



COURT MARTIAL

Citation: *R v Charbonneau*, 2013 CM 1009

Date: 201320807

Docket: 201279

Standing Court Martial

Valcartier Garrison
Courcelette, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private J. Charbonneau, Accused

Before: Colonel M. Dutil, C.M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR DECISION REGARDING A MOTION FOR NON-SUIT

[1] This court decision follows the defence's motion under chapter 112.05(13) of the *Queen's Regulations and Orders for the Canadian Forces (QR&Os)* on the ground that the prosecution did not establish that a *prima facie* case had been made out against the accused in respect of the charges that were the subject of the third and fourth counts.

[2] The prosecution rested its case after submitting three documents of consent from the parties as Exhibits 3, 4 and 5, and calling two witnesses, namely, corporals Lemieux-Chicoine and Gauthier-Boudreau. The prosecution's case is also based on certain admissions from the defence, specifically, that the substance called GHB corresponds to 4-hydroxybutanoic acid, which is included in Schedule III of the *Controlled Drugs and Substances Act*, of which the court took judicial notice under section 15 of the *Military Rules of Evidence*.

[3] A motion for non-suit does not involve determining whether the prosecution established each of the essential elements of the charge beyond a reasonable doubt, but rather, the court must be satisfied that there is evidence of each of the essential elements that, if believed, would justify the accused's guilt. At this stage, the court does not have to

take into account the quality of the evidence in order to determine whether the prosecution presented some evidence for each essential element of the charge to the extent that a reasonable jury, correctly instructed, could render a verdict of guilty—not “would” or “should,” but simply “could” render such a verdict.

[4] Although the test is the same whether the evidence is direct or circumstantial, the application of the test varies according to the type of evidence. When the prosecution bases its case on direct evidence and the judge is satisfied that this type of evidence exists for each element of the alleged offence, the motion must be dismissed. The only issue is therefore to determine whether the Crown’s evidence is believed, which is the responsibility of the trier of facts. The situation differs when the evidence of one or more essential elements is based on circumstantial evidence. In that case, the issue is not simply to determine whether the evidence is credible, but to determine, if the evidence is believed, whether the inference proposed by the prosecution is the correct one. It is the judge’s responsibility to determine whether the circumstantial evidence is reasonably capable of supporting the inferences proposed by the Crown or the prosecution. The judge draws no inference from the facts, nor does he or she assess the credibility of the witnesses. The judge determines only whether the evidence, assuming that it is believed, can reasonably support an inference of guilt.

[5] Soldier Charbonneau, as was his rank before his release from the Canadian Forces and before the trial, is facing two charges. The first is an offence punishable under section 130 of the *National Defence Act*, namely, trafficking in a substance, contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*. The details of the offence are as follows: between May 25 and June 18, 2010, at Valcartier Garrison, in the Province of Quebec, Soldier Charbonneau trafficked in a substance that he represented or held out to be a substance included in Schedule III of the *Controlled Drugs and Substances Act*, namely 4-hydroxybutanoic acid (GHB). The essential elements of this charge are as follows:

- a. The identity of the accused as the offender;
- b. The date and location of the offence as alleged in the details of the count;
- c. The trafficking of a substance represented or held out by that person to be such a substance; and
- d. The intent to traffic.

[6] The identity of the accused as the offender: The defence argued that the evidence did not establish the identity of the accused. The defence claimed that, in their versions of the facts, the witnesses did not indicate that Soldier Charbonneau had actually trafficked in a given substance. It is accurate to state that the witnesses did not indicate that they had seen the accused give them a Gatorade or Powerade bottle that was allegedly represented or held out by Soldier Charbonneau to contain GHB. However, Corporal Gauthier-Boudreau’s testimony indicated that the Gatorade bottle given to her to

drink a mouthful of the liquid therein under the pretext that it contained alcohol had been given to her by either Nicolas Giroux or Jason Charbonneau, but that both individuals together had encouraged her. This evidence satisfies the criterion and constitutes a *prima facie* case of the accused's identity with regard to the third count.

[7] The date and location of the offence as alleged in the details of the count: With regard to the essential element of the date and location of the offence, the versions given by the two witnesses differ. Witnesses Lemieux-Chicoine and Gauthier-Boudreau stated that the facts of the incident during which they were both offered and then drank from a Gatorade bottle that they believed contained alcohol, but that allegedly contained GHB, occurred during the "SAPEUR RAPIDE" exercise between May 25 and June 18, 2010. However, Lemieux-Chicoine testified that the bottle incident took place in the parking lot of 5 CER at Valcartier Garrison, whereas Gauthier-Boudreau testified that it all took place in the garrison's training areas. At this stage, the court does not have to assess the credibility of the witnesses or the reliability of their testimony, and the court states that it is satisfied that some evidence exists as to the alleged date and location of the offence.

[8] The trafficking of a substance represented or held out by that person to be such a substance: The defence admitted that GHB corresponds to 4-hydroxybutanoic acid, which is included in Schedule III of the *Controlled Drugs and Substances Act*. With regard to the trafficking itself, the prosecution argued that the facts show that Giroux and Charbonneau were passing the bottle around inside the light armoured vehicle (LAV) before or after giving it to Lemieux-Chicoine and Gauthier-Boudreau. The prosecution argued that this description is sufficient to establish that Giroux and Charbonneau were trafficking in a substance that they claimed to be GHB. After a careful review of Gauthier-Boudreau's testimony, the court concluded that this version is not on the record. The only reference to the fact that the two individuals were sharing the contents of the Gatorade bottle that they offered to Gauthier-Boudreau a few minutes later can be found in the oral statement she made to the police, which was used to refresh her memory. This statement is not on the record because of the accuracy of its content. It was heard during a voir dire out of the presence of witness Gauthier-Boudreau. Therefore, the trafficking can be established, where applicable, only in relation to witnesses Lemieux-Chicoine and Gauthier-Boudreau, not between Giroux and Charbonneau themselves.

[9] The *Controlled Drugs and Substances Act* defines the term "traffic" as follows:

"traffic" means, in respect of a substance included in any of Schedules I to IV,

(a) to sell, administer, give, transfer, transport, send or deliver the substance,

(b) to sell an authorization to obtain the substance, or

(c) to offer to do anything mentioned in paragraph (a) or (b),

otherwise than under the authority of the regulations.

[10] The evidence shows that witnesses Lemieux-Chicoine and Gauthier-Boudreau both drank a mouthful from a Gatorade bottle that was offered to them by someone inside

the LAV. Lemieux-Chicoine testified that an unidentified individual passed him a bottle of Gatorade while he was in the LAV turret during the “SAPEUR RAPIDE” exercise. Several people were inside the armoured car at that time, including the accused. Lemieux-Chicoine stated that the liquid tasted bitter and that he associated it with GHB, explaining the reasons for his opinion, which are not relevant for the purposes of this motion. He did not see any other person consume liquid from this Gatorade bottle. This first instance involves a gift, but the testimony does not make it possible for this gift to be associated with the accused in any way. The second instance, involving Gauthier-Boudreau, consists of an offer to drink liquid from a Gatorade bottle under the pretext that it contained alcohol, and the gift of this liquid when Gauthier-Boudreau drank the mouthful before asking questions as to the actual contents of the bottle. An exchange ensued between her and Giroux and Charbonneau, or, rather, between her and Giroux or Charbonneau, which led to a statement, which cannot be attributed to one individual more than the other, to the effect that the liquid contained GHB. Witness Gauthier-Boudreau testified that the bottle that was given to her to drink a mouthful of the liquid therein had been given to her by either Nicholas Giroux or Jason Charbonneau. However, she also stated that both individuals encouraged her together under the pretext that the bottle contained alcohol. This evidence to the effect that it was one of those individuals who gave her the bottle needs only to be circumstantial for it to apply to the accused. Is this evidence, assuming that it will be believed, reasonably, I repeat, reasonably, capable of supporting the inferences proposed by the prosecution? Although inciting or encouraging someone to drink alcohol in an LAV can certainly be subject to a charge for a military offence, that is not what is being examined in this case. This case involves “trafficking” in the context of the *Controlled Drugs and Substances Act*, that is, in relation to a substance included in any of Schedules I to IV. Even if the prosecution also sees a common purpose of trafficking in a substance represented or held out to be such a substance when it was either Giroux or Charbonneau who told Gauthier-Boudreau, after the fact, that the bottle contained GHB, and even if the court accepts that it was trafficking when an individual gave a substance included in any of Schedules I to IV to another, this evidence does not allow for the inference that it was Soldier Charbonneau who represented or held out that the liquid in the bottle contained GHB. There is no evidence of the conduct or reaction of the accused when these words were allegedly spoken that would make it possible to reasonably draw the inference that Soldier Charbonneau knew the contents of the bottle before or after, that he showed recklessness in this regard, or that he was participating in a joint business to traffic in a substance represented or held out to be such a substance.

[11] As a result, the court concluded that there is no *prima facie* evidence that Soldier Charbonneau trafficked in a substance represented or held out by him to be such a substance. He must be found not guilty on the third charge.

[12] The second offence consists of conduct to the prejudice of good order and discipline, contrary to section 129 of the *National Defence Act*. The details of the offence are as follows: between May 25 and June 18, 2010, in Quebec City, in the Province of Quebec, he used 4-hydroxybutanoic acid (GHB), contrary to chapter 20.04 of the QR&Os. The prosecution decided to defer to the presumption of subsection 129(2) of the

National Defence Act with regard to the essential element relating to the prejudice of good order and discipline. Chapter 20.04 of the QR&Os reads as follows:

No officer or non-commissioned member shall use any drug unless:

- a. the member is authorized to use the drug by a qualified medical or dental practitioner for the purposes of medical treatment or dental care;
- b. the drug is contained in a non-prescription medication used by the member in accordance with the instructions accompanying the medication; or
- c. the member is required to use the drug in the course of military duties.

[13] The essential elements of the offence as prepared by the prosecution are as follows:

- a. The identity of the accused as the offender;
- b. The date and place of the offence as alleged in the details of the charge;
- c. The alleged conduct, namely, using 4-hydroxybutanoic acid (GHB);
- d. The prejudice of good order and discipline resulting from the conduct. Here, the prosecution claimed that the alleged conduct violates a regulation, namely, article 20.04 of the QR&Os. The prosecution must therefore establish the following additional sub elements:
 - i. The nature and existence of the regulation in question;
 - ii. The accused's knowledge of the regulation;
 - iii. Whether the accused's behaviour violates article 20.04 of the QR&Os; and
- e. The *mens rea* of the offence or the blameworthy state of mind.

[14] My reasons with regard to this charge will be brief. Witness Lemieux-Chicoine stated that he did not see anyone drink from the Gatorade bottle, but that the people who were inside the LAV, including the accused, seemed to be having a lot of fun. Furthermore, Gauthier-Boudreau's testimony during the main trial does not allow for a reasonable inference that Solider Charbonneau consumed the liquid in the Gatorade bottle in the parking lot or training areas of 5 CER at Valcartier Garrison. This is sufficient to grant the motion for non-suit with regard to the fourth count. However, I want to add that, although that evidence was sufficient to establish a *prima facie* case, there is no evidence that one of these locations is part of Quebec City as alleged in the details of this count. The prosecution did not ask the court to take judicial notice of such a fact under the *Military Rules of Evidence* and the court cannot speculate in this regard. Therefore, the

court would have allowed the motion for this reason alone. Soldier Charbonneau must be found not guilty of the fourth count as written.

FOR THESE REASONS, THE COURT:

[15] **ALLOWS** the defence's motion under chapter 112.05(13) of the QR&Os with regard to the third and fourth counts on the ground that the prosecution did not establish a *prima facie* case against the accused

[16] **FINDS** the accused not guilty of the third and fourth counts

AND

[17] Considering that the prosecution withdrew the first two counts at the start of the proceedings of this court martial, the Court ends the proceedings of this Court Martial.

Counsel:

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

Lieutenant-Commander P.D. Desbiens, Defence Counsel Services
Counsel for Soldier J. Charbonneau