COURT MARTIAL

Citation: *R. v. Goulding*, 2022 CM 2013

Date: 20221014
Docket: 202166

Preliminary Proceedings

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Master Corporal B. Goulding, Applicant

- and -

His Majesty the King, Respondent

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

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

(Orally)

Introduction

[1] On 25 May 2021, six charges were laid on a Record of Disciplinary Proceedings (RDP) against Master Corporal (MCpl) Goulding. The charges include: two allegations of sexual assault contrary to section 271 of the *Criminal Code*; two charges of assault contrary to section 266 of the *Criminal Code*; one count of assault with a weapon, contrary to section 257 of the *Criminal Code*; and one charge of drunkenness contrary to section 97 of the *National Defence Act* (*NDA*).

[2] On 7 July 2021, on behalf of the applicant, a disclosure request was sent to the Director of Military Prosecutions (DMP).

[3] On 16 July 2021, the charges were referred to the DMP. The referral was received by the DMP on 30 July 2021.

[4] On 9 December 2021, Major (Maj) Gallant signed the charge sheet, containing six charges against the applicant.

[5] On 9 December 2021, Maj Gallant contacted Lieutenant-Commander (LCdr) Gonsalves, who was initially listed as the assigned counsel on this file, by email in order to canvass dates to schedule trial dates for this matter.

[6] On 15 December 2021, Captain (Capt) Da Cruz contacted Maj Gallant to inform him that he was counsel on the file and that he was very busy until the end of January 2022 and needed time to review the file.

[7] On 11 January 2022, Deputy Director of Military Prosecutions Operations (DDMP Ops) directly contacted Acting Directorate of Defence Counsel Services (ADDCS), asking for assistance in scheduling the matter as the newly assigned defence counsel, Capt Da Cruz was on medical leave and DDMP Ops wanted to schedule dates as soon as possible to ensure the matter proceeded expeditiously, as the court calendar was filling up into the fall.

[8] On 27 January 2022, counsel for the applicant and respondent joined the scheduling teleconference and set dates for the court martial expected to be for two weeks, commencing on 7 November 2022 and concluding on 19 November 2022.

[9] On 16 February 2022, counsel for the applicant sent an email to the Court Martial Administrator (CMA) for the Acting Chief Military Judge (A/CMJ) requesting earlier trial dates should they become available. This request was framed as a standing request.

[10] On 28 April 2022, a second case management call was held with the A/CMJ because the applicant requested an additional week of trial. This was scheduled for 31 October to 4 November 2022, thus preserving the previously scheduled final trial date.

[11] By way of a convening order dated 7 June 2022, the applicant, MCpl Goulding has been ordered to appear before a General Court Martial (GCM). The GCM is set to commence on 31 October 2022 at Canadian Forces Base (CFB) Halifax, courtroom Suite 505, 6080 Young Street, Halifax, Nova Scotia.

[12] On 6 September 2022, the applicant filed an application pursuant to section 187 of the *NDA* and to article 112.03 of *Queen's Regulations and Orders for the Canadian Forces* (QR&O) seeking:

(a) a declaration that his right under the *Charter of Rights and Freedoms* (*Charter*) at paragraph 11(b) to a trial within a reasonable time has been violated; and

(b) a stay of proceedings.

[13] It is noted that the paragraph 11(b) application before the Court is dated 6 June 2022, although the digital signature is dated 6 September 2022, which is consistent with the filing of the request with the office of the Chief Military Judge (CMJ).

[14] On 12 October 2022, in the Asticou courtroom, I heard the application.

Position of the parties

Applicant

[15] The applicant submits that a total delay exceeding sixteen months due to delay in preferring the charges and lack of judicial resources is not acceptable in a system designed and intended to be agile and responsive to the needs of the Canadian Armed Forces (CAF). For this Court to accept these delays would be to risk the slip into complacency warned off at paragraphs 40 and 104 of *R. v. Jordan*, 2016 SCC 27.

[16] In addition, he argued that the current timelines in this matter sees the court martial ending six days before the eighteen-month presumptive limit in *Jordan*. The applicant submits that eighteen months should not be an aspirational goal. The length that this matter has taken does not comply with the intent or purpose of a system that ought to be quicker, not slower, than the civilian justice system. The inordinate amount of time certainly cannot be laid at the feet of the applicant, and he submits it violates his rights under paragraph 11(b) of the *Charter* and as a remedy, seeks a stay of proceedings.

Respondent

[17] As respondent, the prosecution argued the following:

(a) as this court martial is scheduled to proceed and conclude before reaching the presumptive ceiling of eighteen months, the applicant has failed to demonstrate an infringement of his paragraph 11(b) *Charter* rights;

(b) the applicant has failed to demonstrate that he:

(i) made a sustained effort to expedite the proceedings; and

(ii) that the case took markedly longer than it reasonably should have.

(c) the application alleging an infringement of the paragraph 11(b) *Charter* rights to be tried within a reasonable time should be dismissed.

Legal framework

The Jordan framework

[18] Courts martial have ruled in *R. v. Thiele*, 2016 CM 4015, *R. v. Cubias-Gonzalez*,2017 CM 3003, *R. v. McGregor*, 2019 CM 4011, *R. v. Tuckett*, 2019 CM 3006, and in *R. v. Stacey*, 2019 CM 3017, that the presumptive ceiling of eighteen months as established for provincial courts by the Supreme Court of Canada's (SCC) landmark case of *Jordan* and confirmed again in *R. v. Cody*, 2017 SCC 31 applies in the military justice system.

[19] The charges were laid as of 25 May 2021, resulting in the presumptive *Jordan* ceiling being that of 25 November 2022. The specific dates on the timeline in this case are not contested and both parties agree that the scheduled court dates fall below the presumptive ceiling of eighteen months set by the SCC in *Jordan* and adopted into the military justice system.

[20] In *Jordan*, the SCC confirmed the framework that trial judges must follow in assessing delay. For simplicity, where the net delay is below the presumptive ceiling, the onus is on the defence to show that the delay is unreasonable (see *Jordan*, paragraph 48).

> To do so, the defence must establish that (1) it took meaningful steps that demonstrate a sustained effort to expedite the proceedings, *and* (2) the case took markedly longer than it reasonably should have.

[21] In *Jordan*, at paragraph 48, the SCC also made it clear that expected stays for delay in cases that fall below the presumptive ceiling "to be rare, and limited to clear cases".

[22] During the application hearing, I asked counsel for any case law or precedent of such "rare and clear cases" that fell below the presumptive ceiling. I also invited them to provide this case law after the hearing, but as of the writing of this decision, I had not received any case law or precedent of stays provided in cases that fall below the presumptive ceiling.

Analysis

[23] The respondent emphasized that the current delay, based on the scheduling of the court martial, falls under the presumptive ceiling, and therefore, it is the applicant's onus to establish that this is one of the clear cases where, notwithstanding that the delay falls below the ceiling, it is unreasonable.

[24] The applicant contends that although the remaining delay falls below the presumptive ceiling, the delay is unreasonable as the facts establish that they:

(a) took meaningful steps that demonstrate a sustained effort to expedite the proceedings; and

(b) the case markedly exceeded its reasonable time requirements.

[25] Based on many of his submissions, I asked counsel for the applicant directly if he was seeking a change to the presumptive ceiling. I highlighted that this issue was somewhat reviewed for youth courts in the SCC decision of *R. v. K.J.M.*, 2019 SCC 55 where the majority confirmed that the presumptive ceiling of eighteen months remains applicable for a separate system of justice, with a similarly pressing need for expedience. However, he confirmed that was not his intention, but rather, he was simply making submissions on the case before the Court.

Sustained effort to expedite the proceedings

[26] As summarized earlier, the evidence shows that on 7 July 2021, defence counsel sent a disclosure request to the DMP. On 9 December 2021, the prosecution signed the charge sheet, preferring the charges and forwarding the disclosure package to defence, who received it on 14 December 2021. On 22 December 2021, just prior to the holiday period, the preferral and charge sheet were forwarded to the office of the CMJ.

[27] As noted above in *Jordan*, in order to show that the applicant took meaningful steps demonstrating a sustained effort to expedite the proceedings, it must demonstrate that they cooperated with the Crown and put the Crown on timely notice when delay had become problematic. It is the submission of the respondent that the applicant undertook no such effort.

[28] I note that the applicant expressed the considerable concern given the length of time it took for them to receive disclosure. At paragraph 11 of his Notice, he wrote:

> "11. Of note is that disclosure was not sent by the Prosecution to defence counsel until 9 Dec 2021, approximately 6 ½ months after charges were originally laid and after more than a third of the way through the *Jordan* 18 month presumptive period. The applicant points out that 9 Dec 21 was a Thursday and a week before the Christmas leave period began. Nevertheless, on 11 Jan 2022, the DDMP contacted the ADDCS directly by e-mail to discuss this case and the concern over delay."

[29] Neither counsel provided any evidence that between the original request for disclosure being made and the time that defence received it, that the applicant reached out to find out the status of the disclosure request or to determine when they could anticipate receiving it. In fact, defence did not even notify the prosecution that there was a change of counsel until 15 December 2021, which was on the eve of the Christmas leave period.

[30] On 11 January 2022, DDMP sent an email to ADDCS expressing concern with the delay and urging they set a trial date prior to the end of January 2022.

[31] The Concise Oxford Dictionary defines “sustained” as an adjective of the word “sustain”, which in this context is “keep (something) going over time or continuously.” In other words, in order to have made a sustained effort to expedite the proceedings, such effort needs to be continuous starting from when charges are laid, until the conclusion of the matter.

[32] In his oral submissions, the applicant drew the Court’s attention to the fact that the respondent did not provide any explanation for the delay in the disclosure process. However, under the *Jordan* regime, given that the delay falls below the presumptive ceiling, the onus is strictly on the applicant to prove that the delay was excessive. It is not a requirement for the respondent to declare exceptional circumstances at this stage. The onus lies exclusively with the applicant.

[33] On 27 January 2022, at a teleconference with the A/CMJ, both prosecution and defence counsel agreed that a two-week trial would be required and based on judicial availability as it was known in January 2022, the earliest dates offered by the A/CMJ were 7 to 19 November 2022, which was six days prior to the presumptive ceiling of eighteen months.

[34] The applicants contended that they acted in a timely, diligent and reasonable manner.

[35] After attending a trial scheduling conference with the A/CMJ, and the A/CMJ advising them specifically on the lack of judicial availability given the demand, defence counsel would have had to realize that the A/CMJ was exclusively responsible for setting the court dates based on the availability of the judiciary. Nonetheless, on 16 February 2022, in an email to the CMA, they made it known that they desired their case to move forward at the earliest opportunity and asked for it to be considered a standing request.

[36] I note for the court record that defence counsel did attempt to set the earliest possible hearing dates and that he was co-operative with, and responsive to both the prosecution and the court. I highlight that this conduct is particularly important for trial judges in reviewing cases that fall beyond the presumptive ceiling, however, this is not the case here. I would also emphasize that counsel for the applicant has not done anything that I view as an attempt to frustrate or further the delay in this case, however, in order to succeed in an argument under the presumptive ceiling, *Jordan* requires more than that.

[37] In satisfying this criteria, the direction from the SCC in *Jordan* at paragraph 85 was as follows:

> [85] To satisfy this criterion, it is not enough for the defence to make token efforts such as to simply put on the record that it wanted an earlier trial date. Since the defence benefits from a strong presumption in favour of a stay once the ceiling is exceeded, it is incumbent on the defence, in order to justify a stay below the ceiling, to demonstrate having taken meaningful and sustained steps to be tried quickly. While the defence might

> not be able to resolve the Crown's or the trial court's challenges, it falls to the defence to show that it attempted to set the earliest possible hearing dates, was cooperative with and responsive to the Crown and the court, put the Crown on timely notice when delay was becoming a problem, and conducted all applications (including the s. 11(*b*) application) reasonably and expeditiously. At the same time, trial judges should not take this opportunity, with the benefit of hindsight, to question every decision made by the defence. The defence is required to act reasonably, not perfectly.
> [Emphasis added.]

[38] In short, defence counsel is required to provide timely notice to the prosecution when delay has become problematic. In my view, an email sent directly to the CMA in February 2022, months before they appeared before the A/CMJ in April 2022, to schedule adjusted trial dates is not sufficient to fulfill their duty of sustained and continuous efforts. In April 2022, at the scheduling conference, they should have been honest and frank that they viewed the dates agreed to, as violating their client's *Charter* right. It is not sufficient to hold off for another four and a half months to file an application, when they are within two months of the trial, and when it is too late to find judicial availability.

[39] Although I do not want to be critical of defence counsel's effort in contacting the CMA to expedite their case. It is the absence of notice given to the prosecution and the trial judge, after they scheduled the dates with the A/CMJ which in my view, relegates that email request into the realm of a "token" effort simply to be placed on record.

[40] The applicant's duty was to advise the prosecution, as well as myself as the trial judge, that he felt his client's rights were violated based on the agreed dates, such that we could work together to find a solution. Although I believe the date of their notice being 6 June 2022 is likely an error, I explained to counsel that if they had raised it directly with me earlier, due to changes in my court schedule this summer, I would have made every effort to accommodate their request.

[41] I re-emphasized to counsel that when a client elects a GCM involving a panel, rescheduling a court takes time to ensure that the appropriate screening for the trial dates are done and that raising their notice so late after a panel has been appointed is problematic.

[42] Emphasizing again, that nothing changed regarding the dates scheduled and agreed to by all the parties, the prosecution and the trial judge were entitled to believe that delay had not become problematic. Consequently, I find that the applicant did not make sustained efforts to expedite the proceedings.

[43] Although I find that defence counsel did not make sustained efforts to expedite the proceedings, in the event that I have erred, I will proceed to the second test.

Markedly exceeded reasonable time requirements

[44] The applicant must also meet the second pre-condition for obtaining a stay of proceedings in cases of delay falling under the eighteen-month ceiling. The current timelines scheduled for this matter anticipate the court martial ending at least six days before the eighteen-month presumptive limit. It is important to note that although the applicant would have wanted earlier dates, the end of trial dates were agreed to by all parties twice, in both January and April 2022.

[45] The second pre-condition requires that the applicant show that the case markedly exceeded the reasonable time requirements of the case, which pursuant to paragraph 91 of *Jordan* is a question of fact.

[46] As stated above at paragraph 91 in J*ordan*, determining whether the applicant's case has taken markedly longer is not a matter of precise calculation. The reasonable time requirements in advancing a case to court martial depends on a variety of factors, including the complexity of the case, whether the prosecution took reasonable steps to expedite the proceedings and local conditions.

[47] With respect to local conditions, *Jordan* instructs trial judges to employ knowledge of their own jurisdiction, including how long a case of that nature typically takes to get to trial in light of relevant local considerations and systemic circumstances.

[48] The question then becomes whether the delay for a three-week court martial for sexual assault is markedly longer than is reasonable for the military justice system.

[49] In assessing that the delay is excessive, the applicant relies primarily upon the recent reports of retired SCC Fish and Arbour JJ.

[50] Relying upon the recent report of retired SCC Fish J., who re-emphasized Lamer CJ. observations in *R. v. Genereux*, [1992] 1 S.C.R. 259 as well as the SCC's guidance in *R.v. Stillman*, 2019 SCC 40, the applicant brought the following paragraphs to the Court's attention:

> "430. The distinct purpose of the military justice system is "*to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military"*.
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> In *Généreux*, Chief Justice Lamer wrote that "*the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily* […]". Less than two years ago, the majority of the Supreme Court of Canada reiterated in *Stillman* that "*responding swiftly to misconduct within the military" enhances "discipline, efficiency, and morale in the military".*
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> 431. Accordingly, the *NDA* provides that *"[c]harges laid under the Code of Service Discipline shall be dealt with as expeditiously as the*

> *circumstances permit*". Summary trials are completed significantly faster than most criminal trials in the civilian justice system.
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> 432. However, the same cannot be said of courts martial. I was informed by the Office of the JAG ("**OJAG**") that, from 2013-2014 to 2017-2018, the average time to dispose of a charge at court martial was 384 days from the laying of the charge to the completion of the trial. The OJAG stated that, by comparison, "*Statistics Canada data from 2018/2019 identifies a median elapsed time of almost five months (139 days) to process a case in the adult criminal courts of the* [civilian justice system] *from a person's first court appearance to the completion of their case"*.
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> 433. The comparison is complicated by differences in processes, methodological differences in the available data and regional variance in the civilian justice system. **But the data suggests that, as a general rule, trials by court martial currently take longer than most comparable trials in the civilian justice system**. The analyses conducted by the authors of the Court Martial Comprehensive Review Report in 2017 and by the Auditor General of Canada in 2018 support this conclusion."

[51] Relying upon the above average time required to dispose of a charge at court martial being 384 days from the laying of charges to the completion of a trial, the applicant argued that "a total delay exceeding sixteen months due to delay in preferring the charges and lack of judicial resources is not acceptable in a system designed and intended to be agile and responsive to the needs of the Canadian Armed Forces."

[52] After clarifying that the applicant was not arguing to lower the presumptive ceiling within the military justice system, the applicant confirmed that he sought to rely upon the average time of 384 days to provide context to his argument that this case has taken markedly longer than it should have. He submitted that there is no reason why this matter could not have been dealt with in twelve months.

[53] According to the SCC guidance in *Jordan,* in determining whether a trial took markedly longer than it should have, it is necessary to "step back from the minutiae and adopt a bird's-eye view of the case" (See *Jordan,* at paragraph 91).

[54] I reviewed the above comments made by retired SCC Fish J. and found that the average provided is simply a statistic, that on its face, is not conclusive evidence to further the applicant's argument. In fact, there is no context as to how the average was calculated as it undoubtedly includes guilty pleas and joint submissions. Most particularly, the applicant has failed to buttress his arguments with reliable statistical data of the specific timelines for the military justice system to conduct contested sexual assault trials.

[55] Further, given the generous legal aid system available for military members, contested trials within the military justice system often do take longer than their civilian

counterparts. This is not necessarily a bad thing, as the military justice system holds many positive features separating it from the civilian justice system. The importance of the role of the DDCS was specifically recognized by retired SCC Fish J. when he emphasized the importance of the DDCS role given their ability to bring forward applications and arguments that might not be filed in the civilian system. In defending the importance of filing these applications, he wrote:

> 130. Access to free legal counsel, regardless of income, is a benefit extended to the members of the CAF as a counterpart to the extraordinary duties that are imposed on them. Those extraordinary duties include the "unlimited liability" of CAF members, by which they may at any time be ordered into harm's way, potentially risking their lives.
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> 131. The fact that military defence counsel can do the utmost to defend their clients without being required to consider "fiscal responsibility" as part of their decisions is part and parcel of the special benefit which Canada decided to grant to members of the CAF. I would only very reluctantly interfere with this fundamental *quid pro quo*. No satisfactory basis for a recommendation of this sort has been provided to me.
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> […]
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> 133. It is also worth noting that applications filed by military defence counsel have historically played an important role in the evolution of the military justice system. The Directorate of DCS has been involved in important constitutional cases which have triggered amendments to the *NDA*, as well as in challenges which have failed, but which nevertheless provided important clarifications on the jurisdiction of the military justice system. Beyond furthering the interests of their particular clients, military defence counsel ensure the ongoing legitimacy of the military justice system.
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> 134. Applications, including constitutional challenges, may be presented repeatedly only as a consequence of the current structure of the military justice system.

[56] Although, the applicant does not rely upon any particular paragraphs within the Arbour report, upon a quick review of it, there is no escaping its substance with respect to the military justice system's trying of the offence of sexual assault. In fact, the Arbour report refers specifically to the October 2021 interim recommendation that Madame Arbour provided the Minister of National Defence at the time:

> 1. The Honourable Morris J. Fish's recommendation No. 68 should be implemented immediately. All sexual assaults and other criminal offences of a sexual nature under the *Criminal Code*, including historical sexual offences, alleged to have been perpetrated by a CAF member, past or present ("sexual offences") should be referred to civilian authorities. Consequently, starting immediately, the Canadian Forces Provost Marshal (CFPM) should transfer to civilian police forces all allegations of sexual offences, including allegations currently under investigation by the CFNIS, unless such investigation is near completion. In any event, in all cases charges should be laid in civilian court.
> [Emphasis added.]

[57] I note that the respondent did not raise the above fact as a complicating factor, but in light of the applicant's reliance on the Arbour report, it is important that it be highlighted to avoid simply cherry picking some aspects of the report and not others.

[58] In the timeline of concern raised by the applicant, there is no escaping the fact that the period from July until December 2021 was a tenuous time within the military justice system for stakeholders involved in the investigation and prosecution of sexual assault. In short, to properly assess the applicant's arguments, *Jordan* instructs that as the trial judge, I employ my knowledge of the military justice system, in light of relevant local considerations and systemic circumstances which I have highlighted.

[59] In short, I find that the statistics set out in the Fish report provide me no assistance in conducting this assessment.

[60] In his written submissions, the respondent raised the following explanation for much of the delay:

> "21. Additionally, the timeframe in which the charges were laid, referred, preferred, and trial dates were set correspond with a global pandemic, reduced accessibility to CAF offices, and a serious medical injury suffered by counsel, any of which would be considered exceptional circumstances under a *Jordan* calculation as considered at para. 69.
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> 22. While exceptional circumstances need not be argued or considered in this case, as these dates fall under the presumptive 18-month ceiling, the fact that these obstacles have all been overcome while keeping the dates within *Jordan* limits clearly shows that there is no "markedly longer" than reasonable delay. The fact that a whole week of trial was added three months after the original dates were set, also within the 18-month ceiling, only accentuates this fact further."

[61] Given the fact that the onus is on the applicant to prove that the delay is unreasonable, there was no requirement for the respondent to file such evidence to show that potential exceptional circumstances existed.

[62] I find that at the 27 January 2022 teleconference, all parties agreed to the currently scheduled trial dates. Firstly, I note that the scheduled end date does fall very close to the presumptive ceiling, but aside from this application, filed on 6 September 2022, I find that there is no evidence to show that the applicant made sustained efforts to expedite the proceedings with the prosecution. Further, there is no evidence before the Court as to how long an average contested trial of sexual assault normally takes or that this case markedly exceeded its reasonable time requirements.

[63] In summary, as the SCC foresaw at paragraph 48 of *Jordan*, expected stays for delay in cases that fall below the presumptive ceiling would be "rare, and limited to clear cases." Based on the evidence before this Court, I do not find that this case presents such a rare and clear case.

FOR THESE REASONS, THE COURT:

[64] **DISMISSES** the application**.**

Counsel:

Captain C.M. Da Cruz, Defence Counsel Services, Counsel for Master Corporal B. Goulding, Applicant

The Director of Military Prosecutions as represented by Major R. Gallant, Counsel for the Respondent