Citation: *R. v. M.S.*, 2009 CM 3002

Docket: 200820

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

Date: 3 February 2009

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

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

VERDICT
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

INTRODUCTION

[1] Since this trial has been going on for about three months, I feel it necessary to start by summarizing the various stages so far so that we all understand where things stand today.

The charges

[2] As appears from the charge sheet dated 18 July 2008, M.S. has been charged with the forgery of three documents contrary to section 367 of the *Criminal Code*. In the alternative to this charge, he is charged with having altered the same three documents made for military purposes with intent to deceive, contrary to paragraph 125(*c*) of the *National Defence Act* (the *NDA*), having used the three 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 in relation to his enrolment in the Canadian Forces contrary to paragraph 122(*a*) of the *National Defence Act*, and, lastly, having knowingly furnished false information in relation to his enrolment in the Canadian Forces contrary to paragraph 122(*b*) of the *National Defence Act*.

Procedural background

[3] The trial started on 30 October 2008, with M.S. filing a motion requesting that the military judge presiding over the court martial make an order, pursuant to subsection 24(2) of the *Canadian Charter of Rights and Freedoms* (the *Charter*), excluding his medical record which had been seized by Military Police and all the documents it contained, a memorandum and a forensic document examination report, as he considered these to be evidence in support of the charges against him and that this evidence had been obtained as a result of an alleged breach of his right to be secure against unreasonable search or seizure, as provided for in section 8 of the *Charter*.

[4] I heard the motion on 30 and 31 October 2008. On 11 November 2008, the Court reconvened. I determined that the *voir dire* respecting the hearing of this motion should be suspended and that the prosecution's evidence should be heard to allow me to identify more clearly the evidence concerned by M.S. motion.

[5] The Court therefore heard the prosecution's evidence from 11 to 14 November 2008. On 26 November 2008, the last witness was heard, and I allowed the parties to make additional addresses on M.S. motion to exclude evidence. I then adjourned the proceedings to consider how to rule on this motion.

[6] On 17 December 2008, I rendered my decision on the motion, which I dismissed and which concerned 37 documents used by counsel for the prosecution as evidence to support the charges against M.S. As the prosecution's case was not closed, I heard an additional witness introduced by the prosecution on the same day. I then adjourned the case to 19 January 2009 at 1:30 p.m. For reasons that I have already provided before this Court, I was unable to begin hearing this motion before 20 January at 9 a.m.

[7] On 20 January 2009, following the announcement by counsel for the prosecution that his case was closed, and in accordance with paragraph 112.05(13) of the *QR&O*, the accused filed a motion stating that no *prima facie* case had been made out in respect of the third, fourth and fifth charges found on the charge sheet, alleging that the prosecutor had submitted no evidence before the Court for one of the essential elements of the offence charged under section 130 of the *NDA*, namely having breached paragraph 368(1)(*a*) of the *Criminal Code*, and the offences charged under paragraphs 122(*a*) and (*b*) of the *NDA*. The hearing of that motion ended on 21 January 2009.

[8] On 23 January 2009, I ruled on that motion, finding that the prosecution had made a *prima facie* case with regard to M.S. and the third charge appearing on the charge sheet, but that it had failed to do so with regard to the fourth and fifth charges appearing on the charge sheet. I consequently pronounced M.S. not guilty of the fourth and fifth charges.

[9] On the same day, counsel for M.S. announced that her client was not presenting a defence. Afterwards, the Court heard both parties' closing addresses concerning the findings to be made with regard to the first three charges appearing on the charge sheet. This decision therefore concerns the first, second and third charges brought against M.S.

EVIDENCE

[10] The prosecutor called the following evidence for this trial by standing court martial:

a. Testimony heard from the following individuals, in order of appearance: Sergeant Thierry Paré, Military Police Officer, in charge of the investigation leading to the charges before this Court; Manon Francoeur; Major Chantal Descoteaux; Francine Martineau; Sonya Sylvain; Roger Lafond; Luc Métayer; Francine Galarneau; Vickie Mercier, a document specialist; Anne Cloutier; and Sergeant Isabelle Voyer.

b. Documentary evidence numbered from 1 to 24 and listed in the Schedule to this decision; and

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 particularly, Chapter 5002-3 (Component and Sub-Component Transfer) of the *Defence Administrative Orders and Directives*.

FACTS

M.S. military service history

[11] M.S. enrolled with the Canadian Forces as a pilot for the Regular Force on 15 December 1992. After having completed his pilot training, he was assigned to the 430 Tactical Helicopter Squadron (THS) at Valcartier Garrison in June 1996. During his time with this unit, he was deployed on a mission to Haiti between March and October 1997.

[12] In June 1999, M.S. occupational factor in his medical category changed from A1, indicating that M.S. satisfied all medical requirements for his position, to A3, indicating that there were restrictions to his employment for medical reasons. On 15 November 2000, the Directorate Military Careers and Resource Management (the DMCARM), an organization of the Canadian Forces Headquarters in Ottawa which is concerned with military careers, decided that M.S. would be kept on in the Canadian Forces, with the following restriction: he would not be allowed to pilot helicopters.

[13] As a helicopter pilot, he had not been allowed to fly this type of aircraft since June 1999, and the DMCARM's decision confirmed that he would no longer be able to do so, unless there was a change in his medical condition. However, he could continue to fly fixed-wing aircraft.

[14] In June 2001, M.S. was transferred to the headquarters of the 1 Canadian Air Division (1 Cdn Air Div) in Winnipeg. On 20 May 2002, he was transferred to the Canadian Forces Recruiting Centre (CFRC) Quebec. On 27 December 2002, he was transferred to the Reserve Force as a pilot. He was given various administrative assignments in Quebec and Ontario on class A or B service in the Reserve Force, and, in March 2005, was transferred to the Regular Force, still as a pilot. In April 2005, he was transferred, this time as a member of the Regular Force, to the CFRC Quebec, the unit to which he still belongs.

Discovery of a problem concerning M.S. medical category

[15] With regard to the medical aspect of this case, Major Descoteaux, Base Surgeon at the Valcartier Garrison from summer 2000 to summer 2008, was the medical officer who saw and treated M.S. at the Valcartier Garrison's medical clinic from 2000 to 2005. In addition to her administrative duties as base surgeon, she saw a small number of patients, including pilots, because she was qualified as a flight surgeon.

[16] In fact, as a flight surgeon, her duty was to monitor and perform the annual exam of those patients who were pilots in order to determine if they were meeting the medical standards for carrying out their jobs.

[17] On 29 August 2005, Major Descoteaux was given an invoice from the Department of Veterans Affairs (see Exhibit 13) by her staff, which had been received by the clinic and was for a series of 30 interviews between M.S. and a psychologist, Carol Girard, that had taken place between 9 July 2003 and 11 March 2005. The consultation report of the same psychologist dated 20 April 2005 (see Exhibit 17) was obtained by the staff of the Valcartier Garrison's Medical Clinic at Major Descoteaux's request shortly afterwards. The Major also reviewed this report.

[18] The receipt of this invoice and the consultant clinical report in August 2005 caused Major Descoteaux great concern. In fact, on 2 December 2004, Major Descoteaux, in her capacity as flight surgeon, had met with M.S., then member of the Reserve Force, for his annual medical exam, which included an evaluation of his medical fitness for working as a pilot in the Canadian Forces.

[19] M.S. psychological health had been raised by Major Descoteaux during that medical consultation, especially because of information in his medical record referring to a previous situation concerning that subject, namely, an adjustment disorder. The medical officer concluded, on the basis of information provided by M.S., that the issue seemed to have been resolved for over a year. She therefore declared him fit to resume duty as a pilot for the Canadian Forces and graded him A1 in his medical category. During this consultation, M.S. mentioned his intention to transfer to the Regular Force as a pilot to Major Descoteaux, which he did shortly afterwards.

[20] Upon reading the invoice and especially the psychologist's report, Major Descoteaux noted with surprise that the matter of M.S. psychological health was in no way resolved, as he had suggested during his medical exam in December 2004. She compared the findings of that report with another report written by a specialist of the clinic on M.S. psychological health and concluded that they contradicted each other. Major Descoteaux consequently undertook a full review of M.S. medical record and the documents it comprised to verify whether there was a paper trail that could explain this apparent contradiction.

[21] Following her review of the documents, Major Descoteaux concluded that two notes appearing in M.S. Medical Attendance Record entered on 21 and 26 September 2002, the first of which had allegedly been written by her, had been written and signed by someone other than herself and the other physician involved, namely, Doctor Lafond. Later, she also found that there were fewer pages than the usual number of pages found in a Medical Attendance Record.

[22] She also noted that the Medical Examination Record (form CF 2033) and the Type II Aircrew Health Examination form (DND 1737) which she had allegedly completed on 21 September 2001 had been written and signed by someone other than her. Moreover, she discovered that the medical category grade attributed to the occupational factor in both of these documents was A1, meaning that M.S. satisfied all medical requirements for the pilot position. She also noted that some of the comments made in these forms did not correspond to her way of working. She performed a search in the Canadian Forces system to determine if there were copies of the two documents that she had completed originally but found nothing.

[23] She asked her staff whether there was a way of checking which physician had countersigned the Medical Examination Record form (CF 2033) dated 21 September 2002, as she was unable to read the signature of the approving medical officer appearing in Part 5 of the form. In fact, as base surgeon, she usually signed as approving medical officer, but when she was the treating medical officer, another physician would sign.

[24] A print-out of a database file concerning M.S. medical categories was given to her by her staff (Exhibit 16). This file contained the date of the medical exam, the name of the physician who performed the exam, the name of the approving medical officer and the medical category attributed to the military member during the exam.

[25] Major Descoteaux confirmed from the print-out of this file that, on 21 September 2002, she did indeed perform M.S. annual medical exam and that the approving medical officer had been Sonya Sylvain. She also noted that the medical category's occupational factor attributed to M.S. on that date had been A3 and not A1, as appears from the two examination forms in question. It should be noted that Doctor Sylvain confirmed to the Court that she did not recognize her signature on form CF 2033.

[26] Consequently, after having obtained a legal opinion, Major Descoteaux contacted the Military Police in October 2005 to report her findings concerning the alleged commission of certain offences.

Context in which the false documents were made and used

[27] On 4 October 2002, M.S. left the Valcartier medical clinic with his medical record in order to report to Canadian Forces Base Winnipeg, where his home unit was at the time, in order to undergo his release medical examination, because he was transferring from the Regular to the Reserve Force. He had obtained his medical record from the medical archives by order of the base surgeon, Major Descoteaux, to whom he had explained the above in support of his request.

[28] On 8 October 2002, the medical record arrived at CFB Winnipeg's medical clinic. A note dated 9 October 2002 in M.S. Medical Attendance Record indicated that a medical officer, Lieutenant Roque, performed a release medical examination on M.S. Furthermore, the note, which comes immediately after the one that was allegedly forged, states that the member refused a treatment plan. The same note includes a series of numbers written on the same line, namely 111221. Lastly, the print-out of the file concerning M.S. medical categories (Exhibit 16) indicates that a release medical examination was performed on 9 October 2002 by an unnamed physician and was also approved by an unnamed physician and that an A1 grade was

attributed to the occupational factor of M.S. medical category at the 9 October 2002 exam.

Document examiner's report

[29] As part of his investigation, the Military Police investigator, Sergeant Paré, had a forensic document examination (Exhibit 20) prepared, which was submitted as part of the testimony of forensic document examiner Vickie Mercier. The document examination was based on a series of documents filed before the Court and used by the examiner for a comparison. Four of the documents were identified by a lay witness as bearing the signature of and containing the handwriting of M.S., namely annexes J, K, L and P of Exhibit 19. The examiner used these documents and others to establish whether certain styles of handwriting and signatures in the three documents that are the basis of the present charges were those of M.S.

[30] Moreover, documents written by the physicians and used by the document examiner for comparative purposes, combined with the testimony of those physicians, were submitted to the Court in support of the fact that the signatures and certain entries in the three documents that are the subject of the charges had not been written by them. Physicians Descoteaux, Lafond and Sylvain testified to that effect.

[31] The examiner made the following findings

a. concerning the Medical Attendance Record:

i. The entries written and dated 21and 26 September 2002 had been written by M.S.; and

ii. The signatures appearing at the end of the entries written on 21and 26 September 2002 were forged, but their author could not be identified.

b. concerning the Medical Examination Record dated 21 September 2002:

i. All of the text appearing on both sides of the form had been written by M.S.;

ii. Both physicians' signatures were false, and their author could not be identified; and

iii. The note "Approuvé 27-9-2" apparently authored by the approving medical officer could not be attributed.

c. concerning the Type II Aircrew Health Examination form:

i. The words "Sdt Beauchamp" were written by neither Doctor Descoteaux nor M.S.;

ii. The medical officer's signature and words "C Descoteaux" were forged, and the author could not be identified; and

iii. Some figures, including those appearing in the medical category section, had possibly been written by M.S.

THE APPLICABLE LAW AND THE ESSENTIAL ELEMENTS OF THE OFFENCES

[32] To begin with, with regard to the first charge, section 367 of the *Criminal Code* reads as follows:

> 367. Every one who commits forgery
>
> (*a*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
>
> (*b*) is guilty of an offence punishable on summary conviction.

[33] The prosecution had to prove beyond a reasonable doubt the following essential elements of this offence. It had to prove the identity of M.S. and the date and place of the offence as alleged in the first count on the charge sheet. It also had to prove the following additional elements beyond a reasonable doubt:

a. That M.S. made a false document. A document means any material on which is recorded or marked anything that is capable of being read or understood by a person, computer system or other device. A false document means a document the whole or a material part of which purports to be made by or on behalf of a person, who did not make it or authorize it to be made, or who did not in fact exist, that is made by or on behalf of the person who purports to make it but is false in some material particular, that is made in the name of an existing person, by him or under his authority, with a fraudulent intention that it should pass as being made by a person, real or fictitious, other than the person who makes it or under whose authority it is made. Making a false document also includes making a material alteration in a genuine document. A material alternation can be made in one of the following manners: altering a genuine document in any material part, making a material addition to a document or adding to it a false date, attestation, seal or other thing that is material or making a material alteration by erasure, obliteration, removal or in any other way.

b. The prosecution also had to prove that M.S. knew that the document was false when he made it. This element is related to the accused's intent, particularly to the fact that he knew that the document was false when he made it. One way of proving this essential element is by demonstrating that the accused actually knew or was aware that the document was false when he made it. The accused does not need to know the definition of "false document"; he must be aware that the document he makes or alters is not genuine. Another way of proving this essential element is by demonstrating that the accused was aware that he had to enquire after the genuineness of the document he made or altered, but that he deliberately omitted to do so because he did not want to know the truth.

c. The prosecution also had to prove that M.S. intended that the document be considered genuine. This essential element is related to the state of mind of the accused. It involves what the accused intended to happen with the document once completed. This essential element is proved when it is demonstrated that the accused intended for someone to use or act on the document to his or her own detriment as if the document were genuine or to do or fail to do something believing the document to be genuine. The accused does not have to have a particular person in mind. Whether the document was in substance treated as genuine or whether it resulted in a loss is not important. What is important is the accused's state of mind.

d. Lastly, the prosecution had to prove that M.S. intended to harm another person by that person's treating the document as genuine. This last element also relates to the intent of the accused. It is not necessary to demonstrate that the accused had a specific person in mind as a potential victim. It is not important that the document was believed to be genuine or that it resulted in a loss. To harm means to mislead or to deceive. It suffices to demonstrate that the accused intended to cause another person, whoever that might be, to do or fail to do something by their treating the document as genuine.

[34] With regard to the second charge, paragraph 125(*c*) of the *NDA* reads as follows:

125. Every person who

. . .

> (*c*) with intent to injure any person or with intent to deceive, suppresses, defaces, alters or makes away with any document or file kept, made or issued for any military or departmental purpose,
>
> is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding three years or to less punishment.

[35] In addition to establishing beyond a reasonable doubt M.S. identity and the date and place of the offence as alleged in the second count on the charge sheet, the prosecution had to prove

a. that M.S. altered a document;

b. that the document was made for a military purpose (see Note D of article 103.57 of the *QR&O*);

c. that M.S. knew that the document would become false when he altered it;

d. that M.S. intended the document to be used as genuine (see Note C of article 103.57 of the *QR&O*); and

e. that M.S. intended to deceive. To deceive means to mislead.

[36] With regard to the third count, paragraph 368(1)(*a*) of the *Criminal Code* reads in part as follows:

> 368. (1) Every one who, knowing that a document is forged,
>
> (*a*) uses, deals with or acts on it, or
>
> (*b*) causes or attempts to cause any person to use, deal with or act on it, as if the document were genuine,
>
> (*c*) is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years; or
>
> (*d*) is guilty of an offence punishable on summary conviction.

[37] The prosecution had to prove beyond a reasonable doubt the following essential elements of this offence. It had to establish M.S. identity and the date and place of the offence as alleged in the third count appearing on the charge sheet. It also had to prove the following additional elements:

a. That M.S. knew that the documents had been forged. This element is related to the intent of the accused, particularly the fact that he knew

that the documents were forged when he used them. One way of proving this essential element is to demonstrate that the accused actually knew or was aware that the documents were forged when he used them. The accused does not have to know the legal definition of a forged document but must know the circumstances that make such documents forged. Another way of proving this essential element, that is, the accused's knowledge of the forged nature of the documents, is to demonstrate that the accused was aware of the need to enquire about the nature of the documents but deliberately omitted to do so because he did not want to know the truth of the matter.

b. That M.S. used the forged documents. This essential element involves the fact that the accused himself used the documents or caused or attempted to cause another person to use them. It is not necessary that the other person actually used the documents as a result of the efforts of the accused. It suffices that the accused attempted to achieve this.

c. That M.S. presented the documents as being genuine. Representing something as being genuine means describing it as being genuine, the real thing or what it seems to be, or claiming that it is so, rather than as what it actually is and as it is known to the accused. This essential element relates to the intent of the accused to mislead a person and/or an organization to whom or which the documents were presented as being genuine.

[38] Before this Court provides its legal analysis, it is appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt, a standard that is inextricably intertwined with the principles fundamental to all criminal trials. Although these principles, of course, are well known to counsel, other people in this courtroom may well be less familiar with them.

[39] It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law, and the principle of proof beyond a reasonable doubt is an essential part of the presumption of innocence. In matters dealt with under the Code of Service Discipline, as in cases dealt with under criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt beyond a reasonable doubt. An accused person does not have to prove that he or she is innocent. It is up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt.

[40] The standard of proof beyond a reasonable doubt does not apply to the individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but to the total body of evidence upon which the prosecution relies

to prove guilt. The burden or onus of proving the guilt of an accused person beyond a reasonable doubt rests upon the prosecution and it never shifts to the accused person.

[41] A court must find an accused person not guilty if it has a reasonable doubt about his guilt or after having considered all of the evidence. The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. In *R. v. Lifchus*, [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. The principles laid out in *Lifchus* have been applied in a number of subsequent Supreme Court and appellate courts decisions. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It is not a doubt based on sympathy or prejudice. It is a doubt based on reason and common sense. It is a doubt that arises at the end of the case based not only on what the evidence tells the court, but also on what that evidence does not tell the court. The fact that a person has been charged is no way indicative of his or her guilt, and I will add that the only charges that are faced by an accused person are those that appear on the charge sheet before the court.

[42] In *R. v. Starr* [2000] 2 S.C.R. 144, at paragraph 242, the Supreme Court held that:

> . . . an effective way to define the reasonable doubt standard for a jury is to explain that it falls much closer to absolute certainty than to proof on a balance of probabilities.

[43] On the other hand, it should be remembered that it is nearly impossible to prove anything with absolute certainty. The prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law. The prosecution only has the burden of proving the guilt of an accused person, in this case M.S., beyond a reasonable doubt. To put it in perspective, if the court is convinced or would have been convinced that the accused is probably or likely guilty, then the accused would have been acquitted since proof of probable or likely guilt is not proof of guilt beyond a reasonable doubt.

[44] What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses about what they observed or what they did. It could be documents, photographs, maps or other items introduced by witnesses, the testimony of expert witnesses, formal admissions of facts by either the prosecution or the defence, and matters of which the court takes judicial notice under the *Military Rules of Evidence*.

[45] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events. The court has to determine what evidence it finds credible.

[46] Credibility is not synonymous with telling the truth, and a lack of credibility is not synonymous with lying. Many factors influence the court's assessment of the credibility of the testimony of a witness. For example, a court will assess a witness's opportunity to observe, a witness's reasons to remember, such as whether the events were noteworthy, unusual or striking, or relatively unimportant and, therefore, understandably more difficult to recollect. Does a witness have any interest in the outcome of the trial, that is, a reason to favour the prosecution or the defence, or is the witness impartial? This last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that the accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where that accused chooses to testify.

[47] Another factor in determining credibility is the apparent capacity of the witness to remember. The demeanour of the witness while testifying is a factor which can be used in assessing credibility, that is, was the witness responsive to questions, straightforward in his or her answers, or evasive, hesitant or argumentative? Finally, was the witness's testimony consistent with itself and with the uncontradicted facts?

[48] Minor discrepancies, which can and do innocently occur, do not necessarily mean that the testimony should be disregarded. However, a deliberate falsehood is an entirely different matter. It is always serious, and it may well taint a witness's entire testimony.

[49] The court is not required to accept the testimony of any witness except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason, rather, to disbelieve it.

[50] Having instructed myself as to the presumption of innocence and the standard of proof beyond a reasonable doubt, I will now turn to the questions in issue put before the Court and address the legal principles.

ANALYSIS

[51] Before the Court analyses each of the three counts before it, it believes it necessary to consider, first, the credibility and reliability of the witnesses and, second, the probative value of certain pieces of evidence submitted to it.

Credibility and reliability of the testimony

[52] To begin with, with regard to the credibility and reliability of the testimony of each of the witnesses introduced by the prosecution, the Court is of the opinion that they are all credible and reliable. In addition, in her address, counsel for M.S. did not even raise this issue. Despite this, the Court wants to make its assessment

clearly known because it deems it necessary to do so, given the number of witnesses heard and, especially, the link some of the witnesses had to M.S.

[53] With the exception of Major Descoteaux and Francine Martineau, none of the other witnesses know M.S., and they expressed no particular interest in the case. They all truthfully and directly answered all the questions asked of them. The Court did not find any particular reason not to believe their testimony.

[54] Major Descoteaux testified in a clear and consistent manner. Her clear recollection of certain events involving M.S. revealed to the Court that her memory of these events was excellent. It was apparent to the Court that she had no particular interest in the case. Indeed, in order to avoid any incidents, when she noticed that there were problems with certain documents in M.S. record in 2005, she arranged for another treating physician to be assigned to M.S., given that the relationship of trust that should have existed between her and that patient no longer existed. It seems clear to the Court that Major Descoteaux's decision to get to the bottom of the matter had nothing to do with a particular desire concerning the accused. She restricted herself to carrying out the work expected of a base surgeon responsible for managing a medical clinic. Her testimony is reliable and credible.

[55] Francine Martineau also testified in a direct and coherent manner. It is clear to the Court that her knowledge of M.S. is based solely on the professional relationship she had with him at the Recruiting Centre and that she has no particular feelings concerning the charges he faces and their possible outcome. She testified in a truthful manner, and it is clear to the Court that her personal knowledge of M.S. handwriting and signature is based on the characteristics that she had personally noted. Her testimony is credible and reliable.

Probative value to be given to the examiner's testimony and her report

[56] One of the questions raised by counsel for M.S. concerns the weight that the Court should give to the examiner's testimony and her report.

[57] In fact, she submitted to the Court that as no evidence had been submitted by the prosecution to establish a correlation between M.S. and the documents used by the examiner to identify the characteristics of M.S. handwriting and signature, it was difficult for the examiner to use the results from these documents to determine the author of the entries appearing in the three documents referred to in the three charges and, particularly, to conclude that the entries had been made by M.S.

[58] She bases her interpretation of the law concerning this question on two decisions of the Supreme Court of Canada, namely *R. v. Abbey*, [1982] 2 S.C.R. 24, and *R. v. Warsing*, [1998] 3 S.C.R. 579.

[59] In *Abbey*, above, the Supreme Court stated as follows at page 46 of its decision:

> Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.

[60] With regard to *Warsing*, above, the Supreme Court said the following at paragraph 54:

> 54. The appellant's submissions on the strict application of the rule in *Abbey* should be assessed in light of Wilson J.'s later decision in *Lavallee*, which considered *Abbey*. Wilson J., there, set out four propositions which represented the *ratio* of *Abbey* (at p. 893):
>
> 1. An expert opinion is admissible if relevant, even if it is based on second-hand evidence.
>
> 2. This second-hand evidence (hearsay) is admissible to show the information on which the expert opinion is based, not as evidence going to the existence of the facts on which the opinion is based.
>
> 3. Where the psychiatric evidence is comprised of hearsay evidence, the problem is the weight to be attributed to the opinion.
>
> 4. Before any weight can be given to an expert's opinion, the facts upon which the opinion is based must be found to exist.
>
> Wilson J. in considering the fourth principle held that as long as there is some admissible evidence on which the expert's testimony is based it cannot be ignored; but it follows that the more the expert relies on facts not in evidence, the weight given to the opinion will diminish.

[61] It appears that in both of these Supreme Court decisions the question concerning the weight of the expert's opinion had a direct link with the fact that it was based on hearsay evidence.

[62] In fact, in *Abbey*, above, it was because the trial judge had accepted as proved the facts based on hearsay evidence, itself deemed inadmissible on appeal, that the Supreme Court found that the judge had erred with respect to the facts he accepted as the basis of the experts' medical opinions.

[63] As to *Warsing*, above, the Supreme Court ruled on the applicable legal principle but not on how it applied to the case itself. In fact, one of the parties argued that if new evidence was held admissible on appeal, the legal principle relating to weight should be applied. The Court did not rule on the application of the principle, leaving this decision to the judge who would preside over the new trial it had ordered.

[64] The Court readily admits that the probative value of an expert's opinion, and consequently his or her expertise, depends on the facts on which it is based. This was clearly expressed by the Supreme Court in *Abbey* and *Warsing*, above.

[65] In this case, the forensic document examiner used annexes A to P of Exhibit 19 to determine the characteristics of the handwriting and signature of the alleged author, namely M.S. Contrary to the two Supreme Court decisions mentioned above, nothing in the evidence submitted to this Court indicates that the documents used by the examiner have little or no weight, or, in other words, are not very or not at all reliable, or that they should be given little or no credibility.

[66] The admissibility of the documents did not have the effect of attributing them particular weight, which is, in fact, an entirely different issue in law. Therefore, with regard to the probative value of these documents, it should be noted that the witnesses introduced by counsel for the prosecution established that the annexes of Exhibit 19 all come from M.S. medical record and that they are all original.

[67] Moreover, no witness has indicated to the Court that there was a problem concerning the credibility or reliability of the contents of these documents, including the various types of handwriting. It should also be noted that the document examiner testified that the documents submitted to her for examination were of high quality and that, at no time during her testimony, she mentioned that there was a problem with the credibility or reliability of any of the documents, whether in terms of content or the type of writing she found there.

[68] Given that the examiner had a chance to compare the documents in order to identify the necessary characteristics of the handwriting and signature alleged to be those of M.S., she would have been in the best position to inform the Court of any problems respecting the documents, which she did not do.

[69] It was impossible for the examiner to testify on the real identity of the author of the comparison documents (Exhibit 19), and she did not do so. In fact, her testimony essentially concerns the method she used and the characteristics of the handwriting and signatures found on these documents, regarding which she had been told that they related to M.S. Her testimony reveals that the documents allowed her to define the common characteristics of one author's writing and that these characteristics made it possible for her to draw conclusions as to the author of the writing found in the three documents supporting the charges. She associated the author in question with M.S. but only for explanatory purposes, and the Court understood that it could not rely on the examiner's testimony with regard to the identity of the author of the false documents.

[70] Consequently, the Court finds that the documents represented by annexes A to P of Exhibit 19 have high probative value and that the entire testimony of the examiner, Vickie Mercier, who relied, among other things, on these documents, is credible and reliable and is thus of high probative value.

First count

[71] With regard to the identity of the accused, the Court is satisfied beyond a reasonable doubt that this essential element has been proved. In fact, the testimony of Major Descoteaux and Ms. Martineau was amply sufficient in that respect.

[72] As to the place and date of the commission of the offence, the Court is satisfied beyond a reasonable doubt that it was only between these dates and at those places that M.S. had access to his medical record and could have falsified the documents in question.

[73] As to the fact that counsel for the prosecution demonstrated beyond a reasonable doubt that M.S. made three false documents, the Court draws the following conclusions:

a. The testimony of forensic document examiner Vickie Mercier, Major Descoteaux and Doctor Lafond establish that the note dated 21 September 2002 allegedly signed by Major Descoteaux and the note dated 26 September 2002 allegedly signed by Doctor Lafond were forged and thus make the Medical Attendance Record (CF 2016), beyond a reasonable doubt, a false document;

b. The testimony of forensic document examiner Vickie Mercier and Major Descoteaux establish that the Medical Examination Record (CF 2033) is beyond a reasonable doubt a forged document, thus making it a false document;

c. The testimony of forensic document examiner Vickie Mercier and Major Descoteaux establish that the Type II Aircrew Health Examination form (DND 1737) is a forged document, thus making it, beyond a reasonable doubt, a forged document;

d. Francine Martineau's testimony regarding M.S. handwriting in annexes J, K, L and P of Exhibit 19, combined with that of the examiner, Vickie Mercier, who used all annexes of Exhibit 19 to determine the characteristics of M.S. handwriting and signature, establishes beyond a reasonable doubt that the author of the false documents that

are the Medical Attendance Record (Exhibit 3) and the Medical Examination Record (Exhibit 5) was M.S.;

e. Francine Martineau's testimony regarding M.S. handwriting in annexes J, K, L and P of Exhibit 19, combined with that of the examiner, Vickie Mercier, who used all annexes of Exhibit 19 to determine the characteristics of M.S. handwriting and signature, does not establish beyond a reasonable doubt that the author of the false document that is the Type II Aircrew Health Examination form (Exhibit 4) was M.S. In fact, the expert concluded that M.S. could have been the author of certain entries in the document in question, but this cannot meet the required burden of proof.

[74] The Court is satisfied, beyond a reasonable doubt, that M.S. knew that the documents, namely the Medical Attendance Record and the Medical Examination Record, where false when he made them. The nature of these documents and their content means that only medical personnel can complete them. By usurping the role of medical personnel by completing the two documents himself, M.S. was well aware that he was casting doubt on the credibility of the information he entered there. Moreover, he entered information on his air factor in the Medical Attendance Record and information on his medical category grade concerning his job as a pilot, namely grade A1, meaning unrestricted duty, knowing full well that this was false, because when he made the entry, his medical category grade for his job was A3, meaning that there was a medical restriction because he could not fly helicopters.

[75] The Court is also satisfied beyond a reasonable doubt that M.S. intended the documents, namely the Medical Attendance Record and the Medical Examination Record, to be considered to be genuine by military medical authorities. The evidence demonstrates that M.S. was to undergo a release medical examination during the week of 7 October 2002 and that physicians conducting such exams usually use the latest records, where relevant, to perform that exam. Here, the medical exam was performed about two weeks earlier, that is on 21 September 2002. This clearly shows that M.S., given the circumstances, wanted the medical authorities performing his release medical exam to consider the two documents as representing his true state of health.

[76] Based on the circumstances as a whole and the evidence submitted to the Court, it seems clear that M.S. intended to deceive the medical authorities of the Canadian Forces about his air factor using the medical information appearing in the false documents, namely the Medical Attendance Record and the Medical Examination Record. The prosecution demonstrated beyond a reasonable doubt the accused's intent that the Canadian Forces be harmed by treating the two documents as being genuine.

[77] In light of the Court's findings on the Type II Aircrew Health Examination form (DND 1737), namely that counsel for the prosecution did not prove beyond a reasonable doubt that M.S. made a false document out of this document, counsel for M.S. suggested that if the Court drew that conclusion, it would have no other choice but to acquit M.S. on the first charge.

[78] In fact, she argues that as the prosecution decided to include three documents in the particulars of a single count concerning the making of false documents, it therefore had to prove each and every one of the allegations of the charge, failing which the Court must acquit the accused. To support her argument, she is relying on the Supreme Court's decision in *R. v. Saunders*, [1990] 1 S.C.R. 1020, particularly paragraph 5, which reads as follows:

> I am of the view that the appeal must be dismissed. It is a fundamental principle of criminal law that the offence, as particularized in the charge, must be proved. In *Morozuk v. The Queen*, [1986] 1 S.C.R. 31, at p. 37, this Court decided that once the Crown has particularized the narcotic in a charge, the accused cannot be convicted if a narcotic other than the one specified is proved. The Crown chose to particularize the offence in this case as a conspiracy to import heroin. Having done so, it was obliged to prove the offence thus particularized. To permit the Crown to prove some other offence characterized by different particulars would be to undermine the purpose of providing particulars, which is to permit "the accused to be reasonably informed of the transaction alleged against him, thus giving him the possibility of a full defence and a fair trial": *R. v. Côté*, [1978] 1 S.C.R. 8, at p. 13.

[79] In the same vein, counsel for the accused refers to paragraphs 4 and 5 of the Supreme Court decision in *Rosen v. The Queen*, [1985] 1 S.C.R. 83, which read as follows:

> 4. However, the appellant needed not be a trustee to commit the offence of breach of trust. By causing the trustee company to breach its trust he, by the operation of s. 21 of the *Criminal Code*, R.S.C. 1970, c. C-34, could have committed the offence. But he was not charged with that offence in that way, but with that of breach of trust, "being a trustee". Having charged the appellant with "being a trustee", the Crown thereby undertook to prove that averment.

> 5. There is no doubt as to the soundness of the proposition that an aider and abettor may be charged and convicted as a principal. Mr. Rosen, charged with breach of trust could have stood convicted. But if particulars are volunteered or ordered by the Court, they must be met. To find otherwise is, in most cases and is in this case, to mislead an accused, not as regards the offence he committed, but as regards the *actus reus* the Crown is undertaking to prove. That conviction should therefore be quashed.

[80] The Court therefore asked counsel for M.S. to comment on its ability to make a special finding in the circumstances. The accused's counsel suggested to the Court that the section of legislation regarding special findings is not applicable in the circumstances and that, in light of the Supreme Court case law cited above, the prosecution has made its bed and will have to live with its decision.

[81] Section 138 of the *NDA* reads as follows:

> 138. Where a service tribunal concludes that
>
> (*a*) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and
>
> (*b*) the difference between the facts proved and the facts alleged in the statement of particulars has not prejudiced the accused person in his defence,
>
> the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.

[82] In the case before us, it appears that the Court has concluded that the facts proven in relation to the first count pertain to the commission of the offence as regards the Medical Attendance Record and the Medical Examination Record. To some extent, this differs materially from the facts alleged, which not only refer to those two documents, but also include the Type II Aircrew Health Examination.

[83] It is clear to the Court that the Supreme Court decisions refer essentially to the second applicable test from section 138 of the *NDA*—that is, the differences noted by the Court cannot prejudice the accused person in his or her defence.

[84] In fact, if the difference noted by the Court regarding the facts proved leads it to conclude that the prosecution proved a different offence or one having such different features that the accused was misled as to what he had to face before this Court and the

means of defence he could consider for that specific accusation, it then becomes impossible for the Court to make a special finding, and it can only acquit M.S. of this offence.

[85] Taking the totality of the evidence into account, the Court finds that the prosecution has proven, beyond a reasonable doubt, all of the constituent elements of the offence of making false documents in the first count as regards the Medical Attendance Record (Exhibit 3) and the Medical Examination Record (Exhibit 5). Therefore, the Court is of the opinion that the facts proven by counsel for the prosecution are sufficient to establish this offence, even though they differ materially from the allegations in the particulars of this charge.

[86] It should be noted that the facts differ, but that does not have the effect of altering the offence. In reality, it remains the same. The features of the offence also remain the same. The assessment of features is done separately for each of the documents and there is no link between them such that were the Court to decide that only one or two of the documents are false, M.S. would be faced with an offence so different that he would be prejudiced in his defence.

[87] Accordingly, the Court concludes that in the circumstances, it may make a special finding for this offence.

Second count

[88] As regards the second count, the Court is of the opinion that the prosecution has proven, beyond a reasonable doubt, the essential elements of the offence related to the second count, with the exception of one: the element of whether it was M.S. who altered the documents.

[89] To begin with, I will mention that the particulars of this second count specify that the three documents listed were altered by changing the medical diagnoses and forging the physicians' signatures as they appear on the documents.

[90] The physicians who testified before this Court clearly established that their respective signatures, as they appear on the three documents, are not their own. Moreover, the forensic document examination confirmed that fact. However, this examination is unable to provide the Court with the forger's identity. Counsel for the prosecution suggests that based on the context—that is, the fact that the body of the text appearing above the physicians' signatures was identified as having been forged by M.S.—it would be open to the Court to infer from the circumstances, which have been proven beyond a reasonable doubt, that M.S. is also the person who forged the signatures.

[91]Considering all of the evidence, the Court finds that it is probable that M.S. did such a thing, but is not satisfied beyond a reasonable doubt that it is so. The inferences drawn from the evidence presented to the Court do not meet the required burden of proof.

[92] Regarding the charge of having altered the three documents by changing the diagnoses, the Court also remains quite perplexed as to the evidence submitted to it. According to the *Petit Robert*, the definition for the French term "diagnostic" (diagnosis) usually relates to the identification of an illness or a condition from the symptoms observed in an individual. The prosecution has not provided any evidence indicating what the real diagnosis or diagnoses were in order to establish what was altered in the documents in question. For this type of offence, the mere fact that the documents were written in M.S. hand does not, in itself, establish what was changed in the diagnoses and, above all, it does not allow me to automatically conclude that they were altered.

[93] It is true that it has been established that part of the code indicating M.S. medical category for employment was altered on the Medical Examination Record and the Type II Aircrew Health Examination, with A1 having been noted instead of A3. However, that medical category is not a diagnosis, but rather the numerical expression of M.S. ability to pilot on the basis of existing diagnoses.

[94] Taking into account all of the evidence, the Court therefore concludes that there is a reasonable doubt as to whether the diagnoses were altered by M.S.

Third count

[95] The third count is for an offence pertaining to the use of three forged documents, namely the ones listed in the first and second charges.

[96] The Court finds that there is a reasonable doubt regarding the essential element of whether M.S. used the documents in question.

[97] The evidence submitted by counsel for the prosecution shows that M.S. left the Valcartier medical clinic with his medical record on 4 October 2002 with the intention of taking it with him to the CFB Winnipeg medical clinic where he was to have his release medical examination the following week. The medical record did indeed arrive there, and it appears that a physician performed a release medical examination of M.S. on 9 October 2002, since he filled out M.S. Medical Attendance Record on that date, very likely with a patient present. But who arranged for that document to somehow get to the physician, and above all, how did it reach him? There is no direct evidence on the subject, and the inferences that can be drawn from the proven circumstances allow the Court to conclude, at most, that M.S. was probably the person who arranged for the physician to be in possession of his Medical Attendance Record.

[98] As for the other two documents, it remains difficult, in the circumstances, for the Court to conclude that it was owing to M.S. efforts that they came to be at the Winnipeg medical clinic for consideration by the physician performing the accused's release medical examination. At most, the Court may state that it is highly probable that this occurred. For instance, there is no way to rule out the possibility that these documents could have reached the CFB Winnipeg medical clinic prior to the date of the medical examination and been inserted in the medical record by a person other than the accused. There is also no way of ruling out the possibility that these documents may have been in M.S. medical record when he arrived at the CFB Winnipeg clinic owing to the efforts of a person other than the accused.

[99] Even if a physician performing a release examination of a Canadian Forces member generally uses the most recent medical examination on record, nothing in the evidence allows the Court to conclude, beyond a reasonable doubt, that this is what happened in M.S. case. In fact, in spite of the fact that it was proven that the code for M.S. medical category changed on the day of his release medical examination, there is insufficient direct or circumstantial evidence to show that the physician used the forged documents to do so.

[100] Therefore, by taking all of the evidence into account, the Court finds that there is a reasonable doubt as to whether M.S. used forged documents.

DISPOSITION

[101] M.S., please rise. Considering this Court's conclusion regarding the facts established by the prosecution for the first count, and exercising the power set out at section 138 of the *National Defence Act*, the Court makes a special finding with regard to the first charge and finds you guilty of the first count on the charge sheet. This is the indictable offence, under section 130 of the *National Defence Act*, of having made false documents somewhere between Québec City and Winnipeg, between 3 and 9 October 2000—namely a Form CF-2016, Medical Attendance Record, dated 21 September 2002, and a Form CF-2033, Medical Examination Record, dated 21 September 2002—knowing them to be forgeries, with the intention of them being used or acted upon as authentic, to the prejudice of the Canadian Forces, contrary to section 367 of the *Criminal Code*.

[102] Pursuant to subparagraph 112.40(2)(*b*) of the *Queen's Regulations and Orders for the Canadian Forces*, and in light of this Court's conclusions regarding the facts established by the prosecution for the second count made in the alternative to the first, the Court finds you not guilty of the second count.

[103] Lastly, considering the Court's finding in respect of the facts established by the prosecution for the third count, the Court finds you not guilty of the third count.

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