the events that led to this charge, his assertion that he does not use illicit drugs has not been challenged by the prosecution. Ordinary Seaman Hall, Doyle, and Karrer all testified that they did not take drugs or see anyone take illicit drugs. This evidence is not challenged. Although some expert evidence was given concerning the social use of Ecstasy in pubs and nightclubs, no specific evidence has been tendered concerning the nightclub Evolutions. And although Ms Dinn did opine that the quantity found was consistent with levels in people using drugs socially, she agreed that an MDMA tablet or capsule put in a drink would not change noticeably the taste of the drink although it would cause more foam in a carbonated drink. She could also not comment on the state of mind of a person when that person ingests MDMA.

[31] Leading Seaman Rochat, please stand up. Consequently, having regard to the evidence presented as a whole, the court is not satisfied beyond a reasonable doubt that your guilt is the only reasonable inference to be drawn from the proven facts. The court considers the prosecution has not proven beyond a reasonable doubt all the essential elements of this offence. Leading Seaman Rochat, the court finds you not guilty of this charge. Return the headdress to Leading Seaman Rochat. The proceedings of this court martial in respect of Leading Seaman Rochat are terminated.

Lieutenant-Colonel J -G Perron, MJ

Counsel:

Lieutenant-Commander G. Gaul, Regional Military Prosecutions Western
Counsel for Her Majesty The Queen
Mr Mel Hunt, Esquire, Directorate of Defence Counsel Services
Counsel for Leading Seaman Rochat