

Citation: *R. v. Officer Cadet J.A. McNulty*, 2004CM05

Docket: F200405

**STANDING COURT MARTIAL
CANADA
NOVA SCOTIA
CANADIAN FORCES BASE HALIFAX**

Date: 12 March 2004

PRESIDING: LIEUTENANT-COLONEL M. DUTIL, M.J.

HER MAJESTY THE QUEEN

v.

**OFFICER CADET J. MCNULTY
(Accused)**

FINDING

(Rendered verbally)

[1] Officer Cadet McNulty is charged under paragraph 75(g) of the *National Defence Act* for having improperly occasioned false alarms, and alternatively, under section 129 of the *National Defence Act*, for conduct to the prejudice of good order and discipline. The charges arose from an incident that allegedly took place on or about 29 December, 2002, where the accused, Officer Cadet McNulty, would have made a telephone call to HMCS WINDSOR saying words to the effect that there was a bomb onboard. And this conduct would have occasioned false alarms onboard HMCS WINDSOR and in the immediate surroundings.

[2] Let me begin, first, with an explanation about the presumption of innocence and the standard of proof beyond a reasonable doubt. A standard that is intertwined with that principle fundamental to all criminal trials, including trials under the Code of Service Discipline. These principles are certainly well known to counsel, but other people in this courtroom may well be less familiar with them. It is fair to say that the presumption of innocence is perhaps the most fundamental principle in our criminal law. In matters dealt with under the Code of Service Discipline, as in cases dealt under the criminal law, every person charged with a criminal offence is presumed to be innocent until the prosecution proves his or her guilt, and that beyond a reasonable doubt.

[3] 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. 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. The court must find an accused person not guilty if it has a reasonable doubt about his or her guilt after having considered all of the evidence.

[4] The term "beyond a reasonable doubt" has been used for a very long time. It is part of our history and traditions of justice. As pointed out by Mr Prosecutor, in *R. v. Lifchus*, published in [1997] 3 S.C.R. 320, the Supreme Court of Canada proposed a model charge on reasonable doubt. And 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 an imaginary doubt or a frivolous doubt. It must not be based on sympathy or prejudice, rather, it is based on reason and common sense. It must logically come from the evidence or the lack of evidence.

[5] 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 charges that are faced by an accused person are those that are on the charge sheet before a court. What is evidence? Evidence may include testimony under oath or solemn affirmation before the court by witnesses, and that about what they observed or what they did. Evidence is also—could also consist in 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.

[6] It is not unusual that some evidence presented before the court may be contradictory. Often, witnesses may have different recollections of events and the court has to determine what evidence it finds credible. Credibility is not synonymous with telling the truth, and 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, the court will assess a witness's opportunity to observe, a witness's reason to remember or 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 an interest in the outcome of the trial; that is, a reason to favour the prosecution or the defence, or is the witness impartial?

[7] Of course, this last factor applies in a somewhat different way to the accused. Even though it is reasonable to assume that an accused is interested in securing his or her acquittal, the presumption of innocence does not permit a conclusion that an accused will lie where the accused chooses to testify, for example. 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 within itself and with the uncontradicted facts?

[8] 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 may well tint a witnesses entire testimony. A court is not required to accept the testimony of any witness, except to the extent it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is reason not to disbelieve it.

[9] In *R. v. Starr*, reported at (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...."

[10] On the other hand, it should be remembered that it is virtually impossible to prove anything to an absolute certainty, and the prosecution is not required to do so. Such a standard of proof is impossibly high.

[11] The prosecution only has to—has the burden of proving the guilt of an accused person, in this case Officer Cadet McNulty, beyond a reasonable doubt. To put it in perspective, if the court is convinced that the accused is probably or likely guilty, then the accused shall be acquitted. As I said earlier, the proper approach to the burden of proof is to consider all of the evidence together and not to assess individual items of evidence in isolation. And it is essential that the credibility and reliability of the witnesses be tested in the light of all of the evidence presented.

[12] In this case, the defence decided not to call evidence, and it is certainly his right to do so. As I said, the burden of proof is on the prosecution and it does not shift to the accused. As the rule of reasonable doubt also applies to the issue of credibility, the court is not required to definitely decide on the credibility of a witness or a group of witnesses, nor does the court need not fully believe or disbelieve one witness or a group of witnesses. If the court has a reasonable doubt as to the guilt of Officer Cadet McNulty arising from the credibility of witnesses, then the court must find him not guilty.

[13] Now, turning to the evidence before this court. The evidence before this court consists of the testimonies of Ordinary Seaman Suurhoff, Mrs Suurhoff, and Petty Officer 2nd Class Hayward. The evidence consists, also, of Exhibit 3, that has been filed before the court. And Exhibit 3 contains six admissions made by the defence that have been reduced in writing and filed before the court and reads as follows:

On 29 December 2002, at or about 0500 hours, a bomb threat was received onboard HMCS Windsor, stationed alongside in Halifax Harbour.

During the military police's investigation, the call was traced back to C44 470 741 Ordinary Seaman Mark Michael Suurhoff's residence.

Further, the military police were able to obtain a copy of the voice recording of a phone call from Halifax to the base operator, asking to be transferred to HMCS Windsor.

The voice on that recording is that of OS Suurhoff.

At the time of offence, OCdt McNulty was a member of the Canadian Armed Forces Reserves, more precisely a member of the Cadet Instructor's Cadre ... sub-component, as per article 2.034(c) of the Queen's Regulations and Orders for the Canadian Forces....

OCdt McNulty also admits that he was subject to the Code of Service Discipline at the time of the offence, pursuant to section 60(1)(c)(viii) of the National Defence Act.

In addition, this court, taking judicial notice of those facts and matters under Military Rule of Evidence 15, completes the evidence.

[14] The facts leading to this case can be summarized along this way:

During the evening of 28 December, 2002, Ordinary Seaman Suurhoff and his wife, who live at the Naval Radio Station Newport Corners, Nova Scotia, attend at a wedding anniversary party at a neighbour's residence. The accused and his brother Derek's common law wife, Debbie, are also attending that party. The Suurhoff's had met the accused that same day as he was the brother of Derek McNulty, their next door neighbour. During that evening they consume alcohol in the order of three to four drinks. The atmosphere at the party is good, but quiet.

Around midnight, Ordinary Seaman Suurhoff and his wife leave the party to return to their residence. Officer Cadet McNulty and his sister-in-law leave the party with the Suurhoff's. As they are not ready to go to bed, and as they are walking back home with the accused and Debbie, Ordinary Seaman Suurhoff asks Officer Cadet McNulty if he

wants to join them to continue the evening by playing darts. The accused accepts, but Debbie does not accept that invitation.

Then Ordinary Seaman Suurhoff, Mrs Suurhoff, and Officer Cadet McNulty spend the night of the 29 December, 2002, or the early morning, I guess, in the Suurhoff's residence where they play darts during most of the night, and where they talk of various things including the fact that Officer Cadet McNulty's brother, Derek, is having work related problems. The trio is brainstorming to find ways to help him as Officer Cadet McNulty is concerned for his brother and wants to help him.

During that period, Ordinary Seaman Suurhoff drinks three to four beers, and that is from midnight to approximately four to five o'clock in the morning, although his wife has the knowledge of only—of him having only one. As to Mrs Suurhoff, she has only one drink during that night. Concerning Officer Cadet McNulty, he brought over a bottle of rye whiskey, and according to Mrs Suurhoff he has more than one drink during this period. Although they had been all drinking, Ordinary Seaman Suurhoff, his wife, and the accused are not drunk. Officer Cadet McNulty appears to be in a good mood.

Ordinary Seaman Suurhoff knows that the accused's brother is on duty that day on HMCS WINDSOR, a submarine, and also, Officer Cadet McNulty wants to talk to his brother. Ordinary Seaman Suurhoff also knows how to reach HMCS WINDSOR through the base operator. Although not convinced that this is the right thing to do that night, an exchange between Mrs Suurhoff and her husband leads to the three persons going up to the kitchen where Officer Cadet McNulty would call his brother at the suggestion of Ordinary Seaman Suurhoff.

At approximately five o'clock on 29 December, 2002, Ordinary Seaman Suurhoff takes the phone and dials the number to reach the base operator and the three persons are present in the kitchen. Ordinary Seaman Suurhoff asked to be transferred to HMCS WINDSOR. At this time, he hands the telephone over to Officer Cadet McNulty. Mrs Suurhoff is about two feet from Officer Cadet McNulty while her husband is two feet behind her. The Suurhoff's continue to talk together and they're not paying much attention to what is being said by Officer Cadet McNulty.

Suddenly, Ordinary Seaman Suurhoff hears Officer Cadet McNulty say, in a mimic Arabic voice, words to the effect, "This is Abdul and there's a bomb on your boat." Ordinary Seaman Suurhoff

sees Officer Cadet McNulty starting laughing and hung up the phone. Ordinary Seaman Suurhoff testifies that he is stunned by what he just witnessed. He asked Officer Cadet McNulty if it was his brother over the phone, to which Officer Cadet McNulty replies, "I don't think so."

Mrs Suurhoff says that Officer Cadet McNulty started to talk on the phone using the mimic Arabic voice, but she only hears one English word, the word "bomb." She is shocked, stunned, astonished. Her face drops. According to her, the shocking event lasts between three to five seconds.

Very shortly after the phone call, as the Suurhoff's are shocked, they exchange a few words back and forth together. At that time, she's very agitated and vociferous towards Officer Cadet McNulty. She's swearing at him and she asked him if this was his brother. According to her version of events, Officer Cadet McNulty says, "Whoops, I should not have done that." She further hears her husband ask Officer Cadet McNulty if it was his brother, to which Officer Cadet McNulty replied, "No."

In a turmoil, Ordinary Seaman Suurhoff writes down the telephone number of the base operator on a piece of paper and asks Officer Cadet McNulty to leave his premises. Before his departure, Ordinary Seaman Suurhoff tells the accused that he should phone back to settle that or words to that effect. Ordinary Seaman Suurhoff only recalls that Officer Cadet McNulty did not react and left, while his wife testified that Officer Cadet McNulty agreed and then left their premises.

The Suurhoffs did not report the telephone call. Ordinary Seaman Suurhoff had just re-enrolled in the CF and they were concerned that this incident could have an impact on his career as the phone call originated from their residence and could be tracked down, although they were under the impression or belief that Officer Cadet McNulty was to settle the matter. The Suurhoffs never reported the incident to CF authorities including the military police. They spoke to the military police only after being requested to do so. In cross-examination, Ordinary Seaman Suurhoff said that he spoke about the incident to Derek McNulty, socially, the same day as when he met with the military police, after Derek had asked him what his brother had done.

Mrs Suurhoff met with the MPs four days after her husband did. As to Mrs Suurhoff, she says that she spoke of the incident to her neighbour Debbie; that is, Derek McNulty's wife. The Suurhoff's openly admitted that they have discussed this incident between them before they

met with the MPs. Mrs Suurhoff readily admits that she spoke with her husband about this incident before she talked to the police authorities. In cross-examination, she testifies that, despite these discussions with her husband, they did not make up that story together.

[15] Turning, now, to the recipient of the bomb threat; that is, PO2 Hayward. He testified that at 0500 hours on 29 December, 2002, he was on duty on HMCS WINDSOR. He testified that Leading Seaman Derek McNulty was also on duty as one of his subordinates. Petty Officer 2nd Class Hayward says that he—that when he received the telephone call, at that time, Leading Seaman McNulty was sleeping and he was responsible to answer the phone. His testimony can be summarized as follows:

Between 0505 and 0507 hours on 29 December 2002, he receives a telephone call onboard HMCS WINDSOR. In answering the phone, he uses his normal greetings in saying, "Good morning" and then naming himself with his rank and name as well as naming HMCS WINDSOR. In doing so, he wants to ensure that the person calling knows to whom that person is talking.

Immediately after having introduced himself to the caller, he hears words that he believes are, "Hello. This is Ahmed ..." and then something, and when I use the word "something" I do not refer to a family name. And then it continues and it says, "... there is a bomb onboard." Petty Officer Hayward asks, "Who is this?" at which point the phone is hung up at the other end. This message only lasts between five to ten seconds according to him.

He then reacts, first thinking of a joke by a crew member on Christmas holidays or a potential exercise, but quickly rules that out after making a phone call on HMCS VICTORIA. He then doesn't have any other choice than initiate the bomb threat standard operating procedure. His first step is to wake up his watch; that is, Leading Seaman Cleaveley and Leading Seaman McNulty. They initiate the search. The ship's XO is informed and a full security response begins. The available personnel is recalled, the military police is called, as well as the fire department, the Fleet Diving Unit, and the Explosive Ordnance Unit.

The procedure involves searches of each compartment of HMCS WINDSOR, deck to deck, bottom to top. It also involves blockades of the dockyard, searches and inspections of the boat outside, over and under the waterline, as well as a search of the jetty and so on. In other words, a complete and thorough procedure that takes approximately six hours.

Petty Officer Hayward testifies that he never met the accused, nor has he met with Ordinary Seaman Suurhoff. He testified that when approached by the military police he was asked to identify a voice recording and that he identified that voice as the one he heard at 5:05 on 29 December, 2002. However, he did not testify as to what he heard, the words spoken, the recording quality, and factors such as how the demonstration was done, how long did it take, where did it take place, and in which conditions it took place. There is evidence before the court that the voice of the recording of a phone call the night in question, from Halifax to the base operator, from Ordinary Seaman Suurhoff's residence, showed that the voice of that recording was Ordinary Seaman Suurhoff. That concludes the review of the evidence before this court.

[16] I now turn to a consideration of the elements of the offence that the prosecution must prove beyond a reasonable doubt with regard to the first charge laid under paragraph 75(g) of the *National Defence Act*. As I have already indicated in these proceedings, these elements are: first, the identity of the accused as the offender, Officer Cadet McNulty; second, the date and place of the alleged offence; that is, on or about 29 December, 2002 at Naval Radio Station Newport Corners, Nova Scotia; third, that the accused made a telephone call to HMCS WINDSOR saying words to the effect that there was a bomb onboard; fourth, that the words spoken by the accused improperly occasioned false alarms; and finally, that the accused, in this case Officer Cadet McNulty, had a guilty state of mind.

[17] As to the second charge, laid in the alternative under section 129 of the *National Defence Act*, the elements of the offence are: first, the identity of the accused; second, the date and place; that is, on or about 29 December, 2002 at Naval Radio Station Newport Corners, Nova Scotia; third, the conduct of the accused; that is, the accused made a telephone call to HMCS WINDSOR saying words to the effect that there was a bomb onboard; the fourth element is the prejudice to good order and discipline resulting from the conduct; and finally, that Officer Cadet McNulty had a guilty state of mind at the time where the alleged offence was committed.

[18] The defence submits that the only issue, in this case, is the failure by the prosecution to prove, beyond a reasonable doubt, the essential elements or ingredients on both charges as it relates to the identity of the offender as being Officer Cadet McNulty.

[19] The nature of the evidence before this court requires the court to make certain findings as to the credibility of various witnesses. With regard to Ordinary Seaman Suurhoff and Mrs Suurhoff, the prosecution and defence have opposite views as to their credibility. The court finds that they have testified in a straightforward manner and to the best of their knowledge. The court finds that their testimony is not

only extremely credible, but also very reliable, despite minor inconsistencies. The fact that Mrs Suurhoff heard only the word "bomb" and did not grasp the other words spoken is not affecting the reliability of her testimony or her credibility. She was shocked and she was so furious that she lost control. Ordinary Seaman Suurhoff's version is totally corroborated by what was heard by Petty Officer Hayward.

[20] The defence seems to suggest that Ordinary Seaman Suurhoff may be the one who could have uttered the bomb threat. This is not supported by the evidence and would be purely speculative. The Suurhoff's testimonies have not been challenged in any way. To the contrary, their cross-examination enhanced their credibility. The court reviewed, carefully, their evidence, even in light of the fact they could have an interest in this case, and the fact that they had the opportunity to discuss their upcoming testimony in court. As the court already indicated, they both testified in a straightforward and forthcoming manner. They each answered the questions to the best of their knowledge, and they were neither evasive nor hesitant.

[21] The defence did not challenge their evidence, including suggesting that the threat may have been made by someone other than the accused. The court carefully examined their demeanour during both direct- and cross-examination. Although courts must be careful in the interpretation of witness's demeanour in court, they did not, in any way, adapt the manner in which they answered to counsel. They remained polite and consistent without ever being evasive or hesitant. Their testimonies are consistent within themselves and they corroborate each other despite some minor inconsistencies. In light of the total body of evidence, the court does not have any legal justification to reject all or part of their testimony. The court has no reason to disbelieve any part of their evidence.

[22] Petty Officer Hayward is also a credible witness and he has, certainly, no interest in the outcome of this trial.

[23] As already indicated, the only issue concerning the first and second charges is the proof beyond a reasonable doubt of the identity of Officer Cadet McNulty as the offender. The totality of the evidence and trustworthiness of that evidence establishes beyond a reasonable doubt that Officer Cadet McNulty made the phone call at Naval Radio Station Newport Corners, Nova Scotia, in which he said words to the effect that there was a bomb onboard. That evidence also establishes beyond a reasonable doubt that, as a consequence, this phone call occasioned false alarms onboard HMCS WINDSOR and its surroundings. There is no logical or rational conclusion that could be derived from the evidence other than that.

[24] As I said, the credibility and reliability of the witnesses heard by the court is not only extremely solid, but it has not been challenged or shaken in any way, shape, or form by the defence in cross-examination or in any other way, including the contents of Exhibit 3. The evidence of Ordinary Seaman Suurhoff and his wife leaves

no doubt that Officer Cadet McNulty knew what he was doing when he made the bomb threat in that he knew he had not been talking to his brother when he made that threat. Therefore, the court has no difficulty to conclude that Officer Cadet McNulty had, in the circumstances, the requisite *mens rea*.

[25] Officer Cadet McNulty, please stand up. The court finds you guilty of the first charge, and directs that the proceedings be stayed on the second charge. Be seated.

LIEUTENANT-COLONEL M. DUTIL, M.J.

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