Citation: R. v. Corporal M.A. Wilcox, 2009 CM 2024

Docket: 200849

GENERAL COURT MARTIAL
CANADA
NOVA SCOTIA
VICTORIA PARK, SYDNEY

Date: 24 July 2009

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL M.A. WILCOX
(Applicant)

REGARDING CHANGE OF VENUE AND THE TAKING OF A VIEW
(Rendered orally)

[1] By an amended Notice of Application dated 26 May 2009, counsel for the applicant, Corporal Wilcox, seeks an order quashing the convening order for this General Court Martial, or an order that the trial be held at the Kandahar Airfield in Kandahar, Afghanistan, and, in the further alternative, that the panel of this court be permitted to take a view or views of the alleged crime scene and the surrounding area of Kandahar Airfield.

[2] The Notice of Application, marked Exhibit M6-1, amends two earlier notices dated 14 April and 21 April, and counsel for the applicant elected to proceed on the basis of the 26 May notice. I heard evidence and argument on the application here in Sydney, Nova Scotia, on 27 and 28 May; and on 29 May, I dismissed the application in its entirety, but granted the applicant leave, if so advised, to reapply to take a view at a time not earlier than the close of the case for the prosecution. I undertook to provide reasons for this decision in due course, and my reasons follow.

[3] The Notice of Application seeks an order quashing the convening order because the trial was convened in Sydney, Nova Scotia, at the request of the prosecution, who, it is argued, "had no lawful authority to direct the place of trial," and because, it is argued, centuries of common law require the trial to take place where the offences are alleged to have occurred; in this case, Kandahar Afghanistan.

[4] Exhibit M6-3 before me is correspondence dated 21 July 2008, over the hand of Lieutenant-Colonel B.W. MacGregor, Deputy Director of Military Prosecutions, preferring the charges against Corporal Wilcox, pursuant to ss. 165.(2) of the *National Defence Act*, *NDA*, for trial by court martial. At paragraph 2, Lieutenant-Colonel MacGregor writes, "The court martial will be held at Sydney Garrison, Sydney, Nova Scotia." Exhibit M6-2 before me is correspondence dated 17 October 2008, over the hand of M.S. Morrissey, Court Martial Administrator, CMA, addressed to several parties, and enclosing the convening order for the trial of Corporal Wilcox, which is also dated 17 October and signed by M.S. Morrissey. The convening order is in the usual format and states in paragraph 1, "The court martial will be held at Sydney Garrison, Sydney, Nova Scotia."

[5] The attack on the validity of the convening order rests on the submission that the prosecution has no authority to direct the place of trial by court martial. The simple answer is that that is true, but the place of trial was directed by the Court Martial Administrator, who undoubtedly has this authority. Under s. 165.19(1), the CMA was under a duty to convene a General Court Martial once the charge sheet in this case was preferred by the Director of Military Prosecutions. Pursuant to ss. 165.19(2) of the *NDA*, the CMA "performs such other duties as may be specified by this *Act* or prescribed by the Governor in Council in regulations." Queen's Regulations and Orders article 111.02(2) specifies the matters that the CMA is to include in a convening order, including that the order:

> "(b) state the type of court martial convened, the date and time proceedings commence, the <u>place where it will be held</u> and the language of proceedings chosen by the accused." [emphasis added]

[6] The place of trial is a decision to be made by the CMA, although, of course, there is nothing to prevent the CMA, taking into consideration the wishes of the parties in making that decision, just as she does with respect to the scheduling of the trial. There is no evidence before me that the applicant made any representations to the CMA as to where the trial should be held, and there is no basis upon which to quash the convening order.

[7] The applicant is alleged in the charge sheet to be a member of the Reserve Force with the 2nd Battalion, Nova Scotia Highlanders, Cape Breton at the time of the alleged offences, and it does not appear to be an issue that the trial is convened to take place at the home unit of the applicant here in Sydney. I am satisfied on the evidence I heard in the course of the application that the applicant presently resides a short distance from Sydney, in Glace Bay, Nova Scotia, where his family also resides. The decision of the CMA to convene the trial in the location of the home unit of the applicant is reasonable.

[8] The application seeks a change of venue of the trial to the Kandahar Airfield, Kandahar, Afghanistan, on the ground that the common law and the interests of justice require that the trial take place where the offences are alleged to have occurred, or to permit a view to be taken as discussed below.

[9] In *R. v. Sarazin*[1] the Prince Edward Island Supreme Court held that at common law the accused has a *prima facie* right to be tried in the county in which the offence is alleged to have been committed. Although this rule may have been modified by s. 470 of the *Criminal Code*, which expands the jurisdiction of a court over an offence to those courts within whose territorial jurisdiction the accused is found, is arrested, or is in custody. In the present day, though, when a serious offence may be planned in one jurisdiction, committed in a second, the proceeds of the crime deposited in an institution in a third jurisdiction, and refuge be sought in yet a fourth jurisdiction, it is difficult to say how much authority the common law rule should continue to command. But whatever may be the rule at common law or under the *Criminal Code*, it has never been the practice at courts martial to hold the trial at the scene of the alleged offence.

[10] Even a cursory acquaintance with the exigencies of military operations discloses the impracticality of such a rule. Military forces are, by nature, intended to be mobile, often on short notice and over large distances. None of the older authorities on the practice of courts martial that I have been able to consult support the contention advanced by the applicant. Indeed, the American author Winthrop, in his *Military Law and Precedents*, refers to a directive of the War Department in 1895 that courts martial be held wherever the expense will be reduced to a minimum.

[11] What, then, of the interests of justice? This is not a case in which a change of venue is sought in order to minimize the effects of adverse publicity in a local community on the process of selecting an impartial jury. There has been no demonstration of prejudice to the applicant by holding the trial here in Sydney that would be alleviated by holding the trial in Kandahar. The only reason advanced in support of the application on this point is the convenience of permitting a view to be taken by the panel of this court martial of locations on the camp at the Kandahar Airfield.

[12] The applicant seeks an order that the court take a view in Kandahar. In submissions, counsel for the applicant stated that the defence wished to have a view taken of the tent in question, the areas surrounding the tent, and a gate to the base, known as Entry Control Point 3 in order to "properly contextualize and consider the evidence."

[13] I am satisfied on the evidence I have heard in the course of this application that since the date alleged in the charges, the tent in question has been moved some distance

---

[1](1978) 39 C.C.C. (2d) 131

from the site where it was located in March of 2007. I am simply unable to understand how a view of the tent and the surrounding area would permit the members of the panel of this court to better consider the evidence that they will hear. But at this stage, I am not able to reach a final conclusion on the point as I have not yet heard the evidence to be adduced at trial. In addition, counsel on behalf of the applicant felt himself to be at some disadvantage in mounting the application because he did not wish at this early stage to disclose the theory of the defence or the evidence which might support it. In these circumstances and for these reasons I dismissed the application to take a view, but reserved the right of the applicant to reapply at a later stage in the trial. There is, therefore, no ground upon which to justify an order changing the venue of the trial to Kandahar Airfield. For these reasons the application, M6-1, was dismissed.

[14] Since the drafting of these reasons, the evidence of the prosecution on this trial has concluded and counsel has renewed the application to take a view as contemplated by the order I made on 29 May 2009. The renewed application is in writing and was exhibited as M21-1. The parties agreed that I should consider the evidence adduced on the previous application in order to deal with the issue.

[15] The applicant now seeks an order to take a view of the Entry Control Point 3; clearing bays, which on the evidence at trial to this point were located on the camp and were used to verify that weapons were clear of ammunition; tent A-1 and the adjacent tent porch and bunker; the 25-metre range; and the Tim Hortons boardwalk, all, in order that the panel may, "fully understand the testimony of the defence witnesses."

[16] Section 190 of the *National Defence Act* provides:

> 190. A court martial may view any place, thing or person.

[17] Counsel for the respondent, the prosecution, argues that the interpretation of this provision is aided by s. 652 of the *Criminal Code*, which provides in ss. 1:

> 652. (1) The judge may, where it appears to be in the interests of justice, at any time after the jury has been sworn and before it gives its verdict, direct the jury to have a view of any place, thing or person, and shall give directions respecting the manner in which, and the persons by whom, the place, thing or person shall be shown to the jury, and may for that purpose adjourn the trial.

[18] I accept the submission of counsel that the jurisprudence under s. 652 is helpful in applying the equivalent provision in the *National Defence Act*. I accept that the decision to order a view is a matter for the discretion of the court and that an order should be made under s. 190, where such an order appears to be in the interest of justice. The burden of persuasion on this issue rests with the applicant.

[19] As I have already noted, the evidence on the application establishes that since the date alleged in the charge sheet, the tent in question has been moved from its

location in March of 2007. There is no evidence before me as to whether the adjacent porch and bunker remain in the place or condition that they were in at that time. There is a wealth of evidence before the panel of this court of photographs taken both inside and outside the tent in question and showing the area around the tent at or around the time of the alleged offences. This evidence is supplemented by diagrams drawn by some of the witnesses who lived in the tent at the time as well as by the investigator from the National Investigation Service. As well, there are many photographs of the gate area known as Entry Control Point 3.

[20] With respect to the clearing bays, the range, and the Tim Hortons on the boardwalk, I am unable, on the basis of the evidence adduced in the trial to this point, to appreciate any significant issue of fact that might be illuminated by a visit to these locations.

[21] In my view, there is little value to be gained in the appreciation of the evidence in this case from a visit to the camp at Kandahar Airfield, and were this trial conducted by me sitting alone at a Standing Court Marital I would dismiss the application on the ground that the marginal value of taking a view, in all the circumstances, is simply not worth the practical inconvenience, expense, and delay that the taking of a view would occasion.

[22] However, this is a General Court Martial before a panel of members whose role and duty it is to assess the evidence, draw conclusions, and make findings. I cannot say that it would be unreasonable for the members of the panel to conclude that they might benefit from a view in their appreciation and understanding of the evidence once the evidence is concluded. Therefore, I intend to instruct the panel in the course of my charge that they may request that a view be taken of locations on the camp at Kandahar Airfield.

Commander P.J. Lamont, M.J.

Counsel:

Major J.J. Samson, Regional Military Prosecutions Atlantic, and Lieutenant-Commander R. Fetterly, Canadian Military Prosecution Service
Counsel for Her Majesty, The Queen (Respondent)

Major S. Turner and Lieutenant-Colonel D.T. Sweet, Directorate of Defence Counsel Services
Counsel for Corporal M.A. Wilcox (Applicant)