COURT MARTIAL

Citation: *R. v. MacMullin*, 2014 CM 3004

Date: 20140318
Docket: 201345

General Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Warrant Officer J. P. MacMullin, Applicant

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS ON APPLICATION MADE BY THE ACCUSED FOR AN ORDER DECLARING SUBPARAGRAPH 130(1)(A) OF THE *NATIONAL DEFENCE ACT* OF NO FORCE OR EFFECT PURSUANT TO SECTION 52 OF THE *CONSTITUTION ACT* 1982.

(Orally)

INTRODUCTION

[1] Master Warrant Officer MacMullin is charged with one offence punishable under section 130 of the *National Defence Act* for assault contrary to section 266 of the *Criminal Code* and one offence punishable under section 95 of the *National Defence Act* for ill-treating a person who by reason of appointment was subordinate to him.

[2] Essentially, it is alleged that Master Warrant Officer MacMullin assaulted and ill-treated a candidate while he was playing a role as a source in a role-play scenario in order to determine the suitability of that candidate as a source handler for source handling training and subsequent employment in that role.

[3] By way of an application made to this General Court Martial pursuant to subparagraph 112.05(5)(e) of the *Queen's Regulations and* Orders for the Canadian Forces, Master Warrant Officer MacMullin is seeking an order from the presiding military judge finding that subparagraph 130(1)(a) of the *National Defence Act* to be contrary to section 7 of the *Canadian Charter of Rights and Freedoms,* and if so, as a remedy, an order declaring this *National Defence Act* provision to be of no force or effect under subsection 52(1) of the *Constitution Act*, 1982.

[4] More specifically, the applicant is looking for a decision from this court that subparagraph 130(1)(a) of the *National Defence Act* infringes section 7 of the *Charter* because it engages his liberty interests in a manner that is not in accordance with the principles of fundamental justice.

[5] He argued before this court that this *National Defence Act* provision is broader than what is required to achieve the legitimate objective of the legislation. He is seeking an order declaring subparagraph 130(1)(a) of the *National Defence Act* to be of no force and effect to the extent of the inconsistency pursuant to paragraph 52(1) of the *Constitution Act*, 1982, because it is inconsistent with section 7 and cannot be saved by section 1 of the *Charter*. He is also requesting that this court dismisses the charge of assault laid against him, considering that no person can be convicted of an offence under an unconstitutional law.

[6] Considering that a factual foundation is required for the court in order to be in a position to proceed with the application, counsel suggested and the court accepted to proceed, first with the hearing of the evidence on the main trial, and once prosecution's case was close, to open a *voir dire* in order to proceed with the hearing of the application.

[7] The present decision constitutes the determination of the court about this *Charter* voir dire.

[8] The evidence to be considered for this *voir dire* is the one presented during the trial by the prosecution, which is some of the exhibits, the admission made by the applicant as to identity as the offender, the testimony of four witnesses and the judicial notice taken by the court of the facts in issue under Rule 15 of the Military Rules of Evidence.

[9] Without reviewing deeply the facts, evidence heard at trial revealed that on 1 November 2012, Master Warrant Officer MacMullin was part of the directing staff as an assessor in the context of a source handling assessment. It was decided that he could play a source in a role-play scenario that would serve to assess a candidate, Captain Rezaei-Zadeh as being suitable for source handling training and subsequent employment in that role.

[10] The five-minute video played of the Backed Into a Corner scenario involving those two individuals showed that physical force was used toward each other at different times during the three-minute interaction they had.

[11] It is obvious and not denied that at the time of this alleged incident, Master Warrant Officer MacMullin was subject to the Code of Service Discipline by performing his military duties on a defence establishment.

[12] Charges were laid against Master Warrant Officer MacMullin and they were preferred on 27 May 2013 by the Director of Military Prosecutions.

[13] The applicant submits to the court that subparagraph 130(1)(a) of the *National Defence Act* is overbroad and violates section 7 of the *Charter* by depriving him of his liberty in a manner that is not in accordance with the principles of fundamental justice. He also suggests that such violation cannot be justified under section 1 of the *Charter* and he submits that the court shall invalidate that section as an appropriate remedy pursuant to subsection 52(1) of the *Constitutional Act*, 1982. He also suggested that if the military nexus theory should be found as applicable in this case, it cannot cure the section's overbreadth violation and would constitute an unacceptable intrusion by this court into the legislative domain.

[14] The respondent is taking the position that considering the decision of the Court Martial Appeal Court in *R* v *Moriarity* and *R* v *Hannah*, 2014 CMAC 1, confirmed by *R v Vezina*, 2014 CMAC 3, the very same issue was considered and rejected by that court, considering that the scope of subparagraph 130(1)(a) of the *National Defence Act* is limited by the requirement of a military nexus. In addition, he takes the position that such military nexus does exist in the present matter, justifying this court then to dismiss the application.

[15] I would agree with the respondent that this application shall be dismissed for the reasons raised by the prosecution. After a careful review of the evidence, the oral submissions and the applicable case law, I certainly agree with the CMAC conclusion that subparagraph 130(1)(a) of the *National Defence Act* does not violate section 7 of the *Charter* and that a military nexus does exist, justifying this court to proceed with the second charge.

DISPOSITION

FOR THESE REASONS, THE COURT:

[16] **DISMISSES** the application.

Counsel:

Major A.-C. Samson and Major K. Lacharité, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Major E. Thomas, Directorate of Defence Counsel Services
Counsel for Commander D.J. Martin