Citation: *R. v. ex-Master Seaman S.M. Robert,* 2007 CM 4013

Docket: 200687

STANDING COURT MARTIAL
CANADA
ESQUIMALT, BRITISH COLUMBIA
HER MAJESTY'S CANADIAN SHIP SASKATOON

Date:11 April 2007

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

HER MAJESTY THE QUEEN
(Respondent)
v.
EX-MASTER SEAMAN S.M. ROBERT
(Accused-Applicant)

DECISION - APPLICATION UNDER S. 24(1) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR UNREASONABLE DELAY PURSUANT TO 11*(b)* OF THE *CHARTER*
(Rendered orally)

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[1] The accused, H62 916 512 ex-Master Seaman Robert, is charged with having committed two offences. More specifically, she is accused of having trafficked in cocaine and having used cocaine contrary to article 20.04 of the *Queen's Regulations and Orders for the Canadian Forces*. The accused has made an application under sub-paragraph 112.05(5)(*e*) of the *Queen's Regulations and Orders*. The applicant alleges that an unreasonable delay has occurred in this matter and that she has suffered prejudice because of this unreasonable delay. More specifically, the applicant alleges that the loss of her naval career, her inability to find meaningful employment in her field and the stress and anxiety suffered by the applicant is a result of this delay. Thus, her rights under sub-section 11(*b*) of the *Charter of Rights and Freedoms* have been breached. The applicant requests that the court orders a stay of proceedings pursuant to sub-section 24(1) of the *Charter of Rights and Freedoms* as the appropriate remedy for this breach of her 11(*b*) rights.

[2] The evidence presented by the applicant consisted of an agreed statement of facts as well as the testimony of the applicant. The respondent submits the applicant has not met the onus of demonstrating that the delay in bringing this matter to trial was

unreasonable in all the circumstances of this case. The respondent also submits that the applicant has not shown that she has experienced any significant degree of prejudice as a result of the delay in bringing this matter to trial. The respondent asserts that the applicant has not been deprived of her right to liberty, of security of the person, nor of her right to a fair trial, to an extent that would require a stay of proceedings. Thus, the respondent submits that this application requesting a stay of proceedings pursuant to section 24 of the *Charter of Rights and Freedoms* be dismissed. The evidence presented by the respondent in support of this position consisted of the agreed statement of facts.

[3] The relevant provisions of the *Charter of Rights and Freedoms* that apply to this matter are sub-sections 11(*b*) and 24 (1). 11 *(b*) reads as follows:

> 11. Any person charged with an offence has the right
>
> (...)
>
> b) to be tried within a reasonable time;

Paragraph 24(1) reads as follows:

> 24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 162 of the *National Defence Act* provides that:

> **162**. Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

[4] The leading case in dealing with this type of *Charter* motion is the 1992 Supreme Court of Canada decision, *R. v. Morin* [1992] 1 S.C.R. 771. This decision provides lower courts with direction as to the purpose of section 11(*b*). At paragraphs 26 to 30, Sopinka J., writing for the majority, stated that:

> The primary purpose of s. 11(*b*) is the protection of the individual rights of accused.
>
> (...)
>
> The individual rights which the section seeks to protect are: (1) the right to security of the person, (2) the right to liberty, and (3) the right to a fair trial.

He then explains that:

> The right to security of the person is protected ... by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

Justice Sopinka at paragraph 29 also states that:

> Society as a whole has an interest in seeing that the least fortunate of its citizens who are accused of crimes are treated humanely and fairly. In this respect trials held promptly enjoy the confidence of the public.

Finally, at paragraph 30, citing *Conway*, he restates the Supreme Court of Canada's recognition that the interest of the accused must be balanced by the interest of society and law enforcement. He then quoted Cory J. in the *Askov* decision who referred to:

> ... [A] collective interest in ensuring that those who transgress the law are brought to trial and dealt with according to the law.

As the seriousness of the offence increases, so does the societal demand that the accused be brought to trial.

[5] Justice Sopinka provides us with a general approach to a determination as to whether a right has been denied. At paragraph 31, he states that this general approach is a:

> ... judicial determination balancing the interests which the section is designed to protect against factors which either inevitably lead to delay or are otherwise the cause of delay.

He then indicates which factors are to be considered in analyzing how long is too long. These factors are:

a. The length of delay;

b. The waiver of time periods;

c. The reasons for delay of which there is:

(i) the inherent time requirement of the case,

(ii) actions of the accused,

(iii) actions of the Crown,

(iv) limits on institutional resources, and

(v) other reasons for delay;

d. finally, the prejudice to the accused.

[6] The applicant and the respondent do not agree that this period of approximately 12 months, from the time the charges were laid on 24 April 2006 to the date of trial on 10 April 2007, is sufficient to raise the issue of the reasonableness of this delay. The applicant submits the delay is prima facie unreasonable and, through her counsel, provided the court with an analysis of the delay using the factors enunciated in the *Morin* decision. Conversely, the respondent asserts there has not been an unreasonable delay in bringing this matter before a court martial. I wish to note that the respondent did not perform a detailed analysis of the delay using the *Morin* factors to support this assertion. The court would have found this analysis helpful in such proceedings. The applicant did concede at paragraph 35 of her written submissions that this matter deals with serious offences.

[7] Before I proceed with my analysis by following the factors provided in *Morin*, I will indicate the key dates and corresponding actions that I consider crucial in the determination of this motion.

a. A complex CFNIS investigation on drug use amongst the crew of HMCS SASKATOON began after a confidential informer reported on 24 August 2005, on the drug use and the trafficking in drugs by the coxswain of HMCS SASKATOON and this investigation ended on 21 April 2007. Nine persons were investigated and seven of these persons were charged by the NIS;

b. on 20 January 2006, the offence before this court martial allegedly took place;

c. on 23 January 2006, ex-Master Seaman Robert was arrested and interviewed by the CFNIS;

d. in February and March 2006, ex-Master Seaman Robert attended, as an in-patient, the Edgewood drug and alcohol treatment center in Nanaimo;

c. although her class C contract was set to expire in April 2006, this contract was extended to May 2006 so that her moving expenses would be paid by the Crown;

d. on 24 April 2006, charges were laid against ex-Master Seaman Robert;

e. in early June 2006, ex-Master Seaman Robert moved to Quebec. She returned to Esquimalt two weeks later to live with her boyfriend who was in the process of being released from the CF;

f. on 7 June 2006, DDCS received the request for a counsel, from this I assume is the 109.04 application;

g. Lieutenant-Commander McMunagle was assigned to this file on 12 June, and he sent a disclosure request to DMP on 14 June 2006;

h. on 8 June, DMP received the referral package;

i. on 14 June, Major Caron was assigned to the file and on 19 June, this case was re-assigned to Captain Bussey;

j. on 2nd and 9th of August, a disclosure package was sent to Lieutenant-Commander McMunagle;

k. on 24 August 2006, Captain Bussey signed the charge sheet;

l. on 6 September 2006, DDMP indicated the prosecution needed one day to present its case and requested the charge sheet be served onto ex-Master Seaman Robert. The letter of preferral was received by the CMA;

m. on 21 September 2006, Lieutenant-Commander McMunagle provided Captain Bussey with possible dates for a court martial in the fall and winter 2006 and in the spring 2007. Captain Bussey was unavailable on these dates and she informed Lieutenant-Commander McMunagle that the case would be reassigned to another prosecutor, since she was about to go on maternity leave;

n. on 30 October 2006, Lieutenant-Commander Gaul was assigned as prosecutor;

o. on 8 December 2006, ex-Master Seaman Robert was released from the CF under item 5(f) for her involvement with drugs;

p. in January 2007, ex-Master Seaman Robert's relationship with her

boyfriend ended and she returned to Quebec;

q. on 8 January 2007, Lieutenant-Commander Gaul contacted Lieutenant-Commander McMunagle. There were numerous discussions between Lieutenant-Commander Gaul and Lieutenant-Commander McMunagle during the period of 8 January to end February 2007 to resolve this matter, and with the assistant court martial administrator, to find a trial date for this case;

r. finally, on 7 March 2007, the week of 10 April 2007 was set as the trial date during a teleconference call between the prosecutor, defence counsel and the assistant court martial administrator.

[8] Firstly, the period of time, from the day the charge was laid to the date of trial, must be determined and must be shortened by subtracting periods of delay that have been waived. In the matter at hand, charges were laid on 24 April 2006, and the standing court martial has been convened for 10 April 2007. I agree with the applicant's counsel that there has been no explicit or implicit waiver by the applicant of her section 11 (*b*) rights, therefore, the period of delay is approximately 11 months and 2 weeks.

[9] Based on the evidence presented to me on the time line of this case, and of the alleged prejudice suffered by the applicant, I conclude that a period of delay of approximately 12 months requires an analysis of the factors set out in the *Morin* decision. I must now determine whether this period is unreasonable having regards to the interests section 11(*b*) seeks to protect, the explanation for the delay and the prejudice to the applicant.

[10] I must address the reasons for the delay by firstly examining the inherent time requirements for this case. The applicant suggests at paragraph 40 of her written submissions that the inherent time requirements or intake requirements for this case is approximately four months. The respondent did not provide the court with any suggestion on this topic. The applicant contends this is not a complex case, since the prosecution indicated that it could present its case in one day. Although there is disagreement between the applicant and the respondent on the issue of the number of prosecution witnesses in this case, there was no evidence presented to this court on this specific issue. While the applicant asserts that the prosecution would have called only one witness; the CFNIS undercover operator, the respondent, while addressing the issue of a fair trial, indicated that the only evidence that would have been presented would have been the undercover operator and the analysis of the seized substance to prove it was cocaine.

[11] The CFNIS investigation ended three days before charges were laid

against the applicant on 24 April 2006. Although this CFNIS drug investigation appears to be quite complex because of its use of surveillance, undercover operators and the need to bring in a fair number of military police officers from numerous locations in Canada, the case against the applicant seems to be a fairly straightforward matter. This case, at first glance, does not appear complex, the prosecution having indicated it only needed one day to make its case.

[12] Although the respondent did comment on the referral process at paragraph 7 of her written submissions and the applicant commented on this process at paragraph 40 of her written submissions, I wish to point out that the court was not provided with the evidence to support this portion of their written submissions. Therefore, based on the case law from the Court Martial Appeal Court, other decisions from standing courts martial and a review of the applicable regulations governing the military justice process, I conclude that the normal inherent time requirement for such a case should be approximately four months. When describing the inherent time requirements of a case, which inevitably lead to delay, Justice Sopinka at paragraph 41 of *Morin* also states that:

> Account must also be taken of the fact that counsel for the prosecution and the defence cannot be expected to devote their time exclusively to one case.

[13] In the matter at hand, it appears that some consideration must be given to this factor and that certain time periods must be added to the normal inherent time period for this specific case. I would add approximately four months to the normal inherent time requirements for this specific case, based on the evidence presented to me during this motion. I come to this conclusion for the following reasons:

a. I will allow for two weeks during the period of 21 September to 30 October 2006, when defence counsel was in communication with Captain Bussey and offered certain trial dates for the fall/winter 2006 and spring 2007 time frame;

b. I would allow for three weeks during the period of 30 October 2006 to 8 January 2007, when Lieutenant-Commander Gaul would have been familiarizing himself with the file he had just been assigned;

c. I would allow for 8 weeks during the period of 8 January to 7 March 2007, when Lieutenant-Commander Gaul was in communication with Lieutenant-Commander McMunagle to determine the trial date; and

d. finally, I will allow for four weeks, during the period of 7 March

to 10 April 2007.

Therefore, based on the evidence provided to me, I conclude that the inherent time requirements for this specific case should be approximately eight months.

Actions of the Accused

[14] I agree with the applicant that there are no actions by the accused that would have contributed to this delay.

Actions by the Crown

[15] The reassignment of prosecutors did contribute to the delay in this matter. Sometime after 21 September 2006, Captain Bussey informed Lieutenant-Commander McMunagle that she would be on maternity leave in the near future and that a new prosecutor would be assigned to this case. This case was assigned to Lieutenant-Commander Gaul on 30 October 2006. The competent authorities within DMP must have been aware of Captain Bussey's pregnancy and of her impending maternity leave, yet, this file was reassigned approximately five weeks after she would have informed Lieutenant-Commander McMunagle of this eventuality. I would allow three weeks of this period of time to actions by the Crown since I consider that this late reassignment was not conducive to ensure an expeditious processing of this case. I will allow for six weeks during the period of 30 October 2006 to 8 January 2007, since there is no evidence to demonstrate that the prosecutor assigned to this case tried to contact defence counsel to set down a trial date or to resolve this matter.

Limits on Institutional Resources

[16] The court was not provided with any evidence that would suggest that any part of this delay was caused by limits on institutional resources.

Other Reasons for the Delay

[17] The court was not provided with any evidence to explain the absence of action in this file during the period of 24 August to 21 September 2006; therefore, this period of four weeks will be assigned to this heading and will weigh against the Crown.

[18] In summary, I find that the inherent time requirements for this specific case is approximately eight months and that the unreasonable delay in this case is approximately three and one half months. The reasonable time period for this specific case would thus be from 24 April to 24 December 2006.

[19] The period of three and a half months does not lead to a presumption of prejudice to the accused. Since the applicant has testified to having suffered prejudice, the court will now turn its attention to this portion of the analysis to determine if the applicant has suffered any prejudice because of this delay.

[20] The applicant at paragraph 61 of her written submissions alleges that she has suffered greater stress and anxiety because she had to work on HMCS SASKATOON for almost two months after she was charged and that she was prohibited from returning to her reserve unit after her release from the CF in December 2006 pending the outcome of the court martial. The court was not presented with any evidence to support this allegation. To the contrary, the evidence indicates that her contract, which was due to expire in April 2006, was extended to May 2006 to ensure that her move to Quebec would be paid for by the Crown.

[21] The breakdown of her relationship with her boyfriend cannot be linked to the delay since it occurred during the inherent time requirement of this case. Her financial problems appear to be caused by a combination of the termination of her class C contract and her subsequent administrative release from the CF on 8 December 2006 because of her involvement with illicit drugs, contrary to the CF policy on drugs. She was fully aware of this policy and she knew of the dire consequences on her career should she decide to use illicit drugs.

[22] While it is unfortunate that ex-Master Seaman Robert has been in need of the services of a psychologist since her return to Quebec, I do not find that the period of three and a half months, deemed unreasonable in this case, is the main cause of her mental health problems. The possibility of incarceration, should she be found guilty of these charges, her breakup with her boyfriend because of her inability to make long term commitments, her mother's reaction to these charges, her inability to live with her mother and her inability to support herself, are all consequences of her addiction to cocaine and the charges before this court. They do not find their root in the three-and-a-half-month delay, nor does this delay amplify these problems to a point where this court would consider it a breach of the applicants Section 11(*b)* rights and where the drastic measure of a stay of proceedings would be the appropriate remedy.

Decision

[23] For these reasons, the court denies the application for a stay of proceedings.

[24] Before we proceed further, I wish to make a few comments. Firstly, I wish to clarify an issue that I raised following Lieutenant-Commander McMunagle's address. I indicated that I could not find any evidence pertaining to Captain Bussey's maternity leave. As you correctly indicated, Lieutenant-Commander McMunagle, it was

set out in paragraph 27 of the Agreed Statement of Facts, but I had missed it at that time. Also, defence counsel in his address referred to courts when deciding an 11(*b*) motion "not wanting to let them off" because "we all know they are guilty." I can assure both counsel that I am true to my oath and I firmly believe in applying the law to the facts of a case in an impartial manner.

[25] These proceedings under sub-paragraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* are terminated.

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

Counsel:

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