



COURT MARTIAL

Citation: *R. v. Edmunds*, 2015 CM 3022

Date: 20151124

Docket: 201450

General Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Master Corporal N.S. Edmunds, Applicant

- and -

Her Majesty the Queen, Respondent

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

REASONS FOR THE DECISION ON THE ONUS REGARDING THE SPECIAL PLEA OF AUTREFOIS ACQUIT AND AUTREFOIS CONVICT

(Orally)

[1] Master Corporal Edmunds presented a request to the Court to rule on the issue of the onus regarding his application of *autrefois acquit* and *autrefois convict*.

[2] Essentially, Master Corporal Edmunds is claiming that pursuant to the reading of subsection 607(5) of the *Criminal Code*, the onus of the applicant for proving such a special plea is limited to prove that first, he has been lawfully acquitted or convicted, and that second, the time and place of such thing, leaving the onus on the respondent to prove that the charges are not the same as the first court martial or implicitly included in those from the first court martial.

[3] The respondent in this matter is claiming that this *Criminal Code* section has no application in the context of a court martial, considering that this specific matter is addressed in the *National Defence Act* with section 66 of the *National Defence Act*. In addition, in a matter or application raising the jurisdiction of a court martial, he is

suggesting that the onus of proving this type of plea belongs to the party alleging the existence of such thing.

[4] A review of applicable doctrine and case law does indicate to the court that in the context of section 607 of the *Criminal Code*, the onus is on the accused to prove that the conditions of the special plea of *autrefois acquit* and *autrefois convict* have been met.

[5] In Salhany, *Canadian Criminal Procedure*, at section 6.1990, it is said:

To succeed on the defence of *autrefois acquit* or *autrefois convict*, the accused must establish two things: the first is that there was a final verdict on the first charge; the second is that the “matter” in both charges is the same in whole or in part and the charge before the court is the same, or implicitly included in the earlier charge, either in law or on the evidence presented if it had been legally possible at the time to make the necessary amendments. The Code does not require that the offences be absolutely identical. [Footnotes omitted.]

[6] This approach is confirmed in Ewaschuk, *Criminal Pleadings and Practice in Canada*, at section 14:3055:

To maintain a plea of *autrefois acquit* or *autrefois convict*, the accused must establish that he was previously acquitted or convicted of the same or related offence before a court having proper jurisdiction. Similarly, the *onus* of proving the constituent elements of *res judicata* is on the “party alleging its application”. [Emphasis in original; citations omitted.]

[7] In *R. v. Van Rassel*, [1990] 1 S.C.R. 225, the Supreme Court of Canada, in the context of the interpretation of section 607 of the *Criminal Code*, clearly stated the things to be proven by the accused regarding the special plea of *autrefois acquit* and *autrefois convict*. At page 234, the court said:

To make out the defence of *autrefois acquit*, the accused must show that the two charges laid against him are the same. In particular, he must prove that the following two conditions have been met:

- (1) the matter is the same, in whole or in part; and
- (2) the new count must be the same as at the first trial, or be implicitly included in that of the first trial, either in law or on account of the evidence presented if it had been legally possible at that time to make the necessary amendments.

[8] Even taking the approach of the applicant under section 607 of the *Criminal Code*, the Court concludes that the burden would be the same as the one required at section 66 of the *National Defence Act*.

[9] That being said, the Court does agree with the respondent that this matter is addressed specifically in the *National Defence Act* at section 66, then section 607 of the *Criminal Code* could not find any application at the court martial. It is also interesting

to note that the availability of this special plea through section 66 of the *National Defence Act* was confirmed by the Supreme Court of Canada in its recent decision of *R. v. Moriarity*, 2015 SCC 55 at paragraph 7.

FOR THESE REASONS, THE COURT:

[10] **DECLARES** that section 607 of the *Criminal Code* has no application at a court martial on the issue of the special plea of *autrefois acquit* and *autrefois convict* addressed at section 66 of the *National Defence Act*.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for the Applicant,
Master Corporal N.S. Edmunds

The Director of Military Prosecutions as represented by Major A.C. Samson, for the
Respondent