

Citation: *R. v. Sergeant J. Faught*, 2006CM30

Docket: F200630

**STANDING COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO**

Date: 2 March 2006

PRESIDING: COMMANDER P. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

SERGEANT J. FAUGHT

(Accused)

FINDING

(Rendered orally)

[1] Sergeant Faught, this court finds you not guilty of the charge in the charge sheet. You may break off and be seated beside your counsel.

[2] Sergeant Faught is charged with one offence of drunkenness contrary to section 97 of the *National Defence Act*. The particulars allege that on 11 February 2005 at Wainwright, Alberta, he was drunk while on duty as an instructor on the Advance Anti Armour course.

[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. But reasonable doubt is not 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.

[5] Subsection 97(2) of the *National Defence Act* defines drunkenness. It reads:

(2) For the purposes of subsection (1), the offence of drunkenness is committed where a person, owing to the influence of alcohol of a drug.

(a) is unfit to be entrusted with any duty that the person is or may be required to perform; or

(b) behaves in a disorderly manner or in a manner likely to bring discredit on Her Majesty's service.

[6] In the present case, the prosecution relies upon clause (a) of the definition. I agree with the prosecutor that there is no evidence of disorderly behaviour or behaviour that is likely to bring discredit upon Her Majesty's service.

[7] The elements of the offence therefore are: the identity, and date and place of the offence, that is the identity of the accused as being the person referred to in the charge and the date and place of the offence as particularized in the charge; the voluntary consumption of alcohol and a duty that the accused is or may be required to perform; and finally, unfitness for that duty by reason of the influence of alcohol.

[8] In this case, I am not satisfied that the prosecution has established a duty that the accused was required to perform nor am I satisfied that the accused was unfit for any duty by reason of the influence of alcohol.

[9] The evidence is clear that the accused was not required to be at the vehicle departure point on the morning of 11 February 2005. It is not clear to me why he did in fact appear for duty. He was not expected to appear although his workmate and fellow instructor on the course was pleased that he showed up. There was no evidence as to any duty the accused might have been required to perform that morning. Even if there were evidence of a duty the accused was required to perform I am not satisfied that the accused was unfit for the duty of instructing students on the course on 11 February 2005. There is some evidence that he may have

been suffering from the effects of alcohol consumption the previous evening. In my view this evidence falls far short of demonstrating unfitness or impairment of faculties. The symptoms of possible impairment by alcohol, to which some of the witnesses testified, are explained in my view by the medical condition of the accused at the time and by his appearance in court where I was able to observe myself a redness in the eyes of the accused and a flushed face.

[10] I consider that the smell of alcohol on the breath of the accused on the morning of 11 February 2005 is not a reliable indicator either of the amount of alcohol consumed or its impairing effects, if any, on the capacities of the accused. I accept the evidence of the accused that he consumed six double-shot drinks of alcohol the previous evening. I also accept the evidence of Doctor Sitar as to the likely concentration of alcohol in the blood of the accused at 0730 hours. In my view, the accused was not unfit for duty.

[11] In conclusion, I wish to add that I do not fault the directing staff on the course for requiring the accused to return to his accommodation for the day. I believe the authorities were acting in the best interests of the course including the students and the other instructors. Indeed, it is likely that the authorities acted in what they perceived to be the best interests of Sergeant Faught himself by separating him from the students for a time, but I am not persuaded by the evidence and submissions of counsel that the accused was unfit to discharge the duties of an instructor.

[12] I find Sergeant Faught not guilty.

COMMANDER P. LAMONT, M.J.

Counsel:

Captain T.D. Bussey, Regional Military Prosecutor Western
Counsel for Her Majesty The Queen
Lieutenant-Commander M. Reesink, Directorate of Defence Counsel Services Ottawa
Counsel for Sergeant J. Faught