

Date: 20020415

Docket: CMAC-447

Neutral citation: 2002 CMAC 6

**CORAM: STRAYER C.J.
ROSCOE J.A.
BLANCHARD J.A.**

BETWEEN:

CAPTAIN J.L.S. SIMARD

Appellant

--and--

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario on Thursday, March 28, 2002

JUDGMENT delivered from the Bench at Ottawa, Ontario on Thursday, March 28, 2002

REASONS FOR JUDGMENT BY:

ROSCOE J.A.

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REASONS FOR JUDGMENT

(Delivered from the Bench at Ottawa, Ontario,
on Thursday, March 28, 2002)

ROSCOE J.A.

[1] The appellant was convicted of drunkenness contrary to section 97 of the *National Defence Act*, (R.S.C. 1985, c. N-4)

97(1) Drunkenness is an offence and every person convicted thereof is liable to imprisonment for less than two years or to less punishment, except that, where the offence is

97(1) Quiconque se trouve en état d'ivresse commet une infraction et, sur déclaration de culpabilité, encourt comme peine maximale un emprisonnement de moins de deux ans, sauf

committed by a non-commissioned member who is not on active service or on duty or who has not been warned for duty, no punishment of imprisonment, and no punishment of detention for a term in excess of ninety days, shall be imposed.

s'il s'agit d'un militaire du rang qui n'est pas en service actif ou de service — ou appelé à prendre son tour de service — auquel cas la peine maximale est un emprisonnement de quatre-vingt-dix jours.

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

(2) Pour l'application du paragraphe (1), il y a infraction d'ivresse chaque fois qu'un individu, parce qu'il est sous l'influence de l'alcool ou d'une drogue :

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

a) soit n'est pas en état d'accomplir la tâche qui lui incombe ou peut lui être confiée;

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

b) soit a une conduite répréhensible ou susceptible de jeter le discrédit sur le service de Sa Majesté.

[2] The Military Judge in his reasons for conviction stated:

I find beyond a reasonable doubt that the accused at the date and place specified in the charge at about 0230 to 0300 hours on the morning of the 4th of May was under the influence of alcohol. I make this finding on the basis of the testimony of the military policemen whose observations of the accused I've just described and whose detailed testimony in that regard I accept as credible and reliable.

I'm also mindful that although no one saw how much liquor or what type of liquor or alcohol Captain Simard had to drink, he was at a wardroom function that evening. Although no witness spoke directly of Captain Simard fitness to perform any duty that might have been assigned to him at the time, at the time he encountered the two military policemen, I conclude and I so find beyond a reasonable doubt that Captain Simard was in an intoxicated state by reason of indulgence in alcohol. I also find beyond a reasonable doubt on the basis of the testimony given by the two policemen that at the time in question he was staggering, slurred his words, had glassy eyes, was off balance and I conclude this on the basis of the evidence adduced that he was not capable

of performing any military duty he might have been required to perform at the time.

As for intention there was no suggestion in the evidence that Captain Simard's drinking was anything but voluntary. He consumed alcohol and I can only conclude he was at least careless or reckless as to the effects alcohol might have on him.

In summary after carefully scrutinizing the evidence as a whole I find the prosecutor has proved each and every element of the first charge, that is to say, date, time place. The evidence which I have found with respect to Captain Simard's actions or his appearance or his behaviour at the time rendered him, and I so find beyond a reasonable doubt, unfit for duty at the place and time. I also find in the circumstances intention has been proven beyond a reasonable doubt and I accordingly find Captain Simard guilty on charge number 1. (A.B. 90-91).

[3] The Crown on appeal indicated that it was not arguing that there was a likelihood that the appellant would be called to duty. In our view, there was no evidence that the appellant was on duty, or that there was any possibility that he might be called upon to perform any duty either that night or the next day. Although he was in uniform, no witness addressed the issue of the appellant's duty. Since there was no evidence on this element, to have convicted the appellant of drunkenness as described in paragraph 97(2)(a) of the *National Defence Act* was an unreasonable finding and should be set aside. It is therefore not necessary to deal with the constitutional issue raised by the appellant which was based on the finding that the appellant could be found guilty of drunkenness pursuant to paragraph 97(2)(a) without any evidence relating to duty.

[4] However, section 241 of the *National Defence Act* states:

241. Notwithstanding anything in this Division, the Court Martial Appeal Court may disallow an appeal if, in the opinion of the

241. Malgré les autres dispositions de la présente section, la Cour d'appel de la cour martiale peut rejeter un appel lorsque, à son

Court, to be expressed in writing, there has been no substantial miscarriage of justice.

avis, formulé par écrit, il n'y a pas eu d'erreur judiciaire grave

[5] In our view there has been no substantial miscarriage of justice. There was sufficient evidence accepted by the Military Judge, including the finding that the appellant threw the glass over the side of the bridge, that would lead to the conclusion that the appellant was guilty of drunkenness by behaving in a disorderly manner, and, given the un rebutted evidence regarding the state of the appellant's uniform, in a manner likely to bring discredit on Her Majesty's service, as defined in paragraph 97(2)(b).

[6] Given the weight of the evidence, we are satisfied that there was no possibility of any other verdict and the appeal should therefore be disallowed.

(s) "E.A. Roscoe"

J.A.