



HEARING BY A MILITARY JUDGE

Citation: *R. v. Beres*, 2019 CM 2010

Date: 20190424

Docket: 201918

Preliminary Proceeding

Asticou Centre
Gatineau, Quebec, Canada

Between:

Sergeant J.B. Beres, Applicant

- and -

Her Majesty the Queen, Respondent

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

DECISION ON AN APPLICATION FOR FURTHER PARTICULARS

(Orally)

Application Before the Court

[1] On 20 July 2018, an officer authorized by the Director of Military Prosecutions preferred one charge against Sergeant Beres. The particulars read as follows:

“In that he, between the 1st and 31st July 2017, at or near Canadian Joint Operations Command, Ottawa, Ontario, that he did harass Corporal A.D. contrary to DAOD 5012-0, Harassment Prevention and Resolution.”

[2] On 26 March 2019, a new charge sheet was signed by a different officer authorized by the Director of Military Prosecutions with essentially the same details, but for the reference to the conduct being contrary to Defence Administrative Orders and Directives (DAOD) 5012-0, Harassment Prevention and Resolution. It read as follows:

“In that he, between 1 and 31 July 2018, at or near Canadian Joint Operations Command, Ottawa, Ontario, did harass Corporal A.D.”

[3] On 10 April 2019, counsel for Sergeant Beres filed a notice of application for further particulars with the Court Martial Administrator. The notice indicated that Sergeant Beres would make an application pursuant to section 187 of the *National Defence Act (NDA)* and article 112.03 of the *Queen’s Regulations and Orders for the Canadian Forces (QR&O)* to a military judge assigned to hear this application at the earliest date possible prior to setting the matter for trial.

[4] On 11 April 2019, Deputy Chief Military Judge Lieutenant-Colonel d’Auteuil assigned myself, Military Judge Commander Sukstorf to hear the application and based on canvassed availability of counsel, the applicant’s motion was heard today, 24 April 2019.

[5] During these preliminary proceedings, the respondent drew the Court’s attention to a new charge sheet that was authorized on 15 April, 2019. Neither the Court nor the applicant were aware of, nor had they received, the new charge sheet. The respondent provided an updated copy of the charge sheet which reads as follows:

“In that he, between 15 and 31 July 2017, at or near Canadian Joint Operations Command, Ottawa, Ontario, while conducting professional development sessions with Corporal Alexandra Demers, did harass Corporal Demers.”

The evidence

[6] The evidence on this application is composed of the following:

- (a) the notice of application, Exhibit PP1-1;
- (b) the charge sheet dated 20 July 2018, Exhibit PP1-2;
- (c) the charge sheet dated 26 March 2019, Exhibit PP1-3; and
- (d) the charge sheet dated 15 April 2019, Exhibit PP1-4.

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

Position of the Applicant

[8] In his notice of application, the applicant alleged that:

- (a) the charge states the offence charged without any reference to the underlying circumstances or transaction to which the charge relates;
- (b) the complainant's name should be disclosed in the particulars; and
- (c) the applicant is of the view that the charge is insufficiently particularized in the manner that the Supreme Court of Canada (SCC) set out in paragraphs 14 and 15 of *R. v. G.R.*, 2005 SCC 45.

[9] In his notice, the applicant requested that the Court order the respondent to provide particulars that state what acts are alleged to constitute harassment and the full name of the complainant. Upon learning that the newest charge sheet addressed much of the additional information he was seeking, he reiterated the need to understand the underlying circumstances or transaction to which the charge relates. He argued that the term "did harass" is very broad and in light of the reference to the DAOD being removed, the applicant is not aware of what the context is or the test that would be relied upon by the prosecution. The applicant queried whether he was facing a charge of another type of harassment, such as harassment as defined in the Concise Oxford English Dictionary or the harassment as defined at section 264 of the *Criminal Code*. He argued that in preparing his defence the accused needs to know what legal test has to be met by the prosecution.

Position of the Respondent

[10] In response to the defence's application, the respondent stated that notwithstanding the fact that after they received the applicant's notice, they withdrew the original charge sheet, and replaced it with a new charge sheet authorized on 15 April 2019, they are of the belief that the particulars as originally drafted provide sufficient information for the accused to be reasonably informed of the case he needs to meet.

Issues

[11] In light of the new charge sheet, the Court's analysis focussed primarily on the following question: Is the allegation that the accused did harass Corporal Alexandra Demers, within a specific period of time, while he was conducting professional development sessions, 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

The law

[12] QR&O article 107.04 provides the authority for counsel to come forth.

- (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.

[13] Although the absence or insufficiency of details will not necessarily vitiate a charge, an accused who feels he is unable to prepare his defence properly because the charge does not contain sufficient information may apply to the Court pursuant to QR&O 112.05(5)(c) for additional particulars which is what he is doing with the application before the Court. QR&O 105(5)(c) 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;

[14] The real question for consideration is whether the charge as drafted gives the accused fair notice of the accusation against him in order to be able to defend against it. If it does, then it will not be defective, although the court may still order the prosecution to provide defence with further particulars of the offence alleged. In this case, the allegation set out within the 15 April 2019 charge sheet is not defective, so it is a prerequisite for the ordering of particulars that the accused satisfy the Court that the particulars are, in fact, necessary for a fair trial.

[15] 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.

[16] Properly drafted particulars fulfil a number of purposes. Firstly, they ensure that the trial judge is sufficiently informed of the details the prosecution must prove against the accused, thereby assisting the trial judge in making proper, adequate and expeditious rulings on the admissibility of evidence during a court martial. Secondly, particulars give the accused exact and reasonable information to enable him to establish fully his defence.

[17] The QR&O and law on the drafting of particulars are designed to ensure that an accused knows the charge against him or her and is able to make full answer and

defence. The ultimate adequacy of the pleadings is tested against these purposes and not by whether the pleadings comply with a specific rule. In short, this Court must be most concerned with the substance of the alleged defect and whether it has the effect of prejudicing the accused in preparing a defence.

[18] In his response to the application before the Court, the prosecution relied upon subsection 581(3) of the *Criminal Code* which codifies the rule regarding sufficiency of the details and which reads as follows:

Details of circumstances

(3) A count shall contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to, but otherwise the absence or insufficiency of details does not vitiate the count.

[19] Further, he relied upon section 583 that explains:

Certain omissions not grounds for objection

583 No count in an indictment is insufficient by reason of the absence of details where, in the opinion of the court, the count otherwise fulfils the requirements of section 581 and, without restricting the generality of the foregoing, no count in an indictment is insufficient by reason only that

- (a) it does not name the person injured or intended or attempted to be injured;
- (b) it does not name the person who owns or has a special property or interest in property mentioned in the count;
- (c) it charges an intent to defraud without naming or describing the person whom it was intended to defraud;
- (d) it does not set out any writing that is the subject of the charge;
- (e) it does not set out the words used where words that are alleged to have been used are the subject of the charge;
- (f) it does not specify the means by which the alleged offence was committed;
- (g) it does not name or describe with precision any person, place or thing; or
- (h) it does not, where the consent of a person, official or authority is required before proceedings may be instituted for an offence, state that the consent has been obtained.

[20] Although neither subsection 581(3) nor section 583 of the *Criminal Code* are binding on this Court, absent specific direction provided within the *NDA* or the *QR&O*, the provisions provide helpful instruction for this Court.

[21] The applicant relied heavily upon *R. v. G.R.*, 2005 SCC 45 to suggest that notwithstanding the new charge sheet, the underlying circumstances of the alleged

harassment are still of concern. He referred specifically to paragraph 14 of *G.R.* where the accused was charged with incest. In that case, the SCC stated that:

The indictment must “contain sufficient detail of the circumstances of the alleged offence to give to the accused reasonable information with respect to the act or omission to be proved against him and to identify the transaction referred to.”

[22] In response, the prosecution aptly distinguished the *G.R.* case in saying that the SCC made that statement in the context of whether the charge for an allegation of incest was sufficient to provide the accused with sufficient notice of the lesser included offences, being sexual assault and sexual interference which required the absence of consent, an additional element that does not need to be met for incest to have occurred. He referred the Court to paragraph 14 where the SCC stated, “In this case the respondent was fully informed of ‘the transaction’ that gave rise to the charge. That is not, with respect, the problem here.”

[23] At paragraph 15, the Court cites *Brodie v. The King*, [1936] S.C.R. 188 where the SCC provides a broader view. The prosecution also referred the Court to the case of *R. v. Douglas*, [1991] 1 S.C.R. 301, where he argued it was more similar to the case before the Court. Essentially, *Douglas* holds that “what constitutes reasonable or adequate information with respect to the act or omission to be proven against the accused will of necessity vary from case to case.”

[24] In response to the concerns raised by the applicant, the prosecution drew an analogy between the particulars used in charging someone for sexual assault, where multiple incidents are not set out in the particulars, but are, rather, presented into evidence. This is acceptable where the elements of an offence alleged are properly set out so that an accused is clearly aware of the test that the prosecution needs to meet so he can prepare his defence appropriately.

[25] Pragmatically, in an offence under section 129 of the *NDA* alleging harassment, aside from the essential elements of a 129 offence, the elements of harassment must also be proven which gets to the heart of the applicant’s request. The applicant argued that the fact that the reference to the DAOD was removed causes him to question why. Harassment is clearly defined in DAOD 5012-0 and it sets out the elements that must be met before harassment is deemed to have occurred. In response, the respondent relied upon the court martial of *R. v. Scott*, 2018 CM 2025, where the particulars were similar to the ones currently before the Court. In that case, the Court relied upon DAOD 5012-0 to determine whether the allegations before the Court met the elements of harassment, although it was noted in the *Scott* case that counsel did tender into evidence DAOD 5012-0 to assist the Court.

[26] Given the fact that the charge before the Court is for conduct to the prejudice of good order and discipline, contrary to section 129 of the *NDA* and not under section 130 of the *NDA*, it automatically limits the prosecution from relying upon definitions set out within section 264 of the *Criminal Code*. It was noted that there is now significant precedent at the court martial level that notwithstanding whether or not the

prosecution drafts its particulars to reflect that a member “did harass” contrary to DAOD 5012-0, the courts martial have routinely relied upon the definitions set out therein in deciding whether or not harassment occurred.

[27] There is no power for a court to order particulars of the evidence by which the prosecution may seek to prove its case, as distinguished from particulars of the charge itself. For example, one may plead material facts but not the evidence that establishes those facts.

[28] The Court must consider the information already within the knowledge of the accused in deciding whether or not to order particulars. When the applicant was asked whether he was satisfied with the disclosure he received, he responded that he was. The respondent assured the Court that this is not a complex case and that all disclosure was provided.

[29] A distinction exists between a charge and the particulars of that charge on one hand, and with the evidence by which that charge is to be proved on the other. Particulars relate to material facts that have to be proved at trial. Disclosure relates generally to the evidence the Crown will lead at trial to prove the charge alleged.

[30] In considering an application for particulars, it is necessary to distinguish between particulars as they relate to the essential elements of the offence charged and the theory of the Crown. It is not necessary for the Crown to set out its theory in the particulars. As such, particulars may not be ordered simply to limit the scope of the accused’s liability for the offence.

[31] It is important to remember that the true purpose of particulars is to give information to an accused to assist him in the preparation of his defence. It is not to fetter the prosecution in the presentation of its case. The prosecution is given a wide discretion when drafting charges. I find the particulars drafted as they are now are very fair for the accused. In short, the prosecution bears the responsibility of leading evidence that corresponds to the language of the charge sheet. If the charge as drafted cannot be sustained because the evidence does not support the charge, then the prosecution must bear the consequences.

Relief

[32] In short, although much of the relief the applicant originally sought has been remedied with the amended charge sheet, the remaining portion of the applicant’s motion seeking additional particulars is dismissed.

FOR THESE REASONS, THE COURT:

[33] **DISMISSES** the application for further particulars raised by applicant.

Counsel:

Lieutenant-Commander J.E. Léveillé, Defence Counsel Services, Counsel for the Applicant

The Director of Military Prosecutions as represented by Major L. Langlois, Counsel for the Respondent