

Citation: *R. v. Private Khosho*, 2005CM33

Docket: F200533

**STANDING COURT MARTIAL
CANADA
ONTARIO
3RD BATTALION, THE ROYAL CANADIAN REGIMENT**

Date: 20 July 2005

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

HER MAJESTY THE QUEEN

v.

PRIVATE M.M. KHOSHO

(Accused)

FINDING

(Rendered orally)

[1] Private Khosho, this court finds you guilty of the charge.

[2] Private Khosho is charged with one charge of absence without leave contrary to section 90 of the *National Defence Act*. The particulars allege that on 10 November 2004, at 0925 hours, he was absent from the morning parade of the Driver Wheeled course at Building S-118, CFB Petawawa, and remained absent until 1000 hours on the same date without authority.

[3] It is not disputed that Private Khosho was required to attend the morning parade and that he failed to do so. What is very much in issue is whether his absence is excused because he was required to be elsewhere at the time of his absence from the parade.

[4] 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.

[5] 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".

[6] 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.

[7] 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 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. The fact-finding process is not a process of 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.

[9] If the evidence of the accused as to the issues or the important aspects of the case is accepted, it follows that he is not guilty of the offence. But even if his evidence is not accepted, if the court is left with a reasonable doubt, he is to be found not guilty. Even if the evidence of the accused does not leave the court with a reasonable doubt, the court must look at all the evidence it does accept as credible and reliable to determine whether the guilt of the accused is established beyond a reasonable doubt.

[10] What are the elements of the offence of absence without authority contrary to section 90 of the *National Defence Act*? They have been authoritatively set out by the Court Martial Appeal Court in the case of *R. v. Gauthier* [1998] C.M.A.J. No. 4 speaking through Mr Justice Létourneau, to be as follows:

1. A duty upon the accused to be in a given place at a specified time;
2. That the accused failed to be there;

3. That the accused did not have authority for failing to be there; and
4. A mental element; that is to say, knowledge on the part of the accused of the duty imposed upon him or her to be at the specified place.

[11] Warrant Officer Duggan gave evidence for the prosecution. He testified that on 10 November of 2004, he was the second-in-command of the Driver Wheeled course 04. In accordance with a daily routine, the course participants, including the accused, Private Khosho, were drawn up on parade for 0930 hours before going about their tasks for the day. On 10 November 2004, the absence of Private Khosho was noted to Warrant Officer Duggan who verified for himself that the accused was not present, although Warrant Officer Duggan had expected the accused to be present and ready for his training. In accordance with his practice, the previous day, Warrant Officer Duggan had instructed the course participants, including presumably Private Khosho, to muster the following morning at 0930.

[12] I accept the evidence of Warrant Officer Duggan and find therefore that the accused was under a duty to attend the morning parade on November 10 and that he failed to do so. I am also satisfied that the accused was aware of his obligation to be present for the parade as he would have heard the instruction of Warrant Officer Duggan the previous day. As well, in his evidence in cross-examination, the accused agreed that he knew at the time of his absence that he was required to attend the parade.

[13] The main issue in this case relates to the third element I have referred to; that is, whether the prosecution has established beyond a reasonable doubt that the accused did not have authority to be absent from the parade.

[14] Sergeant Arevalo testified that he was assigned as the Battalion Orderly Sergeant for a 24-hour period commencing at 0930 hours, on 9 November 2004. One of his duties in this role was to supervise defaulters, and it was in this capacity that the accused, Private Khosho, was assigned to him. Private Khosho reported to him at 1730 hours, on 9 November 2004. He assigned tasks to Private Khosho during the evening until he released him shortly before midnight, instructing Private Khosho to report back to him at 0630, on the morning of 10 November. Private Khosho did so. After sending Private Khosho to breakfast, Sergeant Arevalo told Private Khosho to complete a cleaning assignment from the previous evening, and report back to him at 0900. Again, Private Khosho did so. Sergeant Arevalo testified that he dismissed Private Khosho at 0915 hours to return to his company, and then Sergeant Arevalo began to brief his successor on the duties of Battalion Orderly Sergeant. His successor commenced at 0930, on 10 November 2004. Sergeant Arevalo did not make a record of the time he dismissed Private Khosho, but he did record the time he briefed the incoming Battalion Orderly Sergeant.

[15] Private Khosho testified that after breakfast on the morning of 10 November, he was instructed by Sergeant Arevalo to finish the cleaning assignment and he was so occupied until 0940 hours when the cleaning was completed. He then reported to the new Battalion Orderly Sergeant who had relieved Sergeant Arevalo. At about the same time, he saw Sergeant Arevalo and told him the task was completed. Sergeant Arevalo then told the accused to return to his company lines. Private Khosho advised Sergeant Arevalo that he had an appointment for 1000 hours with a Captain Luhning, and he was permitted to attend this appointment arriving at 0950 hours.

[16] I do not accept the evidence of Private Khosho as to the times when he completed the cleaning task and reported to Sergeant Arevalo on the morning of 10 November. The timings he gives for these events are not consistent with the evidence of Sergeant Arevalo, whose evidence, as to the timings, I do accept. Sergeant Arevalo closely supervised the accused during the period he was under his authority. Sergeant Arevalo appears to me to have discharged his responsibilities in a careful manner. He appeared to me to be as careful in giving his evidence. He readily admitted correction on relatively minor errors which were brought to his attention in cross-examination, but was firm in his recollection of the time at which he dismissed Private Khosho to return to his company.

[17] I cannot accept that if the accused had not reported to Sergeant Arevalo at 0900, on 10 November, as the sergeant required him to do, that Sergeant Arevalo would not have taken immediate steps to locate the accused before his period of duty, as the Battalion Orderly Sergeant, expired. Sergeant Arevalo was coming to the end of a long duty shift and had reasons to pay close attention to the time. These reasons included his obligation to turn over the duties of Battalion Orderly Sergeant to his successor.

[18] The defence does not suggest that Sergeant Arevalo was untruthful in his evidence as to the timings, but does argue that Sergeant Arevalo was mistaken as to the time he released Private Khosho. It is argued that Private Greer saw the accused entering Building S-118, at 0945, on the morning of 10 November as he; that is, Private Greer, left on his mail run. I do not find the evidence of Private Greer to be inconsistent with the evidence of Sergeant Arevalo as to the timings of Sergeant Arevalo's dealings with the accused.

[19] The defence evidence does not leave me with a reasonable doubt as to the time at which the accused was released from defaulters parade to return to his company. I am satisfied that the accused was not unable to attend the morning course parade. I am, therefore, on all the evidence, satisfied beyond a reasonable doubt that the accused did not have authority to be absent from morning parade at 0930 hours, on 10 November.

[20] It follows that the accused is guilty of the offence of being absent without leave as charged.

COMMANDER P.J. LAMONT, M.J.

Counsel:

Major J-B. Cloutier, Regional Military Prosecutions Central

Counsel for Her Majesty The Queen

Lieutenant-Commander J.A. McMunagle, Directorate of Defence Counsel Services

Counsel for Private Khosho