

Citation: *ex-Corporal M.A. Wilcox v. R.*, 2009 CM 2015

Docket: 200849

APPLICATION FOR RELEASE PENDING APPEAL
CANADA
NOVA SCOTIA
SYDNEY GARRISON, SYDNEY

Date: 30 September 2009

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

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

DIRECTION BY MILITARY JUDGE
(Rendered orally)

[1] Earlier today the offender was sentenced to four years' imprisonment and dismissal from Her Majesty's service. The offender has brought an application under s. 248.1 of the *National Defence Act* seeking his release from custody until the determination of an appeal he intends to bring to the Court Martial Appeal Court against both the findings of guilty and the sentence.

[2] As counsel for the applicant pointed out in argument, this post-conviction procedure under which the trial court can release an offender from custody pending an appeal is peculiar to the system of military justice contained in the *National Defence Act* and has no parallel in the civilian criminal justice system. The offender can apply to the appeal court for the same relief in the same way as an appellant under the *Criminal Code*, but only if he has not already applied to the trial court.

[3] S. 248.3 of the *National Defence Act* reads, in part:

On hearing an application to be released from detention or imprisonment, the court martial ... may direct that the person making the application be released as provided for in s. 248.1 ... if the person establishes

(a) in the case of an application under s. 248.1,

- (i) that the person intends to appeal,
- (ii) [does not apply]
- (iii) that the person will surrender himself into custody when directed to do so, and
- (iv) that the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces ...

I am satisfied on the basis of the evidence I have heard in this application that the offender intends to appeal, and I am also satisfied that he will surrender himself as required. It is the fourth condition on which the application turns in this case.

[4] In the case of *ex-corporal D.D. Beek*, decided 26 July 2007, I stated:

... The more difficult condition, as touched upon by the prosecutor in her address, is whether or not the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces. As I indicated in the course of my colloquy with counsel, there are competing public interests at this stage of the proceedings. On one hand, the *National Defence Act* specifically provides that the sentences of this court have effect as of the day they are pronounced. There is a large public interest in having persons accused and convicted of serious criminal offences serving the sentences that are lawfully imposed by this court.

On the other hand, there is a large public interest in the efficacy [*sic*][that should read "efficacy"] of an appeal process, which among other things, ensures that convictions that are entered by trial courts are made upon proper and lawful grounds. There is, therefore, a large public interest in having the proceedings of a trial court such as this reviewed on appeal....

[5] In this application the burden is upon the applicant to satisfy the court that imprisonment pending the determination of the proposed appeal is not necessary in the interest of the public or the Canadian Forces.

[6] I begin with the observation that the offences for which the offender was found guilty and sentenced are very serious. As a general rule, the more serious the offences then the greater the public interest, and the interest of the Canadian Forces, in seeing that a proper sentence of imprisonment is served immediately upon being imposed. This is especially the case where both parties agreed that a fit disposition on sentence involved some form of incarceration of more than a minimal period.

[7] In my view, the nature of the offences here, involving as they do the criminal carelessness in the use of an infantry weapon resulting in the death of a soldier, heightens the disciplinary interest of the Canadian Forces in the immediate service of the sentence.

[8] In this case I do not consider that the denial of release pending the proposed appeal will undermine or render moot the appeal process.

[9] Counsel for the applicant in submissions referred to the delay in the disposition of the proposed appeal that may be caused by the necessary preparation of transcripts of what has been a lengthy trial. I understand the point to be that if the offender remains in custody undergoing the service of his sentence, then the longer it takes until his appeal is disposed of and he is successful on the appeal, the more harm is occasioned to the public interest in persons not being incarcerated except following a fair and proper trial.

[10] The difficulty with this point is that there is simply no evidence before me as to the length of time it may take to perfect and argue the proposed appeal nor have I been told of any of the grounds upon which an appeal might be taken. As a result, I find I cannot conclude that it is not necessary in the public interest that the offender be imprisoned pending his proposed appeal.

[11] If this were an application to a judge of the Court Martial Appeal Court under s. 248.2, the appeal notice would be filed and the judge would be able to make a determination as to whether or not the appeal was frivolous, as required by s. 248.3(b)(i), and whether the specified grounds of appeal contained in the notice require the preparation of a transcript of the entire proceedings at trial or only some parts of the proceedings or perhaps even no transcripts at all. That judge on that application could also make any necessary order expediting the appeal, an order which this court has no jurisdiction to make.

[12] The applicant has not discharged the burden of establishing that his imprisonment pending the proposed appeal is not necessary in the interest of the public or the Canadian Forces. Accordingly, the application is denied.

COMMANDER P.J. LAMONT, M.J.

COUNSEL:

Major J.J. Samson, Regional Military Prosecutions (Atlantic)
Representative of the Canadian Forces

Major S.J. Turner, Directorate of Defence Counsel Services
Representative for ex-Corporal M.A. Wilcox, Person in Custody