

**Citation:** *R. v. Ex-Private C.W.A. Gorrell*, 2005 CM 39

**Docket:**F200539

**STANDING COURT MARTIAL  
CANADA  
MANITOBA  
CANADIAN FORCES BASE SHILO**

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**Date:** 10 February 2006

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**PRESIDING:COMMANDER P.J. LAMONT, M.J.**

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**HER MAJESTY THE QUEEN**

**v.**

**EX-PRIVATE C.W.A. GORRELL**

**(Accused)**

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**FINDING**

**(Rendered orally)**

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[1] Mr Gorrell, this court finds you not guilty. You may be seated.

[2] Ex-Private Gorrell is charged with one charge of assault causing bodily harm, contrary to section 267 of the *Criminal Code*, which is made a service offence by section 130 of the *National Defence Act*. The charge arises out of an altercation involving the accused and two of his friends, as well as the complainant, Corporal Claveau, in circumstances I will more fully describe.

[3] What began as a verbal dispute in the barrack block concerning excessive noise, escalated to fisticuffs. Mr Gorrell admits that he struck Corporal Claveau and there is no dispute that the blows caused bodily harm to Corporal Claveau. Mr Gorrell claims that his actions were taken in self-defence.

[4] Mr Gorrell and two of his friends, Corporal Ward and Corporal Hefferan, celebrated the end of a course at CFB Gagetown on 11 May 2004 by drinking a lot of beer at an establishment called Griffins. They returned to their barrack block sometime around midnight and were in a boisterous mood. The noise they made disturbed Corporal Claveau, who got up and left his room to confront the noise makers. The accounts of the several witnesses as to how the confrontation developed varied, but on

all the evidence I find that Corporal Claveau challenged the accused and his friends to join him outside the barrack block. They followed Corporal Claveau outside, and after some pushing or shoving, the accused struck Corporal Claveau, knocking him to the ground.

[5] I find that it was, indeed, the accused who delivered this blow, and I accept the evidence of Corporal Claveau that, as a result of the blow, he was knocked unconscious. Corporal Claveau sustained injuries to his chin and left jaw, the top of his forehead, the back of his head, and abrasion-type injuries to the right side of his torso and upper right arm.

[6] I have some difficulties accepting and relying upon the evidence of the accused and his two friends. It is clear to me that all three were intoxicated at the time they returned to the barrack block. The evidence of the accused and his two friends was full of inconsistencies on matters of greater or lesser relevance to the issues before me, but enough to cause me to approach the evidence of these witnesses with great caution, except where their evidence is confirmed by the evidence of other witnesses.

[7] I also have difficulties with the evidence of Ms Matheson who claimed to have seen Corporal Claveau being kicked five times, although she did not identify the accused as the person responsible for the kicking she claims she saw.

[8] There were two other witnesses to the events in question. Corporal Vail testified for the prosecution. He was the roommate of Corporal Claveau at the time, and confirmed the evidence of Corporal Claveau that as they were trying to get to sleep, there was a noise in the hallway of the barrack block. According to Corporal Vail, there was some pushing between Corporal Claveau and one of the friends of the accused. Then, Corporal Claveau put some clothes on and went outside the building. Corporal Vail looked out the room window and, from a distance of about 50 feet, saw the parties outside yelling and pushing back and forth. The friends of the accused were trying to calm and restrain both Corporal Claveau and the accused. Corporal Vail saw the accused break free and punch Corporal Claveau in the face and the two of them started to fight. Corporal Claveau fell to the ground, the accused jumped on top of Corporal Claveau as he lay on the ground, hit him in the face three more times with his fists, and kicked him on Corporal Claveau's right side as the friends were pulling the accused off of Corporal Claveau. Corporal Claveau was not moving and took a few minutes to come to his senses and get on his feet.

[9] Corporal Mantik gave evidence for the defence. He heard the noise in the hallway from his room. He heard Corporal Claveau tell the others to go outside, then, looking out his window, he saw the parties outside the barrack block immediately outside his window. He saw Corporal Claveau take a swing that hit the accused and caused the accused to fall down, and then Corporal Mantik ran outside. He saw the

accused get up and punch Corporal Claveau. Corporal Mantik said this punch knocked out Corporal Claveau. He stated that Corporal Claveau and the accused fell over together as a result of the punch by the accused, and there was a second punch by the accused to Corporal Claveau as they were falling over. He denied that the accused continued to punch Corporal Claveau after Corporal Claveau was down on the ground, as Corporal Vail had testified, and he denied that there was any kicking of Corporal Claveau.

[10] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context, this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed, the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[11] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt and the accused must, therefore, be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt.

[12] But reasonable doubt is not a frivolous or imaginary doubt. It is not something based on sympathy or prejudice. It is a doubt based on reason and common sense that arises from the evidence or the lack of evidence. The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[13] The rule of reasonable doubt applies to the credibility of witnesses in a case, such as this case, where the evidence discloses different versions of the important facts that bear directly upon the issues. Arriving at findings of facts as to what occurred is not a process of preferring one version given by one witness over the version given by another. The court may accept all of what a witness says as the truth, or none of what a witness says. Or the court may accept parts of the evidence of a witness as truthful and accurate. If the evidence of the accused, or the witnesses called on his behalf, as to the issues or the important aspects of the case is accepted, it follows that he is not guilty of the offence. But even if the defence evidence is not accepted, if the court is left with a reasonable doubt, he is to be found not guilty. Even if the evidence on behalf of the defence does not leave the court with a reasonable doubt, the court must look at all the

evidence it does accept as credible and reliable to determine whether the guilt of the accused is established beyond a reasonable doubt.

[14] In this case, counsel on behalf of the accused concedes that the elements of the offence of assault causing bodily harm are established by the evidence. There is no doubt that the accused struck Corporal Claveau, and this constitutes, I find, the intentional application of force by the accused. The offence of assault also requires that the prosecution prove a lack of consent. I find that Corporal Claveau did, in fact, consent to engage in a fist fight with the accused. But even though Corporal Claveau appears to have consented to a fist fight, the law limits his ability to give an effective consent to assault. Where the assailant intends to and does, in fact, cause bodily harm, that apparent consent of the victim is vitiated, *R. v. Jobidon* [1991] 2 S.C.R. 714.

[15] In this case, I find, without hesitation, that the accused did, indeed, cause bodily harm to Corporal Claveau. I also find as a fact, that he intended to cause bodily harm to Corporal Claveau when he struck him in the chin and caused him to lose consciousness and to require sutures to close the wound. Thus, the element of lack of consent, in the offence of assault, is established in this case. In the absence of an affirmative defence, therefore, the accused would be guilty of assault causing bodily harm.

[16] Defence counsel argues that the defence of self-defence is available to the accused on the evidence in this case, and that the conduct of the accused is, therefore, justified. Where there is some evidence on the elements of the defence, such as the proffered defence, such that the proffered defence can be said to be "in play", the burden rests upon the prosecution to establish beyond a reasonable doubt that the defence does not apply before the accused can be found guilty. In such circumstances, the prosecution must negative at least one element of an affirmative defence before the accused can be found guilty, *R. v. Cinous* [2002] 2 S.C.R. 3.

[17] Counsel for the accused argues that the defence of self-defence contained in section 34(1) of the *Criminal Code* applies to justify the actions of the accused. Subsection 34(1) reads:

Everyone who is unlawfully assaulted without having provoked the assault is justified in repelling force by force if the force he uses is not intended to cause death or grievous bodily harm and is no more than is necessary to enable him to defend himself.

[18] In my view, this defence is not open to the accused on the facts of this case as I find them. I find that both Corporal Claveau and Mr Gorrell engaged in a consensual fist fight. In these circumstances, it cannot be said that the assault of Corporal Claveau upon Mr Gorrell was without provocation on the part of Mr Gorrell. I am satisfied beyond a reasonable doubt that, in engaging in a consensual fist fight, both

Mr Gorrell and Corporal Claveau provoked each other. Therefore, self-defence, as set out in subsection 34(1), does not justify the actions of Mr Gorrell in striking Corporal Claveau, *R. v. Paice* [2005] 1 S.C.R. 339.

[19] Self-defence is also dealt with in the *Criminal Code* in section 37, which reads:

(1) Everyone is justified in using force to defend himself or anyone under his protection from assault, if he uses no more force than is necessary to prevent the assault or the repetition of it.

In subsection 2:

Nothing in this section shall be deemed to justify the wilful infliction of any hurt or mischief that is excessive, having regard to the nature of the assault that the force used was intended to prevent.

[20] Unlike the self-defence provision in subsection 34(1), there is no requirement under this provision that the accused not be provoked. Even if the accused has provoked an assault upon himself and has used force in reply, section 37 may be relied upon as a defence, provided, of course, that no more than necessary force is used in self-defence. In my view, there is some evidence in this case sufficient to put this aspect of the defence of self-defence in play, and, therefore, the burden is upon the prosecution to establish beyond a reasonable doubt that the defence contained in section 37 does not apply.

[21] There is no issue that the accused was the victim of an assault by Corporal Claveau. The other elements of the defence, under section 37, that the prosecution must negative, are:

1. The accused must be acting to defend himself from the assault;
2. The force he uses must be no more than necessary to prevent the assault, or the repetition of it;
3. The force cannot be the wilful infliction of excessive hurt or mischief.

[22] Counsel for the prosecution points, among other things, to the injuries suffered by Corporal Claveau as portrayed in the photographs in evidence before me, and submits that the evidence of Corporal Mantik as to the sequence of events during the fight should not be accepted. It is argued that the evidence of Corporal Vail and Ms Matheson, that Corporal Claveau was kicked after he was knocked down and unconscious, and the evidence of Corporal Vail, that the accused struck Corporal

Claveau repeatedly in the face after he was unconscious, should be accepted because that evidence explains the extent of the injuries shown in the photographs.

[23] In my view, it would be unsafe, on all the evidence, for the court to draw conclusions as to how the fight unfolded from the way injuries to Corporal Claveau appear on these photographs.

[24] If the events of the attack had unfolded in the manner to which Corporal Vail testified, I would have no difficulty in finding that the force used by the accused was much more than that which was necessary to prevent the repetition of the assault by Corporal Claveau, and, indeed, that the force used by the accused was excessive. However, I accept the evidence of Corporal Mantik as to the manner in which the fight escalated and unfolded. He had the best opportunity to observe the events. His perceptions at the time, and his present memory of the events, are not affected by the consumption of alcohol and he has no reason to colour or shade his evidence in favour or against either Mr Gorrell or Corporal Claveau. On the evidence of Corporal Mantik, I find that Corporal Claveau pushed the accused down. The accused got up and punched Corporal Claveau in response, knocking him out. I am not satisfied that Corporal Claveau was punched repeatedly after being knocked to the ground or that he was kicked.

[25] Counsel for the prosecution argues that on the evidence of Corporal Mantik, there was a period of some 10 seconds after the accused was knocked down, during which there was more argument between the parties before the accused delivered the punch to Corporal Claveau. It is argued that the effect of this passage of time is to nullify the consent to a fight that Corporal Claveau gave in the hallway of the barrack block a few minutes earlier. In my view, the events should be seen as one continuous transaction, during which the tensions between the parties may have waxed and waned. Nevertheless, I am satisfied that Corporal Claveau and Mr Gorrell consented to a fight throughout.

[26] I conclude that the prosecution has not satisfied me beyond a reasonable doubt that the force used by Mr Gorrell was more than necessary to prevent the assault by Corporal Claveau or the repetition of the assault. The defence of self-defence under section 37 is, therefore, made out, and the accused is not guilty.

**COMMANDER P.J. LAMONT, M.J.**

Counsel:

Major K.A. Reichert, Regional Military Prosecutions Western Area  
Counsel for Her Majesty The Queen  
Major C.E. Thomas, Directorate of Defence Counsel Services  
Counsel for Ex-Private Gorrell