

Citation: *R. v. ex-Captain Savic*, 2007 CM 3005

Docket:200701

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

Date:22 February 2007

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

HER MAJESTY THE QUEEN

v.

EX-CAPTAIN M. SAVIC

(Accused)

FINDING

(Rendered orally)

INTRODUCTION

[1] Ex-Captain Savic is charged under section 83 of the *National Defence Act*, to wit, disobeyed a lawful command of a superior officer. Concerning the second charge laid under section 90 of the *National Defence Act*, to wit, absented himself without leave, further to the representation made by the prosecutor to the effect that no evidence would be presented supporting this charge, this court martial found the accused not guilty of the second charge.

[2] The facts on which the first count is based relate to events that took place during the day of the 1 and 12 May 2006 at Canadian Forces Base Trenton.

THE EVIDENCE

[3] The evidence before this court martial is composed essentially of the following facts: the testimonies heard in the order of their appearance before the court, the testimony of Warrant Officer Bureau, Major Snow, and ex-Captain Savic, the accused in this case; Exhibit 3, a prescription for Warrant Officer Glenn Bureau dated 12 May 2006 and signed by M. Savic. This document was entered in evidence by

consent; the judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

THE FACTS

[4] The facts involved in this case thus relate to two separate events that took place on two different dates, which are the 1 May and 12 May 2006 at CFB Trenton.

[5] During the spring of 2006, ex-Captain Savic was then, a medical officer and a regular force member of the 24 Canadian Forces Health Services unit located on Canadian Forces Base Trenton in the province of Ontario. As a physician, he was performing his military duty in meeting patients on sick parade or on schedule visits, and in doing annual medical exams for aircrew and non-aircrew member, which represent basically what it was qualified, during this trial, as his clinical duties.

[6] On 1 May 2006, ex-Captain Savic was met in his office by his direct supervisor, Major Snow, the Wing Surgeon. She ordered him, according to an email she received from the acting Surgeon General, Colonel Sanschagrin, to suspend temporarily his practice of the medicine in the military, considering some issues that were raised by his practice in the military. Basically, he was restricted to do all the things that a medical officer usually do concerning the practice of the medicine, including meeting patients.

[7] This suspension of his clinical duties was a renewal of an order to the same effect made for the period from the 13 to 27 April 2006 inclusive. The order made on 1 May 2006 was for the period starting from the 28 April to 12 May 2006 inclusive.

[8] Contrary to the first order, which was made in writing, the order made on 1 May 2006 was made only verbally. During the meeting between the accused and Major Snow, the latter made sure that there was a clear understanding that the restriction imposed temporarily had no effect at all on ex-Captain Savic's practice of medicine in the civilian world. Finally, during the same meeting, she told him that, considering he has no clinical duties, he would be employed in doing administrative work by gathering evidence for the audit concerning the clinic's accreditation.

[9] On 12 May 2006, Warrant Officer Bureau, a physician assistant working at the 24 Canadian Forces Health Services unit, went to ex-Captain Savic's office. It is important to say that as a physician assistant, Warrant Officer Bureau has the legal authority to write drugs' prescription for Canadian Forces members only. However, when he likes to do it for himself, he needs a physician's signature to do so.

[10] The purpose of the visit by Warrant Officer Bureau to ex-Captain Savic

on 12 May 2006 was to ask him to sign a prescription he wrote for himself. In fact, he needed to renew for himself the four drugs listed on the prescription, Exhibit 3, introduced as evidence during this trial. The meeting lasted less than a minute and the accused signed the prescription. There was some reference made to the fact that Warrant Officer Bureau's blood work was discussed during that meeting, and more specifically if that subject was raised or not by the accused. The court wants to say that it considers this fact as not relevant because even though this subject was discussed, it does not help, in a way or another, to qualify the nature of the relationship between Warrant Officer Bureau and the accused. If the court is wrong on that specific matter, it's still clear that there is a doubt on who raised that subject during the conversation.

[11] When Warrant Officer Bureau presented the prescription to the pharmacy in order to be filled, Captain Wilson, from the same pharmacy, went to Major Snow with the prescription. Major Snow made some comments and told Captain Wilson to fill the prescription as a verbal order coming from her. Then, Major Snow reported the incident to the commanding officer.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE CHARGE

[12] Section 83 of the *National Defence Act* reads as follows:

Every person who disobeys a lawful command of a superior officer is guilty of an offence and on conviction is liable to imprisonment for life or to less punishment.

[13] Then the prosecution had to prove the following essential elements for this offence beyond a reasonable doubt: the prosecution had to prove the identity of the accused and the date and place as alleged in the charged sheet; the prosecution also had to prove the following additional elements, the fact that an order was given to ex-Captain Savic, and that it was lawful, and that ex-Captain Savic received or knew the order; the fact that ex-Captain Savic was given the order by a superior officer, and that this status was known by him; the fact that ex-Captain Savic did not comply with the order; and finally, the blameworthy state of mind of ex-Captain Savic.

[14] 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.

[15] 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 the cases dealt with under the 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.

[16] 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.

[17] 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.

[18] In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model chart on reasonable doubt. The principles layed out in *Lifchus* have been applied in a number of Supreme Court and appellate court 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 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 no way indicative of his or her guilt, and I will add that only charges that are faced by an accused person are those that appear on the charge sheet before a court.

[19] 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.

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-Captain Savic, 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.

[20] 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.

[21] 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.

[22] 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 testimonies of a witness. For example, a court will assess a witness's 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.

[23] 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?

[24] 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's entire testimony.

[25] 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.

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

[27] The main question in issue in this matter is if it had been proven beyond

a reasonable doubt that ex-Captain Savic did not comply with the order he received from Major Snow on 1 May 2006 to not have patient contact, when he met Warrant Officer Bureau in his office on 12 May 2006. The court considers that all the other elements of the offence have been proven beyond a reasonable doubt, including the lawfulness of the order, through admissions or the uncontradicted evidence submitted to the court.

[28] In order for the court to respond to this question, the defence counsel submitted that the order given by Major Snow was vague and imprecise to the extent that it would be difficult for this court martial to make a determination about the fact that the accused complied or not with the order he received.

[29] Based on the evidence heard, it is clear for the court that the order given to the accused to not have patient contact was definite and unambiguous. Major Snow clearly established that she told to ex-Captain Savic that he was temporarily restricted to perform any duty related to the practice of medicine in the military, including having contact with patients. She identified in her testimony the concept of practising medicine in the military by using terms like "clinical privileges", "clinical duties" or "military clinical practice". The end result of this was that ex-Captain Savic was not allowed to have any contact with patients from the Canadian Forces in order to provide them, as a physician, any medical advice or treatment for a specific period of time.

[30] Additionally, the fact that the accused was reassigned by Major Snow to perform only an administrative duty during the restriction period demonstrates the intent to not let ex-Captain Savic have any contact with patients in the clinic. The fact that the accused had no more access to the patients' charts is another piece of evidence to the same effect.

[31] Finally, in his testimony, the accused confirmed that his understanding of the order given to him by Major Snow was that he was not allowed to see patients in 24 Canadian Forces Health Services unit during the period specifically mentioned to him and that he was tasked to perform only the administrative duty related to the clinic's accreditation.

[32] Then, the court considers that it has been proven beyond a reasonable doubt that ex-Captain Savic was ordered to not have any patient contact from 1 to 12 May 2006 inclusive.

[33] Having determined the specific nature of the order, the court now turns to the issue of the non-compliance of it by the accused. It is established beyond a reasonable doubt that there was a direct contact between the accused and Warrant Officer Bureau when the prescription, Exhibit 3, was signed by the accused. However, does Warrant Officer Bureau was a patient when it was done?

[34] At the heart of that issue is the signature by the accused of a prescription, Exhibit 3, for Warrant Officer Bureau. According to the testimony of the accused, it was a matter of courtesy to do so, considering that it was a provider to provider relationship, or a practitioner to practitioner relationship. It is important to say that Warrant Officer Bureau filled himself the prescription by putting the four drugs he needed to be renewed on the prescription. The accused saw the prescription only when it was shown to him by the accused and just signed it. The court takes note that Warrant Officer Bureau has a limited authority to prescribe because of the nature of his trade, but was unable to do it for himself, as he testified on that issue. On 12 May 2006, Warrant Officer Bureau was looking for a physician's signature in order to get the renewal of his four drugs at the pharmacy.

[35] What is a prescription? As defined in the Oxford English Dictionary, the usual meaning of a prescription is "an instruction written by a medical practitioner authorizing a patient to be issued with a medicine or treatment".

[36] Having taken judicial notice of the acts and resolution of the legislatures of the provinces, the court notes that under the *Medicine Act*, 1991, S.O. 1991, Chapter 30, the Ontario provincial legislature defined the practice of medicine at section 3 of the act as:

... the assessment of the physical or mental condition of an individual and the diagnosis, treatment and prevention of any disease, disorder or dysfunction.

[37] Being a member of the College of Physicians and Surgeons of Ontario, ex-Captain Savic was authorized to practice medicine, including prescribing drugs, as stated at section 4 of the *Medicine Act*:

In the course of engaging in the practice of medicine, a member is authorized, subject to the terms, conditions and limitation imposed on his or her certificate of registration, to perform the following:

...

8. Prescribing, dispensing, selling or compounding a drug.

[38] Considering that the use of a drug as a treatment may be harmful to the health of an individual and may result in his death, it just makes sense that the authorized people having the accurate knowledge and education in our society concerning the use of drugs as a medical treatment be the only persons authorized to control them and order the use of them. It is interesting to note that prescribing a drug for an improper purpose may be considered as a professional misconduct for a physician, according to the Ontario Professional Misconduct regulation on that matter.

[39] When ex-Captain Savic signed the prescription, Exhibit 3, even though if

no assessment was done, he indicated a treatment for Warrant Officer Bureau by authorizing to reissue to him four specific drugs to be taken in accordance with the written down instructions.

[40] Again, according to the usual meaning and as defined in the Oxford English Dictionary, a patient is "a person receiving or registered to receive medical treatment". By using his authority as a physician to prescribe in signing the prescription, the accused made Warrant Officer Bureau a "patient".

[41] Adopting the view expressed by the accused in his testimony would have meant that the physician's signature on a prescription has no consequences and is the equivalent of a rubber stamping procedure. The court find hard to believe that in our Canadian society, physicians would be reduced to that role in these specific circumstances, considering the lot of confidence and trust put in them. When a medical treatment is ordered by a physician, even though the treatment is for an other physician or practitioner in the medical world, the latter is still a patient.

[42] The court, then, is satisfied that it has been proven beyond a reasonable doubt that Warrant Officer Bureau was a patient when the accused signed his prescription on 12 May 2006.

[43] Consequently, having regard to the evidence as a whole, the prosecution has proved beyond a reasonable doubt all the essential elements of the offence of disobedience to a lawful command of a superior officer.

[44] Additionally, having regard to the finding of the court concerning the essential elements of section 83 of the *National Defence Act*, and the application of those elements to the facts of this case, the court is satisfied that the prosecution has discharged its burden of proof by establishing beyond a reasonable doubt the fact that the accused did not comply with the order he received from Major Snow.

[45] Ex-Captain Savic , please stand up. Ex-Captain Savic , this court finds you guilty of the first charge.

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

Counsel :

Major S.A. MacLeod,, Director Military Prosecutions
Counsel for Her Majesty The Queen

Major S.E. Turner, Director of Defence Counsel Services
Counsel for ex-Captain Savic