

Citation: *Captain R.A. Semrau v. R.*

Docket: TBA

**CUSTODY REVIEW HEARING
CANADA
ONTARIO
CANADIAN FORCES BASE PETAWAWA**

Date: 7 January 2009

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

CAPTAIN R.A. SEMRAU

(Applicant)

v.

HER MAJESTY THE QUEEN

(Respondent)

DIRECTION BY MILITARY JUDGE

(Rendered orally)

INTRODUCTION

[1] Captain R.A. Semrau has been brought before me in accordance with section 159 of the *National Defence Act* (thereafter the *NDA*) for the purpose of a hearing to determine whether he is to be retained in custody.

[2] The triggering events that led to this hearing is the arrest of Captain Semrau on 30 December 2008 in Afghanistan by a member of the Canadian Forces National Investigation Services (thereafter the CFNIS), and the laying of a charge against him by the same authority on 31 December 2008 for an offence punishable under section 130 of the *NDA* for second degree murder contrary to subsection 235(1) of the *Criminal Code of Canada* (thereafter the *Criminal Code*) that allegedly occurred in Afghanistan on or about 19 October 2008.

THE EVIDENCE

[3] The evidence before me is composed essentially of the following facts:

- a. Exhibit 1, a letter dated 4 January 2009 addressed to the Court Martial Administrator requesting a review hearing by a Military Judge concerning the custody of Captain Semrau;
- b. Exhibit 2, a memorandum from the custody review officer dated 1 January 2009 directing that Captain Semrau be retained in custody and that he be taken before a military judge for a custody review hearing;
- c. Exhibit 3, a Record of Disciplinary Proceedings dated 31 December 2008 concerning the charge laid against Captain Semrau;
- d. Exhibit 4, an account in writing concerning the arrest of Captain Semrau dated 30 December 2008;
- e. Exhibit 5, a report of custody signed by Captain Semrau on 31 December 2008;
- f. Exhibit 6, a medical disposition report concerning the medical fitness of Captain Semrau for custody dated 31 December 2008;
- g. Exhibit 7, a letter dated 1 January 2009 from the Commanding Officer of the Operational Mentor and Liaison Team (thereafter OMLT) to the Commanding Officer of the 3 RCR Rear Party concerning the arrest of Captain Semrau;
- h. Exhibit 8, an agreed statement of facts concerning the circumstances of the alleged offence presumably committed by Captain Semrau;
- i. Exhibit 9, a second agreed statement of facts concerning information related to Captain Semrau's personal situation; and
- j. Exhibit 10, proposed conditions for an undertaking to be signed by Captain Semrau if he is released from custody;

THE FACTS

[4] On 30 December 2008, Captain Robert Semrau was arrested by a CNFIS member concerning an allegation of second degree murder of a wounded insurgent during an operation in Afghanistan on or about 19 October 2008. Captain Semrau was at the time of the alleged incident and at the time of his arrest a member of the OMLT. An account in writing and report of custody were made on the same day and presented to Capt Semrau the day after.

[5] On 31 December 2008, a charge was laid against Captain Semrau. On the same day, the custody review officer received all the necessary documents and on 1 January 2009, he made the decision to maintain in custody Captain Semrau and informed the latter of that decision. In fact, the custody review officer had no other choice because, in accordance with the regulation, he had to do so considering the nature of the offence for which Captain Semrau was charged.

[6] Reality is, that as an offence of second degree murder is a designated offence as defined at section 153 of the *NDA* because it is an offence punishable under section 130 of the *NDA* that is listed in section 469 of the *Criminal Code*, then regulation clearly states that, when a custody review officer is facing a situation involving such offence, he shall direct that the person be retained in custody and be brought before a military judge for a custody review hearing.

[7] The custody review officer directed, on 1 January 2009, that Captain Semrau be brought before a military judge. In order to do so, Capt Semrau was sent back to Canada, more precisely to CFB Petawawa, where he is currently detained.

[8] On 4 January 2009, the Court Martial Administrator was formally informed of the direction made by the custody review officer and the Chief Military Judge assigned immediately a military judge, which is me, to proceed with the custody review hearing.

[9] On 5 January 2009, a telephone conference took place between both counsel and I in order to determine where and when the hearing would take place.

[10] On the afternoon of 6 January 2009, I proceeded with the custody review hearing in accordance with article 105.27 of the *Queen's Regulations and Orders* (hereafter *QR&O*).

THE APPLICABLE LAW

[11] First, it is important to say that a person subject to the Code of Service Discipline who is seeking release from custody at the pre-trial stage is presumed innocent of the charge or charges alleged. Subsection 11(e) of the Canadian Charter of Rights and Freedom guarantees reasonable bail unless there is just cause for detention and it entrenches the effect of the presumption of innocence at each custody review stage of the military justice process.

[12] Section 159.3 of the *NDA* reads as follows:

(1) Notwithstanding section 159.1, if the person in custody is charged with having committed a designated offence, the military judge shall direct that the person be retained in custody until dealt with according to

law, unless the person shows cause why the person's retention in custody is not justified.

(2) If the person in custody shows cause why the person's retention in custody is not justified, the military judge shall direct that the person be released from custody on giving any undertaking to comply with any of the conditions referred to in section 158.6 that the military judge considers appropriate, unless the person in custody shows cause why the giving of an undertaking is not justified.

[13] Then, considering that Captain Semrau, the person in custody, is charged with a designated offence, the onus is on him to show cause why his retention in custody is not justified, otherwise I will have to direct that he be retained in custody.

[14] In order to convince me to direct that he must be released with conditions Captain Semrau must establish to my satisfaction, on a balance of probabilities, in accordance with section 159.2 of the *NDA*, that:

- a. his custody is not necessary to ensure his attendance before a service tribunal to be dealt with according to law; and
- b. his custody is not necessary for the protection or the safety of the public, having regard to all the circumstances, including there is no substantial likelihood that he will, if released from custody, commit an offence or interfere with the administration of justice.

[15] Concerning the third criterion listed at section 159.2(c) of the *NDA*, I think it cannot receive application, especially in the light of the decision of the Supreme Court of Canada in *R. v. Hall* [2002] 3 S.C.R. 309.

[16] Section 159.2(c) of the *NDA* reads as follows:

“(c) any other just cause has been shown, having regard to the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.”

It is important to say that this subsection does not refer to any specific notion as the confidence in the administration of justice. This specific notion may be included in the more general category of “any other just cause,” but contrary to what was previously or is actually said in section 515(c) of the *Criminal Code*, this specific notion has never been contemplated in the *NDA*.

[17] In *Hall*, aforementioned, the portion of section 515(10)(c) of the

Criminal Code, as it was at the time, permitting detention “on any other just cause being shown” was considered unconstitutional and these words were severed from the applicable provision. Because the impugned phrase confers an open-ended judicial discretion to refuse bail, it was decided that it was inconsistent with both section 11(e) of the *Canadian Charter of Rights and Freedoms*, which guarantees a right “not to be denied reasonable bail without just cause,” and the presumption of innocence. It is a fundamental principle of justice that an individual cannot be detained by virtue of a vague legal provision.

[18] The wording of section 159.2(c) of the NDA being identical, which is “any other just cause has been shown,” it would be difficult for me to give effect to such provision, considering that it uses the same wording as the former one used in section 515(10)(c) of the *Criminal Code* and for which the Supreme Court of Canada said that it was unconstitutional because of its vagueness.

[19] Considering the decision of the Supreme Court of Canada in *Hall*, aforementioned, I don’t have any other choice than to disregard the application of the criterion listed at section 159.2(c) of the *NDA*.

[20] Having instructed myself on the applicable legal criteria, I will now turn to the questions in issue put before me and address the legal principles.

ANALYSIS

[21] I am satisfied, on a balance of probabilities, that the custody of Captain Semrau is not necessary to ensure his attendance before a service tribunal to be dealt with according to law.

[22] Indeed, Captain Semrau has put in evidence the absence of any service and criminal record with both the British and the Canadian Forces. He was released from the British Army with an exemplary discharge. He is married, has one child, and can rely on good family ties. He is a Canadian citizen and he is ready to hand over any passport he has. He intends to reside at the single family home that his wife and he bought in July 2008 in Pembroke. He intends to remain under military authority, and will be employed at his unit, the 3 RCR, while he will await any development in this case. Additionally, the representative of the Canadian Forces does not consider that Captain Semrau represents a flight risk.

[23] I am also satisfied, on a balance of probabilities, that the custody of Captain Semrau is not necessary for the protection or the safety of the public, having regard to all the circumstances, including the fact that there is no substantial likelihood that he will, if released from custody, commit an offence or interfere with the administration of justice.

[24] The circumstances of the incident, which represent the basis of the charge laid against him, involved very particular and unique circumstances in a specific context. Indeed, it allegedly occurred in a hostile environment, further to a counter-attack in order to respond to an ambush made on his team by some insurgent. Basically, it happened in an operational context in a theatre of operations. Also, considering his past and actual conduct in the military and his intent to accept and follow the conditions that I could impose on him for his released from custody, I do not believe that he will interfere in a way or another with the administration of justice. I understand that the representative of the Canadian Forces has reached the same opinion as me, and she firmly believes that Captain Semrau does not represent a danger for the public or may interfere with the administration of justice.

[25] Considering that I don't have to proceed with an analysis of a third criterion, then it is now my conclusion that Captain Semrau has shown cause, on a balance of probabilities, why his retention in custody is not justified.

[26] Even though I made the decision that I don't have to consider a third criterion, I would like to say that the gravity of the nature of the offence would not justify, by itself, as well established in various case law, to maintain Captain Semrau in custody. As I said previously, the circumstances of the alleged offence occurred in a specific context and are very unique. It is also important to say that there is an ongoing investigation on the matter and the disciplinary process is at an early stage, the charge laid being at the chain of command level, and it has not been passed yet to the Director of Military Prosecutions in order to be preferred. If I had to consider it, I would have been of the opinion that Captain Semrau would have demonstrated, on a balance of probabilities, that denial of bail in this case would not be necessary to maintain confidence in the administration of the military justice system.

DISPOSITION

[27] Captain Semrau, please stand up. It is my decision, based on what I mentioned previously, that retaining you in custody is not necessary.

[28] Consequently, I direct that you be released from custody on giving an undertaking to comply with the following conditions:

- a. To remain under military authority;
- b. To remain within the confines of Canada;
- c. To hand over any passport issued to you to the Officer in Command of the Military Police Detachment for CFB Petawawa;

- d. To reside at 530 Mary Street, Pembroke, Province of Ontario;
- e. To notify the Officer in Command of the Military Police Detachment for CFB Petawawa 48 hours in advance of any change in my residential address or my landline phone number:
- f. To abstain from communicating, directly or indirectly, with:
 - i. Master Warrant Officer D.E. Fisher;
 - ii. Private J.S. Fournier;
 - iii. Warrant Officer J.M. Longaphie;
 - iv. Major S.J.V. Nolan;
 - v. Captain A.R. Walker; or
 - vi. Any Afghan Nationals previously or currently involved with the Operational Mentor and Liaison Team (OMLT) of the Joint Task Force Afghanistan. However, it is understood that this condition does not preclude your counsel to meet any person listed above in the course of the preparation of the disciplinary proceedings concerning you; and
- g. To abstain from possessing any firearm, cross-bow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance, or all such things, including in the course of your duties or your employment as a member of the Canadian Forces.

[29] The procedures concerning the custody review hearing of Captain Robert A. Semrau are terminated.

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

COUNSEL:

Major M.M.M. Trudel, Directorate of Military Prosecutions
Representative of the Canadian Forces

Major S.J. Turner, Directorate of Defence Counsel Services
Representative for Captain R.A. Semrau, Person in Custody