COURT MARTIAL

Citation: *R. v. Beres*, 2019 CM 4024

Date: 20190904
Docket: 201923

General Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Sergeant J.B. Beres, Applicant

- and -

Her Majesty the Queen, Respondent

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

DECISION ON DEFENCE APPLICATION FOR PLEA IN BAR OF TRIAL

Introduction

[1] Shortly after the commencement of these court martial proceedings against Sergeant Beres, the defence submitted an application for a plea in bar of trial under article 112.24 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), submitting that the Court has no jurisdiction because the convening order pertaining to this General Court Martial (GCM)is invalid. Specifically, as refined in oral arguments, the applicant submits that the representatives of the Director of Military Prosecutions (DMP) have failed to provide Sergeant Beres with a copy of the charge sheet dated 15 April 2019, on which the convening order is based, in the manner prescribed in the applicable regulations. The applicant also submits that the Court Martial Administrator (CMA) has failed to provide Sergeant Beres with the choice to elect trial by either Standing Court Martial (SCM) or GCM based on the charge sheet on which these proceedings are grounded. The defence asks that the convening order be quashed and the proceedings terminated.

[2] Following the filing of this application by defence counsel on 5 August 2019, the prosecution filed a motion to quash on 26 August 2019, eight days before the hearing of this application. Subsequently, the prosecutor became aware that the facts were in reality different than he understood them to be previously. The Court was advised at the hearing of this application that the motion to quash was withdrawn.

Facts

[3] As highlighted above, both counsel adjusted their position on the basis of changes in their understanding of the factual framework relevant to this application, especially the sequence and details regarding the transmission of documents pertaining to the preferral of charges and convening of this GCM. In order to remain focussed on the issues that I consider relevant to this decision, I will summarize the facts in a simplified fashion. I may comment on other facts in my analysis, as required to explain why they were deemed to be not relevant.

[4] The misconduct alleged in this case would have occurred in July 2017 in the course of professional development sessions at the unit. Charges were laid on a Record of Disciplinary Proceedings on 18 December 2017 and referred to the DMP following an election by Sergeant Beres to be tried by court martial. One charge of conduct to the prejudice of good order and discipline was preferred by a military prosecutor on 20 July 2018. In August 2018 a new prosecutor was assigned to the case. On the evidence before me there appeared to have been no movement on the file until 26 March 2019 when the 20 July 2018 charge sheet was withdrawn and replaced by a charge sheet dated 26 March 2019. That new preferral also alleged one offence under section 129 of the *National Defence Act* (*NDA)*. Documents pertaining to this 26 March 2019 preferral were sent to the accused unit by the CMA staff on 4 April 2019, with instructions that they be served on Sergeant Beres.

[5] A number of events then took place in succession. As a result of the filing of a notice of application for further particulars by defence counsel on 10 April 2019, the prosecutor made another withdrawal and replacement of the charge sheet. The 26 March 2019 charge sheet was withdrawn and replaced by another charge under section 129 of the *DNA*, dated 15 April 2019. It would appear these successive withdrawals and preferrals within days of each other caused confusion for all offices involved, including the accused's unit and the CMA, for a number of reasons, including extraordinary delays in getting original documents transmitted through the mail. There is no evidence that the notice of withdrawal and preferral of a new charge, both on 15 April 2019, were served on the accused and counsel as indicated in the distribution list of these documents and as requested by the prosecutor. The evidence is to the effect that it is on

24 April 2019, at the hearing of the application for further particulars, that Sergeant Beres and his counsel were informed for the first time of the actions taken to withdraw the 26 March 2019 charge and prefer another charge on 15 April 2019. A copy of that charge sheet was given to defence counsel at the audience.

[6] Documents pertaining to the 15 April 2019 preferral were sent to the unit by the CMA on 3 May 2019. On 10 June 2019, the unit confirmed it had served the court martial documents on the accused as requested. However, unbeknown to the staff at the CMA, the documents that had then been served were those pertaining to the 26 March 2019 preferral. The staff at the CMA believed that the most recent charge sheet of 15 April 2019 had been served on Sergeant Beres and that he had elected on 21 June 2019 to be tried by a GCM in relation to that charge. Proceeding under that assumption, the CMA issued a convening order on 2 July 2019 for this GCM to commence its proceedings on 3 September 2019 on the basis of discussions at a scheduling teleconference on 27 June 2019. It was understood at the same teleconference that the period of 3 to 6 September 2019 would be used to hear and determine applications. Proceedings before the panel of the GCM were set to commence on 6 January 2020.

[7] The facts therefore reveal two anomalies in the way the service of documents unfolded. First, the 15 April 2019 charge sheet was not served on the accused in the usual way, that is at the request of the prosecutor in application of QR&O 110.07 and as part of a package sent by the CMA, along with other documents such as notice of choice of trial by SCM or GCM (QR&O 111.07 refers). That charge sheet was, however, given to counsel on 24 April 2019 and subsequently served on the accused on 12 August 2019 for greater certainty, after this application had been filed. Second, it is not contested on the facts that the accused was never provided an opportunity to elect the type of court martial that would try him on the basis of the 15 April 2019 charge sheet.

Position of the parties

[8] The applicant focussed his argument on the fact that the accused did not obtain the opportunity to choose to be tried by a SCM or GCM on the basis of the charge sheet under which he is being tried in the present proceedings. He argues that the scheme mandated at section 165.193 of the *NDA* is sequential in nature. Hence, as the accused was not properly given an initial choice of mode of trial, the scheme, including the possibility of a new choice at subsection 165.193(4) of the *NDA*, has not and cannot be applied to cure the original defect.

[9] The respondent concedes that errors were committed but alleges that these are of no practical significance as the accused can make a new choice and the prosecution will gladly consent to a re-election for a SCM. As the error is of no practical significance, the prosecution submits that no remedy is necessary.

Analysis

[10] It is trite to state that at the core of the jurisdiction to engage in any court martial proceedings are the two documents read at the beginning of each court martial: the charge sheet and the convening order. The former is the embodiment of the decision of a representative of the DMP that the accused be tried by a court martial while the latter directs the type of court martial as well as the time and place of convening. The two documents are intractably linked: the CMA must convene a court martial once a charge is preferred against an accused person on a charge sheet.

[11] As recognized by the Court Martial Appeal Court (CMAC) on numerous occasions, courts martial are *ad hoc* tribunals who have the jurisdiction provided for in the *NDA* and its regulations. When a genuine issue of jurisdiction is raised in a case such as in this application on the facts of this case, the burden to establish jurisdiction shifts to the prosecution, as decided in *Ryan v. R.* (1987) 4 C.A.C.M. 563. (overruled in *R. v. Reddick* [1996] CMAC-393 on the issue of the burden to establish jurisdiction by proving a military nexus – when one was required - but not, as here, on establishing jurisdiction challenged on another basis.). Given that mistakes in the procedure pertaining to the convening of this GCM have been made which cast a doubt on the court's jurisdiction, the prosecution has the burden to alleviate any jurisdictional concern at the satisfaction of the presiding military judge.

[12] Indeed, two sets of mistakes were made in the exchange of correspondence pertaining to this case. First, the charge sheet of 15 April 2019, on which the current proceedings are based, has not been distributed as provided at QR&O 110.07. Counsel for the applicant did not push in oral argument on this specific mistake for good reasons. It was corrected well in time to become insignificant to the outcome of this application, as it was reframed by the applicant in oral arguments. I will not discuss this issue further.

[13] The second mistake is more important. As parties agree, the accused never made a choice of type of court martial on the basis of the charge he is now facing in these proceedings, that is the 15 April 2019 charge sheet.

[14] The choice the accused made to be tried by a GCM on 21 June 2019 was on the basis of a package containing a charge sheet dated 26 March 2019, served on him on 10 June 2019. However, that charge had been withdrawn since 15 April 2019. Consequently, I have to agree with counsel for the applicant: that choice of court martial is void. It cannot constitute the choice of the accused foreseen at subsection 165.193(1) of the *NDA*.

[15] My conclusion is based only on the statutory scheme for choice of mode of trial by the accused at section 165.193 of the *NDA*. I do not need to determine failure on the part of anyone to live up to their legislated commitment nor to state whether any alleged failings constituted a violation of the accused's rights under the *Canadian Charter of Rights and Freedoms*. I am cognisant of the fact that the section 165.193 scheme for choosing the mode of trial was implemented by Parliament as a result of the CMAC decision of *R. v. Trépanier,* 2008 CMAC 3 which found that the inability of the accused to select the type of court martial, an issue identified in the *Lamer Report*, was unconstitutional under section 7 and paragraph 11*(d)* of the *Charter*, as it interfered with the accused's ability to make full answer and defence and to control the conduct of that defence. The choice of mode of trial scheme is therefore driven by a need to enhance the rights of persons to be tried by courts martial. That being said, *Trepanier* does not constitute a recognition that a right to choose one's mode of trial is a principle of fundamental justice. Indeed, that right is not afforded to the accused on every occasion, either in the civilian or military justice systems. What *Trepanier* tells us is that the court martial system in existence at the time, where the prosecution chose the mode of trial in all occasions, violated the fairness owed to accused persons. Once the post-*Trepanier* scheme has been implemented, the accused has acquired the right to expect that it be respected. In the circumstances before me, it is not useful to discuss *Charter* rights: the framework at section 165.193 provides all that is required to decide this matter. It is indeed how the CMAC dealt with a choice of mode of trial issue post-*Trepanie*r, in the case of *R. v. MacLellan*, 2011 CMAC 5.

[16] What I have to decide therefore is the impact of the failure to follow the statutory scheme found at section 165.193 of the *NDA*. As discussed in *R. v. Mahar*, 2014 CM 4007 at paragraph 20:

> 20. [E]rrors do happen in the administration of formal procedures such as those that relate to proceedings under the Code of Service Discipline. Some are so major that only a complete do-over can be an appropriate cure. So was the situation in the court martial case of *R. v. Laity*, 2007 CM 3011 where my colleague, Military Judge d'Auteuil, granted a plea in bar of trial when the evidence revealed that the Record of Disciplinary Proceedings had not been signed and consequently no charge was validly laid. As outlined above, this is not the case here as all of the requirements for the laying of a valid charge were met. Other errors do not have the same effect. This is illustrated by the Court

> Martial Appeal Court decision in *R. v. Couture*, 2008 CMAC 6 where it was decided that the failure of the charge layer to read the legal advice which had been provided on the charge to be laid was of the nature of omitting an administrative control put in place in order to prevent unfounded charges. As such, a failure to comply with that requirement did not invalidate the charge.

[17] The failure here is not in the nature of an administrative control. This is a case where due to a number of oversights for which no blame is laid nor intended, a mandatory statutory requirement pertaining to the type of court martial convened to try the accused was not respected. This is a serious concern as it pertains to the validity of the convening order on which the jurisdiction of this court martial rests. Despite its best efforts, the prosecution was unable to alleviate the concerns raised by the applicant.

[18] I wish to make clear that even if the arguments submitted by the prosecution as it pertains to the practical impact of quashing the convening order on delay did not persuade me in dismissing the application, they constitute valid concerns that will govern the performance of my duties for the continuation of these proceedings. As discussed with counsel, my assignment as military judge presiding the court martial of Sergeant Beres is not dependant on the validity of the convening order subsequently made. From a practical point of view, I believe it is preferable that these proceedings be reconvened on solid bases to alleviate the concerns validly raised in this application. I also see it as my duty as presiding military judge, in the exercise of my authority to manage the trial process, to ensure that other applications can be heard and decided without delaying the planned conclusion of a possible trial scheduled for January 2020.

FOR THESE REASONS, I ORDER AS FOLLOWS:

[19] **I QUASH** the convening order dated 2 July 2019;

[20] **I TERMINATE** the proceedings based on that convening order;

[21] **I REMIT** the matter to the Court Martial Administrator for the convening of a court martial in accordance with the duties and obligations provided in legislation, including the choice to be made by the accused to be tried by a General or Standing Court Martial on the basis of the charge sheet dated 15 April 2019;

[22] **I INFORM** the Court Martial Administrator that I, as the military judge assigned to preside at the court martial of the accused, the parties and their counsel are available to continue proceedings in this case as of 10:30 hours on Tuesday, 15 October 2019 in this courtroom and remain available to proceed before a panel on 6 January 2020 should a General Court Martial be convened;

[23] **I DECIDE** to remain seized of this matter on the basis of the 15 April 2019 preferral and the letter of the designating judge dated 27 June 2019.

Counsel:

Lieutenant-Commander É. Léveillé, Defence Counsel Services, Counsel for the applicant, Sergeant J.B Beres

The Director of Military Prosectuions as represented by Major L. Langlois and Captain C.R. Gallant, Counsel for the respondent