COURT MARTIAL

Citation: *R. v. Banting*, 2019 CM 2008

Date: 20190327
Docket: 201824

General Court Martial

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

Between:

Lieutenant J.C. Banting, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, M.J.

DECISION ON PLEA IN BAR OF TRIAL

(Orally)

Background

[1] Lieutenant Banting joined the Canadian Armed Forces (CAF) on 28 August 2002 as a medical technician and rose to the rank of warrant officer, becoming a physician's assistant. As part of that qualification, he commissioned to the rank of lieutenant on 3 August 2017. At the material times, he was a member of the Canadian Special Operations Training Centre (CSOTC).

[2] On 23, 26 and 27 August 2017, Lieutenant Banting acted as a course instructor teaching medical treatment in combat situations on a Special Operations Common Environmental Training (SOCET) course held at the CSOTC in Petawawa, Ontario. He had taught this same course several times previously.

[3] On 5 October 2017, a Record of Disciplinary Proceedings (RDP) with respect to Lieutenant Banting's conduct while a course instructor was signed by a unit charge layer and set out two different charges that read as follows:

> "FIRST CHARGE
> SECTION 129 N.D.A. **CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE**
>
> *Particulars:* In that Lt J.C. Banting on or about 26 August 2017 at CSOTC in 4th Canadian Division Support Base Petawawa, did say to SOCET participants, "You and I may need a safe word, harder, no that won't work," contrary to DAOD 5012-0.
>
> SECOND CHARGE
> SECTION 129 N.D.A. **CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE**
>
> *Particulars:* In that Lt J.C. Banting on or about 26 August 2017 at CSOTC in 4th Canadian Division Support Base Petawawa, did say to SOCET participants, "You don't want to be gentle putting it in, you don't need/want to jerk it off, you just drive it in there," contrary to DAOD 5012-0."

[4] The Court notes that all the witnesses provided their statements on or about 1 September 2017, prior to the signing of the original RDP. Initial disclosure was made to Defence Counsel Services on 17 January 2018. After this date, Lieutenant Banting retained his current defence counsel, Mr. Joshua Juneau.

[5] On 12 March 2018, pursuant to subsection 165.12(1) of the *National Defence Act* (*NDA*), the prosecution preferred one charge, with different particulars. The prosecution has authority to exercise its discretion and prefer any other charge that is founded on the facts by evidence in addition to, or in substitution of, the charge. Lieutenant Banting was charged under section 129 of the *NDA*, conduct to the prejudice of good order and discipline. The charge sheet statement of particulars reads as follows:

> "*Particulars*: In that he, on or about 26 August 2017, at or near Petawawa, Ontario, while instructing candidates on the Special Operations Common Environmental Training course, used inappropriate sexualised language."

[6] After the prosecution preferred the one charge, additional disclosure was made to Mr Juneau on 26 March 2018 and 3 April 2018 with will-say statements sent on 4 April 2018.

[7] On 16 August 2018, defence counsel sent an email to the prosecution, noting that he intended to bring pre-trial applications. At that time, he raised concern that the charges were not better particularized. Counsel for the applicant told the Court that he was concerned that the charges went from two relatively specific charges to one broader charge and he wanted clarification as to which of the two allegations was being pursued.

Application before the Court

[8] Lieutenant Banting was ordered to appear before a General Court Martial on 25 March 2019 in Petawawa, Ontario. On 1 March 2019, pursuant to article 112.03 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) and section 187 of the *NDA*, the accused filed an application seeking a stay of proceedings for an alleged abuse of process and violation of paragraph 11(*a*) of the *Canadian Charter of Rights and Freedoms*.

[9] On 15 March 2018, the respondent filed a memorandum of fact and law responding to Lieutenant Banting's notice of application. The respondent requests that this Court dismiss Lieutenant Banting's application or, alternatively, direct that further particulars be provided.

[10] In addition, in responding to the application before the Court, at paragraph 8 to his factum, the prosecution clarified that instead of pursuing one or both of the two specific incidents set out in the original charges, he intended to present evidence on what appears to be eleven different instances when the accused allegedly used inappropriate sexualized language.

[11] Since preliminary matters on issues of law are determined by the presiding military judge, it was agreed with counsel that the members of the panel were not required to assemble until after issues of law were determined. The proceedings of the General Court Martial commenced on 25 March 2019 in Gatineau, Quebec to permit the Court to address all preliminary matters on issues of law.

Evidence

[12] The evidence before this court martial on this application is composed of the following:

(a) Convening Order (Exhibit 1);

(b) Charge Sheet (Exhibit 2);

(c) Record of disciplinary proceedings (M1-1);

(d) Defence Administrative Orders and Directives (DAOD) 5012-0, Harassment Prevention and Resolution (M1-2);

(e) Notice of application (M1-3);

(f) Initial disclosure dated 17 January 2018 (M1-4);

(g) Additional disclosure dated 26 March 2018 (M1-5);

(h) Additional disclosure dated 3 April 2018 (M1-6);

(i) Prosecution witness will-say (M1-7);

(j) Respondent's memorandum of fact and law (M1-8);

(k) Verbal submissions by the respondent; and

(l) Verbal submissions by the applicant.

[13] In assessing the application, the Court reviewed all the evidence, considered the extensive oral submissions and instructed itself on the law prior to coming to a decision on the merits of the application.

Defence - applicant

[14] The applicant alleges that the particulars of the charge before the Court lacks requisite specificity, making it impossible to mount a defence. He argues that the prosecution has failed to sufficiently particularize the charge to the degree of certainty required by law, thereby not enabling Lieutenant Banting to know the specific case against him. He argues that this violates his rights under section 7 and paragraph 11(*a*) of the *Charter*, QR&O paragraph 107.04(3) and the common law right of an accused to a fair trial.

[15] As a remedy, in his pleadings, the applicant sought a stay of proceedings, alleging that efforts to amend the particulars at this stage would amount to an abuse of process in that the charge sheet would be void *ab initio* and that a stay was the only remedy available. However, in his oral representations, he acknowledged that he is no longer seeking a stay, but re-emphasized his concern for the fairness of the trial for the accused. In closing, he summarized a number of other judicial remedies that exist for this Court, and referred specifically to the powers of the Court under section 188 of the *NDA* which reads as follows:

> **Amendment of Charges**
>
> **188**. (**1**) Where it appears to a court martial that there is a technical defect in a charge that does not affect the substance of the charge, the court martial, if of the opinion that the conduct of the accused person's defence will not be prejudiced by an amendment of the charge, shall make the order for the amendment of the charge that it considers necessary to meet the circumstances of the case.

Prosecution - respondent

[16] The respondent requested that the Court dismiss the application or, alternatively, direct that further particulars be provided and he also referred to the Court's powers at section 188 of the *NDA* to make amendments to the charges.

[17] At paragraph 38 of his factum, the respondent submitted "section 188 does not expressly prohibit a court martial from amending a charge beyond merely technical errors. It contemplates both the prejudice that may arise to an accused and a curative adjournment where possible. Read in conjunction with section 179, a court martial has the jurisdiction to order particulars or otherwise amend charges as it is necessary and proper to do so for the exercise of the court's jurisdiction."

Issues

[18] The Court's analysis focussed primarily on whether the allegation that the accused used inappropriate sexualized language, on a stated date, is specific enough to permit the accused to respond. If not, on the facts of this case, what is the appropriate manner of addressing a shortcoming?

Analysis

Law

[19] The QR&O provides the following:

> 107.04 – GENERAL RULES – CHARGE PREPARATION
>
> (1) All charges against an accused should be set out on only one Record of Disciplinary Proceedings.
>
> (2) A charge must allege one offence only and contain:
>
> (*a*) a statement of the offence; and
>
> (*b*) a statement of the particulars of the act, omission, conduct, disorder or neglect constituting the offence.
>
> (3) Every statement of the particulars of an offence must include sufficient details to enable the accused to be reasonably informed of the offence alleged and thereby able to properly defend the matter (*see section 2 – Service Offences of Chapter 103 – Service Offences*).
>
> (4) A statement of the particulars of an offence should, when practical, include an allegation of the place, date and time of the alleged commission of the offence.
> [My emphasis]

[20] Firstly, the court must decide whether the charge as drafted gives the accused fair notice of the accusation against him in order to be able to prepare his defence.

If it does, then it will not be defective, however the Court may still order the prosecution to provide the defence with further particulars of the offence alleged.

[21] If the charge as drafted is not defective on its face, before the Court can make an order for detailed particulars, the applicant must satisfy the Court that more detailed particulars are necessary for a fair trial. In this case, it was not argued that the charge was defective, but rather the applicant's arguments were based on concern for a fair trial. As such, the Court analysed it from this perspective.

[22] Thus, the accused must establish that he is prejudiced in his defence by the lack of particulars. The purpose of particulars is not to fetter the prosecution in the presentation of its case, but they are required to ensure that the accused has a fair trial.

[23] Although the absence or insufficiency of details will not necessarily vitiate a charge, an accused who is unable to prepare his defence properly because the charge does not contain sufficient information may apply to the Court for particulars. In the military justice system, the accused's right to apply for further particulars is set out at QR&O subparagraph 102.05(5)(*c*) which reads as follows:

> (*c*) the accused person may apply for further particulars on the ground that the accused person is unable to properly prepare a defence because the particulars of a charge are inadequate or are not set out with sufficient clarity and the judge, if satisfied that the further particulars are necessary to ensure a fair trial, may so order;

[24] The applicant vigorously argued that he has no idea what specific language is being objected to by the prosecution. The prosecution responded in both his factum and in his submission that the inappropriate language complained of was set out in the various disclosure packages and could be determined by referring to the will-say statements. In deciding whether or not this is a case, the Court needed to consider all the relevant information already within the knowledge of the accused. For this purpose, this Court asked for and received copies of the will-say statements that were provided to the accused in disclosure.

[25] According to the will-say statements, there are eight different witnesses, all who were candidates on the course. Each describes one or more different incidents that they individually categorized as inappropriate. Not all of the witnesses described the same incidents to be inappropriate, although none of the witnesses stated they were offended by the language used.

[26] The applicant emphasized that the original two charges in the RDP, only referred to two complaints where the accused allegedly said, "You and I may need a safe word, harder, no that won't work," and "You don't want to be gentle putting it in, you don't need/want to jerk it off, you just drive it in there." Whereas, the new charge preferred by the prosecution simply states that the accused used inappropriate sexualized language. Defence counsel advised the Court that it was not until he received the respondent's factum that he understood that the prosecution intended to rely upon several incidents, rather than one of the original two incidents.

[27] There is a significant difference between the two specific incidents of alleged conduct set out in the original RDP and the more recent assertion that the prosecution intends to rely upon multiple incidents to prove its charge. Words are not precise tools of communication in and of themselves and the same language used in one context may leave observers with a different impression than the same words used in another situation for different reasons. Hence when assessing whether certain words amount to inappropriate sexualized language, the words must be assessed in context, in the environment where they were used and interpreted from the perspective of a reasonable person.

[28] The applicant submitted that the alleged misconduct should be properly set out in particulars one offence at a time, similar to what occurred in the original RDP. QR&O paragraph 107.04(2) requires that each charge relate to one specific offence. As a basis of comparison, the *Criminal Code* also requires that every count in an indictment or information "shall in general apply to a single transaction". The rule is intended to prevent the allegation of more than one offence in the same count of the indictment or information.

[29] In response to the concerns raised by the applicant, the prosecution drew an analogy between the particulars used in charging someone for harassment, where multiple incidents are not set out in the particulars, but are rather, presented into evidence. However, the Court finds that this is not a reliable comparison. Harassment is clearly defined in DAOD 5012 and in order for the prosecution or any authority to prove that harassment occurred, it must prove six essential elements that are described and defined within the DAOD. Most notably, one of the elements requires the proof of either "a series of incidents, or one severe incident which had a lasting impact on that individual."

[30] Unlike an allegation of harassment, "inappropriate sexualised language" as a term is not defined in policy or law and there are no elements or definitions upon which it may be assessed. I asked both counsel to provide the Court with a reliable definition or guidance on the term and neither did. Prosecution referred the Court to the terminology set out in Operation HONOUR, but upon a review of that document, the Court notes that it only states the term itself and does not define or describe how to assess when specific language is inappropriate. The Court noted that in their individual statements, not all of the witnesses found the same language to be inappropriate.

[31] Further, where one act out of a multitude of incidents is singled out as an offence, then a greater degree of particularity is required to enable the accused to identify the specific incident being focussed on, particularly where a broad description such as "inappropriate sexualised language" is being relied on in the particulars.

[32] Fairness for the accused also extends to other aspects of the trial. For example, as the trial judge for a General Court Martial, I must charge the panel on how to assess multiple incidents, each capable of constituting an offence, which are lumped together

as one single offence. Logically, the panel must be told that, before they may find the accused guilty, all of them must be satisfied beyond a reasonable doubt with respect to an incident or incidents that occurred.

[33] Pragmatically, the charge must be framed so that there is a single set of elements upon which a panel deciding the case could be unanimous. Although it is permissible for a panel to arrive at their verdict by different routes and they need not rely on the same facts, upon rendering their decision, there is a prejudicial risk to the accused where the prosecution presents into evidence a smorgasbord of sexual terms allegedly used by the accused, where each usage of language may allegedly constitute an offence itself.

[34] Courts must be diligent to restrict the use of supplemental non-charged evidence of another act or other acts of the accused that is similar in essential respects to the act charged because its prejudicial effect would suggest a propensity to commit the act charged. Without knowing which incidents form the underlying basis of the particulars, how will the Court assess the admissibility of evidence? The relevant rule is found in the *Military Rules of Evidence* (*MRE*) as follows:

> **20** Except as prescribed in this Division, the prosecutor shall not introduce evidence of the general bad character or reputation of the accused, or of another act or other acts of the accused similar in essential respects to the act charged.

[35] For this reason, during the application hearing, the Court advised the prosecution that it would not be permitted to introduce evidence of an incident described at paragraph 9 of his factum unless it constituted part of the charged conduct, which it does not appear to. That incident does not involve the use of language in terms of words spoken or written. I would add, this evidence could be raised if, in the case of subsection 21(1) of the *MRE*, that through its cross-examination or by witnesses, the defence introduces evidence of the accused's good character or reputation. However, as a general rule it is prohibited.

[36] In criminal law, it is possible to 'amend a count in an indictment at any stage in the proceedings provided it is a particular of the offence' and that there is no substitution of the offence (see subsection 601(6) of the *Criminal Code*.). The situation is no different in military criminal law. As both counsel submitted, sections 188 and 179 of the *NDA* provide this flexibility to military judges with the limitation that the Court has no jurisdiction to amend an offence different from the original charge or to add additional charges.

[37] Based on the facts of the case before me and the reasons highlighted above, the Court is satisfied that further particulars are, in fact, necessary for the accused to have a fair trial. The Court is not restricted in what particulars it may order. As such, it is appropriate for the Court to order the prosecution to furnish the accused or his counsel with more specifics, including which alleged incidents form the basis of the alleged offence as particularized.

[38] To be clear, the Court is not ordering details of the evidence by which the prosecution intends to prove its case, as distinguished from the particulars of the charge itself. However, by the nature of a section 129 offence and the multiple incidents referenced in his factum, the prosecution must provide the material facts upon which the specific offence relies.

FOR THESE REASONS, THE COURT:

[39] **GRANTS** the applicant's motion, in part.

[40] **ORDERS** the prosecution to provide specifics of the alleged incident(s) of the use of inappropriate language in the particulars of the charge, in order to allow the accused to respond appropriately to defend himself. In doing so, the prosecution has two options:

(a) Based on its discretion, recommend amendments to the one charge on the record, by selecting one or more incidents of specific inappropriate sexualized language and clearly notifying the defence on what incident(s) it intends to rely upon; or

(b) Withdraw the charge sheet with the permission of this Court.

[41] **PROVIDES** the prosecution until Thursday, 28 March 2019 to fulfil this ordinance.

Counsel:

Mr J.M. Juneau and Mr M.W. Drapeau, Michel Drapeau Law Office, 192 Somerset Street West, Ottawa, Ontario, Counsel for the Applicant, Lieutenant J.C. Banting

The Director of Military Prosecutions as represented by Major G.J. Moorehead and Captain R. Fernet for the Respondent