

**Citation:** *R. v. M.S.*, 2009 CM 3003

**Docket:** 200820

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

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**Date:** 6 February 2009

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

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**HER MAJESTY THE QUEEN**

**v.**

**M.S.**

**(Offender)**

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**SENTENCE**

**Rendered orally**

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### **OFFICIAL ENGLISH TRANSLATION**

[1] On 3 February 2009, this Standing Court Martial found M.S. guilty of making false documents. As the military judge presiding at this Court Martial, it is my duty to determine the sentence.

[2] The military justice system constitutes the ultimate means to enforce discipline, which is a fundamental element of military activity in the Canadian Forces. The purpose of this system is to prevent misconduct or, in a more positive way, see to the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish their missions with success, confidently and reliably.

[3] As stated by Lieutenant-Colonel Jean-Bruno Cloutier in his thesis *L'utilisation de l'article 129 de la Loi sur la défense nationale dans le système de justice militaire canadien*:

[TRANSLATION] Ultimately, to maximize the chances of success of the mission, the chain of command must be able to enforce discipline to deal with any misconduct that threatens military order and effectiveness, not to mention national security, the organization's raison d'être.

[4] The military justice system also ensures that public order is maintained and that persons charged under the Code of Service Discipline are punished in the same way as any other person living in Canada.

[5] It has long been recognized that the purpose of a separate system of military justice or courts is to allow the Canadian Forces to deal with matters that pertain to the Code of Service Discipline and the maintenance of the effectiveness and morale of the troops. That said, any punishment imposed by a court, whether military or civilian, must be as lenient as possible in the circumstances. This principle is in accordance with the duty of the Court to impose a punishment that is commensurate with the gravity of the offence and the previous character of the offender, as provided at subparagraph 112.48(2)(b) of the QR&O.

[6] The Court has considered the respective submissions of counsel in light of the relevant facts presented at this trial and their significance. It has also considered the submissions in light of the relevant sentencing principles, including those set out in sections 718, 718.1 and 718.2 of the *Criminal Code*, to the extent that those principles are not incompatible with the sentencing regime provided under the *National Defence Act*. These principles are the following:

first, the protection of the public, and the public in this case includes the interests of the Canadian Forces;

second, the punishment of the offender;

third, the deterrent effect of the punishment, not only on the offender, but also upon others who might be tempted to commit such offences;

fourth, the separation, where necessary, of offenders from society, including from members of the Canadian Forces;

fifth, the imposition of sentences similar to those imposed on offenders who commit similar offences in similar circumstances; and

sixth, the rehabilitation and reintegration of the offender.

The Court has also taken into account the arguments made by counsel, as well as the case law they filed and the documents they introduced in evidence.

[7] The Court agrees with counsel for the prosecution that the need to protect the public requires the imposition of a sentence that emphasizes denunciation and general deterrence. It is important to note that this entails the sentence imposed not only deterring the offender from re-offending but also deterring any other person in a similar situation from engaging in the same unlawful act. In this case, the Court is dealing with an offence of making false documents pertaining to a medical attendance record and a medical examination record. This is a serious offence, but the Court intends to impose what it considers to be the minimum sentence applicable in the circumstances. In order to arrive at what it believes is a fair and appropriate sentence, the Court also takes into account the following aggravating and mitigating factors.

[8] The Court considers the following factors to be aggravating:

- a. First, the objective seriousness of the offence. You have been found guilty of an offence under section 130 of the *National Defence Act*, for having made false documents contrary to section 367 of the *Criminal Code*. This offence is punishable by imprisonment for a term not exceeding ten years or less punishment. This is, objectively, a very serious offence.
- b. Second, the subjective seriousness of the offence. M.S., you are an experienced person and at the time that you committed the offence, you had held that rank for at least five years. You showed a flagrant lack of integrity and loyalty to the Canadian Forces in acting as you did. You did not hesitate to set aside your fundamental obligations as a military member and, more particularly, as an officer of the Canadian Forces, to gain a personal advantage, namely of being considered medically fit for your occupation as a pilot.
- c. Your contradictory statements and actions between 2002 and 2005 bring to light this lack of integrity and honesty, which was not a one-time occurrence or related only to the commission of the offence. In fact, you have shown, through the witnesses that you brought before this Court that you described your attitude and behaviour towards your colleagues at that time in a completely different, and I would even say opposite, way from your

psychologist. The most shocking aspect of this episode is that your psychologist issued a diagnostic impression that you were suffering from post-traumatic stress disorder, that the symptoms were diminishing as you distanced yourself from the source of the trauma, namely piloting and anything that could bring you close to it, including your job as pilot recruiter, but at the same time you took the necessary steps to become re-engaged as a pilot in the Regular Forces, potentially exposing yourself to coming into contact with the triggers for the symptoms in question. It remains difficult to reconcile the fact, on the one hand, that in the context of your March 2005 re-engagement in the Regular Force, which you never indicated to your psychologist, he stated in his report that your condition required long-term psychological follow-up with the fact, on the other hand, that you stopped consulting your psychologist once his report was sent to the Department of Veterans Affairs as justification for your disability pension.

- d. The documents you forged were important ones. They were reference documents for Canadian Forces Medical Services medical staff, used to make a medical determination as to your ability to meet the obligation related to universality of service and the minimum medical standards required for your occupation. In changing the occupational factor for your medical category to indicate that you met all of the medical requirements to be a pilot and writing the medical notes appearing in those two documents yourself, you potentially put your colleagues' safety at risk and, above all, jeopardized the success of Canadian Forces operational missions as a pilot.
- e. You abused the trust of certain Canadian Forces members, who did not hesitate to entrust you with your own medical record, despite the fact that this was unusual, to assist you with the administrative steps for your release. In making it easier for you, some members thought they were helping you. Instead, you abused their trust and the trust placed in you by the Canadian Forces when you took this opportunity to achieve your own ends by committing a criminal offence.
- f. Lastly, forging these documents required some form of premeditation on your part. Indeed, to achieve a result, you would at least have had to reflect on the manner in which you would attain it and required some time to bring it to fruition.

[9]

The Court considers the following factors to be mitigating:

- a. The treatment you have been subjected to since the charges were laid. The Court can understand that the nature of the charges laid against you may not necessarily be compatible with performing a job at the Recruiting Centre. The effort to employ you on the staff of the Brigade in Valcartier in keeping with your skills is commendable, but when the authorities concluded that this attempt had failed, they considered that it was most appropriate to keep you separated from your peers. The type of ostracism that you experienced over the past months instead created the impression that you had been convicted before your trial was held, and may be perceived as a punishment rather than a preventive measure. The fact that you were on sick leave does nothing to diminish the military authorities' intent to keep you apart from other members.
- b. The fact that you had no criminal record and that there is no mention of similar offences on your conduct sheet.
- c. The fact that you had to face this court martial, which was announced and accessible to the public and which took place in the presence of some of your colleagues, has no doubt had a very significant deterrent effect on you and on them. The message is that this kind of conduct involving the forging of medical documents will not be tolerated in any way and will be dealt with accordingly.
- d. The lack of consequences as regards your employment as a pilot in the Canadian Forces. Be it by chance or simply the way it turned out, to date you have not been employed as a pilot in the Canadian Forces since your transfer to the Reserve Force. You are a risk as a pilot owing to your medical condition, but that risk never materialized.
- e. Your psychological fragility. From the totality of the evidence presented to this Court, the Court accepts your chronic inability to confront and overcome the major obstacles in life that you have faced, which has been identified before this Court as being an adjustment disorder. The disparity between reality and what you want it to be is now so great that you have a lot of trouble reconciling them. It is clear that you need assistance to be more adequately equipped.

[10] The Court would like to add some comments regarding other factors that were suggested to it. First of all, the conduct sheet has no real bearing on the present circumstances of this case. The offences on the conduct sheet are not of the same nature; they relate specifically to piloting and took place nearly 10 years ago.

[11] The Canadian Forces must bear a share of the responsibility in respect of the consequences resulting from the offender's offence. In fact, it was shown before this Court that there were non-medical documents that mentioned M.S. restriction from employment as a pilot owing to his medical condition. It is clear that medical fitness is a criterion of enrollment, but his personal file should have revealed easily enough the contradictions between his actual ability and his ability according to the medical findings. At the very least, there was enough information in his personal file to launch an investigation on when his medical category code changed and the reasons that would warrant such a state of affairs. The testimony of Lieutenant-Colonel Bigaouette clearly showed that M.S. case had been well documented and that the appropriate authorities were in a position to have an accurate picture of the situation as regards M.S. ability to operate an aircraft in the Canadian Forces.

[12] It is true that the two forged medical documents did not reflect M.S. actual medical condition, and that this probably had an impact on the decisions made by the Canadian Forces authorities in terms of transferring him to the Reserve Force and subsequently re-engaging him in the Regular Force, once again as a pilot. The prosecution wishes to see this as a very aggravating and determining fact allowing it justify its position on the sentence. M.S. has consistently submitted throughout the trial and on sentencing that the evidence does not show exactly the extent to which the change of medical code and the decision to accept M.S. back into the Reserve Force, then into the Regular Force, can be attributed to these documents. The Court is not satisfied beyond a reasonable doubt that this is what occurred. Forging documents is one thing; their use and the resulting consequences are another, for which the Court can only conclude on the level of probability.

[13] The Court's opinion is that the sentence suggested by the prosecution, namely demotion to the rank of second lieutenant, a severe reprimand and a fine of \$10,000, goes far beyond what it considers to be the minimum in the circumstances of the case. As for the suggestion from counsel for the defence, namely a fine of \$1000, the Court finds that it does not meet the minimum threshold.

[14] M.S., the Court understands that owing to your attitude since the commission of the offence of which this Court has found you guilty, the Canadian Forces authorities have a pronounced wish for you to receive a denunciatory sentence. However, as I previously explained, the application of the principles of law in imposing a punishment means that this is one factor that the Court has taken into account along with others, and it alone cannot justify the sentence suggested by the prosecution. It is

clear that you have a problem with dealing with adversity and that it is desirable that you find a way to solve that problem once and for all. Otherwise, it has the potential to cause you and those around you much needless suffering.

[15] A fair and equitable sentence should take into account the seriousness of the offence and the offender's degree of responsibility in the particular circumstances of the case. Consequently, the Court is of the view that the imposition of a severe reprimand and a fine is in accordance with this principle in light of all the circumstances and the aggravating and mitigating factors identified by this Court. The Court sees this as the minimum punishment in the circumstances.

[16] M.S., stand up. The Court sentences you to a severe reprimand and a fine of \$3000. The fine must be paid in one immediate installment of \$750 followed by three consecutive monthly installments of \$750, with the first of these three installments beginning on 1 March 2009. In the event you are released from the Canadian Forces for any reason before the fine is paid in full, the then outstanding unpaid amount is due and payable prior to your release. Please sit down.

[17] The proceedings in the matter of the Standing Court Martial of M.S. are now concluded.

LIEUTENANT-COLONEL L.-V. D'AUTEUIL

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