Citation: *R. v. Acting Sub-Lieutenant P. Pelletier*, 2009 CM 4016

Docket: 200872

STANDING COURT MARTIAL
CANADIAN FORCES BASE HALIFAX
HALIFAX, NOVA SCOTIA

Date: 2 October 2009

PRESIDING: LIEUTENANT-COLONEL J-G PERRON, M.J.

HER MAJESTY THE QUEEN
v.
ACTING SUB-LIEUTENANT P. PELLETIER
(Applicant)

Warning

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION RESPECTING AN APPLICATION UNDER SECTIONS 7, 9, 10(A), 10(B), 24(1) AND 24(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS.*
(Rendered orally)

OFFICIAL ENGLISH TRANSLATION

[1] The accused, Acting Sub-Lieutenant Pelletier, has filed an application under paragraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) for a stay of proceedings under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* because of an abuse of process and the violation of his right to a full answer and defence under section 7 of the *Canadian Charter of Rights and Freedoms*. He is also seeking to have evidence excluded under subsection 24(2) of the Charter because of the violation of his rights under section 9 and paragraphs 10(*a*) and 10(*b*).

[2] Acting Sub-Lieutenant Pelletier is charged under sections 130, 97 and 129 of the *National Defence Act*. More specifically, he is accused of sexual assault, drunkenness and harassment. The particulars of these charges are as follows:

> [TRANSLATION]
>
> OFFENCE PUNISHABLE UNDER SECTION 130 OF THE *NATIONAL DEFENCE ACT*, NAMELY, SEXUAL ASSAULT CONTRARY TO SECTION 271 OF THE *CRIMINAL CODE*.
>
> In that, on or about April 27, 2007, at the Royal Military College, Kingston, Ontario, he committed a sexual assault against Officer Cadet D.M.

Second charge, section 97 of the *National Defence Act*:

> DRUNKENNESS
>
> In that, on or about April 27, 2007, at the Royal Military College, Kingston, Ontario, he was drunk.

Third charge, section 129 of the *National Defence Act*:

> CONDUCT TO THE PREJUDICE OF GOOD ORDER AND DISCIPLINE
>
> In that, between September 2006 and April 27, 2007, at the Royal Military College, Kingston, Ontario, he harassed Officer Cadet D.M.

[3] The evidence filed for this application consists of the judicial notice taken by the Court of the facts and issues under Rule 15 of the Military Rules of Evidence, the testimonies of Lieutenant(N) Prokes, Acting Sub-Lieutenant Pelletier and Sergeant Paré, and exhibits filed by the applicant and the respondent.

[4] The applicant does not submit that his right under paragraph 11(*b*) of the Charter has been violated, for he does not believe that an unreasonable amount of time has passed since he was initially charged. He states that the period runs from November 14, 2008, to September 28, 2009, the date this Standing Court Martial first convened. He even points to the exemplary collaboration of the prosecution. He also states that the accused has not been subject to any unusual psychological harm since November 14, 2008.

[5] The applicant requests that the Court order a stay of proceedings. The application is primarily grounded in allegations of abuse of process by the principal investigator in this file, whose conduct violated the rights protected by section 7 of the Charter. He also submits that he was illegally detained, as he was subject to an illegal arrest without a warrant. The applicant further alleges that his right to be informed promptly of the reasons for his arrest or detention and to retain and instruct counsel without delay and to be informed of that right under paragraphs 10(*a*) and 10(*b*) of the Charter were violated.

Counsel for the applicant also submitted to the Court that the most important part of the application was the violation of his right to be informed without unreasonable delay of the specific offence, which is found in paragraph 11(*a*) of the Charter.

[6] The respondent, on the other hand, submits that the period since the charge should be calculated from the date on which the Record of Disciplinary Proceedings (RDP) was signed by Sergeant Turcotte, namely, April 30, 2008, and not on November 14, 2008, when the charge sheet was signed. He also submits that section 11 of the Charter applies to all persons who have been charged; therefore, the rights set out in that section came into being on April 30, 2008.

[7] The respondent argues that according to *R. v. Collins* (1987) 1 S.C.R. 265, the onus is on the applicant to establish that his constitutional rights have been violated. He argues that the applicant was fully aware of the reasons for his arrest from the time he was interrogated, namely, the sexual assault against D.M. on April 27, 2007, at the RMC Kingston. He also argues that a detention found to be illegal is not necessarily arbitrary, and even if it is found to be arbitrary, the appropriate remedy would be the exclusion of the evidence thus gathered. He also states that the pre-charge delay must be determined according to the principles set out in *R. v. Kalanj* (1989) 1 S.C.R. 1594.

[8] The respondent submits that the period in question has no effect on the fairness of the trial, as all of the evidence has been disclosed to the accused, the accused has an excellent memory of the events related to the offences and the witnesses for the accused are available. He also argues that the applicant exercised his right to speak with counsel without any interference and that he was satisfied with the discussion he had and the advice he received. He also notes that the rights set out in paragraphs 10(*a*) and 10(*b*) of the Charter relate only to persons under arrest or detention; therefore, it is not open to the applicant to allege that his rights were violated at the time of the telephone call from Sergeant Turcotte to Acting Sub-Lieutenant Pelletier on November 16, 2007.

[9] The respondent submits that the new charges laid on November 14, 2008, do not represent an abuse of process, as this possibility is provided for in the *National Defence Act* and is an exercise by the prosecution of the discretionary power granted to it by the Act. Finally, he submits that the applicant has suffered no harm that would justify a stay of proceedings.

[10] The Court shall deal with the issues raised in this application in the following order: first, the issue of the arbitrary arrest, then the rights set out in paragraphs 10(*a*) and 10(*b*) of the Charter, the right set out in paragraph 11(*a*), and, finally, the allegation of abuse of process.

[11] Before resolving these issues, it would be helpful to note the relevant dates and events in this case:

April 27, 2007, date of the incident as alleged by the complainant;

Late April 2007, meeting between Acting Sub-Lieutenant Pelletier and Lieutenant(N) Prokes, during which the former was informed of the allegations made by D.M. and received advice from Lieutenant(N) Prokes;

June 4, 2007, telephone conversation between Sergeant Turcotte and Lieutenant(N) Prokes;

June 6, 2007, arrest, interrogation and release of Acting Sub-Lieutenant Pelletier;

May to August 2007, Officer Cadets Demers-Martel[1] and Béland are in training at CFB Gagetown;

Early November 2007, interviews with Officer Cadets Demers-Martel and Béland conducted by Sergeant Turcotte;

November 16, 2007, telephone conversation between Sergeant Turcotte and Acting Sub-Lieutenant Pelletier;

April 30, 2008, RDP signed by Sergeant Turcotte and provided to Acting Sub-Lieutenant Pelletier;

Early September 2008, Acting Sub-Lieutenant Pelletier informed of his right to legal counsel in accordance with QR&O article 109.04;

September 8, 2008, letter from Acting Sub-Lieutenant Pelletier's commanding officer to the referral authority;

October 8, 2008, letter from the referral authority to the Director of Military Prosecutions;

November 10, 2008, disclosure of prosecution's evidence to counsel for Acting Sub-Lieutenant Pelletier;

November 14, 2008, charge sheet signed;

September 28, 2009, start of proceedings of this Court Martial.

[12] Section 9 of the Charter reads as follows:

Everyone has the right not to be arbitrarily detained or imprisoned.

Paragraphs 10(*a*) and 10(*b*) read as follows:

10. Everyone has the right on arrest or detention

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[1]Officer Cadets D.M. and Demers-Martel are not the same individual.

(*a*) to be informed promptly of the reasons therefore;

(*b*) to retain and instruct counsel without delay and to be informed of that right;

[13] The applicant is seeking to have his video-recorded statement set aside. The Court has the discretion to determine the remedy that best responds to the violation of the accused's rights. See *R. v. Bjelland* 2009 SCC 38. The prosecutor has clearly stated that he will not be relying on any evidence arising from the interview with Acting Sub-Lieutenant Pelletier. Counsel for the applicant is aware of this intention. It appears that even if the applicant's rights under section 9 and paragraphs 10(*a*) and 10(*b*) have been violated, such violations shall not cause him any injury in the course of the trial. The applicant is seeking a remedy, the exclusion of evidence, that for the moment is purely hypothetical. It is well established in Canadian law that courts are not required to answer hypothetical questions. Given that counsel for the prosecution does not plan to file in evidence the statements made by the applicant during the interview on June 6, 2007, the Court does not consider it necessary to determine whether the rights set out in section 9 and paragraphs 10(*a*) and 10(*b*) have been violated. It remains open to the accused to object to any evidence filed during the trial if a rule of law indicates that such evidence is inadmissible or if he alleges upon the submission of such evidence a violation of his Charter rights.

[14] Paragraph 11(*a*) of the Charter reads as follows:

11. Any person charged with an offence has the right

(*a*) to be informed without unreasonable delay of the specific offence;

[15] The Record of Disciplinary Proceedings (RDP), which was completed on April 30, 2008, and provided to the accused, contained one charge, namely, sexual assault against D.M., which allegedly took place at the RMC in Kingston on April 27, 2007. The evidence clearly shows that the applicant was informed of the accusation of sexual assault on the same day it was made.

[16] Paragraph 165.12(1)(*a*) of the *National Defence Act* authorizes the Director of Military Prosecutions to prefer a charge against an accused by laying any charge that is founded on facts disclosed by evidence. The charge sheet of November 14, 2008, includes the sexual assault charge listed in the RDP of April 30, 2008, as well as a charge of drunkenness and a charge of harassment of D.M. The applicant was informed of the charges contained in the charge sheet within a few days of the creation of this document. The applicant is not alleging that the charges are vague or incomplete.

[17] The Court therefore finds that the applicant was informed without unreasonable delay of the specific offences, so there has been no violation of his right under paragraph 11(*a*) of the Charter.

[18] Section 7 of the Charter reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[19] The applicant challenges the good faith of Sergeant Turcotte, the principal investigator in this case. He argues that Sergeant Turcotte lacked objectivity and that he often said he was with the major crimes unit of the Canadian Forces National Investigation Service as a ploy to make the accused talk. He also referred to the RDPs in Exhibit R1-3 as examples of situations that could have led to charges of sexual assault but that were dealt with otherwise, either as assault charges or charges under section 129 of the *National Defence Act*. He also wonders whether it was really a coincidence that the RDP was signed three days after the one-year prescription period for holding a summary trial.

[20] Exhibit R1-6 indicates that the accused allegedly entered D.M.'s bedroom at about 3:00 am on April 27, 2008, and, without D.M.'s consent, touched her shoulder, arm, breasts and lower abdomen. This information appears to justify a charge of sexual assault. It is entirely possible that other somewhat similar situations could have been dealt with differently. Canadian law grants the police and the Crown discretionary powers for the laying of charges. The Court can discern no evidence of bad faith or abuse of authority by Sergeant Turcotte or by the Director of Military Prosecutions in the exercise of this discretion.

[21] The applicant's testimony has not convinced the Court that Sergeant Turcotte stepped outside the standards of interrogation accepted by Canadian law. His references to the major crimes unit do not represent an abusive or oppressive form of interrogation.

[22] The charge laid on April 30, 2008, alleged sexual assault contrary to section 271 of the *Criminal Code of Canada*. This offence cannot be tried summarily. Therefore, laying the charge more than one year after the date of the offence cannot be interpreted as an action whose purpose was to prevent the accused from being tried by his commanding officer.

[23] The applicant also submits that the fairness of the trial is vitiated by the fact that he received the disclosure too late to prepare his defence. He also says that it is practically impossible to bring full answer and defence because too much time has passed.

[24] The applicant testified that the electronic statements related to the door mechanisms were no longer available to him at the end of 2008, after his review of the evidence disclosed, and he believed that this was the most troubling element in the preparation of his defence. On cross-examination, he confirmed that the electronic data for the doors to his bedroom and that of the complainant were included in the disclosure. He did not indicate what data involving other doors he might need for his defence. He also agreed that nobody had alleged that anyone else was in the complainant's bedroom the night of April 27, 2007.

[25] The applicant confirmed that he had taken notes following his meeting with Lieutenant(N) Prokes in April 2007 to prepare his response to this allegation. He has a very good memory of the events that took place since his meeting with Lieutenant(N) Prokes in April 2007. He also confirmed that he had spoken with potential witnesses in 2008 and that the witnesses would testify on his behalf or were available to testify.

[26] The applicant is rather vague about what other types of evidence are no longer available to him because of the passage of time.

[27] Therefore, I find that the applicant's evidence does not demonstrate that the seven-month delay, from April 30, 2008, to November 2008, or even the longer delay since the beginning of the investigation, represents an abuse of process or prevents him from producing a full answer and defence. There has been no violation of the rights protected by section 7 of the *Charter*.

[28] The application for a stay of proceedings under subsection 24(1) of the *Canadian Charter of Rights and Freedoms* is therefore dismissed.

LIEUTENANT-COLONEL J-G PERRON, M.J.

Counsel:

Major B. McMahon, Regional Military Prosecutions, Western Region
Prosecutor

H. Bernatchez, Office of the Director of Defence Counsel Services
Counsel for Acting Sub-Lieutenant P. Pelletier