COURT MARTIAL

Citation: *R. v. Pinto*, 2021 CM 5010

Date: 20210726
Docket: 202121

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

Respondent
and
Moving Party

- and -

Master Corporal P.S. Pinto

Applicant
and
Responding Party

Before: Commander C.J. Deschênes, M.J.

DECISION ON AN OBJECTION TO THE MILITARY JUDGE

(Orally)

[1] The applicant is charged for one offence under section 129 of the *National Defence Act* (*NDA*) for allegedly harassing Private K. Girard by sending sexualized text messages to her cell phone between 1 April and 31 May 2020. He presented an application dated 9 July 2021 objecting that I, as the military judge assigned to this case, as well as any other military judge, preside over the applicant's court martial. The applicant alleges that there exists a perception that myself, or any other military judge, would have a personal bias towards finding the applicant guilty due to the extensive media coverage of alleged and actual sexual misconduct in the Canadian Armed Forces (CAF). Following receipt of this application, the respondent served a notice of motion on 23 July 2021 seeking to have the application summarily dismissed, contending that

the application is deficient, as it does not specifically state the legal test to be considered. He also contends that the grounds supporting the application are vague and require speculation and assumption to determine the basis of the argument. Consequently, the application has no reasonable prospect of success and should be summarily dismissed.

The facts

[2] At the commencement of the trial, the Court asked the applicant to provide more details on the allegations with regard to the perception of bias, as well as a summary of the evidence that he intends to adduce in support of his application objecting to this or any other military judge presiding over his court martial, and the legal foundation of his arguments. He contends that my judicial decision will impact the CAF. As a military judge, I am also a member of the CAF. As a result, he argues that there exists an apprehension of bias preventing me from trying this matter fairly. In summarizing the evidence he intends to adduce, he explained that Lieutenant-Commander Wright, Public Affairs Officer for the West Coast, would testify regarding the national media coverage of sexual misconduct in the CAF, specifically, the negative light shed on the CAF in this regard. Vice-Admiral Auchterlonie would also be called to testify as the referral authority for this case. The applicant contends that the pejorative tone of the referral letter indicates a will to see the case being prosecuted and see the applicant punished. The Court then heard the motion from the prosecution to summarily dismiss the application. The prosecutor contends that at no point did the applicant explain how the negative media coverage connects to the presiding judge. He further submits that the Court Martial Appeal Court (CMAC) decision in *R. v. Edwards et al.,* 2021 CMAC 2 has recognized the independence of military judges.

The issue

[3] I must decide if the application objecting that I preside this trial has a reasonable prospect of success.

The evidence adduced at trial

[4] In order to do so, I have considered the submissions of counsel, and the summary of the evidence the applicant intends to adduce, being the existence of negative media coverage of allegations of sexual misconduct in the CAF and the negative tone of the referral letter.

The law

[5] The Supreme Court of Canada (SCC) first articulated the test regarding apprehension of bias in *Committee for Justice and Liberty et al. v. National Energy Board et al.*, [1978] 1 S.C.R. 369 at page 394, and later affirmed in *R v. S. (R.D.),* [1997] 3 S.C.R. 484 at paragraph 31:

> [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information. . . . [T]hat test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision maker], whether consciously or unconsciously, would not decide fairly."

[6] In *S. (R.D.),* at paragraph 111), the SCC highlighted that:

> [T]he reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold".
> [Emphasis in original.]

The SCC established that the threshold for apprehension of bias is a high one, and the ground for the apprehension must be substantial – a mere suspicion is not enough. In other words, the test is not related to the "very sensitive or scrupulous conscience" (paragraph 112). The onus rests on the applicant to meet this threshold, on a balance of probabilities. The SCC also went on to say at paragraph 115 that "[a]ll judges of every race, colour, religion, or national background are entitled to the same presumption of judicial integrity and the same high threshold for a finding of bias. Similarly, all judges are subject to the same fundamental duties to be, and to appear to be, impartial."

[7] In *Wewaykum Indian Band v. Canada,* [2003] 2 S.C.R. 259, at paragraph 76, the SCC felt compelled to repeat the well-established principle that "the standard refers to an apprehension of bias that rests on serious grounds, in light of the strong presumption of judicial impartiality." The test for whether a judge should recuse herself does not require any actual bias. See also, as referred to by counsel, *Yukon Francophone School Board, Education Area # 23 v. Yukon (Attorney General),* 2015 SCC 25.

[8] The analysis in regard to whether there is an apprehension of bias is contextual, decided on a case-by-case basis. Indeed, the existence of a reasonable apprehension of bias depends entirely on the facts of the case.

The analysis

[9] In the case at bar, in stating that I, or any other military judge, would have a bias towards finding Master Corporal Pinto guilty due to the extensive and negative media coverage of alleged and actual sexual misconduct in the CAF, the applicant makes a broad allegation of a general nature that pertains to all military judges; he fails to address specific instances that could form an appropriate basis for an application that objects to the military judge assigned to the case.

The impact of media coverage

[10] Media coverage of specific cases, or of certain crimes alleged to have happened within a specific organisation, is a reality of judicial proceedings. In fact,

paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms* guarantees the principle of open court and the right to have the media access the courtroom to report on the proceedings (see *Dagenais v. Canadian Broadcasting Corp*., [1994] 3 S.C.R. 835 at 883). The right to a public hearing is also protected by paragraph 2(*b*) of the *Charter*.

[11] In *R. v. Ronald*, 2016 ONSC 1687 (in the context of a bail hearing) and *A.P. v. L.K.*, 2020 ONSC 5551 (case of health care for parties' children), the only two relevant cases that this Court could find, the trial judges dismissed the request for their recusal and commented that media coverage of the case they preside does not displace the presumption of impartiality. I concur with this approach. The mere existence of media attention on allegations pertaining to a specific case, or on a category of cases such as sexual misconduct, whether it takes place before or during judicial proceedings, does not, on its own, displace judicial impartiality. As a practical matter, were it otherwise, there would be no judges left, civilian or military, to hear cases of sexual misconduct when the subject of the prosecution is a CAF member.

Impartiality of military judges as CAF members

[12] Members of the judiciary, military and civilian, swear an oath to render justice impartially. Whether they are members of the military or the civilian bench, there is a strong presumption that members of the judiciary are impartial, as stated by the SCC. Military judges are no less impartial than their civilian counterparts. When presiding at a trial, military judges are required to only consider the admissible evidence before them, and they apply the law regardless of the views that the chain of command may have expressed regarding the guilt or innocence of the accused. This issue of judicial independence of military judges has been the subject of several CMAC decisions, some of which were appealed before the SCC in recent years. I accept the prosecution's submission that the CMAC decision in *Edwards et al.* rendered a few weeks ago, has reconfirmed the independence of military judges in the current, although imperfect, construct. In this context, the applicant's objection to me, or my brother and sister judges, to preside this trial, under the guise of negative media coverage of sexual misconduct in the military, seems to be a disguised re-litigation of a paragraph 11(*d*) *Charter* challenge, alleging the lack of independence of military judges, an issue that has been resolved by our appeal court.

[13] Consequently, in the circumstances of this case, a reasonable person, properly informed and viewing the matter realistically and practically, would not conclude that the mere existence of media coverage regarding allegations of sexual misconduct in the military would lead to a conclusion that I could not decide the case fairly.

[14] I find that the allegation in support of the application objecting that I preside this trial, to be both broad and speculative. Further, the evidence the applicant intends to adduce simply aims at proving the existence of media coverage pertaining to the existence of allegations of sexual misconduct in the CAF. Whether the referral authority's letter is damning or not, it has no bearing on my impartiality and does not create an apprehension of bias. The letter is not before me, and the prosecution

confirmed it will not be adduced as evidence in supporting its case; referral letters do not typically form part of the evidence adduced by the prosecution to prove guilt beyond a reasonable doubt. As a result, both at its face and in consideration of the applicant's submissions during the hearing of the respondent's request to dismiss the application, it is apparent that the application has no reasonable prospect of success.

[15] The responsibility for trial judges to deal efficiently with matters before them was unequivocally stated by the SCC in *R. v. Cody*, 2017 SCC 31 at paragraph 38:

> [38] In addition, trial judges should use their case management powers to minimize delay. For example, before permitting an application to proceed, a trial judge should consider whether it has a reasonable prospect of success. This may entail asking defence counsel to summarize the evidence it anticipates eliciting in the *voir dire* and, where that summary reveals no basis upon which the application could succeed, dismissing the application summarily (*R. v. Kutynec* (1992), 7 O.R. (3d) 277 (C.A.), at pp. 287-89; *R. v. Vukelich* (1996), 108 C.C.C. (3d) 193 (B.C.C.A.)). And, even where an application is permitted to proceed, a trial judge's screening function subsists: trial judges should not hesitate to summarily dismiss "applications and requests the moment it becomes apparent they are frivolous" (*Jordan*, at para. 63). This screening function applies equally to Crown applications and requests. As a best practice, all counsel — Crown and defence — should take appropriate opportunities to ask trial judges to exercise such discretion.

Conclusion

[16] In conclusion, the application submitted by Master Corporal Pinto y is factually deficient and has no merit. The applicant's arguments broadly speculate that military judges are biased in general, in light of the media coverage.
The apprehension of bias that he alleges is both speculative and not reasonable. Consequently, in exercising my authority to deal efficiently with this application that, on its face, has no merit, there is no requirement to hear the matter.

FOR THESE REASONS, THE COURT:

[17] **GRANTS** the request of the respondent.

[18] **SUMMARILY DISMISSES** the application objecting that I preside the trial.

Counsel:

The Director of Military Prosecutions as represented by Major G.J. Moorehead, Counsel for the Respondent

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Corporal Pinto, the Applicant