COURT MARTIAL

Citation: *R. v. Stacey*, 2019 CM 3017

Date : 20191129
Docket : 201869

General Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between :

Captain T.A. Stacey, Applicant

- and -

Her Majesty the Queen, Respondent

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

REASONS ON APPLICATION MADE BY THE ACCUSED PURSUANT TO SUBSECTION 24(1) AND PARAGRAPH 11(*b*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*

(Orally)

Introduction

[1] Captain Stacey is charged with one offence of conduct to the prejudice of good order and discipline for having harassed Lieutenant Morris, between 22 September 2014 and 15 June 2015, at or near Canadian Forces Base (CFB) Gagetown, New Brunswick, and at or near CFB Kingston, Ontario, contrary to section 129 of the *National Defence Act* (*NDA*).

[2] On 7 November 2019, the Court Martial Administrator (CMA) signed a convening order for this charge to be dealt with by a General Court Martial on 10 February 2020 at the Asticou Centre in Gatineau. I am assigned as the military judge to preside at this court martial.

[3] Captain Stacey filed the present preliminary application on 22 November 2019 pursuant to section 187 of the *NDA* as a matter to be heard by the military judge assigned to preside at the court martial.

[4] The applicant is claiming that the overall delay of 21 months and 28 days, representing the time between the moment the charge was laid on 24 April 2018 and the anticipated end of this court martial on 21 February 2020, is unreasonable. Accordingly, being above the presumptive ceiling of 18 months as established by the Supreme Court of Canada (SCC) in its decision of *R. v. Jordan*, 2016 SCC 27 and *R. v. Cody*, 2017 SCC 31, and as recognized as the applicable law by four different courts martial decisions, the applicant asked me to declare that such situation constitutes a violation of his right to be tried within a reasonable time, as established at paragraph 11(*b*) of the *Canadian Charter of Rights and Freedoms*, and as such, order a stay of the proceedings as a remedy pursuant to subsection 24(1) of the *Charter*.

[5] The evidence on this application goes as follows: an Agreed Statement of Facts of 11 pages, which is very detailed and two Director of Military Prosecutions (DMP) Annual Reports; one for the period 2015-2016 and the other one for the period of 2018-2019.

[6] From this evidence, I will summarize what I consider to be relevant in the circumstances of this case.

(a) The alleged incident or incidents in support of the charge would have occurred between 22 September 2014 and 15 June 2015. Lieutenant Morris, the alleged victim in this matter, made a complaint to the military police on 31 October 2016, which triggered investigations.

(b) On 24 April 2018, a charge was laid for harassment against Captain Stacey in relation with the situation raised by the complainant.

(c) On 8 May 2018, Major Tremblay was assigned by the Director of Defence Counsel Services (DDCS) as defence counsel for Captain Stacey. On that same day, a request for disclosure was sent to the Director of Military Prosecutions (DMP).

(d) On 23 May 2018, the matter was referred to the DMP by the referral authority and on 18 June 2018, Major Germain was assigned to proceed with the post-charge review on behalf of the DMP. He had final authority on the file.

(e) On 9 August 2018, further to his review of the file, Major Germain decided not to prefer any charge against Captain Stacey. He communicated his decision to the latter in writing the next day.

(f) On 23 August 2018, Major Germain communicated his decision to the complainant in the context of a teleconference call with two Canadian Forces National Investigation Services investigators attending.

(g) On 31 August 2018, the complainant made a complaint to the Judge Advocate General (JAG) about Major Germain's decision to not prefer any charge.

(h) On 5 September 2018, the DMP promulgated its Canadian Military Prosecution Service (CMPS) Complaints Policy.

(i) Between 5 and 25 September 2018, the Assistant Director of Military Prosecutions, Lieutenant-Colonel Farris, had various exchanges with the complainant, which resulted in a complaint being filed pursuant to the CMPS Complaints Policy.

(j) On 27 September 2018, Lieutenant-Colonel Farris informed the complainant that he would conduct a review in accordance with that policy. Consequently, he conducted a *de novo* post-charge review analysis of the matter concerning Captain Stacey.

(k) On 1 November 2018, Lieutenant-Colonel Farris signed the charge sheet and preferred the charge for which a court martial has been convened.

(l) On 8 November 2018, two new prosecutors were assigned to conduct the trial on this case.

(m) Initial disclosure to defence counsel happened on 11 December 2018, followed by a second one on 11 February 2019.

(n) On 18 February 2019, the file was reassigned to another prosecutor, Major Langlois.

(o) Further disclosure was made by the prosecution to Captain Stacey's defence counsel on 21 February, 15 April and 21 June 2019.

(p) On 18 July 2019, Major Langlois initiated a request to defence counsel in order to set a trial date at the coordination conference call. Further to that request, Major Tremblay agreed to meet with the prosecutor on 30 July 2019 to discuss the way ahead, which would include preliminary matters and evidentiary issues for the proceedings.

(q) Both finally met on 6 August 2019. Defence counsel raised the possibility for an abuse of process application and a delay application pursuant to the *Charter*. The latter was considered by defence counsel

given that the file was likely to go over the 18-month ceiling. Admissions and evidentiary concerns were also discussed.

(r) On 9 September 2019, the prosecutor requested that defence counsel participate in a coordination conference call to set a trial date. Further discussions occurred where the prosecutor informed defence counsel that his availability for this trial was 1 December 2019. They agreed to participate in a coordination conference call on 19 September 2019.

(s) On 18 September 2019, Major Tremblay informed the prosecutor that a change of defence counsel was made by Captain Stacey.

(t) On 2 October 2019, the prosecutor was informed that Lieutenant-Colonel Berntsen had replaced Major Tremblay as defence counsel for Captain Stacey.

(u) Further to some discussions among parties, they participated in a coordination conference call on 31 October 2019, where the dates of 14 April to 1 May 2020 were agreed upon for the court martial. However, the issue of an application about delay had not been discussed.

(v) The day after, defence counsel requested a discussion on a delay application with the prosecutor. The prosecution, with the agreement of defence counsel, asked to revisit the trial dates previously set. A second coordination conference call took place where the dates of 10 to 21 February 2020 were agreed upon for the trial itself, and the dates from 12 to 15 November 2019 and from 25 November to 6 December 2019 were identified for hearing all preliminary applications made by Captain Stacey.

(w) I heard and decided on the disclosure application from 12 to 15 November 2019.

(x) I held a hearing for the current application on 25 and 26 November 2019.

[7] Paragraph 11(*b*) of the *Charter* reads, in part, as follows:

> 11. Any person charged with an offence has the right
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> [. . .]
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> (*b*) to be tried within a reasonable time.

[8] As said by the Court Martial Appeal Court (CMAC) in *R. v. LeGresley*, 2008 CMAC 2:

> [36] It is useful at this point to briefly review the interests that s. 11 of the *Charter* is designed to protect. The primary purpose of s. 11(*b*) is the protection of the

> individual rights of accused persons: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh. A secondary interest of society as a whole has also been recognized by the Supreme Court (*Morin*, above), namely that those who are accused of crimes are brought to trial and dealt with according to the law and are treated humanely and fairly.

[9] The military justice system has also expressed the need for proceeding with a charge laid pursuant to a provision of the Code of Service Discipline within a reasonable time. Section 162 reads as follows:

> Charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

[10] The CMAC commented on such requirement in the decision of *R. v. Langlois*, 2001 CMAC 3:

> [14] I do not feel that s. 162 is very helpful, as it only restates in its own way s. 11(*b*) of the Charter. Section 11(*b*) takes priority, of course, and s. 162 clearly cannot be construed so as to limit the rights conferred on an accused by s. 11(*b*).

[11] To determine if there has been an unreasonable delay in trial proceedings, contrary to paragraph 11(*b*) of the *Charter*, the SCC decided in 2016 in *Jordan* that a change of direction was required and set out a new framework for applying paragraph 11(*b*) of the *Charter*. The latter was confirmed in another SCC decision in *Cody,* in 2017.

[12] In *R. v. Thiele*, 2016 CM 4015, *R. v. Cubias-Gonzalez*, 2017 CM 3003, *R. v. McGregor*, 2019 CM 4011, and more recently in *R. v. Tuckett*, 2019 CM 3006, courts martial have established and confirmed that the presumptive ceiling of 18 months discussed by the SCC decisions in *Jordan* and *Cody* is applicable to litigants in the military justice system.

[13] I would add that the decision on 15 November 2019, by the SCC in *R. v. K.J.M.*, 2019 SCC 55 seems to confirm that approach. The majority in that decision confirmed that the presumptive ceiling of 18 months for a separate system of courts for which a need of timeliness is clearly recognized is applicable. The need for new ceilings was not accepted because it would undermine uniformity and become impracticable.

[14] The minimum remedy for a paragraph 11(*b*) *Charter* violation is a stay of proceedings as stated in *R. v. Rahey*, [1987] 1 S.C.R. 588.

[15] The applicable test is as follows:

(a) the Court must calculate the total number of months from the time a charge is laid to the anticipated completion of the trial;

(b) the Court must subtract the number of months waived by the defence or caused by the defence;

(c) if the remainder is more than 18 months, the delay is presumptively unreasonable. The onus then shifts to the prosecution to justify the delay due to exceptional circumstances, which fall into two categories: discrete events and particularly complex cases; if it does not, paragraph 11(*b*) of the *Charter* is violated; and

(d) if the remainder is below the relevant ceiling, the defence must demonstrate that the delay was nonetheless unreasonable to demonstrate a paragraph 11(*b*) *Charter* violation.

[16] Applying the test, the first step is to calculate the total number of months from the time the charge was laid to the anticipated completion of the trial.

[17] The charge was laid on 24 April 2018 and the anticipated end of the trial is on 21 February 2020. Then, the overall delay is 21 months and 28 days, as suggested by both parties.

[18] The second step is to find out if any time is attributable to the applicant, which would automatically reduce the overall period considered for the analysis. It could be any delay waived by the defence or delay caused by:

(a) deliberate and calculated defence tactics;

(b) not being ready to proceed when the Court and the prosecution are ready; or

(c) other defence conduct or action as found by the trial judge.

[19] In this case, there is evidence that the day before defence counsel would participate in a coordination conference call to set a trial date, which was scheduled for 18 September 2019, defence counsel informed the prosecutor that Captain Stacey was considering a change of defence counsel, which happened. It is on 31 October 2019 that the new defence counsel was able to participate in a coordination conference call to set a trial date. I would agree with the prosecutor that this delay was caused solely by the conduct of Captain Stacey and shall be attributable to him and must be reduced from the overall delay. Then, a delay of 1 month and 13 days shall be subtracted from the overall period of 21 months and 28 days.

[20] I do not see in the evidence any other delay, such as any waiver made by Captain Stacey. As such, the net delay to be considered by this Court is 20 months and 15 days.

[21] The remaining delay is still above the presumptive ceiling of 18 months. As a result, the delay is presumptively unreasonable and the burden shifts to the prosecution to justify the delay as having been due to exceptional circumstances.

[22] In order to be exceptional, the circumstances must have been reasonably unforeseen or reasonably unavoidable. Circumstances do not need to be rare or entirely uncommon (*Jordan*, at paragraph 69). There are two broad categories of exceptional circumstances:

(a) discrete and exceptional events, including medical or family emergencies affecting the accused, witnesses, counsel or the trial judge, or exceptional events that arise at trial such as a complainant's unexpected recantation. Cases with international issues such as extradition may also qualify as having exceptional circumstances; and

(b) particularly complex cases which involve voluminous disclosure, large numbers of witnesses, significant expert evidence, charges covering long periods of time, large numbers of charges, pre-trial applications, novel or complicated issues and large numbers of issues in dispute.

[23] In *Jordan*, the SCC expanded on the concept of discrete and exceptional events at paragraphs 73 to 75, as follows:

> [73] Discrete, exceptional events that arise at trial may also qualify and require some elaboration. Trials are not well-oiled machines. Unforeseeable or unavoidable developments can cause cases to quickly go awry, leading to delay. For example, a complainant might unexpectedly recant while testifying, requiring the Crown to change its case. In addition, if the trial goes longer than reasonably expected — even where the parties have made a good faith effort to establish realistic time estimates — then it is likely the delay was unavoidable and may therefore amount to an exceptional circumstance.
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> [74] Trial judges should be alive to the practical realities of trials, especially when the trial was scheduled to conclude below the ceiling but, in the end, exceeded it. In such cases, the focus should be on whether the Crown made reasonable efforts to respond and to conclude the trial under the ceiling. Trial judges should also bear in mind that when an issue arises at trial close to the ceiling, it will be more difficult for the Crown and the court to respond with a timely solution. For this reason, it is likely that unforeseeable or unavoidable delays occurring during trials that are scheduled to wrap up close to the ceiling will qualify as presenting exceptional circumstances.
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> [75] The period of delay caused by any discrete exceptional events must be subtracted from the total period of delay for the purpose of determining whether the ceiling has been exceeded. Of course, the Crown must always be prepared to mitigate the delay resulting from a discrete exceptional circumstance. So too must the justice system. Within reason, the Crown and the justice system should be capable of prioritizing cases that have faltered due to unforeseen events (see *R. v. Vassell*, 2016 SCC 26, [2016] 1 S.C.R. 625). Thus, any portion of the delay that the Crown and the system could reasonably have mitigated may not be subtracted (i.e. it may not be appropriate to subtract the entire period of delay occasioned by discrete exceptional events).

[24] The prosecution argued that the time taken to deal with the unforeseen complaint made by the complainant, which goes from the time the complaint was received on 24 August 2018 after the prosecutor made a final decision not to prefer the charge, to the time the charge was preferred further to a *de novo* review made by another prosecutor on 1 November 2018, must be considered as a discrete event, and consequently, would bring back the total delay to deal with the present charge before this Court just above the presumptive ceiling of 18 months. By subtracting this period of 2 months and 8 days then, the overall delay to be considered would be 18 months and 7 days.

[25] Obviously, defence counsel is of the opinion that such delay cannot qualify as exceptional circumstances, especially because of the position and attitude taken by the prosecution to review the entire matter and prefer it. According to defence counsel, this period of time shall be considered as part of the time taken by the prosecution to decide preferring the charge or not.

[26] The fact that somebody is displeased with the decision made by the prosecution is not, in itself, something that may be qualified as an unexpected or an unforeseeable event. To the contrary, as conceded by the prosecutor, the prosecution is used to and often has to deal with people and organizations that would express their disagreement with a decision made on preferring a charge or no.

[27] What is the difference here is the fact that such disagreement was expressed in writing directly by the twin brother of the complainant to the Chief of the Defence Staff and by the complainant himself to the JAG. The complainant expressed the view that the presentation made by the prosecutor to justify his decision was contrary to law.

[28] The DMP assigned Lieutenant-Colonel Farris to review the matter pursuant to one of his own policies. The result was a decision by Lieutenant-Colonel Farris to review the entire matter *de novo*. Basically, without any other explanation, he made the decision to proceed with an entirely new analysis of the matter to see if a preferral of the charge would be made or not.

[29] The fact that a final decision was made by a DMP's representative, and further reviewed and changed by another one is entirely and purely a matter of prosecutorial discretion and cannot be considered as being a discrete or exceptional event. To the contrary, the DMP, through various representatives, took this entire time, which is two months and eight days, to make a decision that belongs only to him, which is to prefer the charge or not. I noted the fact that there was no new evidence that was put to the DMP in order to support a review of the preferral made the first time. The decision to prefer was made on the same evidence and circumstances which were the basis for the initial decision not to prefer the charge.I do not see anything that could be qualified as new or unforeseen in the circumstances put before me. The DMP and its representatives were, during this entire period of time, in full control of the process regarding the

decision to be made. They were also aware of the impact it could have on the delay to deal with this matter.

[30] Considering my conclusion, the net delay to be considered by this Court for the purpose of this delay application remains 20 months and 15 days, and results in leaving the overall delay to be considered above the presumptive ceiling of 18 months.

[31] Now, the prosecution would like the Court to consider this trial as a complex case that would justify such delay.

[32] The prosecution claims that because of the number of applications made by defence counsel, the complexity of some of the issues raised in them, and the time necessary to deal with all of them could be seen as making this trial a complex one, which would explain why it has to go above the ceiling of 18 months.

[33] Defence counsel denied that because he made these various preliminary applications, it makes this trial complex.

[34] It is true that the abuse of process application may sometimes be seen as a complex issue to be resolved. It calls for a review of the exercise of prosecutorial discretion by the DMP's representative and some facts could be more difficult to establish. In itself, the legal question is not necessarily an easy one.

[35] Disclosure issues may be complex, too. However, the hearing on this question revealed that it was less complex because of the meaningful cooperation of counsel.

[36] The delay application was approached in the same way by counsel, resulting in something really straightforward for the Court to deal with as a matter of proceedings.

[37] Looking at the matter as a whole, I conclude that this case could be qualified as moderately complex in the circumstances, especially because of the abuse of process application.

[38] However, despite qualifying this trial as such, I find it very difficult to consider this situation as being the reason to justify the delay as one reasonable in the circumstances disclosed to me.

[39] In *Jordan*, the SCC expressed its view on the concept of exceptional circumstances:

> [70] It is not enough for the Crown, once the ceiling is breached, to point to a past difficulty. It must also show that it took reasonable available steps to avoid and address the problem *before* the delay exceeded the ceiling. This might include prompt resort to case management processes to seek the assistance of the court, or seeking assistance from the defence to streamline evidence or issues for trial or to coordinate pre-trial applications, or resorting to any other appropriate procedural means. The Crown, we emphasize, is not required to show that the steps it took were ultimately successful — rather, just that it took reasonable steps in an attempt to avoid the delay.

[Emphasis in original]

[40] At the time the decision was made to prefer the charge on 1 November 2018, six months and eight days had passed since the charge was initially laid, leaving about a year to the prosecution for taking reasonable steps to address the problem before the delay exceeded the ceiling.

[41] In the military justice system, an accused person shall appear before a court martial only on the date specified in the convening order signed by the CMA. In other words, an accused person cannot appear before a court martial unless it is convened by the CMA.

[42] The adopted method of setting trial dates in the military justice system for a court martial has been through participation at coordination conference calls conducted by the Chief Military Judge (CMJ) or a military judge on his behalf. This manner of proceeding has been endorsed by the CMJ, the DMP and the DDCS approximately ten years ago.

[43] To confirm participation at these weekly teleconferences, an email is sent each week to all prosecutors and defence counsel appearing in a file that was preferred by the DMP.

[44] Meaningful discussions are encouraged among counsel but if they cannot agree for any reason, they can file a preliminary application to set a trial date. Such application will be heard pursuant to section 187 of the *NDA* as a preliminary matter to be heard and determined by a military judge.

[45] The judge assigned to preside at such preliminary proceedings will be able to hear the parties and make a determination on the date the court martial will be convened, and make sure that the rights of the accused set to stand trial are respected, such as the right to be tried within a reasonable time.

[46] Obviously, the closer you are to the ceiling of 18 months, the more difficult it may be to set a trial date on the court calendar to respect that delay threshold.

[47] The prosecution has not shown that it took all available steps to avoid the situation we are now in. It is only in July 2019, which is about three months short of the presumptive ceiling of 18 months that the prosecution started to inquire with defence counsel about setting a trial date. At that point, the abuse of process application was raised and discussed. In addition, defence counsel informed the prosecution of his intent to consider raising the delay issue if the trial was set beyond the presumptive ceiling of 18 months.

[48] Despite having this information, there is no evidence that the prosecution even considered seeking the assistance of a military judge through a formal hearing, at that point in time, or even sooner. Even when it was considered that a trial could be set through a coordination conference call in September 2019, it could be considered that it

would have been more difficult to get a date that would have been below the presumptive ceiling of 18 months. Even at that point, the prosecution was ready to set a date, starting on 1 December 2019.

[49] In addition, the incident or incidents allegedly occurred about five years ago. This situation called for steps being taken to make sure that this case could be heard as soon as possible after being preferred.

[50] As said by the SCC in *Jordan*:

> [112] Crown counsel will be motivated to act proactively throughout the proceedings to preserve its ability to justify a delay that exceeds the ceiling, should the need arise. Below the ceiling, a diligent, proactive Crown will be a strong indication that the case did not take markedly longer than reasonably necessary.

[51] The evidence before me does not demonstrate that the prosecution was not in a position to inquire sooner with the initial defence counsel or seek assistance from the military judiciary to have a trial date set in consideration of the presumptive ceiling of 18 months.

[52] As demonstrated in this case, when assistance from the military judiciary is required, all efforts will be done to respect this presumptive ceiling. Here, despite the fact that counsel agreed on dates past that point, I was able to hold a hearing on preliminary matters related to this case one week after a trial date was set for this court martial, in order to dispose of all preliminary matters before the trial starts in February 2020. Defence counsel and the prosecutor did the same.

[53] It is my conclusion that the prosecution did not prove the existence of some exceptional circumstances that could have reasonably remedied or prevented the delays resulting from the circumstances of this case.

[54] I, then, conclude that the delay is unreasonable and that the right of Captain Stacey to be tried within a reasonable time has been violated.

[55] Considering the conclusion of this Court on the violation of the constitutional right of the accused to be tried within a reasonable time, I have no other choice, as the minimum remedy, but to direct a stay of the proceedings on the charge.

FOR ALL THESE REASONS, THE COURT:

[56] **GRANTS** the application made by Captain Stacey.

[57] **DECLARES** that the right of Captain Stacey under paragraph 11(*b*) of the *Charter* to be tried within a reasonable time on the charge in the charge sheet has been violated.

[58] **DIRECTS** that, pursuant to subsection 24(1) of the *Charter*, the proceedings of this General Court Martial in respect of Captain Stacey be stayed.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Captain T. A. Stacey

The Director of Military Prosecutions as represented by Major L. Langlois and Lieutenant-Colonel D. Kerr