COURT MARTIAL

Citation: *R v Larouche*, 2012 CM 3024

Date: 20121219
Docket: 201164

Standing Court Martial

Saint-Jean Garrison
Saint-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private R. Larouche, Applicant

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

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that could disclose the identity of the persons described in this judgement as the complainants or witnesses shall not be published in any document or broadcast or transmitted in any way.

Corrected decision:	The text of the original decision was corrected on February 2, 2016.
Corrections made:	In par. 7 and 14, the name cited case is "*Delisle*".

OFFICIAL ENGLISH TRANSLATION

REASONS FOR DECISION

Orally

[1] Private Larouche, the offender in this matter, filed an application for release pending determination of appeal, and a hearing took place this afternoon. His application was made under section 248.1 of the *National Defence Act*.

[2] The evidence presented to the Court consists of the following: the first item is the prosecution's admission that the applicant intends to appeal, specifically, the verdict. Then, of course, there is the application for release pending determination of appeal, the relevant items from the accused's service record, the MPRR, the decision to relieve him from military duty dated 15 December 2010, the child pornography admissions that were made at the verdict hearing and the admissions that were made at the sentencing hearing. Those are the documents. Clearly, as I told Lieutenant-Commander Desbiens who is representing the applicant, I will draw my inferences from the circumstances of the case, also from the facts that were established during the trial to determine the verdict, and from the sentencing hearing.

[3] Section 248.3 of the *National Defence Act* provides criteria for determining whether the Court should order the release of an applicant, as follows: (1) that the person intends to appeal; (2) if the appeal is against sentence only, which does not apply here; (3) that the person will surrender him- or herself into custody when directed to do so; and (4) that the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces. The burden of proof rests on the applicant, the offender in this case, Private Larouche, and he must meet these criteria on a balance of probabilities.

[4] I would like to say from the outset that the seriousness of the offences does not bar this application from succeeding. However, the seriousness is something that must be considered in light of the other criteria analyzed by the Court, and, while it should not guide the decision, it cannot be disregarded. At this stage, I should also mention that the applicant no longer benefits from the presumption of innocence.

[5] The Quebec Court of Appeal's 6 July 2012 decision in *Delisle c La Reine*, 2012 QCCA 1250, is useful in this regard. Basically, in that case, the Court analyzed an application for release pending determination of appeal under section 679 of the *Criminal Code*; there are some similarities. I believe that paragraph 16 of this decision provides an appropriate context for the present application, and I will quote it here:

> [TRANSLATION]
> In that respect, it is relevant to emphasize that the public can lose confidence in the administration of justice not only as the result of an accused's untimely release but also because of an unjustified refusal to release an accused pending the determination of his or her appeal. In fact, the right to appeal trial decisions is integrated into our legal culture and our basic rules of law. The right to appeal allows individuals to have confidence in the penal and criminal justice systems as long as they are firmly convinced that while an error in fact or in law is reversed, on appeal and pending a decision, the accused can benefit from a release in the meantime should the circumstances allow it.

[6] Essentially therefore, what I wish to illustrate here is that the decision to keep someone in detention and ensure that that person serves his or sentence must also be assessed in relation to the right to appeal potentially unjustified decisions, and both factors must be weighed properly. Both factors must be given equal weight. It is a balancing process, a matter of balancing interests.

[7] The only distinction I must make with decisions that come from a civilian court or a provincial court of appeal is that, in the present case, the ground of appeal was not taken into consideration by this Court, contrary to those decisions. And when one reads the *Delisle* decision, one sees that the ground of appeal was one of the factors analyzed, but it will not be in the case at bar.

[8] Regarding the first criterion, the person's intention to appeal, clearly the prosecution's admission that the applicant intends to appeal the verdict, more specifically, as I explained at the hearing on this application, my decision on the Charter issue, which is part of the verdict, is, in my opinion, sufficient evidence, and establishes on a balance of probabilities that the applicant intends to appeal the verdict. It is therefore highly likely that he will appeal. He does not have to prove that he will appeal as he does have 30 days to do so, but it is highly likely that he will appeal this decision. In my view, the first criterion has been met, and the prosecution shares this opinion, in light of its admission.

[9] Second, that the person will surrender him- or herself into custody when directed to do so. The evidence submitted during this trial shows that Private Larouche was arrested and was released in January 2010 subject to certain conditions. In the last couple of years, he has respected these conditions, which were listed in the release order. I am aware that he made attempts that, on two occasions — maybe, I don't know, because I don't have the whole file — may have been attempts or breaches of condition. I understand that there was one event that has been admitted, namely, that he tried to contact, contrary to his conditions of release, certain individuals, but, to my knowledge, it has not been established that there were any consequences to these attempts.

[10] It must also be noted the Private Larouche was free during the entire proceedings, be it during the investigation, once the charges were brought, or during the hearings before the Court Martial. If we look back at the circumstances of this affair, and go back to 12 March 2012, when the proceeding was to begin. It started with an application for an adjournment, and, since then, there has been one adjournment after the other, all justified, but it has meant that we saw each other in May, in August, in October and now again in December. We are now at the end of the proceeding. During this entire time, Private Larouche has appeared before the Court when required to do so. There is also evidence that he has a fixed address, that is, a fixed location where he can be found and reached. He did not have a criminal record prior to this affair. In my opinion, therefore, in the circumstances, Private Larouche has established on a balance of probabilities that he will surrender himself into the custody of the authorities when so required, and I am satisfied that he will have no trouble doing so.

[11] Now, as for the third criterion, which is not necessarily the easiest one, namely, that Private Larouche's imprisonment is not necessary in the interest of the public or the Canadian Forces. Regarding the interest of the Canadian Forces, I would like to draw your attention to the decision in *Wilcox v R*, 2009 CMAC 7, in which the Court Martial Appeal Court had the opportunity to discuss this criterion quite thoroughly. At paragraph 10 of this decision, the Court writes:

> In addition, we are of the view that the element of the interest of the Canadian Forces is mitigated by the fact that the appellant has been dismissed from the Forces. This is particularly so in the context of an application for judicial release pending appeal.

[12] The Court Martial Appeal Court basically confirms my opinion on this issue. The interest of the Canadian Forces as to whether or not imprisonment is necessary in the interest of the public is not as compelling as he is no longer a member of the Canadian Forces; he is therefore no longer moving in the world of the Canadian Forces, and in that respect, the interest of the Canadian Forces would favour his release.

[13] Yet, regarding public interest, coming back to the criterion, imprisonment is not necessary in the interest of the public generally speaking. Let us not forget that Private Larouche is nonetheless a member of the public and that the Canadian Forces move in Canadian society. I therefore have to consider this more broadly.

[14] What are the criteria establishing public interest? The case law of our country's appeal courts indicates that there are two criteria, namely, the safety and security of the public and public confidence in the justice system. This position is reiterated in *Delisle* at paragraph 29, and, in my view, this is the manner in law in which to deal with this issue.

[15] Regarding the second criterion, public confidence in the justice system, all of the decisions of the Quebec Court of Appeal discuss it, but I am specifically referring to *Guité c R*, 2006 QCCA 905, and *JV c R*, 2008 QCCA 2157, at paragraph 7, from which I will cite an excerpt. I will quote the entire paragraph 7:

> [TRANSLATION]
> This public knows the law and is, as Justice Chamberland writes, [TRANSLATION] "familiar with all the ins and outs of the matter": *R c Doe*, REJB 1997-03809 (C.A.), and, as Justice Fish, then at the Court, wrote, "fully appreciative of the rules applicable under our system of justice": *Pearson c R.*, AZ-90011560. This public is therefore able to form a considered opinion with full knowledge of the facts of the cause and the applicable law, an opinion that is not shaped by passion but by reason.

So, this is the criterion applicable to public confidence in the justice system. As I said, it's a balancing exercise between the need to deal with the application properly and of giving full meaning to the right to appeal.

[16] The facts before me. It is clear that Private Larouche has lost his job in the Canadian Forces. He was released on Ground 2(*a*). He has a fixed address. As evidence, I must of course also consider the circumstances surrounding the commission of the of-

fences, which, in my opinion, and as I noted in my sentencing decision, reveal a behavioural problem the exact nature of which I am unaware and on which I cannot comment. But it involves people close to him. The circumstances clearly reveal this, that there was a form of abuse of trust, particularly in the voyeurism offence, and that there was manipulation, as revealed by the facts. I must note, however, that Private Larouche did not use any violence in committing these offences. I must also consider the fact that I issued an order prohibiting any contact with any person under the age of 16 years. There is also the fact that the applicant will be registered as a sex offender and that his forensic DNA will be taken. These are orders that I issued. So, in terms of public safety, we have the order prohibiting him from any contact, which is, to some extent, a monitoring or preventive measure. The Sex Offender Register and the forensic DNA information are there to identify rather than prevent, but these are aspects I must consider when reviewing the issue of public safety.

[17] We also have the crimes. I must note that, objectively, these crimes are serious but not among the most serious. Objectively speaking, the maximum punishment that can be imposed, and I have already cited the Quebec Court of Appeal in that regard, which states that there are offences for which the *Criminal Code* provides higher maximum punishments—matters have to be put in perspective.

[18] There nonetheless remains that the facts reveal Private Larouche's desire to possess images, his desire to see, and the Court has no idea and no evidence as to what extent Private Larouche can control these desires. In fact, the application does not contain any information on the offender's particular situation, be it in terms of his risk of reoffending; his present environment, that is, his family, his network of friends, the support he has for getting through this ordeal; whether or not he acknowledges the problem and, if so, to what extent; his attitude to crime; whether or not he regrets his actions; whether he has taken steps to recognize the problem; whether or not he denies it—I really have no idea. And here I am not criticizing the lack of evidence, but the onus is on the applicant to establish that public safety will not be endangered in these circumstances, and the facts before me rather suggest that the safety of the public and of certain individuals could be jeopardized in the circumstances. In fact, the applicant has failed to establish on a balance of probabilities that it is likely that the public will be safe if he is released.

[19] And here, I would like to draw a distinction with something that I noted in *Wilcox*, which dealt with the public interest and the interest of the Canadian Forces. Something stated in paragraph 6 of *Wilcox*, where the Court wrote:

> [TRANSLATION]
> In our respectful view, he failed to weigh the seriousness of the offence against the particular circumstances of the accused: see *R. v. Ingebritgtson* 5 C.M.A.R. 27 at page 29. The accused was a first offender with a clean conduct sheet in the armed forces. He was well regarded by his commanding officer and within his unit before his dismissal from the Forces. He continued to serve within his unit while awaiting his sentence. He was at liberty pending his trial. He never failed to appear when requested to do so, even after conviction. He has the support of his parents. At the time he received his sentence, he was pursuing his education in order to reintegrate into civilian life.

It is true that I have some elements regarding the circumstances I considered in light of the first and especially the second criterion, but I have no evidence of the accused's personal circumstances to assist me in my analysis of the public safety criterion and to help me determine whether the public will be safe if he is released. I simply have no evidence. And in the absence of such evidence, I must consider the elements before me, the elements that were submitted, and, in my view, they fall short of the burden of proof that the offender had to meet.

[20] As to public confidence in the military justice system, this issue, as I said before, is an issue that must be determined in the same manner as before any other court in Canada. As I mentioned, the decision must be shaped by reason and not by sentiment or passion, and the facts must be analyzed in light of the applicable law.

[21] In my opinion, a public that is well-informed about the legal process and, specifically, court martial proceedings and about the circumstances of this case would lose confidence in the military justice system if the applicant was released in light of the information before this Court.

[22] In my opinion, the applicant did not satisfy the third criterion. Consequently, I order that his application be dismissed.

Counsel:

Major G. Roy, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander P. Desbiens, Defence Counsel Services
Counsel for ex-Private R. Larouche