Citation: *R. v. M.S.*, 2009 CM 3001

Docket: 200820

STANDING COURT MARTIAL
CANADIAN FORCES RECRUITING CENTRE
VALCARTIER GARRISON
COURCELETTE, QUEBEC

Date: 23 January 2009

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
v.
M.S.
(Applicant)

DECISION ON MOTION BY ACCUSED ALLEGING NO *PRIMA FACIE* EVIDENCE OF AN ESSENTIAL ELEMENT OF AN OFFENCE
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

[1] M.S. is charged with forgery, contrary to section 367 of the *Criminal Code*, and, in the alternative, he is charged with having altered documents made for military purposes with the intent to deceive, contrary to paragraph 125(c) of the *National Defence Act* (hereinafter the *NDA*), having used forged documents, contrary to paragraph 368(1)(*a*) of the *Criminal Code*, having knowingly made a false answer to a question set out in a document required to be completed in relation to his enrolment in the Canadian Forces, contrary to paragraph 122(*a*) of the *NDA*, and, lastly, having knowingly furnished false information in relation to his enrolment in the Canadian Forces, contrary to paragraph 122(*b*) of the *NDA.*

[2] As prescribed by the Queen's Regulations and Orders for the Canadian Forces (hereinafter the QR&O), when the case for the prosecution is closed, the accused may, upon motion, ask to be pronounced not guilty on a charge because no *prima facie*

case has been made out by counsel for the prosecution, that is, a case in which there is some evidence with respect to each of the essential elements of the offence charged, and where that evidence, if believed by the trier of fact, would result in conviction.

[3] Consequently, on 20 January 2009, following the closing statement of counsel for the prosecution, and in accordance with paragraph 112.05(13) of the QR&O, the accused brought a motion of no *prima facie* case with respect to the third, fourth and fifth count in the indictment, alleging that counsel for the prosecution had not adduced any evidence in this Court concerning one of the essential elements of the offence charged under section 130 of the *NDA*, that is, of having breached paragraph 368(1)(*a*) of the *Criminal Code*, and those charged under paragraphs 122(*a*) and (*b*) of the *NDA*.

[4] The evidence adduced by counsel for the prosecution at this trial by Standing Court Martial is as follows:

a. The testimony heard, in order of appearance of the witnesses:

   I. Sergeant Thierry Paré, Military Police Officer, in charge of the investigation that led to the charges before this Court;

   ii. Manon Francoeur;

   iii. Major Chantal Descoteaux;

   iv. Francine Martineau;

   v. Sonya Sylvain;

   vi. Roger Lafond;

   vii. Luc Métayer;

   viii. Francine Galarneau;

   ix. Vickie Mercier, document specialist;

   x. Anne Cloutier; and

   xi. Sergeant Isabelle Voyer.

b. Documentary exhibits numbered 1 to 24 and listed in the annex to this decision.

c. The judicial notice taken by the Court of the facts and questions contained in Rule 15 of the Military Rules of Evidence, and more specifically, Chapter 5002-3 ("Component and Sub-Component Transfer") of the Defence Administrative Orders and Directives.

[5] A motion of this kind, made immediately after counsel for the prosecution declares his evidence closed, is different from a motion requesting acquittal on the basis of a reasonable doubt. The latter argument is to the effect that there is some evidence concerning all the essential elements of a charge and on which a reasonable jury, properly instructed, could return a verdict of guilty, but that is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt does not come into play until all the evidence has been adduced, the concept of reasonable doubt cannot be considered here unless the accused has decided not to adduce evidence or has declared his case closed, which is not the case here.

[6] I do not have to assess the quality of the evidence in determining whether or not counsel for the prosecution has adduced some evidence concerning each of the essential elements of the offence in the third, fourth and fifth counts, on the basis of which a reasonable jury, properly instructed in the law, could return a verdict of guilty.

[7] The test for a directed verdict was set out by Justice Ritchie in *United States of America v. Shephard*, [1977] 2 S.C.R.1067, at page 1080, and reads as follows:

> ... whether or not there is any evidence upon which a reasonable jury properly instructed could return a verdict of guilty.

It is important to note that the burden of proof lies with the accused to establish, on a balance of probabilities, that the test has been met.

[8] The Supreme Court confirmed that test at paragraph 9 of its decision in *R. v. Monteleone*, [1987] 2 S.C.R. 154, in the following terms:

> Where there is before the court any admissible evidence, whether direct or circumstantial, which, if believed by a properly charged jury acting reasonably, would justify a conviction, the trial judge is not justified in directing a verdict of acquittal.

[9] The test is the same, whether the evidence is direct or circumstantial. The application of this test will vary with the kind of evidence adduced by the prosecution. When the prosecution's case is based entirely on direct evidence, the application of the test is simple. If the judge determines that the prosecution has adduced some direct evidence on each of the essential elements of the offence, the motion must be dismissed. The only issue that will remain relates to the truth of the evidence, and this aspect will have to be considered by the trier of fact. However, where the evidence of an essential

element of the offence is based on circumstantial evidence, the question to be decided relates not merely to the truth of this evidence. To the extent that the evidence is accepted as truthful, there is also the issue of whether the inferences based on this evidence, as proposed by the prosecution, can be drawn as suggested. The judge must weigh the evidence by determining whether there is a reasonable likelihood that this evidence will support the inferences proposed by the prosecution. The judge does not ask whether he or she personally would draw such inferences and does not determine the credibility thereof. The only question is whether the evidence, if it is believed, may reasonably support an inference of guilt.

[10] First, as regards the third count, that is, the use of forged documents, the essential elements of the offence in paragraph 368(1)(*a*) of the *Criminal Code* are:

a. The identity of the accused.

b. The time and place of the offence.

c. That the accused knew that the documents were forged. This element is related to the accused's intent, particularly the fact that he knew that the documents were forged when he used them. One way of proving this essential element is to show that the accused actually knew or was aware that the documents were forged when he used them. The accused is not required to know the legal definition of a "forged document", but he must be aware of the circumstances that led to those documents being forged. Another way of proving this essential element, that is, the accused's knowledge that the documents were forged, is to show that he was aware of the need to inquire into the nature of the documents but deliberately failed to do so because he did not wish to know the truth about the matter.

d. Another essential element of the charge is that the accused used the forged documents. This essential element implies that the accused himself used the documents or ensured–or tried to ensure–that someone else used them. It is not necessary that the other person actually used the documents as a result of the accused's efforts. It is enough that the accused tried to bring about such a thing.

e. The final evidence, an essential element related to that offence, is that the accused presented the documents as being genuine. Representing something as being genuine means describing or setting forth the genuineness of the document, that is, as if it were the real thing, as it appears to be, rather than what it actually is and is known to be by the accused. This essential element is related to the accused's intent to

deceive a person and/or an organization to which the documents are presented as being genuine.

[11] The accused submitted that counsel for the prosecution introduced no evidence before the Court that he used forged documents. Counsel for the prosecution suggests to the Court that, on the contrary, there is some evidence that the accused used the three forged documents listed in the particulars of this count. He relies on circumstantial evidence from the evidence he adduced before the Court.

[12] The Court does find that there is no direct evidence that the accused used the documents.

[13] In the evidence submitted before the Court by counsel for the prosecution, I note that the following may be used to determine whether reasonable inferences may be drawn, as suggested by counsel for the prosecution, to show that there is some evidence that the accused used the three forged documents:

a. Evidence that M.S. left the Valcartier Garrison medical clinic on 4 October 2002, in possession of his medical file (CF 2034) (see Exhibits 15 and 18, and the testimony of Major Descoteaux).

b. Evidence that, the week after 4 October 2002, M.S. was to report to the Canadian Forces Base Winnipeg to undergo his release medical examination, because his home unit was located there (see the testimony of Major Descoteaux).

c. Evidence that M.S. medical file arrived at the medical clinic of the Canadian Forces Base Winnipeg on 8 October 2002 (see Exhibits 15 and 18, Major Descoteaux's note at Exhibit 12 and her testimony that she obtained Exhibit 15 from the CFB Winnipeg medical clinic).

d. Evidence that a medical procedure for M.S. release took place on 9 October 2002 (see Exhibit 16).

e. Evidence that, on 9 October 2002, a medical note regarding M.S. release, including the series of numbers 111221 written on a single line and a reference to a nicotine addiction and the treatment offered, signed by a medical officer from a Winnipeg unit, Lieutenant (Navy) Roque, was written on M.S. Medical Attendance Record (see Exhibit 3).

f. Evidence that M.S. medical category was written numerically as 111223 on 21 September 2002 and had been so since 28 June 1999,

and that it was written numerically as 111221 on 9 October 2002. Only the last number of this numeric form, namely, the Occupational Factor as a pilot, changed from 3, which indicates that M.S. has employment limitations for medical reasons, to 1, which indicates that M.S. meets all medical requirements for the employment (see Exhibit 16 and Major Descoteaux's testimony on the meaning of the factors attributed).

g. Evidence that the Medical Examination Record (Form CF 2033) and the Type II Aircrew Health Examination (Form DND 1737), both dated 21 September 2002, which are the documents that were allegedly forged and to which the third count refers, contain a medical category written in the numeric form 111221 (see Exhibits 4 and 5).

h. Evidence that, during release medical examinations of Canadian Forces members, medical officers commonly take the most recent medical examination form found in the medical file and use the information therein to make observations on medical diagnoses and treatments regarding that member (see Major Descoteaux's testimony).

i. Evidence that health care and archiving personnel are the only people to have access to the medical file of a member of the military (see Major Descoteaux's testimony).

[14] To the extent that the Court accepts this evidence as true, counsel for the prosecution suggests that the evidence may reasonably support the following inference:

> A medical officer, Lieutenant (Navy) Roque, allegedly did use the three forged documents, namely, the Medical Attendance Record (Form CF 2016) containing a note dated 21 September 2002 (Exhibit 3), the Medical Examination Record (Form CF 2033) (Exhibit 5) and the Type II Aircrew Medical Examination (Form DND 1737) (Exhibit 4), both dated 21 September 2002, or one of these three documents, during the release medical examination of M.S. on 9 October 2002, because of M.S.efforts.

[15] It seems clear that, on examining the evidence submitted, the Court has more than just mere suspicion that M.S. used forged documents. It must therefore analyze whether this evidence, if it is believed, can reasonably support an inference of guilt, as suggested by counsel for the prosecution.

[16] As regards that suggested inference, that a medical officer allegedly used the three forged documents, or at least one of the three, for the release medical

examination of M.S. because of M.S. efforts, the Court is of the opinion that the evidence adduced by counsel for the prosecution may reasonably support that inference. That a medical officer wrote a note regarding M.S. release in the Medical Attendance Record immediately following two forged notes, that the medical officer's note contains an entry in numeric form that appears to refer to a medical category found in the two other forged documents and that the medical officer's note was dated 9 October 2002, that is, the week that M.S. release medical examination was to take place, justifies the Court's finding. In this context, the fact that M.S. had the medical file in his possession as of 4 October 2002 and that there is evidence that he was allegedly the author of the forged notes in the Medical Attendance Record reasonably support the inference that he acted to ensure that the medical officer would use this forged document.

[17] Moreover, the Court is of the opinion that, if such an inference were believed by a properly charged jury acting reasonably, it would justify a conviction.

[18] The Court therefore finds that there is some evidence concerning the fourth essential element in the third count.

[19] The Court is of the view that M.S. has failed to prove, on a balance of probabilities, that there is a complete lack of evidence that he used forged documents.

[20] The accused also submits that counsel for the prosecution presented no evidence to the Court regarding one of the essential elements in the fourth and fifth counts. In respect of the fourth count, having knowingly made a false answer to a question set out in a document required to be completed in relation to his enrolment in the Canadian Forces, the essential elements of the offence in paragraph 122(*a*) of the *NDA* are:

a. The identity of the accused;

b. The time and place of the offence;

c. That the accused made an answer to a question set out in a document required to be completed;

d. That the accused knowingly made a false answer to the question;

e. That the document required to be completed was in relation to the accused's enrolment in the Canadian Forces.

[21] As regards the fifth count, having knowingly furnished false information in relation to his enrolment in the Canadian Forces, the essential elements of the offence in paragraph 122(*b*) of the *NDA* are:

a. The identity of the accused;

b. The time and place of the offence;

c. That the accused furnished information to the Canadian Forces authorities;

d. That the accused knowingly furnished false information;

e. That the information was in relation to the accused's enrolment in the Canadian Forces.

[22] Thus, the accused submits to the Court that counsel for the prosecution adduced no evidence regarding the fifth essential element in the fourth and fifth counts, that is, that the document that was required to be completed and the information furnished by the accused were both in relation to his enrolment in the Canadian Forces.

[23] Regarding this question before it, the Court notes the following evidence:

a. M.S. enrolled in the Canadian Forces on 15 December 1992, and he has been a member continuously since that time, with no break in service, as was established by the documentation (Exhibit 21) submitted as evidence to the Court and the testimony of Sergeant Voyer;

b. M.S. was a pilot in the Regular Force from 15 December 1992 to 27 December 2002 and from 23 March 2005 to date (see Exhibit 21).

c. On 15 November 2000, the DMCARM decided that M.S. would be retained in the Canadian Forces with the following employment limitation: he must not fly helicopters. In addition, it was ordered that M.S. be given a copy of the military message indicating this situation, that another copy be placed in his unit personal file and that a copy also be sent to the base surgeon to be included in his medical file (CF 2034) (see Exhibit 22).

d. M.S. was a pilot in the Reserve Force from 27 December 2002 to 22 March 2005. However, the types of assignments he received in Class A and B service and the training history from that period indicate that he never flew, but rather carried out administrative duties (see Exhibit 21).

e. M.S. allegedly underwent an enrolment medical examination on 1 October 2003, involving an unidentified medical officer at an unidentified location (see Exhibit 16).

f. On 2 December 2004, while he was a Reserve Force member, he underwent an annual medical examination at the Valcartier Garrison medical clinic, involving Major Descoteaux as medical officer for phase 2 of the examination, during which he announced his intention to re-enrol in the Regular Force (see Exhibit 16 and Major Descoteaux's note in Exhibit 12, Annex B).

[24] After reviewing the evidence presented by the prosecution, including the specific points previously mentioned, the Court finds that there is a complete lack of evidence concerning the fifth essential element in the fourth and fifth counts, for two reasons.

[25] First, the evidence clearly shows that the medical examination that M.S. underwent on 2 December 2004, and during which he allegedly furnished false information and knowingly made a false answer, was an annual medical examination and not an enrolment medical examination. The Court was unable to find any direct or circumstantial evidence to qualify the medical examination on 2 December 2004 as being an enrolment examination. Certainly, there are M.S. comments, recorded by the medical officer, in Exhibit 12, Annex B, that he intended to re-enrol in the Regular Force, but that is not enough for an annual medical examination to become an enrolment medical examination. It is possible that this annual examination may have been for M.S. transfer to the Regular Force, but no evidence was submitted to the Court on this subject.

[26] Second, after having reviewed the applicable statutory and regulatory provisions, I conclude that a person enrols in the Canadian Forces, and not in the components.

[27] Paragraphs 122(*a*) and 122(*b*) of the *NDA* clearly refer to an enrolment in the Canadian Forces. Section 14 of the *NDA* sets out the Canadian Forces' constitution. Sections 15 and 16 of this same act set out the components: the Regular Force, Reserve Force and Special Force. It is also interesting to note that section 24 of the *NDA* refers to the concept of transfer between the Regular and Reserve forces, and vice versa, when a member of the military switches from one component to another.

[28] Various Canadian Forces regulations, orders and directives regarding officers and non-commissioned members set out the terms of service, terms of engagement and release, salary and benefits to which they are entitled and which vary

depending on the component to which they belong, that is, the Regular or Reserve Force.

[29] Also of interest is Chapter 5002-3 of the Defence Administrative Orders and Directives (DAOD), entitled "Component and Sub-Component Transfer", which provides, among other things, the following:

> Serving CF members of any component have been recruited and enrolled in the CF. As a result, on transfer between components or sub-components, CF members do not normally require processing by the recruiting system.

[30] According to that DAOD, it appears that CF members must follow certain administrative procedures when transferring that are similar to enrolment procedures. However, this does not mean that, legally, a transfer between components is treated as an enrolment.

[31] Therefore, as a matter of law, I conclude from the existing statutory and regulatory structure that individuals enrol in the Canadian Forces and end up in one of those two components, the Regular or Reserve Force. They are subject to different regimes as regards their duties and conditions of employment, depending on the component to which they belong. When CF members who have been enlisted decide to change components, they make a transfer. Enrolling in the Canadian Forces means becoming a CF member, and being released means leaving the Canadian Forces.

[32] Consequently, if I assume that the medical examination that the accused underwent was for his transfer from the Reserve Force to the Regular Force, I find that counsel for the prosecution adduced no direct or circumstantial evidence that the medical examination that M.S. underwent on 2 December 2004 was an examination for his enrolment in the Canadian Forces. Still based on that same assumption, the evidence adduced by counsel for the prosecution on that subject was actually in respect to M.S. transfer from the Reserve Force to the Regular Force.

[33] M.S., please stand up. It is my decision that the prosecution did make a *prima facie* case against you in respect of the third count set out in the charge sheet but that the prosecution failed to make such a case in respect of the fourth and fifth counts set out in the charge sheet.

[34] Consequently, M.S., I pronounce you not guilty on the fourth and fifth counts.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

Counsel:

Major J. Caron, Regional Military Prosecutions Eastern
Captain P. Doucet, Regional Military Prosecutions Eastern
Counsel for Her Majesty the Queen
Major A. Litowski, Directorate of Defence Counsel Services
Counsel for M.S.