



## COURT MARTIAL

**Citation:** *R. v. Thies*, 2014 CM 3006

**Date:** 20140404

**Docket:** 201360

Standing Court Martial

Canadian Forces Base Halifax  
Halifax, Nova Scotia, Canada

**Between:**

**Her Majesty the Queen**

- and -

**Leading Seaman J.B. Thies, Accused**

**Corrected decision:** The text of the original decision was corrected on May 2, 2017.

**Corrections made:** In paragraph 90, the word “lawful” has been replaced by the word “unlawful”.

**Before:** Lieutenant-Colonel L.-V. d'Auteuil, M.J.

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### REASONS FOR FINDING

(Orally)

[1] Leading Seaman Thies is charged with four service offences under the *National Defence Act* concerning two incidents that allegedly occurred on 24 January 2013 onboard Her Majesty's Canadian Ship *Preserver*.

[2] Those charges are related to two incidents on the ship that allegedly occurred a short period of time after a sailor reported being inappropriately physically touched by another sailor on the ship while at sea and the alleged perpetrator being sent home once the ship got alongside. Essentially, Leading Seaman Thies is before this court martial for having first verbally intimidated Leading Seaman Archibald and second for having torn to pieces the mattress of the latter.

[3] Considering the first alleged incident, he is charged with an offence laid under section 130 of the *National Defence Act* for uttering threats contrary to section 264.1 of the *Criminal Code* and in the alternative he is charged with an offence laid under section 86 of the *National Defence Act* for using provoking speech toward a person subject to the Code of Service Discipline tending to cause a quarrel.

[4] About the second alleged incident, he is charged with an offence laid under section 116 of the *National Defence Act* for having wilfully destroyed property of Her Majesty's Forces; to which, a sleeping mattress. And in the alternative he is charged with an offence laid under section 130 of the *National Defence Act* for mischief not exceeding \$5,000 contrary to section 430(4) of the *Criminal Code*.

[5] The evidence is composed of the following elements:

- (a) in order of appearance before the Court, the testimony of Leading Seaman Archibald, the complainant in this matter; Leading Seaman Klepy; Leading Seaman Thies, the accused before this Court; Petty Officer 1st Class Hulan; Leading Seaman Dee; Sergeant Tustin; Master Seaman Ploughman; Master Seaman Moulaison; and Master Seaman Legacy;
- (b) Exhibit 3, six pictures of Leading Seaman Archibald's bed space and mattress taken on 24 January 2013;
- (c) Exhibit 4, a copy of the directive of the Director of Military Prosecutions Policy Directive on Pre-Charge Screening, dated 1 March 2000, and updated on 18 March 2009;
- (d) the judicial notice taken by the Court of the facts in issues under Rule 15 of the Military Rules of Evidence;
- (e) the judicial notice taken by the Court of the content of the directive of the Director of Military Prosecutions Policy Directive on Pre-Charge Screening under Rule 16 of the Military Rules of Evidence;

[6] On 20 January 2013 while HMCS *Preserver* was at sea an alleged incident occurred during which a cook, Leading Seaman Moulaison, would have inappropriately touched the leg and tried to fondle the genitals of a steward, Leading Seaman Archibald.

[7] Leading Seaman Archibald decided to talk about this event to his immediate supervisor, Master Seaman Legacy, with who he agreed that she would not talk about it with anybody. Basically he wanted some time to think about making a complaint in relation with this incident considering the impact it could have on him. He considered himself as an outsider, not being part of the clique, and for this reason feared about the reaction from some of his shipmates toward him.

[8] On 23 January 2013, while on duty watch, Leading Seaman Archibald inadvertently found out about his immediate supervisor having a discussion with Leading Seaman Moulaison and two other shipmates. The reaction of his supervisor, Master Seaman Legacy, who closed the door on him while telling him that she would talk to him later, made him suspicious about what was going on. Later, his supervisor told him to not worry about the fact that she was talking with Leading Seaman Moulaison but he did not believe her.

[9] Then he decided to talk about the incident with Leading Seaman Moulaison to the ship's physician assistant, then he was brought to the coxswain and made a written statement regarding it.

[10] On the ship, Leading Seaman Archibald was sleeping at 51 Mess, located on the starboard of the ship. At this location, there was about 15 to 17 bunks organized in stacks of three; stewards, cooks, and some shipmates from another trade were sleeping there.

[11] Leading Seaman Archibald occupied the first stack of bunks at the entrance, having the middle bunk. He had also a locker where he put his personal belongings. He described the place as crowded and tight because there was not much place in it.

[12] Leading Seaman Moulaison was the mess mother of 51 Mess, meaning that as the senior rank person in the mess, he would help to take care of any issue arising from shipmates sleeping at that location. He did so a couple of times regarding Leading Seaman Archibald when the later complained about a light bulb being removed in 51 Mess or a rubber snake put in his bunk as a joke.

[13] Further to having made his written statement to the coxswain, Leading Seaman Archibald was removed from 51 Mess and placed at the sickbay as his new place for sleeping. He was removed from all his duties. However, he did not move his personal belongings there.

[14] It did not take long to spread out on the ship that Leading Seaman Archibald made a complaint towards Leading Seaman Moulaison. Leading Seaman Moulaison was seen as being upset and crying about what was happening to him at that time. He was surprised, shocked, and confused about what was going on.

[15] Once HMCS *Preserver* was docked in Mayport, Florida, on the 24th of January 2013 around noon, Leading Seaman Moulaison was taken off the ship, sent to the airport and brought back to Canada.

[16] Leading Seaman Klepy, a steward on the HMCS *Preserver*, confirmed that a lot of people were angry about the allegations made against Leading Seaman Moulaison. He said that it generated conversations among the crew, especially stewards and cooks. He told the Court that he had a conversation with Leading Seaman Thies further to the incident reported. Leading Seaman Thies expressed to him how the situation was unfair

and how it probably was not true considering the situation involving Leading Seaman Archibald has happened before in the past, and that most people thought it was just crying wolf. Even Leading Seaman Klepy expressed to the Court that he personally thought that Leading Seaman Archibald was lying.

[17] On the afternoon of 24 January 2013, some time after 6 p.m., while being off duty and at the bar of the junior ranks mess having a beer, Leading Seaman Thies who was sitting there too would have expressed to him how unfair it was about what happened to Leading Seaman Moulaison and that lower deck justice had to be served. He testified that Leading Seaman Thies had a few drinks at that time. He understood from that expression that Master and Leading Seamen on lower deck had to take justice in their hands because higher authority would do nothing about it.

[18] They both went out of the bar on the quarterdeck to have a cigarette. They came back to the bar after and Leading Seaman Thies would have told Leading Seaman Klepy that he was going to the heads, meaning the bathroom.

[19] Then Leading Seaman Thies came back from the heads, he would have told Leading Seaman Klepy words to the effect that justice had been done. He didn't ask him what it meant by that and Leading Seaman Thies would have told him that he messed up Leading Seaman Archibald's rack. Leading Seaman Klepy did not understand at that time the exact meaning of that comment.

[20] On the afternoon of that same day, sometime between 4 and 6 p.m., Leading Seaman Archibald was given permission to go to the Junior Ranks Mess. He went to the bar-side of the mess and would have seen Leading Seaman Thies sitting at the bar.

[21] Leading Seaman Archibald ordered a beer. He would have been asked by Leading Seaman Thies what he was doing there. He replied that he needed a break because a lot of crazy and weird things were going on.

[22] Leading Seaman Thies then would have asked: "How does it feel to be the most hated person onboard this ship? You better get off this ship quick. You're a numbered man."

[23] Leading Seaman Archibald would then have asked him, "What do you mean by being a numbered man?" Leading Seaman Thies would have replied, "You're a dead man."

[24] Leading Seaman Archibald paid his beer and Leading Seaman Thies would have told him, "You have to get off the ship or you won't make it home."

[25] Then Leading Seaman Archibald asked: "What do you mean by I won't make it home?" Leading Seaman Thies would have replied, "You won't make it home. You're time is up. You better get off this ship quick."

[26] Leading Seaman Archibald would have commented, "Quick, yeah." Leading Seaman Thies would have then replied, "Because you could get hurt."

[27] Leading Seaman Archibald would have then said, "For that, telling the truth, being honest, doing my job." To which Leading Seaman Thies would have replied, "Don't preach to me Archie, I'm just telling you, you better be getting off the ship quick. Oh by the way, don't go to port tonight, I'm just delivering a message;"

[28] Leading Seaman Thies told the Court that he had a conversation with Leading Seaman Archibald in the area for taking the meal located by the bar and he went to him at the table. He told the Court that he had a normal conversation but that he never formulated threats or used words in order to put a threat to Leading Seaman Archibald. According to him he had a normal conversation and they left.

[29] According to Leading Seaman Archibald, after this conversation, he then went back to the sickbay and told the chief about his exchange with Leading Seaman Thies. He was put in contact with Chief Bromley and he went to 51 Mess to get his personal belongings. He then found out that his things were put upside down and some of them were missing, his mattress was cut off.

[30] Petty Officer 1st Class Hulan was the duty coxswain on the ship on that day. He received a phone call from Petty Officer Ferguson asking him to bring a camera. He did so and went to 51 Mess. Photographs of the scene were taken and then he piped all members of 51 Mess in order to muster them at that location. As they heard the pipe, Leading Seaman Klepy and Thies put their beer down and went to 51 Mess. Eight members of 51 Mess mustered, including Leading Seaman Klepy and Thies, Leading Seaman Archibald already being there. The latter appeared to Petty Officer 1st Class Hulan as agitated, a little bit scared, and stressed out about the situation.

[31] Leading Seaman Klepy saw Leading Seaman Archibald's rack slashed from top to bottom with the stuffing torn out, with all of his gear, clothes and effects spread all over the deck, and on his rack. Sometime prior, which is around 5:30 p.m., he was in 51 Mess for changing and the bunk of Leading Seaman Archibald was not in that condition at all. They were shown individually the scene, asked if they did that, which all of them answered no. While they were gathered again, Leading Seaman Klepy looked over at Leading Seaman Thies and the latter would have given him a smirk, which led him to conclude that what mess up the place.

[32] Shortly after Leading Seaman Thies would have told Leading Seaman Klepy not to say anything because if he didn't say anything, nobody could prove it. This conversation would have occurred on the quarterdeck while they were having a cigarette. Leading Seaman Thies would have seemed in some way happy.

[33] Leading Seaman Thies would have also told him about the same time that he mentioned to Leading Seaman Archibald to watch what he does and says to people because people don't take stuff lightly and he can make a lot of enemies doing what he

did. He would have also mentioned to him that if Leading Seaman Archibald doesn't watch himself, he could be found back half floated.

[34] Leading Seaman denied having told Leading Seaman Klepy that he damaged Leading Seaman Archibald's mattress and torn his bunk. He recognized that he had a conversation with him on that day, but never told him such things, including the fact that he must not talk about his alleged confession in order to prevent anybody to prove anything regarding this matter.

[35] Later in the evening of that day, Leading Seaman Klepy went to the hotel room of Master Seaman Ploughman at the Navy Lodge where a number of sailors gathered for a kitchen party. When he arrived, he told the Court that he said to her that Leading Seaman Thies damaged the bunk of Leading Seaman Archibald. According to Master Seaman Ploughman, Leading Seaman Klepy told her that the junior ranks mess was closed because of Archibald's mattress being cut and that Leading Seaman Thies was being interviewed by the duty Coxswain regarding this matter.

[36] Some witness including Leading Seaman Thies confirmed that each sailor carried a sea knife on the ship for seamanship evolutions.

[37] Charges were preferred by the Director of Military Prosecutions on 23 July 2013.

[38] Before this Court provides its legal analysis, it's 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 principle fundamental to all criminal trials. And these principles, of course, are well known to counsel, but 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 guilt beyond a reasonable doubt. An accused person does not have to prove that he 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. There is no burden on Leading Seaman Thies to prove that he is innocent, he does not need to prove anything.

[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 SCR, 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 Supreme Court and appellate courts subsequent 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 a Court.

[42] In *R v Starr* [2000] 2 SCR, 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 Leading Seaman Thies, 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.

[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' opportunity to observe; a witness' reasons to remember, like, were the events noteworthy, unusual and 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' 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' 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] As the rule of reasonable doubt applies to the issue of credibility, the Court is required to definitely decide in this case first on the credibility of the accused, and to believe or disbelieve his evidence. It is true that this case raises some important credibility issues and it is one of those cases where the approach on the assessment of credibility and reliability expressed by the Supreme Court of Canada in *R v W. (D.)* must be applied, because the accused, Leading Seaman Thies, testified.

[51] As established in that decision at page 758, the test goes as follows:

First, if you believe the evidence of the accused, obviously you must acquit.

Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.

Third, even if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused.

[52] This test was enunciated mainly to avoid for the trier of facts to proceed by establishing which evidence it believes, the one adduced by the accused or the one presented by the prosecution. However, it is also clear that the Supreme Court of Canada reiterated many times that this formulation does not need to be followed word by word as some sort of incantation (see *R. v. S. (W. D.)*, [1994] 3 S.C.R. 521, at page 533).

[53] The pitfall that this Court must avoid is to be in a situation appearing or in reality as it chose between two versions in its analysis. As recently established by the Supreme Court of Canada in its decision of *R v Vuradin*, 2013 SCC 38 at paragraph 21:



The paramount question in a criminal case is whether, on the whole of the evidence, the trier of fact is left with a reasonable doubt about the guilt of the accused: *W.(D.)*, at p. 758. The order in which a trial judge makes credibility findings of witnesses is inconsequential as long as the principle of reasonable doubt remains the central consideration. A verdict of guilt must not be based on a choice between the accused's evidence and the Crown's evidence: *R. v. C.L.Y.*, 2008 SCC 2, [2008] 1 S.C.R. 5, at paras. 6-8. However, trial judges are not required to explain in detail the process they followed to reach a verdict: see *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499, at para. 29.

[54] Section 264.1 of the *Criminal Code* reads in part as follows:

- (1) Every one commits an offence who, in any manner, knowingly utters, conveys or causes any person to receive a threat
  - (a) to cause death or bodily harm to any person ...

[55] The essential elements of uttering threats are:

- (a) the identity of the accused as the author of the offence;
- (b) the date and place of the offence as alleged in the particulars of the charge;
- (c) the accused made a threat to cause bodily harm; and
- (d) the accused made a threat knowingly.

[56] A threat may be made by words or gestures or in some other way. It may be made by speaking, writing or in some other manner intending to make it known to another person.

[57] Concerning the fact that the accused made a threat, what is important is the meaning that a reasonable person in all the circumstances would give to the words used. Words spoken or written in jest or in such a way that they could not be taken seriously by a reasonable person in the circumstances are not a threat.

[58] A threat to cause bodily harm to another person is a threat to cause that person something more than just a slight injury or brief pain. Bodily harm is any hurt or injury including psychological harm that interferes with a person's health or comfort and is more than brief or fleeting or minor in nature.

[59] To decide whether the words used amount to a threat to cause bodily harm, the trier of facts must consider the circumstances in which they were used, the manner they were communicated, the person to whom they were addressed, and the nature of any prior or existing relationship between the parties.

[60] “Knowingly” means that the accused uttered the words as a threat, intended that they be taken seriously and mean to intimidate or cause the complainant to be afraid. The prosecution doesn't have to prove that the accused intended that the words be passed along to the complainant, but that the complainant was actually threatened or made afraid by them. It does not matter whether the accused mean to carry out the threat to decide whether the accused made the threats knowingly, the trier of facts must consider the words used, the context in which they were used and the accused mental state of mind at the time the words were used.

[61] Section 86 of the *National Defence Act* reads in part as follows:

Every person who

(...)

- (b) uses provoking speeches or gestures toward a person so subject that tend to cause a quarrel or disturbance,

is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[62] The essential elements of the offence of having used provoking speech toward a person subject to Code of Service Discipline tending to cause a quarrel under section 86 of the *National Defence Act* are:

- (a) the identity of the accused as the offender;
- (b) the date and place of the offence;
- (c) the accused used provoking speeches toward a person;
- (d) the provoking speeches tend to cause a quarrel; and
- (e) the person towards speeches are directed to is subject to the Code of Service Discipline.

[63] Section 116 of the *National Defence Act* reads in part as follows:

Every person who

- (a) wilfully destroys or damages, loses by neglect, improperly sells or wastefully expends any public property, non-public property or property of any of Her Majesty's Forces or of any forces cooperating therewith

(...)

is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.

[64] The essential element of the offence of wilfully destroying property of Her Majesty's Forces are:

- (a) the identity of the accused as the offender;
- (b) the date and place of the offence;
- (c) the accused caused damages to goods;
- (d) the good was public property of Her Majesty's Forces; and
- (e) the accused knew what he was doing, intended to do what he did.

[65] Finally, subsection 430(4) of the *Criminal Code* reads as follows:

- (1) Every one who commits mischief who wilfully
  - (a) destroys or damages property;
  - (b) renders property dangerous, useless, inoperative or ineffective;
  - (c) obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property; or
  - (d) obstructs, interrupts or interferes with any person in the lawful use, enjoyment or operation of property.

(...)

- (3) Every one who commits mischief in relation to property that is a testamentary instrument or the value of which exceeds five thousand dollars
  - (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.
- (4) Every one who commits mischief in relation to property, other than property described in subsection (3),
  - (a) is guilty of an indictable offence and liable to imprisonment for a term not exceeding two years; or
  - (b) is guilty of an offence punishable on summary conviction.

[66] The essential elements of the offence of mischief are:

- (a) the identity of the accused as the offender;
- (b) the date and place of the offence;

- (c) the accused did interfere with property;
- (d) the conduct of the accused was unlawful; and
- (e) the conduct of the accused was wilful.

[67] The question on having the accused interfere with property has to do with the accused conduct towards property or towards a person who are lawfully using, enjoying or operating property. By “property” we mean, land, buildings, and things or objects that we can see and touch.

[68] There are several ways in which one person may interfere with another person's property. The prosecution does not have to prove every kind of interference for which the law provides. Any one is enough, it does not matter which one.

[69] To interfere with property includes destroying or damaging property as well as rendering the property useless, inoperative or ineffective. The person also interferes with property if he obstructs, interrupts or interferes with the lawful use, enjoyment or operation of property, or any person who is lawfully using, enjoying or operating the property even if he is not an owner of it.

[70] Enjoyment of property is not limited to simply having or being in possession of it, but includes being present on property to participate in other activities there. In other words, enjoyment refers to exercising a right, not the subjective enjoyment of property.

[71] The issue about the unlawful conduct of the accused has to do with the nature of his conduct. The prosecution must prove beyond a reasonable doubt that the accused conduct, his interference with property or with persons lawfully using, enjoying or operating property, was unlawful.

[72] The accused conduct was unlawful if he had no lawful justification or excuse or no colour of right to do as he did.

[73] The lawful justification or excuse provides a basis on which the law considers that the person's conduct is justified and as a result, lawful.

[74] Colour of right is an honest belief in a state of facts which if it existed would be a legal justification or excuse for a person's conduct. The belief must be honestly held but it does not have to be reasonable. The reasonableness or otherwise of the belief; however, is a factor for the Court to take into account in deciding whether any belief was honestly held.

[75] It is not up to the accused to prove that he had a lawful justification or excuse or a colour of right for interfering with the property. It is up to the prosecution to prove beyond a reasonable doubt that the accused conduct was unlawful. In other words, the

prosecution must prove beyond a reasonable doubt that the accused conduct was not only without lawful justification or excuse, but also that it was without colour of right.

[76] Concerning the fact that the conduct of the accused was wilful, this question has to do with the state of mind at the time he interfered with the property. The prosecution may prove that the accused conduct was wilful in the order of two ways: the accused conduct was wilful if he mean to interfere with the property in any way that I have described; his conduct was also wilful if he mean to do something that he knew would probably interfere with the property in any way that I have described, but went ahead and did it anyway, being reckless whether this interference with the property happened as a result. The prosecution doesn't have to prove that this conduct was wilful in both these ways, either way is sufficient.

[77] To determine the accused state of mind, what he means to do towards the property or anyone lawfully using, enjoying or operating it, the Court should consider what the accused did or did not do, how he did or did not do it, and what he did or did not say about it. The Court should look at his words and conduct before at the time and after he interfered with the property. All these things in the circumstances in which they happened may shed a light on what he mean to do when he interfered with the property.

[78] Now, the Court considers that the prosecution has discharged its burden of proof beyond a reasonable doubt concerning the date and place regarding the four charges. As a matter of fact there's no doubt that the testimony of the accused and the evidence adduced by the prosecution support such a conclusion.

[79] Now, the Court is applying the test enunciated in the Supreme Court decision of *R v W.(D.)*, in order to determine if it can find any reason in the evidence considered as a whole to disbelieve the accused in his testimony.

[80] The Court will make this assessment first, with the two first charges regarding what would have been said or not to Leading Seaman Archibald by the accused and, second, with the third and fourth charges about the damages to Leading Seaman Archibald's mattress.

[81] Leading Seaman Thies testified in a straightforward manner. He told the Court that he was getting along with Leading Seaman Moulaison and without being a close friend, he would have been the type of guy he would have gone out with for a beer. He said that he became upset with the situation, especially when Leading Seaman Moulaison left the ship. He told also that he was angry for Leading Seaman Moulaison for being put in such position. However, despite he gave the impression to the Court it was a noteworthy event for him in some way, he could not tell if Leading Seaman Moulaison left before or after the incident with Leading Seaman Archibald's mattress.

[82] He denied telling any threat to Leading Seaman Archibald, but conceded that he met him on the day in question. He described that he had a few beers at the bar and left that place once in a while to go to the washroom or to have a cigarette. He saw Leading

Seaman Archibald in the meal area, just beside the bar and sat with him for a minute or two and left when Leading Seaman Archibald left. He did not recall what was the conversation at that time other than being a normal conversation. He told the Court that he knew that Leading Seaman Archibald was moved to sickbay.

[83] He told the Court that he met also Leading Seaman Klepy on the deck when he had a cigarette, but he denied having met him at the junior ranks mess. He also denied that he confessed to Leading Seaman Klepy that he cut off Leading Seaman Archibald's mattress. He admitted knowing the meaning of the term "lower deck justice" and his understanding of it is that people on the lower deck will take care of their own business, but he denied having used those terms.

[84] He confirmed that he had a seaman's knife. He told the Court that he had a drinking problem in 2011 and sought treatment for it. He said that he solved that problem.

[85] The Court finds his testimony with some inconsistencies in the manner he delivered it and with the content of it. As confirmed by the testimony and the evidence of the accused, Leading Seaman Archibald was an outsider with a bit of character, not the usual sailor that people expect to find on a ship. He was essentially on his own, even working alone. He did not have a lot of interaction with others, but was able to get along with others for work.

[86] Even if Leading Seaman Thies described the dismissal of the ship of Leading Seaman Moulaison as a noteworthy event in that he had on him some emotional impact, he also tried to present that day as a usual one in some ways. He clearly recalled meeting Leading Seaman Archibald and Klepy on that specific day but was unable to remember what the topics of the discussions were, even a word of it. He presented his conversation with Leading Seaman Archibald as something normal, usual, as caring for him because he seemed somewhat distressed. Such action from the accused is difficult to understand knowing the feelings he had in the circumstances which is being upset towards Leading Seaman Archibald. He told the Court that it would have taken a significant amount of time to put upside-down the bunk and things of Leading Seaman Archibald, and cut off his mattress, which in fact does not seem to take so long as confirmed by its own evidence he adduced through Petty Officer 1st Class Hulan.

[87] He told the Court that he had settled his problem with alcohol that led him into trouble in the past in 2011 and 2012, but in January 2013 he was still having a few beers at the bar.

[88] It clearly appeared to the Court, through his testimony, that he tried deliberately to downsize the emotional impact that the situation had on him concerning the complaint made by Leading Seaman Archibald towards Leading Seaman Moulaison and the dismissal of the latter of the ship, which would probably explain his selective memory towards the events of that day. In that context, the Court finds it difficult to

believe the flat denial of the accused about the things he would have not said or done regarding the charges.

[89] I would add that previous convictions of the accused adduced as evidence had no impact on the analysis of the Court concerning this matter. Those convictions are for issues that are totally different from what he is charged before this Court and were not used by the Court in order to determine the propensity to commit any offence or the bad character of the accused. In addition it does not prove in any shape or form that he would be less reliable or credible because of the existence of those convictions. From the perspective of the Court, such evidence has a neutral effect as a factor for the analysis of the credibility and reliability of the accused concerning this matter.

[90] Then applying the test enunciated in the Supreme Court decision of *R v W.(D.)* and having considered the evidence introduced before this Court as a whole, it is the opinion of the Court that the accused's evidence must be disbelieved about the fact that he did not make knowingly a threat to cause bodily harm, he did not use provoking speech toward a person subject to the Code of Service Discipline tending to cause a quarrel, he did not wilfully destroy property of Her Majesty's Forces, and he did not wilfully interfere with the property in an unlawful manner.

[91] Now, the Court is turning itself to the second of the test enunciated in the Supreme Court decision of *R v W.(D.)*. Despite the Court concluded that the testimony of Leading Seaman Thies must be disbelieved, what is the impact of it on the evidence considered as a whole? There is nothing in his testimony that would leave the Court in a reasonable doubt about any charge on the charge sheet. Then it would be necessary for the Court to pass to the third step of the test enunciated in *R v W.(D.)*.

[92] Essentially the first and second charges rely on the testimony of Leading Seaman Archibald. The latter testified in a straightforward, clear, and calm manner. He provided detailed information on that day that was striking and unusual for him. He clearly stated that he was an outsider and his accounting of the events was consistent with itself.

[93] From the perspective of the Court, the collateral evidence adduced by the accused concerning the alleged incident of sexual assault does not raise any doubt about the reliability and credibility of the complainant in this matter. Essentially the Court got from that evidence that Leading Seaman Archibald provided evidence that resulted in some discrepancies, but with nothing that would raise any doubt about his credibility. The accused would like the Court to infer from the decision of the prosecution to recommend to the investigator to not lay a charge that the complainant is unreliable and not credible because he was not believed. However, the evidence disclosed rather that such recommendation was not made and it is because evidence was insufficient to lay a charge that nothing arise from that file. There is nothing in the evidence adduced on that matter by the accused that would allow this Court to infer in a way or another that the lack of laying a charge came from the fact that Leading Seaman Archibald was not believed by authorities.

[94] In addition Petty Officer 1st Class Hulan confirmed that Leading Seaman Archibald was concerned and stressed by all those events, meaning Leading Seaman Moulaison confirmed the type of personality he is and Master Seaman Legacy did confirm that he told her about the alleged inappropriate touching by Moulaison and that he asked her to keep her mouth shut until he made up his mind concerning the incident. Those witnesses called by the accused confirmed some aspect of his testimony.

[95] I would add that the reliability and credibility of the witnesses called by the accused in this trial is of no concern. All came and testified in a straightforward manner, asked counsel to repeat a question when they did not have a good understanding of it, and did not hesitate to correct their testimony if they found out that there was something to correct.

[96] Then it is the conclusion of the Court that the testimony of Leading Seaman Archibald is credible and reliable.

[97] Now, concerning the testimony of Leading Seaman Klepy, the Court came to the same conclusion. Essentially the third and fourth charges rely on his testimony. He testified in a calm and straightforward manner. When confronted with the fact that he did not provide to investigators a consistent story and in fact that he denied at the beginning any knowledge about the matter, he did not hesitate to explain that because he feared being seen as the one who committed the offence, he then decided to tell the minimum or nothing. However, he changed his mind about that approach and did not want to be seen as hiding anything for himself or somebody else. His explanation is consistent with the facts and with his general character, which is to tell the least in order to not being seen as the snitch.

[98] Once confronted with his previous statement it did not take him long to remember and provide a consistent statement in accordance with what he recalls today. He had a good memory of the events and he provided to the Court clear observations. When he was not sure of his understanding of the question, he did not hesitate to ask a lawyer to repeat it. The evidence adduced by the accused did not convince the Court that he could not be trusted. It appears to the Court that those witnesses refer more to their feelings and personal opinion than to reason that would ground such a general opinion in conclusion. The reality is that Master Seaman Ploughman confirmed that he went to her hotel room, told her that Leading Seaman Archibald's mattress was cut and that Leading Seaman Thies was suspected of being involved in that matter. One way or another, she told that he clearly pointed at Leading Seaman Thies as being the one who committed the offence.

[99] It is the conclusion of the Court that the testimony of Leading Seaman Klepy is credible and reliable.

[100] Concerning the first charge, the Court concludes that based on the testimony of Leading Seaman Archibald and in a lesser extent, the one of Leading Seaman Klepy,



the prosecution has proved beyond a reasonable doubt the identity of the accused, that he made a threat to cause bodily harm, and that he did that knowingly.

[101] Consequently, having regard to the evidence as a whole, the prosecution has proved beyond a reasonable doubt all the essential elements of the offence of uttering threats.

[102] Concerning the second charge, the Court concludes that based on the testimony of Leading Seaman Archibald and in a lesser extent, the one of Leading Seaman Klepy, the prosecution has proved beyond a reasonable doubt the identity of the accused, that he used provoking speeches toward a person, the provoking speeches tend to cause a quarrel and the person toward the speeches are directed to is subject to the Code of Service Discipline.

[103] Consequently, having regard to the evidence as a whole the prosecution has proved beyond a reasonable doubt all the essential elements of the offence of quarrel.

[104] Concerning the third charge, the Court concludes that based on the testimony of Leading Seaman Klepy and Exhibit 3, the prosecution has proved beyond a reasonable doubt the identity of the accused, that he caused damages to goods and that he knew what he was doing, intended to do what he did. However, the Court also concludes that the prosecution has not proved beyond a reasonable doubt that the goods was a public property of Her Majesty's Forces. The sole testimony of Petty Officer 1st Class Hulan and Leading Seaman Archibald is not sufficient to meet that burden.

[105] Consequently, having regard to the evidence as a whole the prosecution has not proved beyond a reasonable doubt all the essential elements of the offence of wilfully destroying property of Her Majesty's Forces.

[106] Concerning the fourth charge, the Court concludes that based on the testimony of Leading Seaman Klepy and Exhibit 3, the prosecution has proved beyond a reasonable doubt the identity of the accused, that he did destroy property and his conduct was unlawful and wilful.

[107] Consequently, having regard to the evidence as a whole the prosecution has proved beyond a reasonable doubt all the essential elements of the offence of mischief.

**FOR THESE REASONS, THE COURT:**

[108] **FINDS** you guilty of the first and fourth charges on the charge sheet, **FINDS** Leading Seaman Thies not guilty of the third charge, and **DIRECTS** a stay of proceedings on the second charge.

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**Counsel:**

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Lieutenant-Commander B. Walden, Directorate of Defence Counsel Services, Counsel for Leading Seaman Thies