

**Citation:** *R. v. Leading Seaman W.K. Freudenreich*, 2007 CM 3009

**Docket:** 200677

**STANDING COURT MARTIAL  
CANADA  
NOVA SCOTIA  
CANADIAN FORCES BASE HALIFAX**

---

**Date:** 16 March 2007

---

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

---

**HER MAJESTY THE QUEEN**

**v.**

**LEADING SEAMAN W.K. FREUDENREICH  
(Accused)**

---

**FINDING**

**(Rendered Orally)**

---

[1] Leading Seaman Freudenreich is charged under section 116(a) of the *National Defence Act*; to wit, wilfully damaged public property, and with a second charge laid under section 97 of the *National Defence Act*; to wit, drunkenness.

[2] The facts on which the two counts are based relate to events that took place during the evening and the night of 25 to 26 January, 2006, in the City of Halifax, and at the Normandy Block on the Canadian Forces Base, CFB, Halifax.

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 testimonies of Master Corporal Fougere, Master Corporal Nickerson, Master Seaman Casey, Leading Seaman Haggan, Petty Officer 2nd Class House, Warrant Officer Briggins, and Dr David Barry King;

b. Exhibit 3, a bundle of 16 photos illustrating damages made to the door, a bed, and a window of room 316, at the Normandy Block;

- c. Exhibit 4, a DVD of the videotaped interview of Leading Seaman Freudenreich, made by two military police patrolmen on 26 January 2006;
- d. Exhibit 5, a 7-page document identifying and establishing the cost for the damages made in room 316 of Normandy Block;
- e. Exhibit 6, a Medical Emergency Report made for Leading Seaman Freudenreich, dated 26 January 2006;
- f. Exhibit 7, a Medical Emergency and Follow-Up Report made for Leading Seaman Freudenreich, dated 30 January 2006;
- g. Exhibit 8, a Medical Emergency Report made for Leading Seaman Freudenreich, dated 15 February 2006;
- h. Exhibit 9, a Patient Diagnostic Imaging Report made for Leading Seaman Freudenreich, dated 29 January 2006;
- i. Exhibit 10, a Medical Emergency Report made for Leading Seaman Freudenreich, dated 28 March 2006;
- j. Exhibit 11, a Medical Disposition Report made for Leading Seaman Freudenreich, dated 26 January 2006;
- k. Exhibit 12, a Medical Disposition Report made for Leading Seaman Freudenreich, dated 30 January 2006;
- l. Exhibit 13, the curriculum vitae of Dr David Barry King;
- m. Exhibit 14, the neurology report of Dr King, dated 2 March 2007;

all these documents were entered in evidence by consent,

- n. 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 a series of events that took place on the night of 25 to 26 January 2006, at two different locations in Halifax. Leading Seaman Freudenreich was a candidate on the Primary Leadership Qualification Course, PLQ, that took place from 13 January to 2 March 2006, at CFB Halifax. Accommodation for the course candidates was at the Normandy Block on CFB Halifax. There were two candidates per room.

[5] After classes, at about 1730 hours on 25 January 2006, Leading Seaman Freudenreich was at the Ale House with other candidates having a drink and socializing. After a while, a number of candidates, including Master Corporal Fougere and Leading Seaman Freudenreich, headed to a pub for dinner, The Split Crow. They drank alcohol during that dinner. At the end of that evening, Master Corporal Martin, Fougere, and Leading Seaman Freudenreich made the decision to go to a nightclub, the Cheers, in Halifax. They arrived there at about 2000 hours; however, only Master Corporal Fougere and Leading Seaman Freudenreich were allowed to enter in the nightclub. Master Corporal Martin was not allowed to enter because he was too drunk.

[6] Sometime before 0100 hours on 26 January 2006, things were normal for both candidates. They were drinking and having a good time. The live band in the nightclub started to play the "Drunken Sailor" song. Suddenly, Master Corporal Fougere was tackled by the back and fell. When he stood up, he realized that it was Leading Seaman Freudenreich who did that because he was performing some sort of slam dance. He was the only one to do that in the nightclub. Master Corporal Fougere was tackled two other times on the ground by Leading Seaman Freudenreich, even though he asked him twice to stop. Then bouncers came to them, thinking they were fighting. Master Corporal Fougere explained the situation, but he and Leading Seaman Freudenreich were kicked out of the nightclub.

[7] Master Corporal Fougere was embarrassed and mad about that situation. Considering that Leading Seaman Freudenreich was unable to calm down, and in some ways was out of control, even though Master Corporal Fougere attempted to calm him down. In order to obtain some information about this disorderly behaviour, he took him by his jacket, and finally pushed him against a wall in order to stop him. According to Master Corporal Fougere, only Leading Seaman Freudenreich's back hit the wall; however, according to what was reported to the medical authorities by Leading Seaman Freudenreich, and what the latter said that night to various witnesses, his head also hit the wall, which resulted in a mild concussion.

[8] The altercation outside the bar lasted about 30 seconds. Master Corporal Fougere decided to leave, and took a cab. When he left, Leading Seaman Freudenreich was on his feet, conscious, and was not bleeding. According to Master Corporal's testimony, he drank 12 rum and 7-Up that night. He bought six to eight rounds of alcohol to his friends, and he is sure that Leading Seaman Freudenreich drank as much as he did. According to him he was drunk, but not enough to not know what was going on. Master Corporal Fougere went back directly to his room, room 316, at the Normandy Block. He arrived there at about 0100 hours. He took off his clothes and had a shower. The shower is in a different room outside his bedroom.

[9] Suddenly, at 0156 hours, Master Corporal Fougere's roommate, Master Corporal Nickerson, was woke up by a big bang. Leading Seaman Freudenreich was in the door way asking him, "Where is he?" He was very surprised to see him there, knowing that the door is always closed and locked. He realized later that the mechanism

on the door was cracked up in the middle. Then, Leading Seaman Freudenreich, on a first time, kicked the window and cracked the glass, and on a second time jumped in the same window. Master Corporal Nickerson tried to calm him down. He described Leading Seaman Freudenreich like he was crazy, mad, enraged, out of his mind, and blackout. Leading Seaman Freudenreich said to Master Corporal Nickerson, "He slammed my head against a brick wall." Then Leading Seaman Freudenreich flipped up Master Corporal Fougere's bed, kicked the headboard and the metal frame. He totally destroyed the bed, then he went out of the room. In the hallway he kicked the garbage cans.

[10] Meanwhile, Master Corporal Fougere came back from his shower. As soon as he saw him, Leading Seaman Freudenreich started to yell at Master Corporal Fougere and they had a heated argument. Leading Seaman Freudenreich told Master Corporal Fougere, "I thought you were my friend. A friend don't do this." Master Corporal Huberdeau, whose nickname is Moose, stayed between both, calmed down and escorted Leading Seaman Freudenreich to his room. Master Corporal Fougere was told by other candidates to go to the lounge, when he did. Everybody was surprised by Leading Seaman Freudenreich's behaviour that night. All witnesses that were on that course described him as a quiet and low profile person.

[11] Master Seaman Casey took care of Leading Seaman Freudenreich after that. He accompanied him at the hospital because he was complaining that his head was hurting. Leading Seaman Freudenreich told him that night that an altercation occurred between Master Corporal Fougere and him, and that he wanted to hurt Master Corporal Fougere. They went to the civilian hospital where Leading Seaman Freudenreich was checked in; however, they waited from 0300 to 0500 hours to see a doctor that never happened. They decided to go back to the base. Further to the information he received concerning the incident, the senior instructor, PO2 House, met Leading Seaman Freudenreich for five minutes. He appeared, to him, conscious and normal. Then Leading Seaman Freudenreich went to the MIR where he was treated for a mild concussion.

[12] Later that morning, Leading Seaman Freudenreich went to the MP building where he met the two corporals responsible for the investigation. He was cautioned by them, and he called a lawyer. When he came back in the interview room, he was cautioned a second time by the investigators. The latter decided to return him to the course, considering his incapacity to fully understand the caution about a person in authority. On that issue, it appears to the court that it was not the case, based on what it saw on the videotaped interview that was submitted. In any case, after that, Leading Seaman Freudenreich was brought before the chief instructor in order to discuss what happened.

[13] Leading Seaman Freudenreich went back to the MIR for a medical follow-up on 30 January 2006. He went back to the MIR two other times for headache

problems, on 15 February and 20 March 2006. On 26 February 2007, Leading Seaman Freudenreich met a neurologist, Dr King, who produced a medical written report dated 2 March 2007, Exhibit 14.

THE APPLICABLE LAW AND  
THE ESSENTIAL ELEMENTS OF THE CHARGES

[14] Section 116(a) of the *National Defence Act* reads as follows:

Every person who

(a) wilfully destroys or damages, loses by neglect, improperly sells or wastefully expends any public property, non-public property or property of any of Her Majesty's forces or of any forces cooperating therewith

...

is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[15] 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 charge sheet. The prosecution also had to prove the following additional elements: the fact that Leading Seaman Freudenreich caused damages to a public property, and that this public property was one of Her Majesty's forces; and the fact that Leading Seaman Freudenreich knew what he was doing or intended to do what he did.

[16] Section 97 of the *National Defence Act* reads as follows:

(1) Drunkenness is an offence and every person convicted thereof is liable to imprisonment for less than two years or to less punishment, except that, where the offence is committed by a non-commissioned member who is not on active service or on duty or who has not been warned for duty, no punishment of imprisonment, and no punishment of detention for a term in excess of ninety days, shall be imposed.

(2) For the purposes of subsection (1), the offence of drunkenness is committed where a person, owing to the influence of alcohol or a drug,

(a) is unfit to be entrusted with any duty that the person is or may be required to perform; or

(b) behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[17] Then, the prosecution had to prove the following essential elements for the offence 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 fact that Leading Seaman Freudenreich was owed to the influence of alcohol; the fact that Leading Seaman Freudenreich behaved in a disorderly manner, or in a manner likely to bring discredit on Her Majesty's service; and finally, Leading Seaman Freudenreich's blameworthy state of mind.

[18] 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.

[19] 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.

[20] 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 a 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. 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.

[21] 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*, 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 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.

[22] In *R. v. Starr*, [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court held that an effective way to define a 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 Leading Seaman Freudenreich, 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.

[23] 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 fact by either the prosecution or the defence, and matters of which the court takes judicial notice. 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.

[24] 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' opportunity to observe; a witness' reason 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 the accused chooses to testify.

[25] 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. 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.

[26] 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. Having instructed myself as to the onus of standard of proof, I will now turn to the questions in issue put before the court, and address the legal issues. In order to deal with the

appropriate issue relative to each offence, the court will then proceed with a separate analysis for each charge.

[27] On the first charge, the main issue is whether Leading Seaman Freudenreich's consciousness was impaired to the degree that he was incapable of voluntary action. It goes directly to the obligation for the prosecution to prove beyond a reasonable doubt that Leading Seaman Freudenreich knew what he was doing, or intended to do what he did, when he destroyed the door and the bed, and he cracked a window, in room 316 of Normandy Block at CFB Halifax on 26 January 2006. All other essential elements of this charge are not in dispute, and the court is also satisfied that they are proved beyond a reasonable doubt.

[28] This issue was raised by the defence counsel through the defence of automatism. First, I will discuss the law in Canada respecting automatism as a defence, then I will proceed with an analysis of the facts in relation to the law on that issue. In 1999, the Supreme Court of Canada reconsidered the state of the law pertaining to automatism. For the majority in the court, Judge Bastarache developed a general test applicable to all cases involving claims of automatism in *R. v. Stone*, [1999] 2 S.C.R. 290, at page 350. Before this new *locus classicus*, *R. v. Rabey*, [1980] 2 S.C.R. 513, at page 518, has defined automatism as an unconscious involuntary behaviour. Now, a new definition, much broader, and founded on the medical literature which speaks of different levels of consciousness applies. Judge Bastarache expresses the new concept as:

... a state of impaired consciousness, rather than unconsciousness, in which an individual, though capable of action, has no voluntary control over that action.

and it is at page 367 of *Stone*.

[29] Such a condition may be caused by a mental disorder, and hence it is the wording of section 16 of the *Criminal Code* that applies. On the contrary, true automatism only includes involuntary behaviour which does not stem from a disease of the mind, and, if successful, entitles the accused to an acquittal. However, such a classification is a problem because there may be cases in which the facts simply are not conducive to such strict categorization. Accordingly, the court has adopted a general—the Supreme Court has adopted a general test applicable to all cases involving claims of automatism. First, the accused must establish a proper foundation for a defence of automatism. Second, the court must determine whether mental disorder or non-mental disorder automatism has application.

[30] In order to establish the proper foundation for his defence, the accused has the legal burden to prove it on a balance of probabilities. It is also important to say that satisfying this evidentiary burden is a question of mixed law and fact for the trial judge. As automatism is easily feigned, and all knowledge of its occurrence rests with the accused, two conditions apply: The accused must claim that he acted involuntarily at the



relevant time; and, in addition, the defence must present expert evidence confirming its claim.

[31] Through the evidence he presented to the court, the court is satisfied that the accused claimed that he acted involuntarily at the time of the destruction of different items in room 316 in Normandy Block at CFB Halifax.

[32] Then, the court will now turn to the second step, concerning the presentation of the expert evidence. A neurologist, Dr King, testified in a very professional and unbiased manner. He was of the opinion that, during the incident with Master Corporal Fougere, Leading Seaman Freudenreich was the victim of a traumatic brain, i.e., a disruption of brain functions caused by a physical force. He confirmed Warrant Officer Briggins' diagnosis at the time of the incident, i.e., that Leading Seaman Freudenreich's head injury resulted in a mild concussion. During his examination, he stated that Leading Seaman Freudenreich's actions were beyond his conscious control when he destroyed property on 26 January 2006.

[33] However, as mentioned by Judge Bastarache in *Stone* at paragraph 186, this court has kept in mind that because the expert opinion provided by Dr King did only rely on the accuracy and truthfulness of the account of events given to him by the accused, the weight to be given to his conclusion had to wait the step of the cross-examination by the prosecution.

[34] When Dr King was given a hypothetical by the prosecutor, including the facts that were proven beyond a reasonable doubt before this court and that he was not told by the accused, i.e., the quantity of alcohol consumed by the accused, the behaviour of the accused at the nightclub, including the reason why he was kicked out, the specific comments the accused made concerning Master Corporal Fougere during and after he destroyed Her Majesty's property, the argument he had and the words he used in the hallway when he talked to Master Corporal Fougere, then the expert tempered his initial conclusion. He then said that the alcohol was certainly affecting Leading Seaman Freudenreich's behaviour before the head injury was caused. He also said that the subsequent behaviour was probably a combination of the two. Then he wasn't able to say that the damages made to the room by the accused were a direct consequence of his head injury, considering that alcohol had also a role to play in that matter.

[35] Also, he stated that considering the conscious and deliberate acts surrounding the incident in the room, it is less likely that the destruction of property by Leading Seaman Freudenreich was made unconsciously and in a non-deliberate manner. In answering the court, Dr King stated that Leading Seaman Freudenreich had maybe some difficulty to control his anger, but that he had consciousness of what he was doing, considering that he was aiming to a specific room, specific goods, and a specific person. Finally, Dr King clearly admitted that Leading Seaman Freudenreich was not in an automatic state when the events in question occurred.

[36] Additionally, the triggering stimulus was not very severe. In fact, as described by both Warrant Officer Briggins and Dr King, it was at the low level of the scale. There was no significant corroborative evidence of bystanders, other than saying that he was acting like somebody who was very enraged. As stated by Judge Bastarache in *Stone*, at paragraph 190:

... I would caution, however, that the evidence of bystanders must be approached very carefully since automatism and rage may often be indistinguishable to untrained bystanders.

This is exactly what this court has done.

[37] There is also no medical history of automatism. The court considered that the offence is reasonably explicable without reference to the alleged automatism. Moreover, the alleged trigger of the automatism, the head injury caused by a push on the wall by Master Corporal Fougere, made Master Corporal Fougere, and things identified to him, as the victim of the alleged automatic violence. Consequently, it is the decision of this court that the accused failed to raise evidence that would permit a properly instructed jury to find that he acted involuntarily on a balance of probabilities. Leading Seaman Freudenreich's actions were voluntary.

[38] 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 wilfully damaged public property.

[39] The court will now proceed with the analysis of the second charge. The defence counsel submitted to the court that the prosecution failed to prove beyond a reasonable doubt that the conduct of Leading Seaman Freudenreich, before his head injury, was disorderly. The court does not agree with this submission. While under the influence of alcohol, Leading Seaman Freudenreich started, on his own, without any warning, some sort of slam dance. He was the only one to act this way in the nightclub, and the security service thought that there was a fight at that time considering that Master Corporal Fougere was tackled to the ground a number of times.

[40] As the word "disorderly" is defined in the Concise Oxford Dictionary, the accused was, "Involved or contributed to a breakdown of peaceful and law-abiding behaviour." Having been kicked out of the nightclub by the security personnel because of his level of intoxication and his behaviour does also prove that the accused acted in a disorderly manner.

[41] The defence counsel have also submitted that it was impossible to say if the destruction of property by the accused was caused by the fact that he was owed to the influence of alcohol or because of his mild concussion. It is interesting to note that Dr King, called as an expert witness by the accused, told to the court that, even though it was

impossible to distinguish between the consumption of alcohol or the head injury as the cause explaining the destruction of Her Majesty's property by Leading Seaman Freudenreich, it was clear for him that both factors contributed to that action. Then, the court's conclusion is that it has been proven beyond a reasonable doubt that the accused was owed to the influence of alcohol when the items were destroyed. Additionally, considering the court's conclusion on the first charge, it is clear that the destruction of Her Majesty's property does constitute evidence beyond a reasonable doubt that the accused behaved in a manner likely to bring discredit on Her Majesty's service.

[42] 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 drunkenness. Additionally, having regard to the finding of the court concerning the essential elements of section 116 and 97 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 wilfully damaged public property and committed the offence of drunkenness.

[43] Leading Seaman Freudenreich, please stand up. Leading Seaman Freudenreich, this court finds you guilty of the first and the second charge. Please, be seated.

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

Counsel:

Major S.D. Richards, Regional Military Prosecutions Atlantic  
Counsel for Her Majesty the Queen  
Major L. D'Urbano, Directorate of Defence Counsel Services  
Counsel for Leading Seaman W.K. Freudenreich