

Citation: *R. v. ex-Corporal B.D. O'Toole*, 2008 CM 3003

Docket: 2007-32

**STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE KINGSTON**

Date: 14 February 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN

v.

EX-CORPORAL B.D. O'TOOLE

(Accused)

FINDING

(Rendered orally)

INTRODUCTION

[1] Ex-Corporal O'Toole is charged with one offence punishable under section 130 of the *National Defence Act* for the possession of marihuana contrary to section 4(1) of the *Controlled Drugs and Substances Act*.

[2] The facts on which this count is based relate to events that occurred on 11 May 2006 at Canadian Forces Base Kingston, Building B-77, "mod" 1, room D. More specifically, further to a search warrant obtained that day by the military police, a quantity of marihuana was seized in the accused's room while he was at work.

THE EVIDENCE

[3] The evidence before this court martial is composed essentially of the following facts:

- a. the testimonies heard in the order of their appearance before the court: the testimony of Ms. Tera Lee Asselstine, Corporal (Retired) Duncan and Ms. Tabitha Gosse;

- b. Exhibit 3, written admissions made by the accused in accordance with Rule 37(b) of the *Military Rules of Evidence*;
- c. Exhibit 4, a DVD on which is recorded the statement of the accused made during an interview conducted by the military police investigator on 7 June 2006; and
- d. Exhibit 5, the laboratory drug testing form result of the accused further to a urine test he made on 16 May 2006.

THE FACTS

[4] On the morning of 11 May 2006, a representative of the Fire Marshall proceeded to the semi-annual fire inspection in Building B-77 located on CFB Kingston. In that building, the accused, ex-Corporal O'Toole, was the sole occupant of room D in "mod" 1 of the same building.

[5] Prior to the inspection, the accused left his room unlocked. He was the only person to have a key for his room. Basically, as a matter of routine, he was used to do so, knowing that his girlfriend, Ms. Gosse, had taken for some months the habit to come to his room to check if he woke up early enough in order to avoid being late for work. According to the statement he made to the police, he did not see her that morning. According to Ms. Gosse's testimony, she saw him that morning for a couple of minutes. She entered the room and found out that he was on his way out. He wanted to grab a coffee at Tim Hortons before going to work early, which explained why he was ready to go at that time. He then left and left her alone in the room.

[6] At the time of the incident, Ms. Gosse and ex-Corporal O'Toole were dating each other for almost two years. Even though she was living at her grandparents' house, it was not unusual for her to stay and sleep in his room on weekends and holidays. For that reason, it was not surprising that she left some of her clothes in the dresser. That very morning, she changed clothes in order to get ready for work at Tim Hortons.

[7] She testified that it is in ex-Corporal O'Toole's room that she realized that she left in her purse two bags of marihuana. She explained to the court that as a regular user of marihuana for some years, it was normal that she had some with her. She said that the drug was purchased earlier that week and that she shared it the night before with some friends. She unfortunately forgot to leave it somewhere else.

[8] She said to the court that she was well aware that ex-Corporal O'Toole couldn't be associated in any way with drugs, or people using it, because it could jeopardize his status as a member of the Canadian Forces. It is the reason why she never told him that she was herself a user since they were dating each other.

[9] She explained to the court that she decided that morning to leave the drug on the desk, with the zigzag paper, in ex-Corporal O'Toole's room and put a pipe aside in the same room, in a location that she couldn't remember. Basically, she left the drug in plain view, without paying attention to the consequences of her gesture, because she was in a hurry to go to her job. She was warned twice before for being late and a third time could result by being fired by her employer. She said that she locked the door, thinking that she could make her way later to recuperate the drug before her boyfriend gets in his room, even though she had no key to get access to it.

[10] Later that morning, the fire inspection took place. Essentially, it consisted in checking all smoke detectors in the rooms. The cleaner for that building, Ms. Asselstine, accompanied the representative of the Fire Marshall in order to provide him access to each room in the building. In order to do so, she had a master key.

[11] When she opened the door of ex-Corporal O'Toole's room, she observed that the room was messy. She also saw the two bags with what she considered to be drugs in it. She went out of the room and the military police was called.

[12] Corporal Duncan, an MP on duty that day, came to the building, went in the room and noticed the presence of the bags with drugs in it on the desk. He then called his colleague, who got a search warrant. Later that morning, the search warrant was executed and the two bags, with what was identified formally later as marihuana, were seized.

[13] Ex-Corporal O'Toole was interviewed on 7 June 2006 by Corporal Duncan regarding that matter. He denied that he was the owner of the drug found in his room and stated that he did not use drugs since he joined the Canadian Forces in 2002. When he was asked about the involvement of his girlfriend in this matter as the owner or user of the drug found in his room, he answered that he had no comment on that issue.

[14] Ex-Corporal O'Toole was charged concerning this matter in August 2006. That incident was one of the reasons supporting his release from the Canadian Forces in January 2007. He made a redress of grievance concerning his release, which is still a pending issue at the present time.

[15] Ms. Gosse indicated to the court that she revealed only a week ago to ex-Corporal O'Toole her involvement as the sole owner of the drug seized in his room on 11 May 2006. She explained that she kept that information for herself, thinking that the justice system could not find guilty somebody that did nothing. They both live together since the release of her boyfriend from the Canadian Forces. She said that even though he was kicked out of the Canadian Forces, she thought it was better to keep secret the information on the ownership of the drug because she was convinced that it was better this way for the well-being of her boyfriend.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE

[16] Section 4(1) of the *Controlled Drugs and Substances Act* reads as follow:

4. (1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

[17] Then, the prosecution had to prove the following essential elements beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charge sheet. The prosecution also had to prove the following additional elements: the nature of the substance, which is, in this case, marihuana, that can be found under Schedule II of the *Controlled Drugs and Substances Act*, and the possession of the substance.

[18] Concerning the essential element of possession of the substance, the definition of the term “possession” is provided under section 2 of the *Controlled Drugs and Substances Act*, and reads as follow:

2. (1) ... "possession" means possession within the meaning of subsection 4(3) of the *Criminal Code*;

[19] Then, subsection 4(3) of the *Criminal Code* reads as follow:

4. (3) For the purposes of this Act,

(a) a person has anything in possession when he has it in his personal possession or knowingly

(i) has it in the actual possession or custody of another person,
or

(ii) has it in any place, whether or not that place belongs to or is occupied by him, for the use or benefit of himself or of another person; and

(b) where one of two or more persons, with the knowledge and consent of the rest, has anything in his custody or possession, it shall be deemed to be in the custody and possession of each and all of them.

[20] It means that in order to prove beyond a reasonable doubt that the accused had possession of the marihuana seized in his room, the prosecutor had to prove that ex-Corporal O’Toole had knowledge, consent and control over the substance.

[21] Before this court provides its legal analysis, it's 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 these principles, of course, are well known to counsel, but other people in this courtroom may well be less familiar with them.

[22] 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 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.

[23] 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.

[24] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or 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. The principles laid out in *Lifchus* have been applied in a number of Supreme Court and appellate courts 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 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.

[25] 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.

[26] 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, ex-Corporal O'Toole, 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 have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[27] 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.

[28] 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.

[29] 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' reasons to remember, 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 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.

[30] 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?

[31] 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' entire testimony.

[32] 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.

[33] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court and address the legal principles.

ANALYSIS

[34] The court finds that the only question in issue, based on the evidence put before it, is about the possession of the marihuana by the accused. In other words, did ex-Corporal O'Toole had knowledge, consent and control over the marihuana seized in his room?

[35] All other essential elements, including the establishment of the nature of the drug seized, were established beyond a reasonable doubt by the prosecution, essentially by the way of the admissions made by the accused.

[36] In order to determine the issue of possession, the nature of the evidence in this case requires this court to make, first, certain findings as to the credibility of the witnesses.

[37] Ms. Asselstine testified in a calm and straightforward manner. This witness was totally disinterested to the case and provided coherent and clear explanations about the way the fire inspection was conducted and the circumstances in which she noticed the presence of the drug in the accused's room. Her evidence is credible and reliable.

[38] Corporal (Retired) Duncan testified in a clear and straightforward manner. His testimony was coherent, respectful, and he had a good recollection of the events concerning the execution of the search warrant and the interview of the accused. He limited himself to what he saw and what he heard, no more or no less. His testimony is credible and reliable.

[39] The testimony of Ms. Gosse was inconsistent with itself and somewhat incoherent. Firstly, considering the very high level of importance and carefulness she gave in her testimony to the fact that her boyfriend could not be associated in any way with drugs because of his job, especially in the context that she was a regular user herself, fact that she hid to him since the beginning of their relationship up to last week, it is very difficult to understand why she would have left a large quantity of marihuana, such as 19 grams, in plain view in his room. It could have taken seconds to hide the two bags in the dresser she had for her own needs in the room or anywhere else, even though she was in a hurry. By leaving the drug in plain view, as she claimed, she potentially jeopardized their relationship because he could find out that she was a user and then conclude that she couldn't be trusted, and more importantly, as she stressed during her testimony, Canadian Forces authorities may also find out about the drug in her boyfriend's room on the base and then take some action towards him accordingly, which in fact, happened. The actions she said she took about the disposition of the drug in her boyfriend's room on 11 May 2006 don't match her thoughts she said she had at the time towards the association of ex-Corporal O'Toole to a drug.

[40] Secondly, as highlighted by the prosecutor in his address, why would she have left the two bags of drugs in plain view with the zigzag paper in the room while she put aside the pipe? She provided this answer without being prompted by any counsel during her testimony, and the court doesn't understand the need to behave that way. Why not putting the stuff at the same place if she intended to come back later to recuperate it? This unanswered question constitutes an additional element supporting the incoherence of her story.

[41] Thirdly, if her intent was to hide her usage of drugs from her boyfriend and to avoid him being associated with drugs, why would she have left in plain view two bags of 19 grams of marihuana and locked the door of the room, for which she has no key, and leaves the place without having a better option than to come back in the room before ex-Corporal O'Toole that day? This incredible explanation, unfortunately for her, doesn't stand by itself properly in the context she described to the court.

[42] Finally, it is very hard to believe for the court that further to the fact that ex-Corporal O'Toole was formally charged and later released from the Canadian Forces for that matter, that she hid from him, up to last week, that the drug seized in his room on 11 May 2006 was in fact hers, and that she is a regular user of it. Moreover, considering the context of the incident, it is very hard to believe that it took almost two years before he started to ask her if she had any involvement in this matter, especially considering that they were still involved seriously in a relationship to the point that she expressed the wish to get married with him.

[43] For all the reasons above, the testimony of Ms. Gosse is not credible and reliable and must be disbelieved concerning the reasons and the context supporting the fact she left the drug in plain view in her boyfriend's room. However, the court does believe her when she said that she was a regular user of marihuana at the time of the incident, and that consequently, she might have brought the drug in the room.

[44] Considering the evidence as a whole, the court is satisfied that the prosecutor has established beyond a reasonable doubt, based on the direct evidence and the circumstantial evidence introduced in this case, that room D, at "mod" 1, in Building B-77, was under the control of ex-Corporal O'Toole. He was the only one to have a key and to provide access to those he wanted, including his girlfriend. It is clear for the court that if Ms. Gosse wanted to access his room, she had to tell him in order that he leaves the door unlocked, or simply opens the door when he was there. Even though there was a master key hold by the cleaner, there is no evidence whatsoever that this person, or any other, could have put the drug in his room.

[45] Concerning the element of knowledge and consent, the court does not consider that the prosecutor has proved it beyond a reasonable doubt. There is no direct evidence concerning this element that was adduced during the trial by the prosecutor. However, the prosecutor took the position that because of the circumstantial evidence he

introduced, which is that the room where the drug was seized was the accused's room, that the accused was the sole occupant of the room, and that the drug was found in plain view, the court may appropriately make the inference that the accused was aware of the presence of the drug in his room.

[46] However, is this the only logical and reasonable appropriate inference based on the circumstantial evidence that the court can make? The answer is no. It is logical and reasonable to appropriately infer from the circumstantial evidence accepted by this court that the drug could have been left in the accused's room on 11 May 2006 without his knowledge and consent.

[47] Based on the statement made by the accused to the police and the testimony of Ms. Gosse, it is logical to infer that on the morning of 11 May 2006, the latter had access to her boyfriend's room and that she stayed there for a moment without the presence of the accused. Probably, he knew that his girlfriend was using marihuana, as his response to the MP let think, when he answered, "No comment" about his girlfriend's involvement with drugs. Did he know that she was carrying drugs with her that morning? Probably, considering that he probably knew she was a user. Did he use marihuana, which would help to explain the presence of drugs in his room? Again, there is no evidence at all on that issue. Did he know and consent that she left drugs in his room that very morning? Without any other evidence, direct or circumstantial, it is very difficult to answer. Probably, she was not afraid to leave drugs in plain view in his room that very morning because she knew he would not be upset by that fact. All these unanswered questions and inferences support the logic, reasonable and appropriate inference that marihuana could have been left in his room that very morning without his knowledge and consent.

[48] The court does not disagree with the position of the prosecutor when he said that this court, as it stated in the decision of *Re Chambers and The Queen*, 20 C.C.C. (3d) 440 at page 448, is not precluded "from drawing appropriate inferences from evidence that a prohibited drug is found in a room under the control of an accused where there is also evidence from which an inference may properly be drawn that the accused was aware of the presence of the drug." However, based on the evidence introduced, this is not the only logical and appropriate reasonable inference that this court can make.

[49] Consequently, having regard to the evidence as a whole, the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of possession of marihuana.

[50] Additionally, having regard to the finding of the court concerning the essential elements of section 4(1) of the *Controlled Drugs and Substances Act*, and the application of those elements to the facts of this case, the court considers that the

prosecution has not discharged its burden of proof by establishing beyond a reasonable doubt the fact that the accused did possess marihuana on 11 May 2006.

DISPOSITION

[51] Ex-Corporal O'Toole, please stand up. Ex-Corporal O'Toole, this court finds you not guilty of the first and only charge on the charge sheet.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

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