COURT MARTIAL

Citation: *R. v. Meeks,* 2023 CM 2018

Date: 20231103
Docket: 201960

Standing Court Martial

Asticou Centre Courtroom
Gatineau, Quebec, Canada

Between:

Sergeant J.K. Meeks, Applicant

- and -

His Majesty the King, Respondent

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

DECISION ON CONSIDERATION OF SUSPENSION OF SENTENCE AND RELEASE PENDING APPEAL

(Orally)

The case

[1] On 28 June 2023, this Court found Sergeant (Sgt) Meeks guilty of the offence of assault causing bodily harm. The facts related to my findings are set out in the published decisions at *R. v. Meeks,* 2023 CM 2013 and *R. v. Meeks,* 2022 CM 2016. On 27 October 2023, I convicted and sentenced Sgt Meeks to 30 days' detention.

[2] The morning after his committal, on 28 October 2023, the Court received an application by Sgt Meeks for release pending appeal (RPA). He was being held in detention at 2 Military Police Detachment (2 MP Det) Petawawa awaiting a transfer to the Canadian Forces Service Prison and Detention Barracks (CFSPDB) in Edmonton, Alberta. He had twenty-four hours upon which to notify the Court of his intention, and although the prosecution was unavailable at that time, the Court did convene a hearing with his defence counsel to formally acknowledge receipt of his application on the court record.

[3] Immediately upon seeing and hearing from Sgt Meeks, I became alarmed and asked him about what mental health support would be available in the event he was released pending appeal, but the resources appeared passive and not readily available over the weekend.

[4] While waiting on the prosecution, I asked Sgt Meeks if he would be willing to attend the Pembroke Hospital for an assessment prior to his release, to which he agreed.

[5] On 28 October 2023, the Court ordered 2 MP Det and the 3rd Battalion, Royal Canadian Regiment (3 RCR) to transport Sgt Meeks to the hospital. After initial assessment, he was retained in the hospital for a follow-up with a specialist the next day. After consultation with the specialist, he was kept in the hospital for the rest of the week.

[6] On 29 October 2023, the Court ordered Sgt Meeks not to leave the hospital without notifying both his unit and his counsel. His unit was ordered to physically visit him each day and conduct a telephone call each evening.

[7] On 3 November 2023, Sgt Meeks was released from the hospital and appeared before the Court. He has now served eight days of the required 30 days of his detention imposed by the Court.

[8] His counsel has requested that, prior to considering his request pending appeal, based on the reasons I gave in my sentencing decision, and in addition to the new medical information, that I reconsider whether the rest of Sgt Meeks' sentence should be suspended. Alternatively, he requests that the Court consider the RPA.

[9] The prosecution argued that the Court is *functus* to reconsider suspending Sgt Meeks' detention, as the Court is not a "suspending authority" set out in *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 113.33. He further argued that if the Court was to determine it has this power to suspend the punishment that it should not suspend the punishment, as there is insufficient evidence to support such a need as the CFSPDB provides all the necessary medical and mental rehabilitation support necessary. Secondly, he argued that the defence had not provided sufficient evidence to support his RPA as he did not declare that he, in fact, intended to appeal.

Is the Court functus?

[10] In considering this issue, the Court reviewed some of the significant courts martial and Court Martial Appeal Court (CMAC) decisions that considered the issue of *functus* and provided them to counsel if they wished to make any additional submissions. In *R. v. Banting*, 2020 CMAC 2, the CMAC had to decide the issue of *functus*, and it summarized the relevant law that should guide us at paragraphs 7 and 8 as follows:

> [7] In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577, the Supreme Court held that a decision cannot be re-visited simply because a court has changed its mind, made an error within its jurisdiction or because there has been a change of circumstances. It can only do so if authorized by statute, there has been a slip in preparing the decision, or there has been an error in expressing the manifest intention of the court. *Chandler* instructs as follows:
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> > The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: (1) where there had been a slip in drawing it up, and, (2) where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186. (At p. 860.)
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> [8] The principle of *functus officio* prevents courts from continually hearing applications to change their decisions. See, *Ontario (Energy Board) v. Ontario Power Generation Inc.*, 2015 SCC 44, [2015] 3 S.C.R. 147, at para. 65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 79; *Reekie v. Messervey*, [1990] 1 S.C.R. 219, 66 D.L.R. (4th) 765, at pp. 222-23.

[11] A military judge's authority to suspend the execution of the punishment is found at section 215 of the *NDA* which reads as follows:

> **Suspension of execution of punishment**
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> **215 (1)** If an offender is sentenced to imprisonment or detention, the execution of the punishment may be suspended by the court martial that imposes the punishment or, if the offender's sentence is affirmed, is substituted or is imposed on appeal, by the Court Martial Appeal Court.
>
> **Consideration of victim's safety and security**
>
> **(1.1)** If the court martial or the Court Martial Appeal Court, as the case may be, makes a decision that the execution of the punishment be suspended, it shall include in the decision a statement that it has considered the safety and security of every victim of the offence.

[12] Under the *NDA*, the suspension of a sentence that has already been imposed is authorized under section 216 and 217. These sections make it clear that the power to suspend is held by suspending authorities which are set out in regulations. QR&O 113.33 sets out the suspension authorities, which does not include military judges.

[13] The statutory structure of these provisions suggests that once that window of opportunity for military judges to exercise their power has passed, the authority to suspend a punishment with respect to service reasons or the member's welfare lies with the listed positions in the chain of command to consider suspension at sections 216 and 217 of the *NDA.*

[14] In interpreting similar provisions, the CMAC in the case of *Regina v. Blaquiere*, CMAC-421, 133 C.C.C. (3d) 118, paragraphs 30 to 31 makes it clear that no entity

other than those appointed as a suspending authority under similar provisions to sections 216 and 217 has the authority to suspend a sentence after the court martial has refused to do so. The CMAC recognizes that military judges have such power, but if they choose not to execute it, they do not retain that power under section 216 and 217 to do so later. Paragraphs 30 to 31 read as follows:

> [30] The Minister of National Defence has also specifically appointed military judges personally as suspending authorities and does this in their individual respective appointment orders. The President of this Standing Court Martial was appointed but he chose to refuse the application for suspension.
>
> [31] No entity without such an appointment has the authority to suspend a sentence. General Court Martial and Disciplinary Court Martial have no such power in relation to the sentence imposed by them. Likewise, the Court Martial Appeal Court is without such jurisdiction.

[15] In my view, considering the two CMAC decisions and guidance on this issue, as well as the structure of the *NDA* provisions, I find that at this stage, this Court does not have jurisdiction to grant the suspension of sentence on a sentence that I imposed and properly considered suspending.

Release pending appeal

[16] A hearing was also held in accordance with QR&O 118.04. The evidence filed at the hearing consisted of the application for release pending appeal and counsel's oral submission.

[17] Considering the conviction, the accused can no longer rely upon the presumption of innocence as it is now displaced, and paragraph 11(*e*) of the *Charter* no longer applies. Consequently, when a person who has been convicted and sentenced applies for release pending appeal the onus is on the applicant. The criteria that an applicant must establish for release pending appeal of a conviction are set out in section 248.3 of the *NDA* as follows:

> (i) that the person intends to appeal,
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> (ii) if the appeal is against sentence only, that it would cause unnecessary hardship if the person were placed or retained in detention or imprisonment,
>
> (iii) that the person will surrender himself into custody when directed to do so, and
>
> (iv) that the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces . . .

[18] The applicant applying for release pending appeal bears the burden of establishing that each criterion is met on a balance of probabilities: *R. v. Ponak*, [1972] 4 W.W.R. 316 (B.C.C.A.), at pages 317 to 318; *R. v. Iyer*, 2016 ABCA 407, at

paragraph 7; *R. v. D'Amico*, 2016 QCCA 183, at paragraph 10; *R. v. Gill*, 2015 SKCA 96 at paragraph 14.

Intent to appeal

[19] Defence counsel for Sgt Meeks has indicated that he intends to appeal, and it was also noted in court that there is currently a case before the Supreme Court of Canada (SCC) related to military judicial independence that has been relied upon by many offenders. To be clear, the test at this stage is a low one and military judges should not assess the merits of an appeal beyond confirming the applicant's intention. In my view, provided the applicant and his counsel advise the Court on the record that he intends to appeal, then the criteria is met.

Will the member surrender himself into custody when directed to do so

[20] The applicant has strong links to the area and has always been extremely compliant. Even in the week when he was detained, he was compliant and never once caused any concern.

[21] Accordingly, I am satisfied that the applicant will surrender himself into custody in accordance with the order for his release.

The person's detention or imprisonment is not necessary in the interest of the public or the CAF

[22] The interest of the CAF is greatly diminished in a case where the person has been or will be released from the CAF. Therefore, all that remains for the Court to decide is whether it is in the interest of the public. Common law suggests that there are two components of the public interest to be considered, being public safety and confidence in the administration of justice:

(a) Public safety. In this case, the prosecution concedes that it is not likely that the applicant will commit offences if he is released pending appeal. It has been four years since the incident and there have been no issues that have arisen regarding the public safety; and

(b) Public confidence in the administration of justice. The prosecution argued that the applicant must be detained to maintain public confidence in the administration of justice. The framework for applying this aspect, was reviewed by the SCC in the case of *Oland*, where Moldaver J., writing for a unanimous court, explained that this ground is determined by the weighing of two competing interests: enforceability and reviewability (see *Oland* at paragraph 24).

[23] Enforceability. In *Oland*, Moldaver J. stated that enforceability considerations are informed by the similar basis of pre-trial detention set out in the *Criminal Code*. He wrote as follows:

> [37] In assessing whether public confidence concerns support a pre-trial detention order under s. 515(10)(c), the seriousness of the crime plays an important role. The more serious the crime, the greater the risk that public confidence in the administration of justice will be undermined if the accused is released on bail pending trial. So too for bail pending appeal. In considering the public confidence component under s. 679(3)(c), I see no reason why the seriousness of the crime for which a person has been convicted should not play an equal role in assessing the enforceability interest.
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> [38] With that in mind, I return to s. 515(10)(c), where Parliament has set out three factors by which the seriousness of a crime may be determined: the gravity of the offence, the circumstances surrounding the commission of the offence, and the potential length of imprisonment (s. 515(10)(c)(ii), (iii) and (iv)). In my view, these factors are readily transferable to s. 679(3)(c) — the only difference being that, unlike the pre-trial context, an appeal judge will generally have the trial judge's reasons for sentence in which the three factors going to the seriousness of the crime will have been addressed. As a rule, the appeal judge need not repeat this exercise.
> [Emphasis added.]

[24] Section 159.2 of the *NDA* has a provision that mirrors the factors set out in subparagraphs 515(10) (c) (ii), (iii) and (iv) of the *Criminal Code* provisions. Section 159.2 of the *NDA* read as follows:

> **Justification for retention in custody**
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> **159.2** For the purposes of sections 159.1 and 159.3, the retention of a person in custody is only justified when one or more of the following grounds have been established to the satisfaction of the military judge:
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> (a) custody is necessary to ensure the person's attendance before a court martial or civil court to be dealt with according to law;
>
> (b) custody is necessary for the protection or the safety of the public, having regard to all the circumstances including any substantial likelihood that the person will, if released from custody, commit an offence or interfere with the administration of military justice; and
>
> (c) custody is necessary to maintain public trust in the administration of military justice, having regard to the circumstances including the apparent strength of the prosecution's case, the gravity of the nature of the offence, the circumstances surrounding its commission and the potential for a lengthy term of imprisonment.

[25] Upon my assessment of the case, the public safety or flight concerns with respect to the applicant are negligible and the public interest in reviewability overshadows the enforceability interest.

Undertaking

[26] The Court hereby directs that the applicant be released upon giving an undertaking, pursuant to *NDA* section 248.6 as follows:

(a) remain under military authority and in the event he is released, to advise the military police of any change of address or employment location;

(b) surrender himself into custody when directed to do so; and

(c) keep the peace and be of good behaviour.

[27] Now that the conditions necessary for the applicant's release are established, I have included them in the undertaking.

FOR THESE REASONS, THE COURT

[28] **ORDERS** the offender be released pending appeal on the signing of Part 2 of the Direction and Undertaking set out at section 248.6 of the *NDA*.

Counsel:

Lieutenant-Colonel D. Berntsen (Retired), Defence Counsel Services, Counsel for Sergeant J.K. Meeks, Applicant and Offender

The Director of Military Prosecutions as represented by Major G.D. Moffat, Prosecutor and Counsel for the Respondent