



COURT MARTIAL

Citation: *R. v. McEwan*, 2018 CM 4012

Date: 20180716

Docket: 201740

Standing Court Martial

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

Between:

Her Majesty the Queen

- and -

Corporal R.A. McEwan, Accused

Before: Commander J.B.M. Pelletier, M.J.

DECISION ON ISSUANCE OF JUDICIAL ARREST WARRANT

(Orally)

Introduction

[1] Corporal McEwan is being tried on the basis of the charge sheet at Exhibit 2 which alleges two offences committed on 24 October and 17 November 2016. Corporal McEwan was released from the regular force on 30 November 2016. The continued jurisdiction over these offences results from the application of subsection 60(2) of the *National Defence Act (NDA)*.

[2] The prosecution applies to this Court for the issuance of a warrant for the arrest of the accused, Corporal McEwan, under the authority of section 249.23 of the *NDA* and *Queen's Regulations and Orders for the Canadian Forces (QR&O)*, article 105.061.

[3] Indeed, Corporal McEwan has failed to appear at his trial by Standing Court Martial (SCM) this morning, 16 July 2018 at 0930 hours at Canadian Forces Base

Petawawa, Petawawa, Ontario despite the fact that he had been ordered to do so by virtue of the convening order at Exhibit 1, issued on 13 June 2018 by the Court Martial Administrator.

[4] The convening order was the result of an order by a military judge, granting the prosecution's request for a trial date in the absence of the accused, who, despite having been served with the application the day before it had been set for hearing, had not appeared.

The law

[5] Section 249.23 of the *NDA* provides for the issuance of warrants for arrest on non-appearance of accused:

249.23 Where an accused person has been duly summoned or ordered to appear before a court martial, the court martial may issue a warrant in the form prescribed in regulations made by the Governor in Council for the arrest of the accused person if the accused person

- (a) fails to appear as summoned or ordered; or
- (b) having appeared before the court martial, fails to attend before the court martial as required.

[Emphasis added.]

In referring to a failure to attend as ordered, the wording of this section presumes, as a prerequisite for the issuance of a warrant for arrest, that the accused was aware of the order obliging him to attend this trial by SCM this morning at 0930 hours in this location. If he was so aware, it is by the fact that he was duly ordered to appear before the Court. The issue then becomes whether the accused person, on the facts of this case, has been "duly ordered" to appear before this court martial by the convening order at Exhibit 1.

The facts

[6] An Affidavit of Service at Exhibit 4 provided by Philip S. Holmes, Bailiff/Process Server for P H Court Services, reveals that a copy of the convening order was served on Corporal McEwan by leaving it with his common law wife at a residence on Mary Street, Petawawa, Ontario, on 14 June 2018.

Analysis

[7] The prosecution submits that there is no procedure in the *NDA*, QR&O or *Military Rules of Evidence* pertaining to service of court martial documents to persons no longer under military authority. Consequently, the prosecutor asks that in applying QR&O article 101.04, I follow a course that seems best calculated to do justice in taking inspiration from the *Criminal Proceedings Rules for the Superior Court of*

Justice (Ontario), SI/2012-07 and accept that the procedure followed by the bailiff/process server in this case is an acceptable alternative to personal service. That should lead me to issue the arrest warrant even if, as agreed, there is no evidence on record that personal service has been performed.

[8] The difficulty with the prosecution's proposition is that even if service of court martial documents to persons no longer under military authority is not expressly provided for in the *NDA* or its regulations, service of court martial documents, specifically the convening order, is expressly provided for in QR&O article 111.06. That article states that a copy of the convening order and charge sheet are delivered personally to the accused. QR&O article 111.07, immediately following, even proposes a format for acknowledgement of receipt of the documents.

[9] It would appear therefore that the concept of "duly ordered" implies personal service, at least for those accused persons present at a unit. The question is why that concept should be relaxed for those no longer serving, hence not present at a unit. I have not been shown any reasons why the concept should be relaxed for those accused persons who have become civilians, such as Corporal McEwan.

[10] As the evidence does not reveal that the convening order has been served personally on Corporal McEwan in this case, I conclude that Corporal McEwan has not been duly ordered to appear at his court martial this morning.

Conclusion

[11] Consequently, the Court is not in a position to issue the arrest warrant requested by the prosecution.

[12] The application from the prosecution must therefore be dismissed.

Counsel:

The Director of Military Prosecutions as represented by Major S. Poitras

The Accused was not present and not represented