

Citation: *R. v. Corporal R.J.A. Resch*, 2005CM30

Docket: F200530

**STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES HEALTH SERVICES CENTRE BORDEN**

Date: 1 June 2005

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

HER MAJESTY THE QUEEN

v.

CORPORAL R.J.A. RESCH

(Accused)

FINDING

(Rendered Orally)

[1] Corporal Resch, this court finds you not guilty of the first charge in the charge sheet.

[2] The accused, Corporal Resch, is charged, in the first charge, with behaving in a disgraceful manner contrary to section 93 of the *National Defence Act*. The particulars allege that on the date in question, 14 October 2003, he exposed his genitals in the presence of one or more persons. A second alternative charge of conduct to the prejudice of good order and discipline, alleging the same particulars, was dismissed by me at the close of the case for the prosecution on the grounds of a complete lack of evidence of prejudice to good order and discipline.

[3] The evidence in this case disclosed that the accused entered the work area of the Junior Ranks dining mess at Canadian Forces Base Borden and encountered two female members of the kitchen staff. His work related duties occasionally required his attendance in the area, and he was a friend of one of the male kitchen staff. The two female staff members knew the accused to see him, but that appears to be the extent of their relationship with him.

[4] The evidence is clear, that while standing in the doorway of the mop room leading to a hallway, in the presence of the two female staff members, the accused pulled down his pants in order to show the female members a tattoo which he had apparently put on his body on or very near his genital area.

[5] 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.

[6] Proof beyond a 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 beyond a reasonable doubt is much closer to absolute certainty than it is to a standard of probable guilt.

[7] 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.

[8] The elements of the offence of behaving in a disgraceful manner are as follows: The prosecution must lead evidence identifying the accused and specifying the date and place of the offence; the evidence must demonstrate disgraceful behaviour on the part of the accused; and, as well, the evidence must demonstrate a state of mind on the part of the accused at the time of the behaviour; that is, an intention on his part to offend.

[9] What is meant by "disgraceful behaviour"? The *National Defence Act* does not define this term, and, as counsel have pointed out in their addresses, there is very little, if any, jurisprudence in previous cases to assist in understanding what this term means. The dictionary definition of the term, "disgraceful," is "shockingly unacceptable." In my view, the test for disgraceful behaviour is conduct that a reasonable person, having regard for all the circumstances in which the conduct occurred, would consider to be shockingly unacceptable.

[10] In this case, Mr Peter Horne gave evidence for the defence. He was employed as a kitchen helper at the Junior Ranks mess in October 2003, and is the friend of the accused to whom I referred earlier. He testified that he was present in the hallway area and heard the encounter between the two female employees and the accused. He heard conversation between the parties during which mention was made of the accused's tattoo.

[11] The witness describes the attitude of the female employees as curious about the tattoo. Mr Horne understood from the conversation that the tattoo was located in the accused's genital area and that the ladies wished to see the tattoo. At that point the accused lowered his pants and displayed the tattoo, thereby exposing his penis. Thereafter, according to Mr Horne, the tattoo was the subject of joking among the two ladies.

[12] I accept the evidence of Mr Horne as to what occurred in the hallway. Although he is a friend of the accused, he did not appear to me to be shading his evidence to favour his friend. He was straightforward and convincing as a witness. He had a good opportunity to hear the conversation. Importantly, he was not cross-examined as to his version of the events in the kitchen hallway. I find that the two female employees may not have instigated the act of the accused in displaying his genital area, however, they at least acquiesced in this activity.

[13] I must have regard for all the surrounding circumstances, including the fact that the accused was in uniform, apparently on duty, in the working area of a Canadian Forces dining mess, in the presence of two female civilian kitchen staff members to whom the accused was but a slight acquaintance. On all the evidence, while the conduct of the accused was certainly inappropriate, I cannot say that I am satisfied beyond a reasonable doubt that the accused behaved in a disgraceful manner on the occasion in question, nor am I convinced beyond a reasonable doubt that the accused, by his conduct, intended to give offence. Accordingly, he is not guilty of the first charge.

[14] The proceedings of this court martial in respect of Corporal Resch are hereby terminated.

COMMANDER P.J. LAMONT, M.J.

Counsel:

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