

Citation: *R. v. Corporal J.L. Hentges*, 2008 CM 1024

Docket: 200854

**STANDING COURT MARTIAL
CANADA
QUEBEC
ASTICOU CENTRE, GATINEAU**

Date: 28 November 2008

PRESIDING: COLONEL M. DUTIL, C.M.J.

HER MAJESTY THE QUEEN

v.

**CORPORAL J.L. HENTGES
(Accused)**

FINDING

(Rendered Orally)

Introduction

[1] Corporal Hentges is charged with an offence under paragraph 125(c) of the *National Defence Act* for altering a document issued for a military purpose. The particulars of the charge allege that:

"... on or about 15 October 2007, at Ottawa, Ontario, with intent to deceive, altered a CF 2018, sick chit, to indicate that he was off duty."

The Evidence

[2] The evidence before the court consists of the following: The testimony of Sergeant Fulljames, who said that he is and was the supervisor of Corporal Hentges at the time of the alleged offence. Although his testimony was short, he stated that on 15 October 2007 Corporal Hentges gave him a sick report which was marked as Exhibit 3 in the proceedings. Upon reading the document that read out, in part, off duty for seven days, Sergeant Fulljames was not sure as to exactly what that meant. He also testified that he received a document that has been marked Exhibit 4 from Health Services. The difference between those two documents is that one says "off duty by seven days" and the other one says "desk duty by seven days."

[3] The evidence consists also of the Admissions made by counsel for the accused that has been marked as Exhibit 5, and the Agreed Statement of Facts that has been marked as Exhibit 7, and they read as follows:

Exhibit 5

"On 15 October 2007 Diane Dakers, a medical services clerk at the CF Health Services Centre, received a phone call from Sergeant Fulljames.

During the phone conversation, Diane Dakers obtained the original sick report concerning the accused, held in the folder at the sick parade desk at the emergency department of the CF Health Services Centre, and faxed it to Sergeant Fulljames. The folder contained all the day's sick reports.

The accused was given a photocopy of the sick report because Health Services were short on sick report forms and were using photocopies.

Diane Dakers deals with leave passes which are issued when a sick report requires more than three days leave."

The Agreed Statement of Facts, marked as Exhibit 7, reads as follows:

"It is agreed by the prosecution and defence that:

On 15 October 2007 Corporal Hentges saw Dr Liew, a physician at CF Health Services Ottawa, for a knee injury.

Dr Liew issued a sick report which provided instructions to the chain of command that Corporal Hentges was to be placed on desk duty for seven days, October 15, '07, start, no driving.

The sick report given to Corporal Hentges was a photocopy as the health centre had run out of originals.

When he returned from sick parade, Corporal Hentges submitted a photocopied sick report to Sergeant Fulljames, his supervisor, which read off duty for seven days, October 15, 2007, start, no driving.

Dr Liew did not write instructions that Corporal Hentges was to be off duty for any period.

The sick report is a CF document used by medical authorities to communicate medical employment limitations to the chain of command. In this case it was provided by Dr Liew to Corporal Hentges in order for him to communicate to his chain of command that he was to be placed on desk duty for seven days."

That's the end of the Agreed Statement of Facts.

Finally, the evidence is completed by the court taking judicial notice of those facts and matters under section 15 of the Military Rules of Evidence, including of the contents of the CANFORGEN that was marked as Exhibit 6, which is a CDS direction to the chain of command regarding medical care prescribed and medical employment limitations assigned by medical staff to CF members.

The law and the essential elements of the charge

[4] Now, dealing with the law and the essential elements of the charge. It is a charge under paragraph 125(c) of the *National Defence Act*, and this paragraph 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 ...

[5] The prosecution rightly described the essential elements of the offence that it must prove beyond reasonable doubt in order to secure a finding of guilty. The first one is the identity of the accused; second, the date and place of the alleged offence. Here we're dealing with 15 October 2007 at Ottawa, Ontario; third, that Corporal Hentges altered the CF 2018, the "sick chit," to indicate that he was off duty; forth, that the document, the CF 2018, is a document that is made or issued for a military purpose; and, finally, that Corporal Hentges did alter the document with intent to deceive.

Presumption of Innocence and Reasonable Doubt

[6] Before the court provides its legal analysis, it's appropriate, although I'll do it very summarily today, it's appropriate to deal with the presumption of innocence and the standard of proof beyond a reasonable doubt. It's 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.

[7] In matters dealt with under the Code of Service Discipline, or in any case in 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's up to the prosecution to prove its case on each element of the offence, and that beyond a reasonable doubt. That standard does not apply to individual items of evidence or to separate pieces of evidence that make up the prosecution's case, but it applies to the total body of the evidence upon which the prosecution relies to prove the guilt. The burden of proving the guilt of the accused beyond a reasonable doubt rests with the prosecution and it doesn't shift to the accused. The court must find an accused person not guilty if it has a reasonable doubt about the guilt after having considered all of the evidence.

[8] The term "beyond a reasonable doubt" has been used for a long time and it's part of our history and traditions of justice. In substance, a reasonable doubt is not a far-fetched or frivolous doubt. It's not a doubt that is based on sympathy or prejudice, it's a doubt that is based on reason and common sense. It's a doubt that arises at the end of the case based not only on what the evidence tells the court, but on what the evidence does not tell the court. The fact that a person has been charged is in no way indicative of his or her guilt. And I will add that the only charge or charges that are faced by an accused person are those that appear on the charge sheet before the court.

[9] In *Starr*,¹ at paragraph 242, the Supreme Court of Canada held that:

... [A]n 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.

On the other hand, it should be remembered that it's nearly impossible to prove anything with absolute certainty, and the prosecution is not required to do so. Absolute certainty is a standard of proof that does not exist in law, at least not in Canadian law. The prosecution only has the burden of proving the guilt of the accused, Corporal Hentges, beyond a reasonable doubt. To put it in perspective, if the court is convinced that the

¹ [2000] 2 S.C.R. 144

accused is probably or likely guilty, then the accused shall be acquitted since proof of probable or likely guilt is not proof beyond a reasonable doubt.

[10] In a trial like the one we have today evidence is either direct or circumstantial or both, and exhibits, like witnesses, may provide direct or circumstantial evidence. The evidence can be in the form of admissions or agreed statements of fact as well, and this is what we have here. In a trial all evidence counts, and when we're talking about direct or circumstantial evidence the law treats them both equally and neither is necessarily better than the other. In each case the court must decide what conclusions it will reach based upon the evidence as a whole, direct and circumstantial.

Questions in Issue

[11] The prosecution submits that the evidence proves each element beyond a reasonable doubt, and the defence made no representations. Based on the totality of the evidence, the court sees no issue with the date and place of the offence. There's also proof beyond a reasonable doubt, that the form CF 2018, Sick Report, or "sick chit," is a document made for a military purpose. Finally, the court is satisfied beyond a reasonable doubt that Corporal Hentges handed the document marked as Exhibit 3 with intent to deceive his superiors with regard to the employment limitations that were imposed by his treating physician, Captain Liew. There is no doubt that Dr Liew limited his employment to desk duty for a period of seven days, where Corporal Hentges knew that he was not to be off duty for seven days. That should be enough to conclude that Corporal Hentges acted fraudulently and with intent to deceive.

[12] The evidence establishes certainly beyond a reasonable doubt that the sick report received by Corporal Hentges is not the same that he gave to his superior, Sergeant Fulljames. However, is this sufficient to establish beyond a reasonable doubt that he personally altered the document before handing it out to Sergeant Fulljames in absence of evidence as to what occurred between the MIR and the return of Corporal Hentges to work? Is there sufficient evidence to allow the court to draw that Corporal Hentges is the only person that could have altered this document? Based on the same evidence, could one, at Corporal Hentges's request, have made the alteration and photocopied the document or leave Corporal Hentges to make that photocopy after the alteration was made? I don't know. It's more than likely that Corporal Hentges altered the document, however, suspicion, extensive as it may be, is not a ground for conviction.

[13] Based on the evidence before the court, convictions or conviction could have been secured on several offences, and I'll leave the prosecution to determine on which charges that could have been the case, be it on the *National Defence Act* or the *Criminal Code*. In any event, that is totally irrelevant at this stage of the proceeding.

Conclusion and Disposition

[14] Based on the evidence the court has a reasonable doubt with regard to the element that Corporal Hentges altered personally the document, and to secure a conviction on paragraph 125(c) the accused must be the person who has made the alteration. Therefore, for these reasons, Corporal Hentges, the court finds you not guilty of the charge.

Colonel M. Dutil, C.M.J.

COUNSEL:

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