



## COURT MARTIAL

**Citation:** *R v Donald*, 2012 CM 4022

**Date:** 20121203

**Docket:** 201216

Standing Court Martial

Canadian Forces Base Valcartier  
Quebec City, Quebec, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Private E.W. Donald, accused**

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

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### REASONS FOR FINDING

(Orally)

[1] The accused, Private Donald, is charged with assault and using provoking speeches and gestures towards a person subject to the Code of Service Discipline, tending to cause a quarrel. 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.

[2] It is fair to say that the presumption of innocence is most likely the most fundamental principle in our Canadian 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 case is 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 el-

ement 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.

[3] 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.

[4] The 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 part of our history and tradition of justice.

[5] 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. 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 the evidence tells the court, but also on what that evidence does not tell court. The fact that the person has been charged is no way indicative of his or her guilt.

[6] 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....

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 Private Donald, 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.

[7] 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.

[8] 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.

[9] 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, the 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 the accused chooses to testify.

[10] 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 un-contradicted facts?

[11] 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.

[12] 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 test 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.

[13] In this case the court may only consider the evidence presented during the trial and may not consider the evidence presented during the application made by Private Donald alleging a breach of his right under section 9 of the *Charter of Rights and Freedoms*. Private Donald did not testify during the trial and he did not present any evidence. Therefore, the court only has to focus on the third step of the test in reaching its verdict.

[14] Having instructed myself as to the onus and standard of proof I will now turn to the questions in issue before this court. The evidence before this court martial is composed essentially of the testimony of Private Calpito, Corporal Pilon and Private Perl. Judicial notice was taken by the court of those facts and issues under Rule 15 of the Military Rules of Evidence and three exhibits were produced by the prosecution.

[15] The *Criminal Code* defines the offence of assault at paragraph (1) of section 265 as follows:

A person commits an assault when

- (a) without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
- (b) he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or
- (c) while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.

A weapon is defined at section 2 of the *Criminal Code* as:

... any thing used, designed to be used or intended for use

- (a) in causing death or injury to any person, or
- (b) for the purpose of threatening or intimidating any person

and, without restricting the generality of the foregoing, includes a firearm.

[16] The particulars of the first charge read as follows:

"In that he, on or about 20 January 2011, at Canadian Forces Base Borden, Borden, Ontario, did commit an assault on T10 770 899 Private Calpito, A.J."

[17] The prosecutor alleges the assault was committed when Private Donald while openly carrying a weapon accosted or impeded Private Calpito. The prosecution had to prove the following essential elements of 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 Private Donald was carrying a weapon;
- (c) that Private Donald openly carried the weapon;
- (d) that Private Donald accosted or impeded Private Calpito; and lastly
- (e) that Private Donald intended to openly carry a weapon and that he intentionally accosted or impeded Private Calpito.

[18] Private Donald was a student on the QL3 Medical Technician course at CFB Borden at the time of the alleged offences. During the early evening of 20 January

2011 he was in his room with his room-mate, Private Calpito. The evidence clearly proves beyond a reasonable doubt the identity of the offender and the time and place of both alleged offences. Privates Calpito and Donald were the only persons present in the room when the alleged offences occurred.

[19] Private Calpito stated that it was normal to see Private Donald and other course mates with pocket knives and to see them working with the knife. He testified they were arguing about PH levels. Private Donald approached Private Calpito's desk to get a book. Private Calpito would have first seen Private Donald's knife when Private Donald had the book in his hands. Private Donald would have pointed the answer in the book with his knife and he would have then brought his knife to Private Calpito's neck. He testified he believed Private Donald's intention was to point out the answer at that time.

[20] Private Calpito testified he focused his attention on the knife at that point. He was worried, he perceived the knife as a threat because the knife had come close to him. He testified the only threat was the knife close to him and not Private Donald. He also stated he did not know Private Donald's intention, but he was afraid he could be harmed accidentally. He also said he was worried Private Donald could be careless with the knife, but he was not concerned that Private Donald intended to hurt him. Private Calpito pulled out his knife and he put it at Private Donald's throat and told Private Donald on three occasions to put down his knife. He stated he reacted in the manner in which he had been trained; that is to say, he perceived a threat and used a level of force comparable to the threat he was facing. He said he mirrored Private Donald in that he did the same actions Private Donald was doing. He used the term "escalation of force." He stated he reacted to the threat and did not think of any other option.

[21] During his cross-examination he agreed that it was possible that Private Donald was sitting on his chair facing the desk when he would have put his knife near Private Calpito's neck, but stated he could not remember because of the passage of time. He agreed that Private Donald was stuck in that position and could not move around. He stated that he "tunnelled in" on the knife since it was a threat. He explained that by "tunnel in" he meant that he focussed specifically on the knife. He would have woken up at the sight of blood coming from Private Donald's neck. He stated that "in essence" Private Donald did not attack him. He agreed that Private Donald had no reason to point a weapon at Private Calpito and that they had not had any issues between them before the incident. He reacted to the weapon and he agreed it was possible that Private Donald was merely trying to point out something with the knife.

[22] Private Calpito agreed that he had drunk some beer before the incident, but he did not specify the quantity. He did not mention it to the CFNIS, but did tell the custody review officer that alcohol was not a factor in the incident. The incident happened on 20 January, it appears the pictures at Exhibit 3 were taken on 20 January. Private Calpito agreed that there were cans of beer in the room at the time of the incident, but that they do not appear on the pictures.

[23] Private Calpito stated on numerous occasions that he could not remember exactly what happened on 20 January because of the passage of time. He stated that he had reviewed the statement he had provided the Canadian National Investigation Service shortly after the incident and that he was basing his testimony on that statement since the passage of time made it difficult to remember what happened on that day. Private Calpito is not a reliable witness.

[24] Corporal Pilon testified Private Calpito's knife was on his desk and that Corporal Donald's knife was on Private Calpito's bed. The evidence before this court clearly demonstrates that Privates Calpito and Donald each had a pocket knife in their possession at the time of the alleged offence. Although a pocket knife is not designed to be used or intended for use in causing death or injury to a person or for the purpose of threatening or intimidating a person, it may nonetheless be used for these purposes. Accordingly, the court finds that a pocket knife is a weapon. It was not contested by defence counsel that Private Donald was in possession of his pocket knife when he moved towards Private Calpito's bed space and when he was searching in the textbook. The court also finds that Private Donald was openly carrying a weapon at the time of the alleged offence.

[25] Did Private Donald accost or impede Private Calpito? The *Criminal Code* does not define accost or impede. Article 1.04 of the Queen's Regulations and Orders reads as follows:

Words and phrases shall be construed according to the common approved meaning given in the Concise Oxford Dictionary if in English, or in Le Petit Robert if in French, except that:

- (a) technical words and phrases, and words that have acquired a special meaning within the Canadian Forces, shall be construed according to their special meaning; and
- (b) words and phrases that are defined within QR&O or within the *Interpretation Act* or the *National Defence Act* shall be construed according to that definition.

[26] The *Interpretation Act* and the *National Defence Act* and the Queen's Regulations and Orders do not define the words accost or impede. The Concise Oxford Dictionary defines accost as:

"approach or address boldly or aggressively."

And impede as:

"delay or block the progress or action of."

[27] Although Private Calpito described their conversation as an argument, he did not testify that Private Donald had approached him or had addressed him in a manner that could be described as boldly and aggressively. He did agree that Private Donald had

approached his bed space to look at the textbook situated on his desk. He did state that he did not feel threatened by Private Donald. Private Calpito did agree that Private Donald was sitting on a chair when the alleged offence occurred. Private Calpito was sitting on his bed at the time of the alleged offence. Private Calpito was not moving other than to perform the actions necessary to put his knife near Private Donald's neck.

[28] The court finds the prosecution has not provided any evidence that would prove beyond a reasonable doubt that Private Donald did accost or impede Private Calpito.

[29] The prosecutor also alleges the assault was committed when the blade of Private Donald's knife touched Private Calpito's neck. The prosecution thus had to prove the following essential elements of 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 Private Donald applied force directly or indirectly to Private Calpito;
- (c) that Private Donald intended to apply force to Private Calpito;
- (d) that Private Calpito did not consent to the application of force by Private Donald; and
- (e) that Private Donald knew that Private Calpito did not consent to the force that Private Donald intentionally applied.

[30] Did Private Donald apply force directly or indirectly to Private Calpito? Private Calpito initially testified that Private Donald had his knife close to his neck. He then specified the knife was one inch from his neck. During his cross-examination he initially stated the knife was approximately one inch from his neck. When questioned further on the position of the knife and whether he could see the blade of the knife he stated, "He felt the knife on his neck, but that he never saw the blade close to him." Private Calpito never felt threatened by Private Donald, but he did state he was very worried by the presence of the knife. He offered no explanations as to why he should feel so threatened by the knife other than by saying the blade was close to his neck and that he could be cut accidentally or if Private Donald was careless. He reacted by grabbing his knife from his desk and performing the three or four actions necessary to open the blade and to put it near Private Donald's neck. He would have reacted instinctively and in accordance with the training he had received since joining the Canadian Forces.

[31] Private Calpito had joined the Canadian Forces in June 2009. He explained that the knife was a weapon just like a rifle pointed at him and that he relied on the training he had received at his basic course, his SQ course and the field phase of his QL3 Medical Technician course to react to this threat and use the escalation of force to negate that threat. He also stated that he tunnelled in on the knife and woke up at the sight of blood.

[32] The court has already indicated it does not find Private Calpito to be a reliable witness. It also finds Private Calpito not to be a credible witness. He first mentioned the blade of Private Donald's knife touched his neck when he was trying to explain why he knew that the blade was exposed and not closed. He also mentioned on numerous occasions that he cannot remember many elements of the incident. The court finds the prosecution has not provided evidence that would prove beyond a reasonable doubt that Private Donald applied force directly or indirectly to Private Calpito.

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

"In that he, on or about 20 January 2011, at Canadian Forces Base Borden, Borden, Ontario, used provoking speeches and gestures towards T10 770 899 Private Calpito, A.J. tending to cause a quarrel."

[34] 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 Private Donald uttered provoking words or made provoking gestures;
- (c) that Private Donald uttered those words or made those gestures towards a person who is subject to the Code of Service Discipline;
- (d) that those words or gestures would tend to cause a quarrel or disturbance ; and
- (e) that Private Donald uttered those words or made those gestures intentionally.

[35] Private Calpito was a member of the Regular Force at the time of the alleged offence. He was a person subject to the Code of Service Discipline at the time of the alleged offence (see subparagraph 60(1)(a) of the *National Defence Act*).

[36] Did Private Donald utter provoking words or make provoking gestures? The prosecutor submits that the provoking words were "What like this?" and the provoking gesture was the waving of the knife toward Private Calpito.

[37] Private Calpito never stated Private Donald said, "What like this?" And he never stated that Private Donald waived the knife toward him. He testified that he became aware of the knife when Private Donald was holding the book and he became concerned when Private Donald would have held the knife close to his neck.



[38] Private Perl testified that Private Donald would have told him that he had waived his knife at Private Calpito when he had found the answer in the textbook and that he would have jokingly said, "What like this?" And he would have waived it again when Private Calpito would have told him not to do that. Private Donald and Private Calpito would have gotten up and met in the middle of the room and would have then held each others knife at the other person's neck. Private Perl is not a reliable witness. His recollection of his conversation with Private Donald is quite vague and he also had to refresh his memory by reading the statement he had given to the CFNIS. Private Perl's version of events is also quite different from Private Calpito's version of events.

[39] The court finds the prosecution has not provided evidence that would prove beyond a reasonable doubt that Private Donald uttered provoking words or made a provoking gesture towards Private Calpito.

**FOR THESE REASONS, THE COURT:**

**FINDS** Private Donald not guilty.

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**Counsel:**

Major P. Doucet, Canadian Military Prosecution Services  
Counsel for Her Majesty the Queen

Lieutenant-Commander M.P. Letourneau, Directorate of Defence Counsel Services  
Counsel for Private E.W. Donald