

Citation:R. v. Major B.L. Murray, 2004CM51

Docket:F200451

**STANDING COURT MARTIAL
CANADA
ONTARIO
ROYAL MILITARY COLLEGE KINGSTON**

Date:12 November 2004

PRESIDING:COLONEL K.S. CARTER, M.J.

HER MAJESTY THE QUEEN

v.

**MAJOR B.L. MURRAY
(Accused)**

FINDING

(Rendered orally)

[1] Major Murray, the court finds you guilty of the charge of drunkenness in regard to one action in the early morning of 4 July 2003; that is, owing to the influence of alcohol, you behaved in a disorderly manner in striking Corporal Lincoln.

[2] The court will allow you and your escort to break off and sit with your counsel while the court goes through its reasons for this decision.

[3] It is always useful to briefly review the principles that apply at courts martial and at all criminal trials in Canada. In this case as in any court martial or criminal trial in Canada, an accused person is presumed not guilty, is presumed innocent and the burden is on the prosecution to prove every element of the offence beyond a reasonable doubt. These two principles have been described in the Supreme Court of Canada decision of *R. v. Lifchus*, which can be found at (1997), 118 C.C.C. (3d) 1.

[4] An accused person is presumed innocent throughout his or her trial and the presumption remains with the accused person from the beginning of the trial until after all the evidence has been heard and considered and the finder of fact has been satisfied beyond a reasonable doubt of the guilt of the accused person. The fact that a person has been charged is in no way indicative of his or her guilt. There is no burden on the accused person to prove his or her innocence. If the court has a reasonable doubt that

the accused committed an offence with which he or she is charged, the benefit of that doubt must be given to the accused and he or she must be found not guilty of that charge.

[5] A reasonable doubt is a doubt that is held after a fair, thorough, and impartial consideration of all the evidence before the court. This standard is a higher one than that used in everyday decision making. A reasonable doubt is described as an exacting standard; that is, to prove a matter beyond a reasonable doubt is a standard of proof that is rarely encountered in everyday life and everyday decision making.

[6] While this court has considered the evidence as a whole to determine whether or not the guilt of Major Murray has been proven beyond a reasonable doubt, the burden is on the prosecution to prove each essential element of the offence beyond a reasonable doubt. If there is a reasonable doubt concerning only one essential element of the charge, then Major Murray must be given benefit of that doubt. However, the standard of proof applies to the total body of evidence which the prosecution has relied upon.

[7] Evidence can come in many forms but often evidence is in the form of sworn or affirmed oral testimony of witnesses before the court. It is not unusual that some evidence before the court is contradictory. Often witnesses have different recollections of events. The court must determine what testimony it finds credible and reliable. A credible witness is one who the court assesses provides honest and reliable testimony. A sincere witness, honestly endeavouring to tell the truth, may still give unreliable evidence.

[8] Many factors influence the court's assessment of the credibility of a witness. These include a witness' opportunity to observe, a witness' reasons to remember; for example, were the events noteworthy, unusual, striking or relatively unimportant and therefore more difficult to recollect. Does the 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 the accused is interested in securing his or her acquittal, the presumption of innocence which I mentioned earlier does not permit a conclusion that the accused will lie if he or she chooses to testify.

[9] Another factor in determining credibility is the apparent capacity of the witness to remember. Emotional restrictions may affect a witness' credibility; that is, a witness may be so scared, angry, or elated that this affects their ability to observe, or a witness may be under the influence of alcohol or prescription or non-prescription drugs. This latter consideration plays a significant role in this case.

[10] The witness' demeanour is also a factor that can be used to assess credibility; that is, was he or she responsive to questions; straightforward in his or her answers; or evasive, hesitant or argumentative? Finally and quite importantly in this case, was the

witness' testimony consistent within itself and with any uncontradicted facts. Minor discrepancies can and do innocently occur but these do not necessarily mean that the testimony should be disregarded. However a deliberate falsehood is an entirely different matter. It is always serious and may taint a witness' entire testimony.

[11] A 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 to disbelieve it.

[12] Now this is a case where the accused person, Major Murray, has chosen to testify and the Supreme Court of Canada has established, in those circumstances, what this court must do. In a case called *R. v. W.(D)*, which is found at (1991), 63 C.C.C. (3d) 397, the Supreme Court of Canada has set out a process for the court to follow. First, the court must analyse whether or not the accused is believed. If the accused is believed, and implicit in this analysis is that the accused person's evidence is exculpatory, then the court must acquit the accused. If however, the accused is not believed, but nevertheless the testimony of the accused person raises a reasonable doubt, then again, the court must find the accused not guilty. Finally, if the testimony of the accused is not believed and does not raise a reasonable doubt, but still a reasonable doubt exists on the basis of the evidence that is accepted by the court, then, again, the court must find the accused person not guilty. It is only if the court does not have a reasonable doubt about any of the essential elements of a charge that the court will find the accused guilty. In this case, this approach must be applied a little differently because, as will become apparent, the court has not found that Major Murray's testimony that it accepts is exculpatory.

[13] The process to be followed has been explained further in the Nova Scotia Court of Appeal case of *R. v. Mah* [2002] N.S.J. No. 349, where at paragraph 41 the court explains:

... *W.D.* describes how the assessment of credibility relates to the issue of reasonable doubt. What the judge must not do is simply choose between two alternative versions... *W.D.* reminds us that the judge at a criminal trial is not attempting to resolve the broad factual question of what happened. The judge's role is the more limited one of deciding whether the essential elements of the charge have been proved beyond a reasonable doubt ... the ultimate issue is not whether the judge believes the accused or the complainant or part or all of what they each had to say. The issue at the end of the day in a criminal trial is not credibility but reasonable doubt.

[14] As this charge is one of drunkenness under section 97 of the *National Defence Act*, the prosecution must establish beyond a reasonable doubt not only the identity of the accused, and the date and location of the offence but also that drunkenness, in one of the forms specified, was committed. In this particular case, the prosecution has indicated that the method of commission of the offence that it relies upon is that Major

Murray, owing to the influence of alcohol, behaved in a disorderly manner. Behaving in a disorderly manner is undefined in the section so the court gives it its normal meaning. As defined in the Concise Oxford Dictionary this means, acting in a way that contributes to a breakdown in peaceful behaviour.

[15] The prosecution submitted that the evidence before the court established all the essential elements of the offence charged. He states that identity, date, location and Major Murray's voluntary consumption of alcohol; that is, the required mental element of the offence, have been established not only by the evidence presented by the prosecution but also through the testimony of Major Murray himself.

[16] He characterizes the incident in the parking lot as an unfortunate chain of events that could have been avoided. The prosecution submitted that the only witness, other, presumably, than Corporal Wolf, whose perceptions were unaffected by alcohol was Corporal Lincoln and his testimony should be considered the most reliable. The prosecution conceded that it felt all witnesses were endeavouring to testify in a credible manner but that it was the accuracy of their recollections rather than its honesty that the court should consider. In regard to Major Murray, the prosecution argues that both his words and deeds constituted disorderly conduct and the fact of his prior consumption of alcohol combined with the nature of those actions lead to the inference that the disorderly behaviour was owing to the influence of the alcohol he had consumed.

[17] The defence did not contest that the elements of identity, date and location had been established beyond a reasonable doubt. The defence counsel did argue however that no disorderly conduct by Major Murray had been established, or if any disorderly conduct was established, that it resulted from the influence of alcohol upon Major Murray.

[18] Defence submitted that all the evidence showed that Major Murray's voluntary consumption of alcohol was moderate that evening. The defence characterized Major Murray as the most credible and reliable source of testimony. Defence counsel submitted that Corporal Prosser was unreliable and not credible because he was severely intoxicated during the incident and he sought to minimize his own actions. The defence also argued that Corporal Lincoln tried to minimize his own misconduct. The defence argued that Captain Duffy, Captain Pellerin and Private Beemer's testimony portrayed Major Murray as being moderate in his consumption of alcohol and the victim of aggressive behaviour.

[19] Major Boutin acknowledged that Major Murray might be seen as having made the wrong choice in striking Corporal Lincoln but that was due to a perceived threat to his wife and uninfluenced by his consumption of alcohol.

[20] In summary, the defence submitted that Major Murray acted as a professional pilot and officer in the circumstances that he found himself in on the early morning of 4 July 2003.

[21] As the court set out earlier, one of its most important tasks is to determine which testimony it finds credible and reliable and why. To a large extent this can be assisted by evaluating the testimony of individuals involved in an incident in light of the testimony of non-partisan individuals uninvolved in the incident and neutral information such as reports, maps and diagrams of the location identifying things such as distances, buildings, lighting and weather conditions at the relevant time, if those are presented to the court.

[22] In this case, the court has heard the testimony of seven witnesses. One witness, Corporal Wolf, is a member of the military police who became involved in this matter after the incident. The court has found her a very credible and reliable witness with no reason to favour any of the participants in the incident and suffering from no physiological or emotional impediments. In particular, the court has found useful her observations of the various participants' condition and attitude in the few minutes immediately after the incident in the parking lot.

[23] The court has found Captain Duffy and Captain Pellerin, prosecution witnesses, as credible witnesses even though their perceptions were affected to some degree by the alcohol they consumed that evening. In particular, their testimony was very useful in assessing the perception on the part of their group of officers and pilots and friends of the nature and tone of the comments made by and the actions of Corporal Prosser that evening.

[24] The court accepts that Private Beemer's recollections are limited by both her consumption of alcohol and the passage of time since the incident, however, in regard to those parts of the evening she remembers, the court has found her a credible witness.

[25] As there is general agreement as to the background to these incidents, the court will set the scene on the basis of the facts it has found.

[26] On the evening of Thursday, 3rd July 2003, at a restaurant called Eat at Joe's on Canadian Forces Base Cold Lake, Alberta, several groups of people had converged for different and unconnected reasons. There was a group of pilots and family members and friends who were getting together to say goodbye to people who were being posted out, specifically Captain Duffy and his wife. This group of maybe 10 or 12 people arrived at various points sometime after 7 p.m. for a meal and subsequent social conversation and drinking. The heart of the group appeared to be Captain Duffy and his spouse, the two Captains Pellerin and Major Murray and his wife. All of these people voluntarily consumed alcoholic drinks to different degrees throughout the evening. The

members of the group remained at the restaurant until closing, departing sometime around 1 a.m. the following morning, 4th of July, 2003.

[27] A second group consisting of a number of mainly technicians from 441 Squadron were a group who decided to go for what has been described as an after shift beer call. This was a somewhat larger group than the "pilots and friends" group. The identified members of this group were Corporal Prosser, who was distinctive because of his bicycling attire, particularly his helmet, Master Corporal McGuire, Private Beemer (then Private Lefebvre) and Corporal Lincoln. In this group, only Corporal Lincoln was identified as not drinking.

[28] There was also apparently another group and it is not clear if there was any overlapping membership in these groups and that is the Base Hockey Team group.

[29] At some time, later in the evening, Captain Laverdiere, a pilot with 441 Squadron, joined the "pilots and friends" group. Even before this time, some comments from the "441 technicians" group, in particular from Corporal Prosser that were perceived as disparaging towards pilots, were overheard by Captain Duffy. After Captain Laverdiere arrived, Corporal Prosser directed some comments that he perceived as humorous towards Captain Laverdiere and received some comments in return. It seems fair to say that not all members of the "pilots and friends" group perceived the comments of Corporal Prosser as humorous. At no time however, was there any indication that Major Murray was even aware of these comments.

[30] As a number of people were going up to pay their bills, there was an exchange of comments between Corporal Prosser and Laverdiere near the cash register. Shortly thereafter, outside in the parking lot as the Duffy's, the Pellerin's and Captain Laverdiere were getting into the Pellerin's van to depart, there was another comment made by Corporal Prosser through the window of the van. Corporal Prosser describes it as a continuation of the humorous banter between himself and the individual he knew by his nicknames, Happy or Lavy, but whose full name he did not and still does not know. Captain Duffy who heard the last comments perceived them as provocative, offensive and disrespectful and including the use of the term "f'ing asshole". Captain Duffy had to stop Captain Laverdiere from exiting the van to confront Corporal Prosser.

[31] In short, the interactions between Corporal Prosser, at the least, and the "pilots and friends" group while apparently perceived as good natured and humorous banter by Corporal Prosser and perhaps not inappropriate by other members of his group were perceived in a totally different light by the recipients. This is significant because it assists in resolving apparent contradictions in the testimony. What Corporal Prosser and, indeed, his friends thought he was saying was not what others heard. This is not an uncommon situation, even when alcohol consumption is not a factor.

[32] There was no interaction between Major Murray and Corporal Prosser or any members of the "441 technicians" group at any time before the incident in the parking lot. In essence, before the incident, Major Murray and his wife had enjoyed a social evening with friends. Corporal Prosser on the other hand had been engaged in a series of verbal encounters with at least one pilot and had created an impression of provocation, disrespect and antagonism with at least one other, Captain Duffy.

[33] A few minutes after the incident in the parking lot, Corporal Wolf's observations of the participants were that Major Murray displayed indications of being under the influence of alcohol in that his speech was a little slurred, he was unsteady on his feet and smelled of alcohol but he was cooperative and not argumentative. Mrs. Murray had been drinking but was so emotional and crying that Corporal Wolf could not assess to what degree. Master Corporal McGuire was completely uncooperative. Corporal Prosser was intoxicated, argumentative, and aggressive towards Major Murray, calling him an "a-hole". This term is very similar to the one Captain Duffy heard Corporal Prosser use towards Captain Laverdiere earlier. The court would indicate it could not be characterized as humorous banter. Corporal Wolf indicated that she had to resort to a threat to arrest Corporal Prosser for drunkenness in order to restrain him.

[34] The before and after assessments of the attitude and activity of, in particular, Major Murray and Corporal Prosser are important in assessing the reliability of their respective testimony. In light of the objective assessment of Corporal Wolf, the court finds that during the incident both Major Murray and Corporal Prosser were under the influence of alcohol, although Major Murray to a noticeably lesser extent than Corporal Prosser. The court also finds that both before and after the incident, Corporal Prosser was aggressive, swearing, and acting in a fashion that was provoking.

[35] The court has first considered very carefully the testimony of Major Murray, as the case of *R. v. W.(D.)* requires. At about 7 or 7:30 p.m. on a Thursday evening, the 3rd of July, 2003, Major Murray and his wife met some friends at Eat at Joe's for a social evening; that is, a meal and some beers after. Major Murray, as was his practice, had already decided before he had consumed any alcohol to walk rather than drive home. Over the next approximately five hours, he and his wife ate, drank, draft beer in his case, and socialized with their group of friends. During the evening although he had noticed a person in bicycle gear in Eat at Joe's he was unaware of any adverse comments, tension or anything unusual happening. At the end of the evening when his wife was showing some photographs to a waitress of their new home, he decided to wait for her outside. There he saw his friends to whom he had just said goodbye exiting and getting into a van ready to drive home. He declined the offer of a ride from them for himself and his wife. As the van pulled away, he observed the person in bicycle gear, who he subsequently found out was Corporal Prosser, walking with noticeably exaggerated gestures around the front of a car parked adjacent to where the van had been parked and overheard a generally unintelligible comment which included the word "pilots". Major Murray concluded this comment must be directed towards him, even

though the individual was not someone who he recognized, even though Major Murray did not indicate he was wearing or carrying anything that identified himself as a military member or a pilot and even though there was approximately 15 feet between himself and that person. Major Murray felt called upon to respond immediately to the largely unintelligible comment by directing a question to the then unknown individual saying "Do you have something to say about pilots?".

[36] The response from Corporal Prosser who was getting into the other vehicle when Major Murray responded was to the effect, "Don't make me come over there". Corporal Prosser then exited the vehicle, walked up to Major Murray and with no further conversation, pushed Major Murray. Major Murray fell backwards and landed on his backside and his right elbow and his head struck the pavement. Major Murray got up immediately and by that time another unknown individual, subsequently identified as Master Corporal McGuire, was restraining Corporal Prosser and was taking him back to the far side of the vehicle they had both exited from. Another individual from that vehicle, again at that time unknown to Major Murray was attempting to calm Major Murray down, as was Major Murray's wife who had just appeared on the scene. Major Murray was by this time angry and using the term "fuck" in the questions he was directing towards Corporal Prosser. The person attempting to stay between Major Murray and Corporal Prosser and to calm Major Murray down was subsequently identified as Corporal Lincoln. Corporal Lincoln continued to interpose himself between Major Murray and a route that would allow Major Murray to more closely approach Corporal Prosser who was 15 to 20 feet away. Major Murray recognized that the person subsequently identified as Corporal Lincoln was genuinely trying to calm things down and prevent any further confrontation between himself and Corporal Prosser. Major Murray shouted, demanding Corporal Prosser's name several times, and when unsuccessful demanded Corporal Lincoln's name and received an answer, Tyrone Lincoln. Major Murray continued to try and get Corporal Prosser's name from Corporal Lincoln and also from Corporal Prosser and to try and approach Corporal Prosser. Major Murray and Corporal Lincoln were facing each other about two feet apart and Major Murray's wife was between them with one hand on each of their chests. Major Murray did not recall if his wife was saying anything but perceived the conversation between himself and Corporal Lincoln suddenly become more heated. He heard Corporal Lincoln say "Take your hands off me you fucking bitch" in what he perceived to be a threatening tone to his wife and perceived some movement so he reacted by slapping Corporal Lincoln on the side of his face. Major Murray did not recall if Corporal Lincoln fell to the ground, nor being hit by Corporal Lincoln and did not even realize that he was missing a few seconds of the encounter. Major Murray's next recollection is that he could see his wife was very upset and desperately needed his attention so the two of them returned into the restaurant where one of them asked a waitress to call the military police.

[37] In Major Murray's recollection, this entire incident was very brief, lasting between one or two minutes from the time of Corporal Prosser's initial comment to when he struck Corporal Lincoln and Corporal Lincoln struck him in return.

[38] In summary, Major Murray's own testimony is he drinks five to eight draft beer over the course of the evening. The evening has been a relaxed and pleasant outing with friends. While waiting for his wife to exit the eating establishment, and after his friends have left, he overhears from about 15 feet away a generally unintelligible comment from a stranger who is apparently about to enter a vehicle that includes the term "pilots". Major Murray does not know the individual and is not in a circumstance that identifies himself as a pilot. The individual making the comment may or may not be a member of the Canadian Forces; the comment may or may not be derogatory; and it may or may not have been directed at Major Murray. It is, however, around 1 a.m. in the parking lot of a licensed establishment and Major Murray feels compelled to invite interaction. After, from Major Murray's perspective, an entirely bizarre and violent response and while recognizing his wife and other well-intentioned persons are trying to calm him down, he hurls some insults, tries to approach the person who has struck him to get an explanation and tries to get the person who struck him to identify himself. Major Murray was on a base, within the jurisdiction of the military police, with staff still inside the establishment who could have called them. He was faced with three individuals, two of whom the court has seen and are quite large, who exited a vehicle that was still in the parking lot with a licence plate which he could have recorded. The individuals have military haircuts and are of an age that they could serve in the military. Major Murray indicated that he believed that if they were military then if he identified himself as a major this would have put an end to the matter. Major Murray, at some point in time, had both his wife and a well-intentioned person from his perspective trying to calm him down and he indicates he did not identify himself, he did not calm down, he did not accept a name and a licence plate as being sufficient for identification, or indeed, even acquiesce to his wife's concerns. When he suddenly perceived a threat to his wife from the person who had been trying to calm him down, he does not try and pull his wife out of the way, interpose himself between his wife and the person or try to restrain the person. Major Murray slaps the large, young, fit looking man, Corporal Lincoln on the side of the face.

[39] The court finds that while it accepts much of Major Murray's testimony about what occurred, that it cannot accept as rational and logical the reasons provided for his choices that day. The rationale provided by Major Murray in his own testimony for his actions, is the court believes, a genuine, well-meaning but ultimately futile attempt to rationally and logically explain the series of choices that do not make sense when you are not under the influence of alcohol as Major Murray was at that time. Major Murray's testimony, in and of itself, also demonstrates disorderly behaviour owing to the influence of alcohol, specifically in the striking of Corporal Lincoln.

[40] This analysis satisfies all three steps in the *R. v. W.(D.)* analysis. In its simplest terms, Major Murray's own testimony demonstrates that he voluntarily consumed alcohol, the required mental element of this offence, then behaved in a disorderly fashion and the only reasonable inference, particularly given his friend Captain Duffy's description of him as jovial and easy going, is that this was owing to the influence of alcohol.

[41] The court would go on, however, to comment on the testimony of Corporal Prosser, Corporal Lincoln and Private Beemer and explain how that testimony, together with the testimony of Captain Duffy and Corporal Wolf would also establish beyond a reasonable doubt the essential elements of the offence.

[42] Although Private Beemer has a limited recollection of what happened and was adversely affected by her alcohol consumption, the court accepts that she did hear Corporal Prosser say "Don't make me come over there" before he exited the vehicle and struck Major Murray. The court also accepts from her testimony that Major Murray's wife was quite active, asking for everyone's name and was visibly upset from the time she came out and saw her husband on the ground after Corporal Prosser's attack.

[43] The court finds that Corporal Prosser was not a very credible witness due not only to the degree of his intoxication that evening, but also because of his observed aggressive and provocative attitude. The court finds that it cannot rely on Corporal Prosser's memory of and characterization of his interaction with Captain Laverdiere as all humorous banter that was well received. In particular, Captain Duffy's identification of the term "f'ing assholes" being used by Corporal Prosser and the aggressive nature of his comments and actions and Corporal Wolf's subsequent and independent identification of Corporal Prosser's aggressive attitude towards Major Murray and the reference to him as an "a-hole" created the impression, combined with the statement heard by both Major Murray and Private Beemer "Don't make me come over there", that Corporal Prosser was in such a state that he was looking for an opportunity to provoke someone. It is indeed unfortunate that he was able to do so. Consequently, the court finds his recollections of words said by him and his recollection and evaluation of their attitudes and actions towards him are so coloured and unreliable due to intoxication and aggression as to not be credible at all.

[44] Corporal Lincoln, however, falls into a different category. The court accepts that he had not been drinking alcohol that evening and that consequently his perceptions do not face the same deficiencies as those of the other witnesses to the incident in the parking lot. At the same time, Corporal Lincoln can only provide information about part of the evening as he had been absent for some part of that evening driving people back to their residences. Although he was clearly a participant and although he was a co-worker and could be considered a friend of Corporal Prosser, the court finds him a credible and reliable witness for the period from the first interaction between Major Murray and Corporal Prosser until he is struck by Major Murray. In that regard, his

testimony augments, to a large extent, Major Murray's own testimony and in some cases the court finds may provide a clearer perspective. The court finds that Corporal Lincoln was forthright about his own actions whether creditable or discreditable that evening. The court accepts based on Corporal Lincoln's testimony that Major Murray did make some additional comments to Corporal Prosser at the beginning of the incident, one of which included the use of the term "retard". The court also accepts as reliable Corporal Lincoln's account of the actions of Major Murray and his wife during the time frame that Corporal Lincoln was attempting to calm Major Murray down and to defuse the situation. That means that the court accepts that Major Murray did identify himself but without his rank to Corporal Lincoln. The court also finds that Corporal Lincoln's more comprehensive assessment of the incident and the longer time frame that he indicated it occurred over is more reliable.

[45] Based on the testimony of Captain Duffy, Corporal Lincoln, Private Beemer and Corporal Wolf, the court could also find that the prosecution had proved beyond a reasonable doubt that Major Murray behaved in a disorderly fashion owing to the influence of alcohol. As the court has already said however, it can and does find that on the basis of the testimony which it accepts of the accused himself.

COLONEL K.S. CARTER, M.J.

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