



COURT MARTIAL

Citation: *R v Cyr*, 2012 CM 4019

Date: 20121102

Docket: 201243

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, BC, Canada

Between:

Her Majesty the Queen

- and -

Master Seaman P.J.A.A. Cyr, Accused

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

REASONS FOR FINDING

[1] The accused, Master Seaman Cyr, is charged of having obtained by false pretence from the Government of Canada the sum of \$663.32 by claiming Leave Travel Assistance (LTA) benefits based on a mode of travel he did not use. He is also charged in the alternative of having by deceit, falsehood or other fraudulent means, defrauded the Government of Canada of the sum of \$663.32 by claiming Leave Travel Assistance benefits based on a mode of transportation he did not use.

[2] Before this court provides its analysis of the evidence and of the charges, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. Although these principles are well known to counsel, other people in this courtroom may be less familiar with them.

[3] 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 the cases dealt with under Canadian 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 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.

[4] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to the 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.

[5] 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 a part of our history and traditions of justice.

[6] 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. 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 evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt.

[7] 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 Master Seaman Cyr, 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.

[8] Evidence may include testimony under oath or solemn affirmation before the court by witnesses. 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.

[9] 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.

[10] 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's opportunity to observe, 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 that accused chooses to testify.

[11] 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's testimony consistent with itself and with the uncontradicted facts?

[12] 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.

[13] 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.

[14] The court must focus its attention on the test found in the Supreme Court of Canada decision of *R v W.(D.)*, [1991] 1 S.C.R. 742. This 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.

In *R v J.H.S.*, 2008 SCC 30, paragraph 12, the SCC quoted approvingly the following passage from *R v H.(C.W.)*, 68 C.C.C. (3d) 146 (BCCA) where Wood J.A. suggested the additional instruction:

I would add one more instruction in such cases, which logically ought to be second in the order, namely: "If after a careful consideration of all the evidence, you are unable to decide whom to believe, you must acquit."

[15] Having instructed myself as to the onus and standard of proof, I will now turn to the questions in issue put before the court. The evidence before this court martial is composed essentially of the following: judicial notice, the testimony of Master Seaman Cyr, admissions and exhibits. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence. Pursuant to Rule 16 of the Military Rules of Evidence, judicial notice was taken by the court that the distance between 19 Dalglish Avenue in Kingston, Ontario, and the Pearson International Airport in Toronto is 278 kilometres. Twelve exhibits were produced by the prosecution and defence counsel presented one exhibit. Admissions are found at Exhibits 12 and 15. The prosecution did not present any witnesses during the trial. Master Seaman Cyr was the only witness.

[16] On 23 June 2010, Master Seaman Cyr signed a CF Leave Request Authorization requesting leave over the period 21 August to 12 September 2010, Exhibit 5. The address while on leave was stated as 19 Dalglish Avenue, Kingston, Ontario; the residence of Master Seaman Cyr's parents.

[17] On 15 July 2010, Master Seaman Cyr attended the CFB Esquimalt Base Orderly Room (BOR) where he signed a Request for Accountable Advance of Public Funds in the amount of \$1369.12, see Exhibit 9, citing the purpose for this request as "LTA – 21 August to 12 September 10. Master Seaman Cyr also presented his signed leave pass and the document "Acknowledgement of Limitations Travel by PMV at Member's Request", see Exhibit 6, where he indicated his intent to travel by private motor vehicle and that his license plate number was 728 RBF.

[18] Master Seaman Cyr testified that his initial plan was to drive to go meet his parents in Kingston. He would then join them to drive to Halifax to attend his brother's wedding on 28 August. He would then return with his parents to Kingston to attend his sister's wedding and remain in Kingston until he would drive back to Victoria. He would have spoken to his mother sometime between 16 and 19 July and she would have suggested it was wiser to fly instead of driving since he would be on the road for approximately ten days during his leave period. It was decided he would fly to Halifax and drive back to Kingston with his family.

[19] On 19 July 2010, Master Seaman Cyr purchased a one-way ticket for an Air Canada flight flying 26 August 2010, departing Victoria, BC and arriving at the Halifax airport. The total cost of this flight was \$393.25. On 8 August 2010, a one-way ticket for an Air Canada flight flying 12 September 2010, departing Toronto, Ontario and arriving at Victoria, BC was purchased for Master Seaman Cyr by a credit card in the name of his wife, Melanie Cyr. The total cost of this flight was \$422.76. The total cost of the flights was \$816.01.

[20] On 1 October 2010, Master Seaman Cyr attended the CFB Esquimalt BOR and submitted a General Allowance Claim for Leave Transportation Assistance for the period 21 August 2010 to 12 September 2010 claiming for his travel "PMC Victoria, BC to Kingston, ON" by "PMC", a distance of 8557 kilometres for a total amount of \$1454.69.

Master Seaman Cyr signed the document as "Certified that the items claimed herein have not been claimed previously and that the details are as stated." Master Seaman Cyr was paid a further \$85.57 in final settlement of his LTA Claim.

[21] The particulars of the first charge are as follows:

"In that he, on or about 1 October 2010, at or near Canadian Forces Base Esquimalt, British Columbia, did by false pretence obtain from the Government of Canada the sum of \$663.32 by claiming Leave Transportation Assistance benefits based on a mode of transportation he did not use."

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- (a) the identity of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Master Seaman Cyr obtained the sum of \$663.32;
- (c) that Master Seaman Cyr obtained that sum from the Government of Canada;
- (d) that Master Seaman Cyr claimed Leave Travel Assistance benefits based on a mode of transportation that he did not use; and
- (e) that Master Seaman Cyr obtained the sum by a false pretence.

[22] The particulars of the second charge read as follows:

"In that he, on or about 1 October 2010, at or near Canadian Forces Base Esquimalt, British Columbia, did by deceit, falsehood or other fraudulent means defraud the Government of Canada the sum of \$663.32 by claiming Leave Transportation Assistance benefits based on a mode of transportation he did not use."

The prosecution had to prove the following essential elements for this offence beyond a reasonable doubt:

- (a) the identify of the accused as the offender and the date and place as alleged in the charge sheet;
- (b) that Master Seaman Cyr claimed Leave Travel Assistance benefits based on a mode of transportation he did not use;
- (c) that Master Seaman Cyr deprived the Government of Canada of the sum of \$663.32;

- (d) that Master Seaman Cyr used deceit, falsehood or other fraudulent means that caused the deprivation; and
- (e) that Master Seaman Cyr intended to defraud.

[23] The evidence clearly proves beyond a reasonable doubt the identity of the offender and the time and place of both offences and the fact that Master Seaman Cyr did claim Leave Travel Assistance benefits and that he did obtain the amount of \$1454.69 from the Government of Canada.

[24] Master Seaman Cyr told the clerks he would be driving to go to Kingston when he initiated the LTA process. He never drove to Kingston from Victoria. The General Allowance Claim form, see Exhibit 11, indicates PMC Victoria, BC, to Kingston, Ontario, in the travel details and the amount of the claim is calculated based on that mode of transportation. He knew he had flown from Victoria to Halifax and from Toronto to Victoria when he finalized his claim on 1 October 2010 and he did not tell the clerk that he had flown and that he had not used his private motor vehicle. The court finds the evidence proves beyond a reasonable doubt that Master Seaman Cyr claimed Leave Travel Assistance benefits based on a mode of travel he did not use.

[25] Paragraph 2 of Compensation and Benefits Instruction (CBI) 209.50 reads as follows:

(Entitlement to reimbursement) Subject to paragraph (4), CBI 209.51 and 209.52, an officer or non-commissioned member proceeding to their home on leave with pay and allowances is on one occasion only, in each leave year, for the portion of the journey made in Canada or between Canadian points, entitled to actual expenses for transportation not to exceed an amount calculated at the rate established in subparagraph 3(a) of 209.25 for each km that is not travelled at public expense in excess of 800 kilometres.

Paragraph (4) of CBI 209.50 reads as follows:

"(Calculation) Calculation of the kilometres between the officer or the non-commissioned member's place of duty and their home shall be made using:

- (a) direct road distance in respect of that purpose of the journey served by road; and
- (b) for any other portion of the journey, the actual kilometres by the most direct route."

"Home" is defined at paragraph 1 of CBI 209.50 as follows:

Home means:

- (b) in respect to of an officer or non-commissioned member other than as described in subparagraph (a)
- (i) the place where the member's parent is residing.

It appears from the General Allowance Claim form completed on 1 October 2010 that the amount of \$1454.69 was calculated in accordance with this CBI.

[26] The Leave Travel Assistance Statement of Understanding, see Exhibit 7, was signed by Master Seaman Cyr on 14 June 2010. This document makes reference to CBI 209.50 and indicates at paragraph 8 that LTA allows CF members to see their next of kin. The location of the next of kin for members without dependents is the location where the parents normally reside. Paragraph 9 provides for another type of LTA but specifies that the expense claimed may not exceed what would have been reimbursed had the member returned home.

[27] It is clear from this document, the Statement of Understanding, that LTA is a financial benefit whose purpose is to pay for the cost of transporting a member from his place of duty to the home of his next of kin and then his return to his place of duty. Thus Master Seaman Cyr could claim those costs from Victoria to his parents' residence in Kingston, Ontario. This document also provides that a member intending to use his private motor vehicle must produce a leave pass and the licence plate number of the vehicle.

[28] The main issue in this trial is whether Master Seaman Cyr intended to defraud the government. The secondary issue is the amount that was defrauded should the court find Master Seaman Cyr did commit fraud.

[29] Master Seaman Cyr testified he did not intend to steal or defraud any money from the government. He explained that he did not inform the clerks that he had not driven to Kingston but had flown instead because he did not think it was necessary since it had cost him more to travel the way he did than the amount he would have been allowed to claim. He explained that the costs of the flights from Victoria to Kingston and from Kingston to Victoria were used to establish the maximum amount he was allowed to claim. He stated that one could not claim a reimbursement to go visit his next of kin that would exceed the cost of the flights. He stated that his cost of flying to Halifax, driving from Halifax to Kingston, driving from Kingston to Toronto and the flight to Victoria were higher than the costs of a round trip by car from Victoria to Kingston.

[30] Master Seaman Cyr's explanations make no sense at all. Master Seaman Cyr is not a credible witness. He agreed with his counsel during his examination-in-chief that paragraph 2 of the Acknowledgement of Limitations of Travel by PMV at Member's Request form he provided when he requested his advance specifically states that the re-

imbursement of the transportation and travelling expenses will be limited to the cost of the most economical and practical method of travel. He then refers to cost comparisons based on the costs of flights. He states that the maximum amount one could receive is based on the cost of a flight, yet he is claiming a much larger amount based on travel by car.

[31] CBI 209.50 clearly states that a CF member is entitled to actual expenses for transportation. Both counsels suggest that Master Seaman Cyr disbursed \$816.01 for his flights and that he could have claimed this expense. Master Seaman Cyr's flight to Halifax is less expensive than his flight from Toronto to Victoria. As such, the court will accept counsel's suggestion and will consider the amount of \$816.01 as a reimbursable amount.

[32] Master Seaman Cyr took a taxi to the Victoria airport and to his home at a cost of \$65 per trip. A friend drove Master Seaman Cyr from Kingston to the Toronto Pearson International Airport. The distance between Kingston and the Toronto airport is 278 kilometres. Exhibit 15 provides that a member may be reimbursed the low kilometric rate when that member is a passenger in a private motor vehicle of another person. Both counsels also suggest that Master Seaman Cyr can claim reimbursement for that trip at a rate of 17 cents per kilometre. The court will also agree with this suggestion; therefore Master Seaman Cyr could claim \$47.26 for that trip between Kingston and Toronto.

[33] The court does not agree with Master Seaman Cyr that he could claim the expenses incurred by driving from Halifax to Kingston with his parents. The purpose of the LTA benefits is to reimburse a member for his or her costs to travel to the home of his next of kin; not to travel elsewhere with his next of kin. Thus, based on the evidence before this court, the actual expenses of Master Seaman Cyr are \$993.27. This is the amount he could have claimed based on his chosen mode of transportation. The court finds that Master Seaman Cyr received the amount of \$461.42 in excess of his entitlement to reimbursement.

[34] Did Master Seaman Cyr obtain the sum by a false pretence? A false pretence is a representation about any present or past fact that is false. The representation may be made in words or in some other way. Merely exaggerating or depreciating the quality of something is not a false pretence, unless it amounts to a deliberately dishonest statement about the thing.

[35] A false representation about any present or past matter of fact is only a false pretence if Master Seaman Cyr: knows that the representation is false; makes the representation to induce someone to act on it; or makes the representation to dishonestly deprive the Government of Canada of the money.

[36] To determine whether Master Seaman Cyr knew that the representation was false and what he intended to achieve by it, the court should consider: what he did or did not do; how he did or did not do it; and what he said and did not say.

[37] The court should look at Master Seaman Cyr's words and conduct before, at the time, and after the representations were made. All these things, and the circumstances in which they happened, may shed light on Master Seaman Cyr's state of mind at the time. They may help the court decide what he knew or did not know, as well as what he meant or did not mean to do. A trier of fact must always use good common sense.

[38] While the court is willing to believe that he planned on driving when he received his advance of \$1369.12 on 15 July 2010, it is clear from the evidence that he was aware of the costs of his two flights and of his taxi rides when he finalized his claim on 1 October 2010. He knew at that time that he had spent approximately \$950 and that he was claiming an amount that was much higher. Common sense tells one that his claim would have been re-evaluated by the clerk to take into account the mode of travel he had in fact used if the clerk would have been aware of that fact.

[39] The court does not believe his explanations concerning his understanding of the so-called cost comparisons. His explanations are based on his opinions on the benefits and entitlements and vague unsubstantiated statements concerning the costs of driving and of flying. It is clear on 1 October 2010 that he knew he was claiming a much higher amount than what he had actually spent on transportation. He chose to provide false information to the clerks. His testimony explaining his reasons for not informing the clerks that he had flown are not believed by the court.

[40] The court finds the prosecutor has proven beyond a reasonable doubt that Master Seaman Cyr obtained the sum of \$461.42 by false pretence.

[41] Did Master Seaman Cyr use deceit, falsehood or other fraudulent means that caused a deprivation? To prove this element, the prosecutor must satisfy the trier of fact beyond a reasonable doubt that it was by using deceit, falsehood or other fraudulent means that Master Seaman Cyr deprived the Government of Canada. All three means do not have to be proven; one is enough.

[42] "Deceit" is an untrue statement made by a person who knows that it is untrue or has reason to believe that it is untrue but makes it despite that risk to induce another person to act on it as if it was true, to that other person's detriment. "Falsehood" is a deliberate lie. "Other fraudulent means" is a term that covers more ground than either deceit or falsehood. It includes any other means which are not deceit or falsehood, properly regarded as dishonest according to the standards of reasonable people.

[43] "Deprivation" includes, but does not require that the Government of Canada suffer actual economic loss. It is enough that the Government of Canada is induced to act to its detriment by Master Seaman Cyr's conduct. The Government of Canada's financial interests must be at risk, but the Government of Canada does not have to lose any money or anything of value as a result of Master Seaman Cyr's conduct.

[44] Based on the previously explained reasons as to why the court does not believe Master Seaman Cyr, the court finds the prosecutor has proven beyond a reasonable

doubt that Master Seaman Cyr used deceit and falsehood to deprive the Government of Canada of the sum of \$461.42.

[45] Did Master Seaman Cyr intend to defraud? This element relates to Master Seaman Cyr's state of mind at the time he deprived the Government of Canada of the money by deceit, falsehood or other fraudulent means. To prove this essential element, prosecution counsel must satisfy the trier of facts beyond a reasonable doubt that Master Seaman Cyr meant to do those things that amount to deceit, falsehood or other fraudulent means, and knew that doing them could put at risk the financial interests of the Government of Canada. It does not matter whether Master Seaman Cyr thought that what he was saying or doing was not dishonest, or thought that neither the Government of Canada nor anyone else would suffer harm in the end as a result.

[46] To determine Master Seaman Cyr's state of mind, what he knew or meant to do, the trier of facts should consider: what he did or did not do; how he did or did not do it; and what he said and did not say.

[47] The trier of facts must look at Master Seaman Cyr's words and conduct before, at the time, and after he used the deceit, falsehood or other fraudulent means to deprive the Government of Canada of the money. All these things and the circumstances in which they happened may shed light on Master Seaman Cyr's state of mind at the time. They may help decide what he meant or did not mean to do. It is also reasonable to conclude that a sane and a sober person means to do what he or she actually does. It is a conclusion that may be drawn from what Master Seaman Cyr did.

[48] Based on the previously explained reasons as to why the court does not believe Master Seaman Cyr's explanations, the court finds the prosecutions has proven beyond a reasonable doubt that Master Seaman Cyr intended to defraud the Government of Canada of the sum of \$461.42.

FOR THESE REASONS, THE COURT:

[49] **FINDS** MS Cyr guilty on the first charge with the special finding that he obtained by false pretence the sum of \$461.42 and not \$663.32 and;

[50] **DIRECTS** that the proceedings on the second charge be stayed.

Counsel:

Lieutenant-Commander P.D Desbiens, Directorate of Defence Counsel Services
Counsel for Master Seaman P.J.A.A. Cyr

Lieutenant-Commander D.T. Reeves, Canadian Forces Prosecution Services
Counsel for Her Majesty the Queen