COURT MARTIAL

Citation: *R v Bergeron-Larose*, 2012 CM 1013

Date: 20121006
Docket: 201248

Standing Court Martial

Halifax Courtroom
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Ordinary Seaman R. Bergeron-Larose, Accused

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR FINDING

(Orally)

INTRODUCTION

[1] Ordinary Seaman Bergeron-Larose was charged with two counts. First, he was charged with an offence punishable under section 130 of the *National Defence Act*, namely, possession of a Schedule 1 substance, contrary to the *Controlled Substances Act*; second, he was charged with conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act* for using a drug contrary to article 20.04 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os). Once counsel for Her Majesty closed his case, counsel for the defence asked that the accused be acquitted on the second count on the grounds that the prosecution had not introduced any evidence regarding one of the essential elements, namely, the use of a prohibited substance. Counsel for Her Majesty did not object, and the Court found the accused not guilty on the second count, from the Bench.

EVIDENCE

[2] Apart from the issues listed in section 15 of the *Military Rules of Evidence* of which judicial notice taken, the only relevant evidence introduced at trial regarding the first count is limited to the testimony of a single person, Maritime Enforcement Officer 2nd Class Jevaun Martinboro. This individual has been a member of the United States Coast Guard since 2005 and has been working for a unit called the "Tactical Law Enforcement Cell" since 2010. This unit takes part in anti-drug operations in the Caribbean region and on the east coast of the Pacific Ocean. In short, this unit intercepts vessels suspected of taking part in criminal activities related to the smuggling of narcotics and other illicit drugs, with the goal of seizing the contraband goods before they enter Canada or the United States, as the case may be. During the month of April 2012, a detachment of the Maritime Enforcement Officer 2nd Class Martinboro's unit was attached to Her Majesty's Canadian Ship *St. John's* for an anti-drug operation in the Caribbean, Op CARIBBE. His role was to act as boarding officer, that is, the person responsible for the team's safety and for the proper conduct of the boarding manoeuvre following the interception of a smuggler's vessel. Over the years, he has not only received training on weapons handling and boarding procedures, but also acquired knowledge allowing him to use scanners for identifying narcotics. In connection with his work in detecting and seizing drugs, including cocaine, he received professional training on identifying drugs so that he would be able to recognize them when they are discovered during searches carried out by his team. More specifically, he has been trained in the various steps to follow to correctly identify the nature of substances suspected of being drugs or narcotics.

[3] He testified that on 12 April 2012, he and the members of his team took advantage of a layover in Montego Bay, Jamaica, to visit the area while they were on leave. He boarded a bus with his colleagues. He took the opportunity to stop at a music store and ask if he could obtain a CD of what he could hear playing. He was told to come back 40 minutes later to pick it up. He therefore went to a bar to have a drink with his friends. He then returned to pick up his CD, but when he came back to the same bar to rejoin his friends, they had already left for someplace else. He asked a few individuals that he knew were crewmembers of HMCS *St. John's* if they could help him find these friends of his. Two individuals, one of them being the accused, decided to go along with him to look for the crewmembers at other places where they could have gone. He noted that one of the two individuals was talking with a taxi driver to arrange a ride for them, but it seemed to him that the conversation was taking too long for a simple request for transportation. This led him to suspect that the two individuals wanted to buy marihuana. They therefore got in the Jamaican taxi. Maritime Enforcement Officer 2nd Class Martinboro sat behind the driver, and Ordinary Seaman Bergeron-Larose sat next to Maritime Enforcement Officer 2nd Class Martinboro, on the passenger side. The other Canadian seaman, named Caron, according to the witness, sat in the front of the vehicle, on the passenger side. The vehicle left the scene, and he described, first, an interaction with the taxi driver and then another between the two Canadians themselves, the latter interaction being in French. When the taxi was going up a street, the witness heard the taxi driver say to the two

Canadians, “This will only take a bit”. Ordinary Seaman Bergeron-Larose turned to Maritime Enforcement Officer 2nd Class Martinboro and said, “Sorry dude, this will only take a bit, but I feel bad that it’s your job to take it off the street, and I’m here buying the stuff”. According to the witness, the vehicle stopped in the middle of a residential driveway. A moment later, another vehicle parked behind theirs. The driver got out and approached the other vehicle. It was dark, but Maritime Enforcement Officer 2nd Class Martinboro stated that there was a little bit of light on the side, where he could see a picnic table near a stairway. He could not see what the taxi driver was doing behind the vehicle. A few moments later, Maritime Enforcement Officer 2nd Class Martinboro saw their taxi driver go up to the window next to Ordinary Seaman Bergeron-Larose’s seat. The window rolled down, and the driver gave the accused a small transparent plastic bag containing a small quantity of white powder. The witness heard the passenger in the front of the vehicle ask the taxi driver how much was in the bag, and the driver answered that it contained “two grams of cocaine”. The driver then told the passenger in the front that he was going to give him the merchandise now and that could pay him for it later. Maritime Enforcement Officer 2nd Class Martinboro added that they went directly to a bank and that the passenger in front gave an unspecified sum of money to the taxi driver. They then headed to an establishment where they played pool, about five minutes later. They all got out of the vehicle, Maritime Enforcement Officer 2nd Class Martinboro paid his share of the bill, and they went their separate ways. When he returned around three o’clock in the morning, he did not speak to anyone. He did not raise the issue until 15 April, when he brought it up as a hypothetical story with his team. His superior took him aside, and he admitted that this story had really happened to him a few days earlier. He then made a statement and identified the individuals who accompanied him in the taxi a few days earlier. As regards the observations that Maritime Enforcement Officer 2nd Class Martinboro was able to make of the small bag of white powder that the Jamaican taxi driver gave to Ordinary Seaman Bergeron-Larose, he stated that the bag was big enough to hold one or two tablets of Tylenol. According to him, the substance appeared to be cocaine. However, Maritime Enforcement Officer 2nd Class Martinboro acknowledged that

a) the small bag of white powder did not give off any odour;

b) he did not touch the substance that was in the bag; and

c) he did not taste the substance that was in the bag.

In response to the questions put to him by counsel for the defence, namely, whether it was possible that the substances could have been any white powder, such as salt, sugar, flour, crushed Tylenol or Aspirin tablets, powdered soap, rat poison, chalk or baking soda, Maritime Enforcement Officer 2nd Class Martinboro answered that it was indeed possible.

ANALYSIS AND DECISION

The presumption of innocence and the standard of proof beyond a reasonable doubt

[4] Before applying the law to the facts of the case, I will take this moment to discuss the presumption of innocence and the standard of proof beyond a reasonable doubt, which is an essential component of the presumption of innocence.

[5] Whether facing charges under the Code of Service Discipline before a military court or proceedings before a civilian criminal court involving criminal charges, an accused person is presumed to be innocent until the prosecution has proved his or her guilt beyond a reasonable doubt. This burden of proof rests with the prosecution throughout the trial. An accused person does not have to prove that he or she is innocent. The prosecution must prove each of the essential elements of a charge beyond a reasonable doubt. 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 can be based not only on the evidence, but also on a lack of evidence. A charge sheet is not evidence or proof of guilt.

[6] Proof beyond a reasonable doubt does not apply to individual pieces of evidence or to separate parts of the evidence. It applies to the all of the evidence relied on by the prosecution to establish guilt. The burden of proof rests with the prosecution throughout the trial and is never shifted to the accused. It is useful, however, to recall that it is virtually impossible to prove something with absolute certainty, and that the prosecution is not required to do so. That kind of standard of proof does not exist in law. In other words, if the Court is convinced that Ordinary Seaman Bergeron-Larose is probably or likely guilty, it must acquit him, since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

The offence of possession of a substance under the Controlled Drugs and Substances Act, S.C. 1996, c. 19

[7] The offence of possession of a substance under the *Controlled Drugs and Substances Act* appears in subsection 4(1) of that Act. It reads as follows:

> 4.(1) Except as authorized under the regulations, no person shall possess a substance included in Schedule I, II or III.

Just to be clear, suffice it to say that cocaine is one of the substances included in Schedule 1. In this case, the prosecution must not only prove beyond a reasonable doubt that Ordinary Seaman Bergeron-Larose is the person who committed the offence on the date and at the place stated in the charge sheet, but must also prove each of the following elements beyond a reasonable doubt:

a) the accused was in possession of a substance;

b) the alleged substance is one included in Schedule I, namely, cocaine; and

c) the accused knew that the substance was cocaine.

[8] The only issue in this case concerns the essential element regarding proof beyond a reasonable doubt of the nature of the substance alleged to be cocaine. All of the other essential elements of this offence are admitted by the defence. It has been proved beyond a reasonable doubt that the accused intended to procure cocaine and that he was in possession of the small bag as described by Maritime Enforcement Officer 2nd Class Martinboro. The contents of the bag were not seized and analyzed. Therefore, there is no direct evidence that the substance that was in the small transparent bag was cocaine. The relevant evidence is limited to the observations of the witness, Martinboro, and the statements of the accused, the other passenger and the taxi driver, which establish the context, namely, that it was cocaine they were looking for. Another relevant element is the fact that the passenger gave the taxi driver a sum of money immediately after withdrawing it from a bank machine, as described, once again, by Maritime Enforcement Officer 2nd Class Martinboro. The Court finds that the testimony of Maritime Enforcement Officer 2nd Class Martinboro is credible, reliable and consistent.

[9] The law does not necessarily require that a substance included in the Act have been seized and analyzed for its nature to be proved beyond a reasonable doubt. Indirect or circumstantial evidence may be sufficient to establish this essential element, even if the substance cannot be produced in court. However, the combination of the accused's desire to obtain the substance and his belief that he received it for consideration is not enough to establish that the alleged substance is cocaine. The Court is satisfied that Maritime Enforcement Officer 2nd Class Martinboro has enough training and experience in drugs to give an opinion, as an ordinary witness, not as an expert witness, on the characteristics of cocaine and on the observations he made during the evening of 12 April 2012, in Montego Bay. In *R v Woodward*, (1975) 23 CCC (2d) at p. 508 (Court of Appeal for Ontario), such evidence had been admitted when the trial judge had allowed a police officer to give his opinion regarding the nature of a brownish-green substance in 14 small bags on the strength of the odour it was giving off. The Court of Appeal for Ontario wrote as follows, at p. 511:

> As to Constable Creighton's opinion evidence that the contents of these plastic bags was marijuana, an opinion which he based on the odour of the substance which he detected without having opened the plastic bags, it may be said that while that evidence did not carry substantial weight it was, nevertheless, some evidence and was properly admitted. Furthermore, coupled with the admission of the accused by his conduct, as previously described, that he had marijuana in his possession, it takes on considerably more potency.

[10] In *Woodward*, it should be recalled that, in addition to the accused's admission, there were 14 small bags that had been seized by the police, although a certified analysis of the substance had not been entered in evidence. Such factors are absent in the present case. Maritime Enforcement Officer 2nd Class Martinboro's testimony was absolutely neutral and impartial. He explained that his training had taught him that the

process of identifying drugs or narcotics requires that various steps be taken to identify substances correctly. He did not describe the steps that he was taught to identify cocaine, but he clearly stated in this testimony that he could not rule out the reasonable possibility the substance given to Ordinary Seaman Bergeron-Larose could have been something other than cocaine. He did not touch or taste the contents of the bag, and he did not offer any technique or step that he would have followed to clearly identify that it was cocaine, except that he saw that it was a white powder that appeared to him to be cocaine. As I said earlier, proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt. Similarly, proof that the substance is likely cocaine, according to a single witness, and the candour of his answer to the effect that it is possible that the substance could have been any type of white powder do not constitute proof of the substance beyond a reasonable doubt.

[11] The Court agrees with the Quebec Court of Appeal's opinion in *R c Dubé*, 1998 CanLII 13025 (QC CA) [TRANSLATION] "that there is nothing illogical in finding a person guilty of attempted possession if that person intended to possess a narcotic and took the necessary action to possess it". However, as appears from that decision, this is only possible where there is no doubt that the substance is a narcotic. In the present case, this has not been proved beyond a reasonable doubt. There can be no doubt that Ordinary Seaman Bergeron-Larose's intentions the evening of 12 April 2012, were reprehensible, but this does not allow the Court to stretch the scope of evidence that, even in the opinion of the only witness heard, admits other possibilities regarding the nature of the substance alleged to be cocaine. Because of this Court's finding regarding the prosecution's failure to establish beyond a reasonable doubt that the alleged substance was cocaine, there is no need for the Court to consider the last essential element of the offence, namely, the accused's knowledge that the substance was cocaine.

FOR THESE REASONS, THE COURT:

[12] **FINDS** the accused, Ordinary Seaman Bergeron-Larose, not guilty of the first count.

Counsel:

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

Lieutenant-Colonel J.-B. Cloutier, Defence Counsel Services
Counsel for Ordinary Seaman R. Bergeron-Larose