Citation: *R. v. Corporal M.A. Wilcox,* 2009 CM 2013

Docket: 200849

GENERAL COURT MARTIAL
CANADA
NOVA SCOTIA
VICTORIA PARK, SYDNEY

Date: 29 September 2009

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

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

A *CHARTER* CHALLENGE TO S. 139 OF THE *NATIONAL DEFENCE ACT*, THE SCALE OF PUNISHMENTS.
(Rendered orally)

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[1] By a Notice of Application marked as Exhibit M22-1 the offender, Corporal Wilcox, whom I will refer to as the applicant, challenges the constitutional validity of s. 139 of the *National Defence Act*, the provision which sets out the scale of punishments that may be imposed in respect of service offences. A similar application was brought at the outset of the trial, and on 6 February 2009 I ruled that the application was premature, and reserved the right of the applicant to renew the application if he were found guilty on any of the three charges in the charge sheet. In the meantime, the panel of this General Court Martial has found the applicant guilty on charges two and three in the charge sheet, that is, a charge of criminal negligence causing death and a charge of negligent performance of a military duty. The panel entered a stay of proceedings in respect of an alternative charge of manslaughter. I heard evidence and argument on the renewed application on 9 and 10 September, and at the conclusion of argument I denied the application and advised that these reasons would follow in due course.

[2] The written submissions of both parties were filed as exhibits on the application. It was submitted on behalf of the applicant that the scale of punishments in s. 139 infringed the *Charter* guaranteed rights not to be deprived of liberty except in accor-

dance with the principles of fundamental justice,[1] to a fair hearing,[2] and not to be subjected to any cruel and unusual treatment or punishment.[3] Although several remedies are sought under both of ss 52 and 24 of the *Charter*, in the circumstances I do not find it necessary to discuss remedies.

Subsection 139(1) of the *National Defence Act* reads:

> The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:
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> (*a*) imprisonment for life;
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> (*b*) imprisonment for two years or more;
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> (*c*) dismissal with disgrace from Her Majesty's service;
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> (*d*) imprisonment for less than two years;
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> (*e*) dismissal from Her Majesty's service;
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> (*f*) detention;
>
> (*g*) reduction in rank;
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> (*h*) forfeiture of seniority;
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> (*i*) severe reprimand;
>
> (*j*) reprimand;
>
> (*k*) fine; and
>
> (*l*) minor punishments

[3] In the course of argument counsel for the applicant clarified that he is not attacking the constitutional validity of any or all of the specified punishments contained in subsection 139(1). Rather, he argues that the section fails to include the several other sentencing options that are found in the *Criminal Code*, such as conditional and intermittent sentences of imprisonment, suspended sentences and probation and absolute and conditional discharges, and that this distinction in the treatment of mainly military offenders from similarly situated civilian offenders dealt with under the *Criminal Code* infringes the enumerated *Charter*-guaranteed rights.

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[1] See *Charter* s. 7

[2] See *Charter* s. 11(*d*)

[3] See Charter s. 12

[4] I do not accept these submissions for the reasons that follow.

In the first place, I accept the submission of the respondent, the prosecution, that at this stage of proceedings following a finding of guilty at a fair trial, s. 11(*d*) of the *Charter* simply does not apply. The structure of the enumerated rights in s. 11 distinguishes those who are charged with or in the course of being tried for an offence from those who have been found guilty of an offence. The *Charter*-guaranteed right to a fair hearing does not apply at the post-conviction stage.[4]

[5] *Charter* s. 7 provides:

> 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.

It does not appear to be disputed by the respondent prosecution that the liberty interest of the applicant, which is protected by s. 7, is engaged where, as in this case, the applicant is liable to imprisonment. The issue therefore is whether a principle of fundamental justice is breached by the omission from s. 139 of the sentencing options found in the *Criminal Code*.

[6] In *R. v. Malmo-Levine*; *R. v. Caine* and *Canadian Foundation for Children, Youth and the Law v. AG Canada*,[5] the Supreme Court of Canada set out the three criteria for a principle of fundamental justice within the meaning of s. 7:

1. it must be a legal principle;

2. there must be a societal consensus that the rule or principle is fundamental to the way in which the legal system ought fairly to operate; and

3. it must be identified with sufficient precision to yield a manageable standard against which to measure deprivations of life, liberty or security of the person.

The challenge, of course, is to identify the principle of fundamental justice that is in issue.[6]

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[4]See *R. v. Lyons*, [1987] 2 S.C.R. 309, per La Forest J., especially at paragraph 74.

[5]*R. v. Malmo-Levine*; *R. v. Caine*, [2003] 3 S.C.R. 571, and *Canadian Foundation for Children, Youth and the Law v. AG Canada*, [2004] 1 S.C.R. 76

[6] See *R. v. D.B.* [2008] 2 S.C.R. 3

[7] In his written submissions the applicant refers to the following principles which he submits are principles of fundamental justice. Firstly, a sentence must be just and appropriate; that is, it must be a fit sentence; and, secondly, deprivation of liberty in a custodial facility is a last resort.

[8] I am satisfied that the principles identified by the applicant are legal principles, indeed they are important principles to be applied by a sentencing court. But I am not persuaded on the evidence and argument I have heard that these important principles are so vital or fundamental to our societal notion of justice that either should be held to be a fundamental principle of justice. It is difficult to see, for example, how a statutory regime of minimum sentences of imprisonment, which must be imposed by a sentencing court without regard for the personal circumstances of the offender or the unusual circumstances of an offence, can co-exist comfortably with the suggested principles of fundamental justice for which the applicant contends.[7] But it is not in doubt that Parliament can legislate minimum sentences of imprisonment[8] as long as in so doing Parliament does not thereby mandate a sentence that is cruel and unusual within the meaning of s. 12 of the *Charter*.[9] In my view, the two principles suggested by the applicant in his written submissions do not amount to fundamental principles of justice.

[9] In the course of argument counsel for the applicant suggested a third principle; that is, that the differences in sentencing treatment between military and civilian offenders must, as a principle of fundamental justice, be justified on the ground of military necessity. The decision of the Court Martial Appeal Court in *R. v. Trépanier* and *Beek*,[10] was relied upon in support of this proposition where that Court quoted with approval a passage from the judgment of McIntyre J. in the case of *R. v. MacKay*,[11] as follows:

> It must not however be forgotten that, since the principle of equality before the law is to be maintained, departures should be countenanced only where necessary for the attainment of desirable social objectives, and then only to the extent necessary in the circumstances to make possible the attainment of such objectives. The needs of the military must be met but the departure from the concept of equality before the law must not be greater than is necessary for those needs. The principle which should be maintained is that the rights of the serviceman at civil law should be affected as little as possible considering the requirements of military discipline and the efficiency of the service....

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[7] See *R. v. Latimer,* [2001] 1 S.C.R. 3

[8] See *R. v. Morrisey*, [2000] 2 S.C.R. 90, *R. v. Ferguson*, [2008] 1 S.C.R. 96,

[9] See *R. v. Smith,* [1987] 1 S.C.R. 1045

[10] 2008 CMAC 3

[11] [1980] 2 S.C.R. 370 at page 408

[10] *MacKay*[12] was a case arising under the Canadian Bill of Rights, and the issue before the Supreme Court of Canada was whether the prosecution of the accused under what is now s. 130 of the *National Defence Act* for drug trafficking offences contrary to the *Narcotic Control Act* violated the Bill of Rights, especially the guarantee of equality before the law. The judgment of the majority of the court was delivered by Ritchie J., who stated:

> The effect of s. [130] of the *National Defence Act* is to import the provisions of that *Act* concerning trial, punishment and discipline so as to make them apply to the trial of offences under the *Criminal Code* when tried by court martial and *the implementation of that legislation of necessity occasions differences in the treatment of service personnel and civilians in regard to procedure, the rules of evidence and other matters*… [emphasis added]

[11] In my view, the CMAC in *Trépanier* and *Beek*[13] was not intending to lay down as a legal principle that any distinctions in the law or procedure between a prosecution under the *Criminal Code* and one under the *National Defence Act* are presumed to violate the principle of equality before the law. There is no such legal principle, and therefore a requirement to justify the differences in sentencing treatment under the two statutes cannot amount to a principle of fundamental justice.

[12] Therefore, the applicant has failed to identify a principle of fundamental justice that is breached in the present application, and the argument under s. 7 of the *Charter* fails.

[13] In *R. v. D.B.*,[14] Rothstein J. stated:

> ... In general Parliament's authority in determining appropriate sentences is subject only to constitutional review under s. 12 of the *Charter* ...

I turn therefore to the question of whether the applicant has established an infringement of the right not to be subjected to cruel and unusual treatment or punishment in violation of s. 12. The test here is one of "gross disproportionality."[15] But here the test is not being applied to a particular punishment or set of punishments that the court may consider or impose. The issue for me, as framed by the applicant, is whether the failure

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[12] *Ibid*. See page 392.

[13] Supra note 10.

[14] Supra note 6 at paragraph 148.

[15] Supra note 9.

to include the sentencing alternatives available under the *Criminal Code* may result in a punishment that is "so excessive as to outrage standards of decency".

[14] I conclude that it does not. The list of available punishments in subsection 139(1) extends from the most severe punishments that can be imposed under the *Criminal Code* down to the very modest punishments referred to as minor punishments. They include distinctively military punishments that may be appropriate for military offenders though they have no proper place in a regime for punishing civilians. There is ample scope here for the imposition of punishment that is not so excessive as to outrage standards of decency. The failure of Parliament to provide in s. 139(1) for still other forms of punishment that would also not be so excessive as to outrage standards of decency does not render the existing scale of possible punishments grossly disproportionate.

[15] For these reasons the application was dismissed.

Commander P.J. Lamont, M.J.

Counsel:

Major J.J. Samson, Regional Military Prosecutions (Atlantic)
Counsel for Her Majesty The Queen

Lieutenant-Colonel D.T. Sweet, Directorate of Defence Counsel Services
Counsel for Corporal M.A. Wilcox

Major S. Turner, Directorate of Defence Counsel Services
Co-Counsel for Corporal M.A. Wilcox