COURT MARTIAL

Citation: *R v Chaban*, 2014 CM 2006

Date: 20140415
Docket: 201373

Standing Court Martial

Canadian Forces Base Wainwright
Wainwright, Alberta,, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant C. Chaban, Accused

Before: Colonel M.R. Gibson, M.J.

REASONS FOR FINDING

(Orally)

[1] Lieutenant Chaban is charged with the offence of wilfully making a false entry in a document signed by her that was required for an official purpose, contrary to section 125(a) of the *National Defence Act*. The particulars of the charge allege that: "between 18 March 2012 and 30 April 2012, at or near Wainwright, Alberta, did sign a Land Force Command Physical Fitness Standard Evaluation Form, indicating that she successfully completed the Land Force Command Physical Fitness Standard Evaluation on 16 March 2012, knowing that she did not."

[2] In explaining the court's decision, I shall first review the facts of the case as they have emerged in the evidence heard by the court, then instruct myself as to the applicable law, indicate the findings that I have made with regard to the credibility of certain witnesses, then apply the law to the facts in explaining the analysis that I have made, before indicating the court's determination as to finding on this charge.

The Facts

[3] There were six prosecution witnesses who gave evidence. Six documents were admitted into evidence, the most important of which were the Land Force Command Physical Fitness Standard Evaluation Forms at Exhibits 4 and 6. The accused did not testify, and the defence called no evidence.

[4] Master Corporal Leblanc testified that, at the relevant time, he was the Acting Chief Clerk in the Base Orderly Room (BOR) at Canadian Forces Base (CFB) Wainwright. He knew Lieutenant Chaban, who was the Pay Accounting Officer (PAO), and identified her in court. He saw her signature frequently, as she was the *Financial Administration Act* section 33 signing authority, who had to sign financial documents for verification purposes. He testified that he saw her signature on a daily basis. He saw Exhibit 4 on 18 Mar 2012. It did not have a signature at Section D. He put it in the filing cabinet in his office rather than let it be processed and entered into HRMS, as he knew that Lieutenant Chaban had not completed the Battle Fitness Test (BFT) that day, and he knew that only one BFT was scheduled on that day. He knew this because he had seen her in the office throughout the morning, while she interacted with some audit staff that had come from Edmonton. Building 698 where they worked is not a large building. It was composed of ATCO trailers and had approximately nine rooms inside. When shown Lieutenant Chaban's signature on the documents, Master Corporal Leblanc stated that it looked familiar to him.

[5] Warrant Officer Bastin testified that she was the Chief Clerk at 3 Canadian Division Headquarters in Edmonton. In this capacity, she was the current custodian of Lieutenant Chaban's personnel file. She testified that the document ultimately entered into evidence as Exhibit 6 was located on Lieutenant Chaban's personnel file.

[6] Sergeant Rochon testified that she was a RMS clerk, who was scheduled to do the BFT test on 16 March 2012, at the same time as Lieutenant Chaban. She knew Lieutenant Chaban, and identified her in court. This particular BFT was the last one scheduled for that fiscal year at CFB Wainwright. Sergeant Rochon testified that she did not see Lieutenant Chaban take part in the 13 km rucksack march on 16 Mar 2012, nor was she present at the trench dig or body drag components of the BFT that took place afterwards. The group doing the BFT that day was a small group, of perhaps 20 people.

[7] Master Warrant Officer (retired) Crone testified that in March 2012, he was the Base Operations Master Warrant Officer at CFB Wainwright, responsible for elements of the BFT, and for completing the forms. He indicated that personnel were required to complete the 13 km rucksack march part of the BFT in less than 2 hours, 26 minutes and 20 seconds, and that the entire test, including the trench dig and body drag portions after the rucksack march, should be completed within three hours. He saw the BFT form for 2nd Lieutenant Chaban, as she then was, and noted that it did not have the member's signature at Section D, as required. He highlighted this deficiency, and returned the form to her unit.

[8] Corporal Sterner testified that at the relevant time she was a clerk in the BOR at Wainwright. She testified that Lieutenant Chaban approached her with the form in evidence at Exhibit 6, and asked her to make an entry in PeopleSoft updating the HRMS to indicate that 2nd Lieutenant Chaban had successfully completed the BFT, as this was required for her prospective promotion to lieutenant. Corporal Sterner remarked to herself that it was not normal that an individual member would approach a clerk for such an update, as usually the form would come in the mail. Corporal Sterner remarked that the member's signature in blue ink at Section D of Exhibit 6 was not there at that time.

[9] Major (retired) Matichuk testified that, in March 2012, he filled the position of Base Administration Officer at CFB Wainwright. He had received the promotion pro forma form in respect of 2nd Lieutenant Chaban's impending promotion to lieutenant, and was verifying that all the prerequisites had been completed. He noted that she had not completed her BFT, and notified her of this. She indicated that she had completed the BFT, and produced the form at Exhibit 6 to him a few days later. He noted that while the rest of the form appeared to be a photocopy, the member's signature at Section D appeared to be completed in blue ink.

The Law

[10] In order to arrive at a proper finding in this case, the court must instruct itself as to the applicable law. The first issue relates to the presumption of innocence and the standard of proof beyond a reasonable doubt.

[11] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in Canadian criminal law, and the standard of proof beyond a reasonable doubt in order to displace the presumption of innocence is an essential part of the law that governs criminal trials in this country. In matters dealt with under the Code of Service Discipline, as with cases dealt with under Canadian civilian criminal law, every person charged with an 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 essential 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.

[12] 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. In order to secure a conviction, it is incumbent on the prosecution to prove each essential element of the offence charged to the standard of proof beyond a reasonable doubt. 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.

[13] The court must find an accused person not guilty if it has a reasonable doubt about his or her guilt on all the essential elements of the offence after having considered all of the evidence.

[14] The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and tradition of justice.

[15] In *R v Lifchus* [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model jury charge 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; rather, 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 the evidence tells the court, but also on what that evidence does not tell the court. The fact that the person has been charged is no way indicative of his or her guilt.

[16] In *R v Starr* [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court of Canada 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....

[17] 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 beyond a reasonable doubt.

[18] 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.

[19] The second issue is the assessment of the testimony of witnesses. 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, videos, 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.

[20] 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 and reliable.

[21] Credibility is not synonymous with telling the truth, and the 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's oppor-

tunity to observe events, as well as a witness's reasons to remember. Was there something specific that helped the witness remember the details of the 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.

[22] 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? However, demeanour must be assessed with caution, and should be assessed in conjunction with an assessment of whether the witness's testimony was internally consistent, that is, consistent with itself, and consistent and with the other uncontradicted or accepted facts in the evidence. The Court of Appeal for Ontario, and the Court Martial Appeal Court, have cautioned against over-reliance on demeanour as a factor in assessing the credibility of witnesses and the reliability of their evidence.

[23] 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 taint a witness's entire testimony.

[24] The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. The court may accept the evidence of a particular witness in total, in part, or not at all. In *Captain Clark v. The Queen*, 2012 CMAC 3, the Court Martial Appeal Court has given very clear guidance as to the assessment of credibility of witnesses. Justice Watt for the Court elaborated the governing principles:

> First, witnesses are not "presumed to tell the truth." A trier of fact must assess the evidence of each witness, in light of the totality of the evidence adduced at the proceedings, unaided by any presumption, except the presumption of innocence [of the accused person.]
>
> Second, a trier of fact is under no obligation to accept the evidence of any witness simply because it is not contradicted by the testimony of another witness or other evidence. The trier of fact may rely on reason, common sense, and rationality to reject uncontradicated evidence. [A trier of fact may accept or reject, some, none or all of the evidence of any witness who testifies in the proceedings.]

[25] Credibility is not an all or nothing proposition. Nor does it follow from a finding that a witness is credible that his or her testimony is reliable. A finding that a witness is credible does not require a trier of fact to accept the witness' testimony without qualification. Credibility is not co-extensive with proof.

[26] As Justice Watt indicated at para 48 of *Clark*:

> Testimony can raise veracity and accuracy concerns. Veracity concerns relate to a witness' sincerity, his or her willingness to speak the truth as a witness believes it to be. In a word, credibility. Accuracy concerns have to do with the actual accuracy of the witness' account. This is reliability. The testimony of a credible, in other words an honest witness, may nonetheless be unreliable.

[27] I will now turn to an assessment of the evidence in this case, and whether the prosecution has met its burden of proving the guilt of the accused on each essential element of the offence, to the standard of proof beyond a reasonable doubt.

[28] I will start by an assessment of the credibility and reliability of the evidence of the six witnesses called by the prosecution, mindful of the guidance of the Court Martial Appeal Court described earlier. I found all of the prosecution witnesses to be credible, and I accepted their evidence. Each gave their evidence in a straightforward and measured manner, clearly being careful not to exaggerate or speculate, and readily admitting if they could not recall a particular detail.

[29] The essential elements of the offence as charged and particularized are as follows:

a. identity of the accused as the offender;

b. date and place of the offence as particularized;

c. that Lieutenant Chaban signed a document; that is, that the signature on the document is hers;

d. that the document was required for official purposes;

e. that the document was a Land Force Command Physical Fitness Standard Evaluation form;

f. that the effect of her signature was to indicate that she had successfully completed the Land Force Command Physical Fitness Standard Evaluation on the specified date of 16 March 2012;

g. that, as she knew she had not completed the test, the entry was thus false; and

h. that she had a culpable intent, in this case, wilfully making a false entry

[30] The prosecution asserts that it has met its burden of proving all of the essential elements of the offence. The defence submits that there is insufficient evidence that the signature of member at Section D of Exhibit 6 is actually that of Lieutenant Chaban,

that it is possible that someone else could have signed it, and that I should have a reasonable doubt on this element.

[31] I am satisfied that there is ample evidence with regard to the first two elements, of identity and date and place. While there is no direct evidence before the court that Lieutenant Chaban signed the document in question, the inference to be drawn from the evidence that the court does accept is irresistible. There is no evidence to substantiate the defence assertion that someone else could have forged or simulated Lieutenant Chaban's signature, and this argument strikes me as wild speculation without substance. There is no logical reason why anyone else would have done so, and no credible evidence has been presented to the court to substantiate an assertion that the signature that appears at the block "signature of member" at Section D of the BFT form at Exhibit Six is not hers.

[32] The evidence clearly indicates that Lieutenant Chaban made representations to Mr. Matichuk that she had successfully completed the BFT, when in fact she had not, and that she presented the signed form to him as substantiation of that. If in fact the signature on the form was not hers, then she would certainly have made that observation known to him or to other relevant authorities on the Base. There is no air of reality to the assertion that the signature at the signature of member block of Exhibit 6 is that of someone other than Lieutenant Chaban. Moreover, Master Corporal Leblanc, who was well familiar with Lieutenant Chaban's signature from having seen it on a daily basis, testified that the signature on the form was familiar to him as Lieutenant Chaban's.

[33] When one looks at Exhibit 4, the signatures that appear on the document (that is, the signature of member at Section B, Mr. Matichuk's signature in the authorization block at Section C, and the evaluator's signature of Master Warrant Officer Crone at Section D) are clearly originals, written in blue ink. The signature of member block at Section D is blank, as was highlighted by Master Warrant Officer Crone using a yellow highlighter. The document at Exhibit 6 is clearly a photocopy of Exhibit 4, with the addition of an original signature in blue ink at the signature of member block at Section D.

[34] The court thus makes the following findings of fact. In March of 2012, 2nd Lieutenant Chaban, as she then was, was the PAO at CFB Wainwright. She needed to complete the BFT to fulfill the prerequisites for her anticipated promotion to lieutenant. On 16 March 2012, she was scheduled to complete the BFT, which was the last one scheduled at CFB Wainwright for that fiscal year, ending 31 March 2012. She did not do so. Instead, she spent that morning with members of an audit team at Building 698. Lieutenant Chaban subsequently presented the form at Exhibit 6 to Corporal Sterner, asking her to make an entry in the HRMS indicating that she had successfully completed the BFT, and signed the Section D block of Exhibit 6 prior to presenting it to Mr. Matichuk as substantiation that she had completed the BFT. The import of the signature of member block at Section D of the BFT form is clearly to substantiate the information indicated there that she had successfully completed the BFT on 16 March 2012. The form was a document required for the official purpose of substantiating her successful completion of the BFT, for the purpose of being entered in HRMS, and also ful-

filling the prerequisites for her anticipated promotion. I find that Lieutenant Chaban thus wilfully made a false entry in a document signed by her that was required for an official purpose.

FOR THESE REASONS, THE COURT:

[35] **FINDS** that the prosecution has met its burden of proving all of the essential elements of the offence to the standard of proof beyond a reasonable doubt. Lieutenant Chaban, the court finds you guilty of the first charge on the charge sheet.

Counsel:

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Counsel for Her Majesty the Queen

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