



COURT MARTIAL

Citation: *R. v. Bannister*, 2020 CM 4001

Date : 20200107

Docket : 201938

Standing Court Martial

Her Majesty's Canadian Ship *Queen Charlotte*
Charlottetown, Prince Edward Island, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Captain T.J. Bannister, Respondent

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

DECISION ON APPLICATION BY PROSECUTION TO SUBSTITUTE CHARGE SHEET

(Orally)

Introduction

THE BACKGROUND

[1] By virtue of the convening order dated 19 November 2019, the accused, Captain Bannister, is to be tried by Standing Court Martial presided by myself as military judge pursuant to a charge sheet dated 19 December 2017, which includes six offences addressing three incidents each by a set of two charges under sections 93 and 129 respectively of the *National Defence Act (NDA)*.

[2] The preferral of that 2017 charge sheet resulted in Captain Bannister being tried a first time by Standing Court Martial from 15 January 2018 until he was acquitted on all six charges appearing on that charge sheet on 27 February 2018.

[3] The Director of Military Prosecutions (DMP) appealed the acquittal of Captain Bannister on the first four charges. The appeal was successful, the Court Martial Appeal Court (CMAC) ordering a new trial on these four charges on 1 May 2019.

[4] As a result, on 27 June 2019 a charge sheet was signed on behalf of the DMP which includes the four charges stemming from the two incidents which were the subject of that appeal and of the order for a new trial.

[5] However, the Court Martial Administrator (CMA) has not acted in relation to the preferral made by the filing of that 27 June 2019 charge sheet with her office, preferring instead to accompany its convening order of the charge sheet used for the convening of the first trial, which includes five minor amendments of unknown origin and which still includes two charges for which the accused cannot be tried, having already been found not guilty of those charges at the first trial, a decision which was not appealed.

[6] The CMA has not provided any authority for not acting on the charges preferred by a representative of the DMP and has provided no reasons for re-preferring instead the charge sheet used at the first trial.

THE APPLICATION

[7] The prosecution now applies under section 187 of the *NDA* to substitute that 2017 charge sheet with the charge sheet dated 27 June 2019.

[8] The defense consented to the application by the prosecution, which I take to mean that:

- (a) the proposed substitution of the charge sheet is consented to in the circumstances of this case even if the particulars of the charges have been amended;
- (b) Captain Bannister maintains his election to be tried by Standing Court Martial; and
- (c) Captain Bannister wishes to resolve this matter in the shortest amount of time possible by pleading guilty to some of the charges and, therefore, does not wish to challenge the jurisdiction of the Court at this time.

ANALYSIS AND FINDINGS

[9] It is hardly a subject of contention that an order for a new trial by the CMAC is still subject to the exercise of prosecutorial discretion by a representative of the DMP to conduct the prosecution of the accused at a new trial and has no effect on the CMA without an expression of the willingness to exercise that discretion.

[10] There is no clearer expression of the exercise of prosecutorial discretion than making a new preferral, as a representative of the DMP did in this instance by signing a new charge sheet on 27 June 2019 and filing it with the CMA as provided for at section 165 of the *NDA*.

[11] Under the *NDA* the CMA must act upon a duly performed preferral on the part of a representative of the DMP.

[12] In the circumstances of this case, proceeding under the 2017 charge sheet would lead to useless preliminary applications, most obviously a Plea in Bar as the accused benefits from an unchallenged verdict of not guilty of two of the charges the 2017 charge sheet contains.

[13] These circumstances cast significant doubts on the ruling made in the Standing Court Martial of *R. v. Thibeault*, 2014 CM 3023 which essentially stands for the proposition that an order for a new trial by the CMAC resuscitates courts martial proceedings at the stage when the accused has pleaded to the charges, in the order of procedure of QR&O article 112.05. This outcome is, in my respectful opinion, wrong in law. If followed, it would lead to absurd results in consideration of the unique rules applicable to the convening of and procedures applicable to courts martial.

DISPOSITION

FOR THESE REASONS, THE COURT:

[14] **CONCLUDES** that granting the application will not prejudice the accused and will avoid the inconvenience of requesting that the CMA issues a new convening order, including the required inquiry regarding election between a Standing and a General Court Martial.

[15] **GRANTS THE APPLICATION.** The proceedings of this Standing Court Martial will be conducted on the basis of the charge sheet dated 27 June 2019 preferred by the DMP which includes the four charges upon which the appeal was granted by the CMAC on 1 May 2019.

Counsel:

The Director of Military Prosecutions as represented by Major M.L.P.P. Germain,
Counsel for the Applicant

Lieutenant-Commander B. Walden, Defence Counsel Services, Counsel for Lieutenant
T.J. Bannister, the Respondent