



COURT MARTIAL

Citation: *R. v. LeBlanc*, 2010 CM 4005

Date: 20100205

Docket: 200956

Standing Court Martial

Canadian Forces Base Bagotville
Bagotville, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Corporal A.E. LeBlanc, Accused

Presiding: Lieutenant-Colonel J.-G. Perron, M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR FINDING

(Rendered orally)

[1] The accused, Corporal LeBlanc, stands accused of one charge laid under section 124 of the *National Defence Act*. More specifically, he is accused of negligently performing a military duty. The particulars of this charge are as follows:

On October 19, 2008, at around 11 am, at Canadian Forces Base Bagotville, Alouette, province of Quebec, while he was supposed to be guarding CF-18 aircraft, he failed to keep watch as it was his duty to do.

[2] The evidence before this Court consists of the facts and matters of which the Court has taken judicial notice under section 15 of the *Military Rules of Evidence*, exhibits and the testimonies of Sergeant Campbell, Sergeant Langlois, Corporal Tremblay and Corporal LeBlanc.

[3] Before this Court provides its legal analysis of the 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 principles fundamental to all criminal trials. While these principles are certainly well known to counsel, other people in this courtroom may not be so familiar with them.

[4] It is fair to say that the presumption of innocence is 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 charged with a criminal offence is presumed to be innocent until the prosecution proves his or her 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. An accused person is presumed innocent throughout his or her trial until a verdict is given by the finder of fact.

[5] 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 beyond a reasonable doubt rests upon the prosecution, and it never shifts to the accused person. A court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time and 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 to provide the necessary instructions as to reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate court 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 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 in no way indicative of his or her guilt.

[6] In *R. v. Starr*, [2000] 2 S.C.R. 144, 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.

[7] However, 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 beyond a reasonable doubt. To put it in perspective, if the Court is satisfied or would have been satisfied that the accused is probably or likely guilty, then the accused would have to be acquitted, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[8] What is evidence? Evidence may include testimony under oath or a 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 has taken judicial notice. It is not unusual that the evidence presented to the Court may be contradictory. Often witnesses may have different recollections of events. The Court has to determine what evidence it finds credible. 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, the Court will assess a witness's opportunity to observe or a witness's reasons to remember. The Court will consider, for instance, whether there was something specific that helped the witness remember the details or event that he or she described: 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 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 the accused chooses to testify.

[9] 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 with 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 taint the witness's entire testimony. 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, a court will accept evidence as trustworthy unless there is a reason rather to disbelieve it.

[10] To make a finding, the Court must determine whether the prosecution has proven all the essential elements of the offence beyond a reasonable doubt. The essential elements of the offence are the following:

- (a) the offender's identity;
- (b) the date and place of the offence.
- (c) the fact that the accused had been assigned a military duty;
- (d) the fact that the accused had been informed of the duty assigned to him;
- (e) the standard of care imposed on the accused in performing the duty; and

- (f) the act or omission of which the accused is accused of must represent a marked departure from the standard of care expected of him in performing the duty.

Evidence

[11] The evidence clearly indicates that Sergeant Campbell, Corporal Tremblay and Corporal LeBlanc were part of the Wing Auxiliary Security Force (WASF) on October 19, 2008, and that Sergeant Campbell was corporals LeBlanc and Corporal Tremblay's section commander. The CF-18s were on standby for the Sommet de la Francophonie being held in Quebec City, and the WASF had been activated to provide security for the CF-18s. One group was controlling access to the base, and two teams were guarding the CF-18s. On October 19, 2008, at around 11 am, corporals LeBlanc and Tremblay were assigned to monitor access to the CF-18s parked on the tarmac at CFC Bagotville. They were in a two-row, four-door truck and were parked close to Hangar 7. They each had a C-7 rifle with a 30-round magazine, which they kept on the back seat of the truck. Corporal Tremblay was in the driver's seat, and Corporal LeBlanc in the front passenger seat; the windows of the truck were closed. Corporal Tremblay left the truck for about five minutes to go to the washroom inside Hangar 7. Sergeant Campbell, who was alone in his truck, drove up to corporals Tremblay and LeBlanc's truck, pulling up on the passenger side of the sentries' truck. Corporal Tremblay returned to his truck, opened the driver's door and told Corporal LeBlanc that Sergeant Campbell wanted to speak with him. The unanimity of the witnesses regarding the facts ends at this point.

[12] Sergeant Campbell was the prosecution's first witness. He testified that he had watched Corporal LeBlanc while he was driving up to the truck. According to his description, the corporal was reclined and not moving, and his eyes were closed. Sergeant Campbell saw no movement. He observed him for at least a minute. He testified that the sentries had been instructed to control access to the CF-18s and to let only technicians near them. Moreover, he had issued instructions that the sentries were to stay awake if a fellow sentry had to go to the washroom or leave for another reason to ensure that someone was guarding the CF-18s at all times.

[13] On cross-examination, Sergeant Campbell confirmed that access through the main gate of the base and the barrier by the military police station was controlled. In a second vehicle, two other sentries were also guarding the CF-18s, from the other side of Hangar 7. He could not remember exactly how much time he had watched Corporal LeBlanc; although he believed that it had been about a minute, he also stated that it had seemed like an eternity. He also confirmed that he had watched Corporal LeBlanc for at least a minute. He had been beside the vehicle, from where he could see Corporal LeBlanc perfectly. He explained that he had observed Corporal LeBlanc for some time since, from his experience in the training system, he had learnt that it was important to properly observe someone before accusing him or her of being asleep. Sergeant Campbell is a credible witness.

[14] Sergeant Langlois was the prosecution's second and last witness and described the training and instruction of WASF members. He too is a credible witness.

[15] Corporal Tremblay was the defence's first witness. He left the vehicle to use the washroom in Hangar 7, leaving his C-7 rifle with Corporal LeBlanc. When he returned to his vehicle, he allegedly saw Sergeant Campbell in his vehicle doing an FOD check (for objects that could damage the CF-18s) some way behind Corporal Tremblay's truck. Then, Sergeant Campbell's vehicle pulled up on the passenger side of his truck. Sergeant Campbell was there for about 10 seconds before Corporal Tremblay reached his truck.

[16] When he reached his truck, Corporal Tremblay opened the door on his side of the truck. Corporal LeBlanc's seat was more reclined than usual. Corporal LeBlanc quickly turned his head toward Corporal Tremblay: his eyes were wider than usual, and he seemed surprised. Corporal Tremblay told Corporal LeBlanc that Sergeant Campbell wanted to speak to him. In Corporal Tremblay's view, it was clear from Sergeant Campbell's gestures that Sergeant Campbell wanted to speak to Corporal LeBlanc. Corporal LeBlanc lowered his window and Sergeant Campbell reprimanded them on their duties and left. Corporal LeBlanc seemed surprised at the reprimand, but Corporal Tremblay was unable to explain the reason for his surprise. Corporal Tremblay asked Corporal LeBlanc whether he had been asleep, and he answered in French [translation] "I don't think so".

[17] Corporal Tremblay testified that sentries were not allowed to sleep while guarding the CF-18s, explaining that this was a ground rule and that it was a sentry's duty not to sleep so as not to shoot anyone by mistake. Corporal Tremblay is a credible witness.

[18] Corporal LeBlanc was the defence's second and last witness. He denies having been asleep or dozing. He testified that his seat had been slightly reclined while he was guarding the CF-18s. He had apparently seen Sergeant Campbell's van approaching the corporal's truck in his rear-view mirror. Sergeant Campbell allegedly stopped about one metre away from his vehicle and Corporal LeBlanc had not paid any attention to him.

[19] Corporal LeBlanc testified that he had straightened himself up slightly in his seat and turned his head toward Corporal Tremblay when the latter had opened his door. Corporal LeBlanc testified that he had seen Corporal Tremblay in his peripheral vision before he opened the door. Corporal Tremblay had opened his door and told him that the Sergeant wanted to speak to him. He lowered his window, and the Sergeant reprimanded him and continued to the other sentries' truck. As to what he had replied to Corporal Tremblay, [translation] "I don't think so", Corporal LeBlanc explained that he was Acadian and that his response was a translation of "I don't think so, Tim" from the television series "Home Improvement".

[20] On cross-examination, Corporal LeBlanc confirmed that he had been trained in sentry duty and that he was not meant to sleep, but to be on constant watch. He explained why he had not paid any attention to Sergeant Campbell when the Sergeant had stopped close to his vehicle, stating that he had believed that it was better not to pay him any attention and to give him time to react.

[21] This resumes the evidence. The full test as set out in the Supreme Court of Canada's decision in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, can be applied because the accused, Corporal LeBlanc, testified. As established in that decision, the test 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.

[22] Given all of the evidence, the Court is of the opinion that Corporal LeBlanc is not a credible witness and does not believe his version of the events. His testimony is implausible, since it is inconsistent with the evidence as a whole, as well as being contradictory and weak. Corporal LeBlanc testified that he saw Sergeant Campbell approach his vehicle and stop a metre away; he also explained why he had not paid any attention to him before Corporal Tremblay told him that Sergeant Campbell wanted to speak to him. He testified that he had seen Corporal Tremblay approach the truck in his peripheral vision. Corporal Tremblay testified that Sergeant Campbell's gestures clearly indicated that Sergeant Campbell wanted to attract Corporal LeBlanc's attention. So it seems that Corporal LeBlanc could clearly see Corporal Tremblay arriving at the truck in his peripheral vision but could not see Sergeant Campbell's obvious gestures even though he had seen him approach and pull up close to his truck. Moreover, Corporal Tremblay's description of Corporal LeBlanc's reaction when he opened his door does not support Corporal LeBlanc's version; to the contrary, it suggests the reaction of a person who was surprised at Corporal Tremblay's arrival. These contradictions also create a doubt about the truth of Corporal LeBlanc's explanation of his reply [translation] "I don't think so".

[23] The Court therefore does not believe Corporal LeBlanc's testimony that he was fully conscious and aware of what was going on around him at that moment. The reason why he allegedly did not speak to Sergeant Campbell before Corporal Tremblay told him to do so is not corroborated by the evidence.

[24] The question the Court must now ask itself is whether the evidence accepted by it leaves it with a reasonable doubt as to the guilt of the accused. To do so, the Court must review the essential elements of the offence.

[25] The evidence accepted by the Court proves beyond a reasonable doubt the following essential elements: the offender's identity, the date and place of the incident, the fact that the accused was assigned a military duty and the fact that he was informed of that duty. The Court must now determine which standard of care was imposed on the accused. As indicated by the Court Martial Appeal Court in *R. v. Brocklebank*, 106 C.C.C. (3d) 234, at paragraph 18,

[i]n summary, the standard of care applicable to the charge of negligent performance of a military duty is that of the conduct expected of the reasonable person of the rank and in all the circumstances of the accused at the time and place the alleged offence occurred. In the context of a military operation, the standard of care will vary considerably in relation to the degree of responsibility exercised by the accused, the nature and purpose of the operation, and the exigencies of a particular situation. An emergency, or the heightened state of apprehension or urgency caused by threats to the security of Canadian Armed Forces personnel or their materiel might mandate a more flexible standard than that expected in relatively non-threatening scenarios.

[26] The WASF was responsible for ensuring the security of the CF-18s who were on standby to support the protection of the Sommet de la Francophonie. Each member of the section of Sergeant Campbell, who was in charge of the security of the CF-18s, was armed with a C-7 rifle and a 30-round magazine. As indicated in Exhibit 4 and in Sergeant Langlois's testimony, the members of the WASF had been trained in the use of force in order to perform this duty.

[27] It is clear from the testimonies of Sergeant Campbell, Corporal Tremblay and Corporal LeBlanc that Corporal LeBlanc knew that he had to keep close watch, especially when he was alone at his station. He had to stay awake and vigilant. The Court therefore finds that the standard of care expected of Corporal LeBlanc in the performance of his sentry duty was to remain constantly on the look-out and to be vigilant to ensure that no one who was not authorized to do so came near the CF-18s.

[28] The Court now has to determine whether the act or omission of which Corporal LeBlanc is accused constitutes a marked departure from the standard of care or conduct expected of Corporal LeBlanc in the performance of his duty to guard the CF-18s (see paragraph 32 of *Brocklebank*). The particulars of the charge tell us that while he was meant to be guarding the CF-18s, Corporal LeBlanc failed to keep watch as it was his duty to do. First, the Court must determine what omission Corporal LeBlanc is accused of.

[29] Sergeant Campbell testified that he had observed Corporal LeBlanc for at least a minute and that he had seen him sitting in his reclined seat, immobile and with his eyes closed. Corporal Tremblay testified that Corporal LeBlanc's seat was reclined and that Corporal LeBlanc was surprised when Corporal Tremblay had opened his door and had been unaware that Sergeant Campbell was gesticulating to attract his attention. Corporal LeBlanc testified that his seat had been reclined and that he had straightened up and had looked at Corporal Tremblay when the latter opened the door.

[30] Corporal Tremblay testified that Sergeant Campbell had pulled up next to the corporals' truck about 10 seconds before Corporal Tremblay opened his door. Corporal Tremblay was very confident that it could not have been more than 10 seconds. Sergeant Campbell had described the timeframe as at least a minute and stated that it had seemed like an eternity. His explanations as to why he observed Corporal LeBlanc are very credible. Neither Sergeant Campbell nor Corporal Tremblay can explain why they are positive that the amount of time they claim to be the time during which Sergeant Campbell's vehicle had stopped close to Corporal LeBlanc's vehicle is correct. The Court does not doubt Sergeant Campbell's and Corporal Tremblay's credibility, but it does question their reliability about this aspect of their testimonies. Corporal LeBlanc described a period of five seconds, but this part of his testimony seems to be referring to the time between when Corporal Tremblay told him that Sergeant Campbell wanted to speak to him and when he opened his window. The Court finds that Corporal LeBlanc had his eyes closed for at least 10 seconds.

[31] The Court does not believe Corporal LeBlanc's version. The defence's other evidence, Corporal Tremblay's testimony, does not support Corporal LeBlanc's testimony, but does in large part support the prosecution's evidence about Corporal LeBlanc's state. Thus the evidence of the defence accepted by the Court does not leave the Court with reasonable doubt.

[32] The prosecution's evidence does not show beyond a reasonable doubt that Corporal LeBlanc was sleeping when he was alone in the truck and being observed by Sergeant Campbell. However, the evidence accepted by the Court indicates that Corporal LeBlanc was reclining and had his eyes closed for at least 10 seconds. The Court therefore finds that the evidence accepted by the Court proves beyond a reasonable doubt that Corporal LeBlanc had his eyes closed and that he was not vigilant from the time when Sergeant Campbell stopped close to his vehicle to when Corporal Tremblay opened his door.

[33] Now, the Court must determine whether a lack of vigilance as a result of having closed one's eyes for at least 10 seconds is an omission that constitutes a marked departure from the standard of care expected of Corporal LeBlanc in performing his duty.

[34] The WASF had been assigned to ensure the security of the CF-18s on standby in support of the security of the Sommet de la Francophonie being held in Quebec City on October 19, 2008. You were responsible for guarding the CF-18s parked on the tarmac at CFC Bagotville and allowing only authorized personnel to go near the aircraft. You were meant to be alert and vigilant at all times, especially when you were alone at your station. While performing this military duty, you were armed with a C-7 rifle equipped with a 30-round magazine. This was not an exercise but an operational task.

[35] While you were alone in your truck, you stopped guarding the CF-18s by closing your eyes for at least 10 seconds, during which time you were not vigilant. Given the operational context of your duty and the fact that you were alone in the

vehicle, the Court finds that your omission constitutes a marked departure from the standard of care expected of you in performing your duty to guard the CF-18s.

[36] Corporal LeBlanc, for the reasons stated by the Court, the Court finds you guilty of the charge.

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