COURT MARTIAL

Citation: *R. v. Cruz*, 2010 CM 2020

Date: 20101207
Docket: 201045

Standing Court Martial

Asticou Centre
Gatineau, Québec, Canada

Between:

Her Majesty the Queen

- and -

Private D.J. Cruz, Accused

Before: Commander P. J. Lamont, M.J.

DECISION OF NOTICE OF APPLICATION FOR SEPARATE TRIALS

(Orally)

[1] The application, marked M2-1, an application for separate trials is dismissed.

[2] Private Cruz is charged in a charge sheet with five offences contrary to the *National Defence Act*. At the opening of his trial by Standing Court Martial, he applied by a written notice of application, Exhibit M2-1, for separate trials to be held on the charges. I dismissed the application.

[3] Queen's Regulations and Orders, article 112.05(5)(*d*) provides:

> (*d*) where a charge sheet contains more than one charge, the court may, if it considers the interests of justice require it, proceed with separate trials and direct the order in which those trials shall be held ...

[4] I am invited by counsel to apply the reasoning that would be applied on trials under the *Criminal Code*, which provides in section 591(3) as follows:

> (3) The court may, where it is satisfied that the interests of justice so require, order
>
> (*a*) that the accused or defendant be tried separately on one or more of the counts ...

[5] The five charges fall into three groups: the first two charges allege the making of false statements in official documents; charges three and four allege fraud in the claiming of separation expenses; and the fifth charge alleges an attempt to obstruct the course of justice. The applicant submits that the accused should be tried in three separate trials.

[6] I agree with counsel that the principles developed under section 591 of the *Criminal Code* should be applied on this application. The clear wording of this section and of the analogous provision in Queen's Regulations and Orders casts the burden upon the applicant to show that the interests of justice require separate trials of the charges.

[7] In *R. v. Last*, 2009 SCC 45, the Supreme Court of Canada speaking through Deschamps J discussed the factors the court is to consider in deciding in a particular case whether the interests of justice require separate trials. At paragraph 18:

> Factors courts rightly use include: the general prejudice to the accused; the legal and factual nexus between the counts; the complexity of the evidence; whether the accused intends to testify on one count but not another; the possibility of inconsistent verdicts; the desire to avoid a multiplicity of proceedings; the use of similar fact evidence at trial; the length of the trial having regard to the evidence to be called; the potential prejudice to the accused with respect to the right to be tried within a reasonable time; and the existence of antagonistic defences as between co-accused persons ...

[8] As the court made clear this list of factors is not exhaustive. At the end of the exercise the trial court has to balance, and (paragraph 44):

> ... weigh cumulatively all the relevant factors to determine whether the interests of justice require severance.

The interests of justice, the court continues at paragraph 16:

> ... encompass the accused's right to be tried on the evidence admissible against him, as well as society's interest in seeing that justice is done in a reasonably efficient and cost-effective manner.

[9] Some of the factors enumerated in *Last* do not arise in the present case. For example, the prosecution does not intend to adduce similar fact evidence and there is no co-accused to raise an antagonistic defence.

[10] In my view, the following factors in particular weigh against separate trials of the charges in this case. On the evidence I heard in the course of this application I conclude that there is a strong factual nexus between the various charges. The first two charges

will involve a consideration of the nature of the relationship between the accused, Private Cruz, and Ms Rhea Noblefranca and their living conditions. The third and fourth charges will involve a consideration of whether the accused was entitled, or not, to financial benefits in the course of his military service that depend, in part, on the domestic relationship between these two parties. The fifth charge will involve a consideration of whether there was an attempt to materially misrepresent the facts that are relevant to the other four charges. Thus the present case is very different from the factual pattern in *R. v. Last* where Deschamps J noted that the two separate attacks of a sexual nature in that case were separate incidents, and at paragraph 32:

> ... The trier of fact would not need to know about one in order to understand the other.

Here an understanding of the facts underlying one group of charges is likely to be very important to an understanding of the facts underlying the remaining charges.

[11] Generally speaking, the closer the relationship between the factual issues the greater the risk of inconsistent verdicts between separate trials. I consider this risk, if three separate trials were held in this case, to be more than minimal.

[12] The expressed intention of the accused to testify on some of the charges, but to exercise his right not to testify in respect of others, is an important consideration. I recognize, of course, that the effect of denying an application for separate trials is to compel the accused to give evidence on all of the charges if he chooses to give evidence on any of them. Accused persons, like any other witness, cannot choose to answer only some of the relevant questions that may be put to them. But on the limited information I have been given in the course of the submissions of counsel for Private Cruz, I am not persuaded that the expressed intention is objectively justifiable. While the issues of fact on all five charges are different, they are closely related. It is, therefore, difficult to appreciate why, if he chooses to give evidence, Private Cruz would wish to limit his evidence to only some of the charges.

[13] In the course of submissions, counsel did not identify specific grounds of prejudice to the accused from the holding of a joint trial on all five charges. I can see none myself. And the practical consideration of time and resources, including inconvenience to two prosecution witnesses, who would otherwise be required to testify on three different occasions, militate in favour of trying all these closely related charges together. The application is dismissed.

Counsel:

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