

**Citation:** *R. v. Able Seaman S.A. Fenwick-Wilson*, 2007 CM 4022

**Docket:** 200673

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

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**Date:** 1 August 2007

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

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**HER MAJESTY THE QUEEN**

**v.**

**LEADING SEAMAN S.A. FENWICK-WILSON  
(Accused)**

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**FINDING  
(Rendered orally)**

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[1] The accused, C60 573 673 Able Seaman Fenwick-Wilson, is charged with having used marijuana contrary to article 20.04 of QR&O. The prosecution asserts that the evidence presented to this court proves beyond a reasonable doubt every element of the alleged offence. The accused asserts that the evidence has not proven beyond a reasonable doubt that she has, in fact, smoked marijuana as alleged in the charge.

**THE EVIDENCE**

[2] Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. The evidence before this court martial is found in the Agreed Statement of Facts which is Exhibit 3.

**THE APPLICABLE LAW**

[3] Before this court provides its verdict, 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 of justice to all criminal trials. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[4] It is fair to say that the presumption of innocence is most likely 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 with under Canadian 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 person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[6] 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, it is part of our history and traditions of justice.

[7] 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 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 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.

[8] In *R. v. Starr*, [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court held that:

... [A]n 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 does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case Able Seaman Fenwick-Wilson, 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.

[9] 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 or 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. The court has to determine what evidence it finds credible. A court will accept evidence as trustworthy unless there is a reason rather to disbelieve it.

[10] When deciding this matter this court must focus its attention to the third step of the test found in the Supreme Court of Canada decision of *R. v. W.(D.)*, [1991] 1 S.C.R. 742. As established in that decision, at page 758, 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.

## **THE ESSENTIAL ELEMENTS OF THE CHARGE**

### **Facts**

[11] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue before this court. The prosecution's case is contained in the Statement of Facts presented as Exhibit 3. The accused has admitted the facts contained in Exhibit 3 under Military Rule of Evidence 37(b). The accused was interviewed by a CFNIS investigator on 27 April 2005 because another CF member who had been interviewed by that investigator had implicated her in the use of illicit drugs.

[12] The accused was fully briefed on all her legal rights before the interview and she clearly indicated that she understood these rights. She chose to be interviewed without discussing her options with a lawyer. The accused has not challenged the voluntary nature of her statements to the CFNIS investigator.

[13] Able Seaman Fenwick-Wilson admitted she knew the CF drug policy at the time of the offence. She admitted that she knew that illicit drugs are not tolerated in the Canadian Forces. She admitted to smoking "weed" during the Christmas 2004

period and also after the 2005 new year countdown. She stated that she had never used drugs before that occasion.

[14] Able Seaman Fenwick-Wilson answered "yes" when asked by the investigator if the type of drug she had used was marijuana. She admitted to smoking a joint when she had been drinking at the house party that took place approximately 20 minutes outside of her hometown of Penticton, British Columbia. When asked what she had taken at that house party, she replied "marijuana."

[15] The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt: The identity of the accused as the offender and the date and place as alleged in the charge sheet; that the accused used a drug without authority; that the drug was marijuana; and that the accused knew the drug was marijuana.

[16] Defence counsel has argued that this court should not put much weight on the evidence of the accused pertaining to the exact nature of the substance she smoked on New Year's Eve 2005. He argued that the cumulative effect of being intoxicated at the time of the alleged use of marijuana, the fact she had never used marijuana before that occasion, and the lack of any corroborative evidence should lead the court to be reluctant to accept this evidence as being reliable. Thus, as argued by defence counsel, the court should be left with a reasonable doubt as to the exact nature of the substance Able Seaman Fenwick-Wilson actually smoked at that occasion.

[17] The evidence does not reveal the level of intoxication of Able Seaman Fenwick-Wilson at the time of her alleged use of marijuana, nor does it describe exactly the circumstances surrounding her smoking marijuana during the house party. The evidence does not indicate the type and number of alcoholic beverages she had consumed that evening. Her answers to the CFNIS investigator are straightforward and do not indicate any problems in recalling the events of that evening or her actions. Therefore, I find that the evidence does not reveal a high level of intoxication.

[18] Although there is a relative paucity of evidence pertaining to this alleged offence, Able Seaman Fenwick-Wilson's statements concerning her use of marijuana are not tentative or ambiguous. Although the evidence does indicate that she had never used marijuana before that occasion, it does not tell the court that this was her first exposure to the world of drugs, nor does it tell the court that she was familiar with drugs or at least familiar with marijuana. Therefore, the court cannot agree with defence counsel's submission that "one single exposure is not sufficient to enable the accused to know what she is smoking." I do not find that the evidence supports this assertion.

[19] Able Seaman Fenwick-Wilson made a conscious and voluntary decision to admit to the CFNIS investigator her use of marijuana during a New Year's Eve party

on 1 January 2005 and of her knowledge of the CF policy prohibiting such conduct. Her answers were straightforward. She described the events as she remembered them. The evidence does not indicate that her level of intoxication was at a level that could make this court have doubts concerning the reliability of her admissions.

[20] Able Seaman Fenwick-Wilson, please stand up. I find that the evidence accepted by this court proves each element of this offence beyond a reasonable doubt. I find you guilty of this offence.

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

Counsel:

Captain T. Bussey, Regional Military Prosecutions Western  
Counsel for Her Majesty the Queen  
Captain N. Weigelt, Directorate of Defence Counsel Services  
Counsel for Able Seaman Fenwick-Wilson