COURT MARTIAL

Citation: *R v Brinton*, 2013 CM 4020

Date: 20130919
Docket: 201320

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman D.J. Brinton, Offender

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

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] The accused, Leading Seaman Brinton, is charged of having disobeyed the lawful commands of a superior officer and of absence without leave. 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] The presumption of innocence is probably the most fundamental principle in Canadian 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 with 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.

[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] 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.

[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 Leading Seaman Brinton, 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 to 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 a lack of credibility is not synonymous with lying.

[10] 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.

[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] 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: the testimony of Dr Hache, Chief Petty Officer 2nd Class Eastham, Petty Officer 2nd Class Larouche and Master Seaman Rogers. Judicial notice was taken by the court of the facts and issues under Rule 15 of the Military Rule of Evidence. Judicial notice of the Canadian Forces Leave Policy Manual taken under Rule 16 of the Military Rules of Evidence. Seven exhibits were produced by the prosecution and defence counsel presented two exhibits.

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

"In that he, on or about 27 June 2012, at or near Halifax, Nova Scotia, wrote a civilian university exam contrary to an order given to him by Petty Officer 2nd Class M. Larouche."

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 an order was given to you; that is, to not write a civilian university exam;

(c) that it was a lawful order;

(d) that you received or knew the order;

(e) that the order was given by a superior officer; namely, Petty Officer 2nd Class M. Larouche;

(f) that you were aware of that officer's status;

(g) that you did not comply with the order; and

(h) your blameworthy state of mind.

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

"In that he, on or about 27 June 2012, at or near Halifax, Nova Scotia, did not rest at his residence contrary to an order given to him by Petty Officer 2nd Class M. Larouche."

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 the order was given to you; that is, to rest at your residence;

(c) that it was a lawful order;

(d) that you received or knew the order;

(e) that the order was given by a superior officer; namely, Petty Officer 2nd Class M. Larouche;

(f) that you were aware of that officer's status;

(g) that you did not comply with the order; and

(h) your blameworthy state of mind.

[16] Defence counsel indicated there is no factual dispute on the identity of the alleged offender, the time and place of the alleged offences, the fact that Petty Officer 2nd Class Larouche told Leading Seaman Brinton to go home and rest and not write the exam, that Petty Officer 2nd Class Larouche is a superior officer and Leading Seaman Brinton knew Petty Officer 2nd Class Larouche was a superior officer and that Leading Seaman Brinton received the order. Defence counsel argues the orders given to Leading Seaman Brinton were not lawful orders because he was on sick leave or excused duty and thus a military duty could not be imposed on Leading Seaman Brinton. Can a sailor

be ordered by his superior to do or not do something while on sick leave? This is the crux of the case.

[17] Leading Seaman Brinton attended sick parade on the morning of 27 June 2012 and was seen by Dr Hache. He examined Leading Seaman Brinton, was provided information by Leading Seaman Brinton and he prepared a treatment plan that he gave to Leading Seaman Brinton. Dr Hache testified sick leave is part of the treatment plan to assist patients in getting better and prevent the spreading of the illness. Dr Hache testified that not spreading the disease is an important part of the decision to grant sick leave. A doctor cannot order a treatment to a patient, he can only recommend the treatment. Excused from duty is the term used on sick chits instead of sick leave. Dr Hache testified that the chain of command acts on the recommendation of the doctor. He testified that a person on sick leave should be home following the treatment plan but could go to the pharmacy or the grocery store to get supplies. One could pick up family members but within reason. Academic activities did not fall within what he deemed acceptable activities while on sick leave. In such cases, he had the option of giving a different recommendation to the chain of command.

[18] Dr Hache told Leading Seaman Brinton to rest at his home that day, to hydrate himself, to take the prescribed medication and to return if his condition became worse. He believed Leading Seaman Brinton understood his directions. He did not remember exactly what he said to Leading Seaman Brinton but his notes indicate he told Leading Seaman Brinton to stay home. He usually tells his patient to stay home and to avoid contact with others to prevent the spreading of the disease. He did not put information on the sick chit (see Exhibit 3) that could inform the chain of command of his diagnosis.

[19] Leading Seaman Brinton was a student on a QL5 marine engineer trade course and Petty Officer 2nd Class Larouche was his divisional petty officer. Leading Seaman Brinton reported to Petty Officer 2nd Class Larouche after his meeting with Dr Hache and gave him the sick chit. Petty Officer 2nd Class Larouche told Leading Seaman Brinton to go home and rest and to not write a civilian university exam that day. He explained why he had given that specific order not to write the university exam. Leading Seaman Brinton had requested approximately one month prior to the alleged offence the permission to miss classes on his course on 27 or 28 June to write a university exam. He was told to substantiate his request by writing a memorandum but he did not do so. Two exams in the QL5 course were planned for the 27th and 28th of June.

[20] Leading Seaman Brinton had offered to come to classes on 28 June but Petty Officer 2nd Class Larouche refused because it would have been contrary to the direction found on the sick chit. Petty Officer 2nd Class Larouche felt he had no authority to revoke a sick chit and he did not give an order that would have overridden the sick chit. Petty Officer 2nd Class Larouche testified he trusted sick chits issued by a doctor. Petty Officer 2nd Class Larouche described Leading Seaman Brinton as pale, hunched and looking like he was sick.

[21] Master Seaman Rogers was an instructor on the QL5 course and the divisional master seaman of Leading Seaman Brinton. She was present when Petty Officer 2nd Class Larouche ordered Leading Seaman Brinton to rest at his home and not write the university exam. She testified the orders were clear and that Petty Officer 2nd Class Larouche had repeated the orders. She had gotten sick leave in the past and she knew the expectations were for her to stay home and rest. She also trusted the sick chit and had to rely on it when a student is sick.

[22] Leave is not defined in the *National Defence Act* or in the *Queen's Regulations and Orders*. Leave is defined as "absence from duty approved by an approving authority" at Chapter 1 of the Canadian Forces Leave Policy Manual. I wish to note at this time that I am referring to the latest version of the Leave Policy Manual dated 6 July 2012 as found on the Department of National Defence Canadian Forces website as opposed to the document dated 16 June 2009 presented by defence counsel. Leave is defined in the Concise Oxford Dictionary as "time when one has permission to be absent from work or duty."

[23] Sub-paragraph (a) of article 16.16 of the *Queen's Regulations and Orders* provides that an officer or non-commissioned member may be granted sick leave not exceeding two continuous calendar days by the member's commanding officer without the recommendation of a medical officer. Sub-paragraph (b) provides that a medical officer or a civilian medical doctor designated by the senior medical officer of a base may grant 30 days of continuous calendar days not including any sick leave granted by the commanding officer under sub-paragraph (a).

[24] The purpose of sick leave is found at article 6.1.01 of Chapter 6 of the Leave Policy Manual. This article reads as follows:

"The purpose of sick leave is to supplement the medical treatment provided to CF members. It is granted for that period of time during which a member is unfit for duty but is not required to convalesce in an infirmary or hospital. No CF member who is on Sick Leave can be ordered on Annual Leave."

Dr Hache excused Leading Seaman Brinton from duty for two days beginning on 27 June 2012. (see Exhibit 3) In other words, he granted Leading Seaman Brinton sick leave for two days.

"Annual leave is an entitlement. The purpose of annual leave is to sustain initiative and enthusiasm and to encourage the physical and mental well-being of CF members by providing periodic opportunities for rest and relaxation."

This is the stated purpose as found in article 3.1.01, Chapter 3 of the Canadian Forces Leave Policy Manual. Sick leave is not an entitlement. Annual leave is defined as "leave charged against an annual leave period of service entitlement" but sick leave is not defined in Chapter 1 of the Leave Policy Manual.

[25] Officers and non-commissioned members of the Regular Force are enrolled for continuing, full-time military service. (see section 15(1) of the *National Defence Act*) The Regular Force, all units and other elements thereof and all officers and non-commissioned members are at all times liable to perform any lawful duty. "Duty" means any duty that is military in nature and includes any duty involving public service authorized under section 273.6 of the *National Defence Act*. (see paragraphs (1) and (4) of section 33 of the *National Defence Act*) Duty is defined in the Concise Oxford dictionary as "a moral or legal obligation in a task required as part of ones job."

[26] Article 19.18 of the *Queen's Regulations and Orders* provides that:

An officer or non-commissioned member who is suffering or suspects he is suffering from a disease shall without delay report himself sick.

Section 98 of the *National Defence Act* creates the offence of malingering or feigning or producing disease or infirmity and of aggravating or delaying the cure of, disease or infirmity by misconduct or wilful disobedience of orders. A person guilty of that offence is liable to imprisonment for life or to less punishment if he or she commits the offence on active service and, in any other case, is liable to imprisonment for a term not exceeding five years or to less punishment. This offence is objectively a serious offence.

[27] Chapter 34 of the *Queens Regulations and Orders* pertains to medical services. Paragraph (4) of article 34.07 provides that:

... medical care shall be provided at public expense to a member of:

(a) the Regular force ...

[28] Exhibit 10, CANFORGEN 039/08 CMP 018/08 dated 13 February 2008, provides interim guidance to clarify the obligations of concerned parties for the effective sharing of medical information. At paragraph 1, the CANFORGEN states:

"This CANFORGEN provides interim guidance to clarify the obligations of concerned parties."

Paragraph 2 reads as follows:

"Health care providers in the CF health system have obligations to service personnel they see for treatment and to the chain of command. Their primary obligation to service men and women is to maintain their health and mental well-being, prevent disease, diagnose or treat any injury, illness or disability and facilitate their rapid return to operational fitness. The health care provider's primary obligation to the chain of command is to sustain or restore service personnel to operational effectiveness and deployability. In some circumstances this will require them to report a service person's MEL to the chain of command. Such reporting ensures personnel can perform their duties safely, reliably, efficiently and at no risk of aggravating an existing medical condition. The disclosure of information on service personnel MEL shall be guided by the following objectives."

Paragraphs 4 to 6 of this CANFORGEN read as follows:

"4. Second, commanding officers are charged with the maintenance of operational effectiveness, capability and the welfare and safety of their subordinates. In discharging their responsibilities a CO must ensure that individuals are assigned only those duties that can be performed safely and effectively. To properly employ a sailor, soldier, airman or airwoman and ensure the conditions for his/her successful treatment and return to full duty a CO requires insight on MEL and prognosis. This may be facilitated by additional non-clinical information which may be provided if it is relevant to the assignment of appropriate duties to the service person.

5. Third, health care providers have a professional duty to safeguard patient medical information from inappropriate disclosure. Patients discussed with health care provider's intimate and personal details. Health care providers are particularly cognizant of and sensitive to the need to maintain a service person's confidence when conferring with them on health care issues. Health care providers must exercise due diligence in the context of supporting operational effectiveness while respecting the legal and regulatory framework in which they work.

6. The absence of clear communications between the health care provider and the CO is detrimental to the CF mission. While specific information such as diagnosis and detailed treatment should not be disclosed, an open dialogue to share relevant information on a need to know basis is essential in order to maintain the integrity of the CF health care system and to ensure that neither the individual nor the mission is compromised. Sharing appropriate information and treating that information in a sensitive, respectful manner for the good of the soldier, sailor, airman and airwoman and CF operational effect is a joint responsibility of the service person, health care provider and CO. The following provides specific direction to fulfill that objective."

[29] Paragraph 7 directs that a member of the Canadian Forces must report himself or herself as sick without delay when suffering from or suspecting he or she might be suffering from a disease and must follow the medical employment limitations specified by the health care provider.

[30] A clear message is easily understood from these different sources. Regular Force members must be fit to perform the duties assigned to them. The Canadian Forces will provide the necessary medical services to service members and help ensure the physical efficiency of the all Canadian Forces members.

[31] A non-commissioned member must become acquainted with, obey and enforce the *National Defence Act*, the *Security of Information Act*, *Queen's Regulations and Orders*, and all other regulations, rules, orders and instructions that pertain to the performance of the member's duties. (see article 5.01 and 19.01 of the *Queen's Regulations and Orders*) A non-commissioned member must also promote the welfare, efficiency

and good discipline of all who are subordinate to the member. (see paragraph (c) of article 5.01 of the *Queen's Regulations and Orders*)

[32] I wrote the following at paragraph 64 of the *R v Lambert*, 2011 CM 4012 decision:

As stated in *R. v. Liwyj*, 2010 CMAC 6, the offence created by section 83 of the *National Defence Act* "reflects the fact that obedience to orders is the fundamental rule of military life." It is the legal obligation of every member of the Canadian Forces to obey the lawful orders of a superior officer, see article 19.015 of the QR&O. An order is not to be obeyed if it is manifestly unlawful. The prosecution has to prove beyond a reasonable doubt that the order was not manifestly unlawful. As stated at paragraph 24 of *Liwyj*:

An order that is not related to military duty would obviously not meet the necessary threshold of lawfulness. In other words, a command that has no clear military purpose will be considered manifestly unlawful.

[33] In *Scott v R*, 2004 CMAC 2, the Court Martial Appeal Court stated the following on the importance of obedience to lawful commands at paragraph 11:

... Orders placing troops in harm's way will generally have a clear military purpose that will take them past the first branch of the *Big M. Drug Mart, supra,* test and their legality will stand or fall (more generally, one would expect, the former) on a section 1 justification. We also recognize that such orders may not necessarily be limited to circumstances where troops are engaged in combat. Obedience to lawful orders is essential to maintaining necessary discipline in the military....

[34] Note (B) to article 19.015 reads as follows:

Usually there will be no doubt as to whether a command or order is lawful or unlawful. In a situation, however, where the subordinate does not know the law or is uncertain of it he shall, even though he doubts the lawfulness of the command, obey unless the command is manifestly unlawful.

[35] The Court Martial Appeal Court stated at paragraph 12 of the *R v Matusheskie* 2009 CMAC 9 decision that:

... Notes B and C of Article 19.015 of the QR&Os... reflects the fact that obedience to orders is the fundamental rule of military life. [And] there must be prompt obedience to all lawful orders [unless the command is manifestly unlawful.]

The court then states at paragraph 13:

The threshold for finding an order to be manifestly unlawful is, properly, very high... [A manifestly unlawful order] must be one that offends the conscience of every reasonable, right-thinking person; it must be an order which is obviously and flagrantly wrong. The order cannot be in a grey area or be merely questionable; rather it must patently and obviously be wrong.

[36] Defence counsel referred the court to the first sentence of Note (F) to article 103.16 of the *Queen's Regulations and Orders* when she argued the orders by Petty Officer 2nd Class Larouche were not lawful commands. Notes are not to be construed as if they had the force and effect of law but should not be deviated from without good reason. (see article 1.095 of Queen's Regulations and Orders) The court must also pay attention to the second sentence of that note. The sentences reads as follows:

A command, in order to be lawful must be one relating to military duty, i.e., the disobedience of which must tend to impede, delay or prevent a military proceeding. A superior officer has the right to give a command for the purpose of maintaining good order or suppressing a disturbance or for the execution of a military duty or regulation or for a purpose connected with the welfare of troops or for any generally accepted details of military life....

[37] Leading Seaman Brinton was a student of the QL5 course. That was his primary duty on 27 and 28 June 2012. He had to write an exam for that course on each of those days. He had previously indicated to his superiors that he wished to be excused on one of those days to write a civilian university exam. He was granted two days of sick leave or excused duties for these two days because a doctor had determined he was unfit to perform his regular duty. Dr Hache told him to rest at him home, hydrate himself and take the prescribed medication.

[38] Sick leave is granted to a military member as part of the treatment plan to assist the military member in his or her healing so that he or she can return to normal duties as soon as possible. Petty Officer 2nd Class Larouche had a duty to ensure the welfare of Leading Seaman Brinton. He ordered Leading Seaman Brinton to go home and rest. Dr Hache had told Leading Seaman Brinton the same thing. Dr Hache, a civilian, could not give an order to Leading Seaman Brinton but Petty Officer 2nd Class Larouche could. While Petty Officer 2nd Class Larouche could not order Leading Seaman Brinton to take medications, he could order him to rest at his home since it was one way of ensuring Leading Seaman Brinton could recover more quickly. This order imposed a duty onto Leading Seaman Brinton to be at his residence for the purposes of resting and recuperating.

[39] This order by Petty Officer 2nd Class Larouche is connected to the welfare of Leading Seaman Brinton and other military members.

[40] Petty Officer 2nd Class Larouche ordered Leading Seaman Brinton to go rest at his residence had a military purpose and was thus a lawful order.

[41] Petty Officer 2nd Class Larouche was also aware that Leading Seaman Brinton was supposed to write a university exam on 27 or 28 June. Sick leave is not annual leave. Sick leave is granted for a specific purpose; that is, to help the service member heal faster and return to duty. If one is too sick to perform his or her regular duties then one is too sick to engage in other demanding personal endeavours during normal duty hours. Petty Officer 2nd Class Larouche's order not to write the university exam was for the purpose of maintaining good order and discipline. Good order in that sick leave would only be used for its intended purpose and the discipline of Leading Seaman Brinton and others. Petty Officer 2nd Class Larouche's order to Leading Seaman Brinton to not write the university exam had a military purpose and was thus a lawful order.

[42] Leading Seaman Brinton did not comply with the orders since he did not go to his residence immediately and he did write the university exam. The court finds Mr Blake's evidence credible and reliable. Based on the evidence presented to the court, the

court finds the prosecution has proven beyond a reasonable doubt that Leading Seaman Brinton had planned to write his exam on 27 June and voluntarily did write it on 27 June.

[43] The court finds the evidence proves beyond a reasonable doubt that Leading Seaman Brinton intentionally disobeyed Petty Officer 2nd Class Larouche's lawful order.

[44] The particulars of the third charge read as follows:

"In that he, at approximately 1200 hours, on or about 27 June 2012, at or near Halifax, Nova Scotia, without authority was absent from his residence and remained absent until approximately 1500 hours on 27 June 2012."

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;

(b) that you had a duty to be in a given place at a specific time; specifically, to be at your residence from 1200 hours on or about 27 June 2012 until approximately 1500 hours on 27 June 2012;

(c) that you failed to be there;

(d) that you did not have authority for failing to be there; and

(e) that you were aware of the duty which was imposed on you.

[45] Based on the reasons given at the analysis of charges 1 and 2, the court finds that Leading Seaman Brinton had a duty to be at his residence from approximately 1200 hours to approximately 1500 hours on 27 June 2012 and that he was aware of this duty. The evidence given by Mr Blake clearly indicates that Leading Seaman Brinton was writing a university exam at Mount Saint Vincent University at 1300 hours on 27 June 2012. The evidence does not tell the court exactly how much time it took Leading Seaman Brinton to complete this exam.

[46] Based on the reasons given at the analysis of charges 1 and 2, the court finds that Leading Seaman Brinton did not have the authority for failing to be at his residence. He was not at his residence at approximately 1200 hours and remained absent for an undetermined period of time.

[47] Defence counsel argued that the rule of *Kineapple* applied to this case in that the court can only convict the accused of one charge should it find the prosecution has proven every charge beyond a reasonable doubt. Charge No. 1 alleges the disobedience of the lawful command of not writing a university exam on 27 June 2012. Charges 2 and 3 were laid in the alternative; one is the disobedience of the lawful command of resting at

his residence and the other is absence without leave of his place of duty, his residence. The rule in *Kineapple* would apply for charges 2 and 3 and, I assume, that is the reason these charges were laid in the alternative. Charge No. 1 is distinct from these charges because it pertains to a specific set of circumstances. Leading Seaman Brinton could have spent the day doing some other activity away from his residence and been charged with charges 2 and 3 but he would not have been charged with charge 1. Therefore, I do not agree with defence counsel that this rule applies as she proposes.

FOR THESE REASONS, THE COURT:

[48] **FINDS** Leading Seaman Brinton guilty of charges 1 and 2 and orders a stay of proceedings for charge 3.

Counsel:

Lieutenant-Commander D.T. Reeves
Counsel for Her Majesty the Queen

Lieutenant-Commander D. Liang and Major S. Collins, Directorate of Defence Counsel Services
Counsel for Leading Seaman D.J.Brinton