

Citation: *R. v. Lieutenant-Colonel G.C. Szczerbaniwicz*, 2008 CM 2008

Docket: 200807

**STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES COLLEGE TORONTO**

Date: 17 April 2008

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

**LIEUTENANT-COLONEL G.C. SZCZERBANIWICZ
(Accused)**

FINDING

(Rendered orally)

[1] Lieutenant-Colonel Szczerbaniwicz, this court finds you not guilty of the offence as charged, but guilty of the related, less serious offence of common assault, contrary to section 266 of the *Criminal Code*. You may break off and be seated beside your counsel.

[2] Lieutenant-Colonel Szczerbaniwicz is charged with one offence under the *National Defence Act*, of assault causing bodily harm, contrary to the *Criminal Code*. The circumstances involve an altercation between the accused and his spouse of some 30 years, Wanda. There is no issue that on the date alleged, 16 August 2006, the accused intentionally applied force to Mrs Szczerbaniwicz without her consent and that he knew she was not consenting to the application of force. The issues are two: Firstly, whether the assaultive behaviour was justified under subsection 39 (1) of the *Criminal Code* by reason of the defence of personal property; and secondly, whether bodily harm was caused to the complainant by the assaultive behaviour of the accused.

[3] The prosecution at court martial, as in any criminal prosecution in a Canadian court, assumes the burden to prove the guilt of the accused beyond a reasonable doubt. In a legal context, this is a term of art with an accepted meaning. If the evidence fails to establish the guilt of the accused beyond a reasonable doubt, the accused must be found not guilty of the offence. That burden of proof rests upon the prosecution and it never shifts. There is no burden upon the accused to establish his or her innocence. Indeed,

the accused is presumed to be innocent at all stages of a prosecution unless and until the prosecution establishes, by evidence that the court accepts, the guilt of the accused beyond a reasonable doubt.

[4] Reasonable doubt does not mean absolute certainty, but it is not sufficient if the evidence leads only to a finding of probable guilt. If the court is only satisfied that the accused is more likely guilty than not guilty, that is insufficient to find guilt beyond a reasonable doubt and the accused must, therefore, be found not guilty. Indeed, the standard of proof beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt.

[5] But reasonable doubt is not a frivolous or imaginary doubt. It is not something based on sympathy or prejudice. It is a doubt based on reason and common sense that arises from the evidence or the lack of evidence. The burden of proof beyond a reasonable doubt applies to each of the elements of the offence charged. In other words, if the evidence fails to establish each element of the offence charged beyond a reasonable doubt, the accused is to be found not guilty.

[6] The rule of reasonable doubt applies to the credibility of witnesses in a case, such as this case, where the evidence discloses different versions of the important facts that bear directly upon the issues. Arriving at conclusions as to the facts of the case is not a process of simply preferring one version given by one witness over the version given by another. The court may accept all of what a witness says as the truth, or none of what a witness says, or the court may accept parts of the evidence of a witness as truthful and accurate.

[7] Mrs Szczerbaniwicz testified that she was separated from her husband. He was posted to NATO in Brussels, where the couple had a house. She returned from Canada to Belgium with their daughter during the evening of 15 August 2006. The following morning she awoke and was on the telephone to Canada when the accused awoke. They had a conversation about moving personal effects from storage in Winnipeg to their home in British Columbia that Mrs Szczerbaniwicz was then occupying with their son. The conversation apparently became heated, at least from Mrs Szczerbaniwicz's side, on the issue of who would pack up Mrs Szczerbaniwicz's effects.

[8] She followed him up the stairs in the residence. She took a mounted diploma off the wall at the stairs and threw it to the floor. At that point, the accused raised his fist in her direction and yelled that he was going to get her. He came down the stairs and turned her around and pushed or shoved her up the stairs. She fell backwards and landed on the floor on her elbow. She was shocked by this, and went into the spare bedroom and closed the door. The accused came in, slamming the door, offered abusive language to her, and demanded that she leave the house today.

[9] After retiring to bed for a short time, she felt pain in her finger, and when she thought the accused had left for work, she got up and put some ice on the finger. The accused left for work and she returned to bed for some period, and eventually went to a friend's house for lunch. The next day, her friend took her to a medical facility. She was told that her finger was broken. The arm was put in a cast for a week, and she had bruising on her back and legs and elbow. She took some medication for pain.

[10] The prosecution introduced into evidence a videotaped statement made by the accused on 4 September 2006, to investigators from the National Investigation Service. The accused also testified in his defence in essentially the same terms as the statement. He testified that he was heading upstairs to shave and shower, and Mrs Szczerbaniwicz was yelling at him. When he turned to say something from the top of the stairs, she pulled the diploma off the wall, threw it on the ground, and started jumping on it when it didn't break. He went down the stairs and grabbed her by the clothing in her neck area and swung her around to get her off the diploma. She kicked the diploma down the stairs, and as he went to retrieve it, he was hit in the head when she threw another picture from the wall at him. He forced her back up the stairs and into a bedroom by yelling at her and tried to close the door while she resisted the door closing. He denies showing his fist to her; denies taking hold of her, other than by the clothing; and denies that she fell as a result of him swinging her around.

[11] It is evident that there are many inconsistencies between the versions of the facts given by Mrs Szczerbaniwicz and Lieutenant-Colonel Szczerbaniwicz. Despite that, I find that neither changed their evidence in any substantial respect as a result of cross-examination by counsel. I was impressed with the manner in which Mrs Szczerbaniwicz gave her evidence, but I am mindful of the limited importance that can ordinarily be attached to the demeanour of a witness. However, Mrs Szczerbaniwicz gave her evidence in a remarkably straightforward manner, without any apparent malice toward her husband, and without embellishment or exaggeration. She readily admitted to some facts that might be thought to reflect poorly on her own behaviour.

[12] On the whole, I find that both witnesses were attempting to give the court their best recollection of the events. For the most part, I consider that the discrepancies in the versions they give are likely attributable to the heightened state of emotions on both sides that were in play on the morning of 16 August.

[13] As I have stated, the defence concedes that Lieutenant-Colonel Szczerbaniwicz intentionally applied force to the person of Mrs Szczerbaniwicz without her consent, and that he knew she was not consenting to the application of force. The defence urges me to find that the events unfolded in the manner to which Lieutenant-Colonel Szczerbaniwicz testified, and as he described in his statement to the police investigators. But there is no doubt that even accepting all of his evidence, the elements of the offence of assault are established in this case.

[14] The defence says that the assaultive behaviour of the accused as described in his evidence is justified by the defence of protection of his personal property, being the diploma that was hanging on the wall in the stairwell. Subsection 39 (1) of the *Criminal Code* reads:

39. (1) Every one who is in peaceable possession of personal property under a claim of right, and every one acting under his authority, is protected from criminal responsibility for defending that possession, even against a person entitled by law to possession of it, if he uses no more force than is necessary.

[15] I accept the submission of the defence that on the authority of *R. v. Little*, from the Ontario Court of Appeal, there is some evidence on each of the elements of this defence in this case, and, accordingly, the defence is in play. The court must weigh this evidence, bearing in mind that the burden is upon the prosecution to establish beyond a reasonable doubt that the defence does not serve to justify the conduct of the accused. I am satisfied that the accused was in peaceable possession of the diploma and that his actions in assaulting his spouse were motivated by his desire to protect his personal property. To my mind, the real issue here is whether in so doing, he used no more force than was necessary to defend his possession.

[16] In this connection, I have considered several factors, including the nature of the property in question; its value, including its sentimental value to the accused; the risk of harm to which the property was exposed by the actions of the complainant; the alternative courses of action open to the accused at the time; and the consequences for the complainant of the action the accused took. With respect to the matter of the action taken by the accused, I accept the uncontradicted evidence of the complainant that she suffered the bruising she described in her evidence to her back, her legs, and her elbow. I find, therefore, that she did indeed fall as a result of the pushing or shoving by the accused in the manner she described in her testimony. I do not accept the evidence of the accused in which he denies that the complainant fell. On his version of events, there is no explanation as to how the bruising occurred. This objective fact of the bruising is consistent with the evidence of the complainant on this point, and inconsistent with the version of events given by Lieutenant-Colonel Szczerbaniwicz.

[17] I accept the evidence of Lieutenant-Colonel Szczerbaniwicz that the diploma was very important to him as it signified a major achievement for him in his professional development. But there is no evidence before me that the diploma was in fact damaged to any significant degree as a result of being thrown to the floor, and perhaps jumped on. Even if there were damage, the item in question is a document that might be replaced if necessary. In his statement to the investigators, the accused was specifically asked whether he had gone a bit too far, and replied in reference to the diploma, "It is hard to say. When I think of it in retrospect, it is just a piece of paper, but it meant a lot to me. It was the anger of the moment. If I had been even a little bit--I should have just said, I can replace that, if she breaks that. But I didn't. That is in retrospect."

[18] I am urged by counsel to consider this statement as simply an expression of regret and not as an admission that the force used was excessive. But in my view, this evidence, taken in the context of the evidence as a whole, supports the conclusion that as a result of his angry state of mind, Lieutenant-Colonel Szczerbaniwicz lost his self-control for a short period of time, during which he physically manhandled his spouse, causing her to fall and suffer the bruising injury I have described.

[19] On all the circumstances I am persuaded that the accused used excessive force against the complainant in the purported defence of his personal property; that is, that he used more force than was necessary, and therefore the defence under subsection 39 (1) does not serve to justify his actions.

[20] The second issue is whether the unjustified assault by the accused upon his spouse caused bodily harm. This term is defined in section 2 of the *Criminal Code* to mean:

... any hurt or injury to a person that interferes with the health or comfort of the person and that is more than merely transient or trifling in nature;

In this connection, the prosecution points to the evidence of the complainant that her finger was broken and her lower arm put in a cast for a period of a week. The prosecution does not argue for a finding of bodily harm based only upon the evidence of bruising and pain. It is clear that Mrs Szczerbaniwicz's finger was in ordinary health immediately before the altercation with the accused. She noticed pain in her finger a short time period after the assault, and decided to have the finger medically examined the following day.

[21] While I think it likely that the injury to the finger was incurred at the time of the fall as a result of the pushing of the accused, I am not persuaded beyond a reasonable doubt as to this element of the offence charged. Accordingly, Lieutenant-Colonel Szczerbaniwicz is guilty of the lesser included offence of simple assault.

COMMANDER P.J. LAMONT, M.J.

Counsel:

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