COURT MARTIAL

Citation: *R. v. Semrau*, 2010 CM 1003

Date: 20100127
Docket: 200945

General Court Martial

Asticou Centre courtroom
Gatineau, Québec, Canada

Between:

Her Majesty the Queen

- and -

Captain R.A. Semrau, Applicant

Before: Colonel M. Dutil, C.M.J.

DECISION RESPECTING AN APPLICATION PURSUANT TO S. 191 OF THE *NATIONAL DEFENCE ACT* AND ARTICLE 112.03 OF THE *QUEEN'S REGULATIONS AND ORDERS FOR THE CANADIAN FORCES* THAT THE COURT LACKS JURISDICTION BECAUSE THE TRIAL WAS CONVENED TO TAKE PLACE AT A LOCATION OTHER THAN WHERE THE ALLEGED OFFENCE OCCURRED.

(Orally)

INTRODUCTION

[1] The applicant is seeking an order from this court to quash the convening order signed and dated 17 December 2009 by M.S. Morrissey, the Court Martial Administrator, or order that the trial be held at Kandahar Airfield, on the basis that courts martial can only be convened to commence where the alleged offences took place on the basis of the common law principle to that effect. This application is strictly limited to the issue of whether the Court Martial Administrator has the legal authority, explicit or implied, to select the location of the trial at a place other than where the alleged offence occurred. This application does not address potentially relevant issues to the conduct of

these proceedings such as should the General Court Martial conduct its proceedings to one or more locations at a later stage.

THE EVIDENCE

[2] The evidence before this court is therefore limited to the matters that the court took judicial notice under s. 15 of Military Rules of Evidence, including but not limited to the *National Defence Act*, *Criminal Code*, and the *Queen's Regulations and Orders for the Canadian Forces*. Exhibits have been filed before the court by consent of the parties for completeness of the record and they consist of the notice of application and the written submissions of both parties. These documents cover broader issues than the outcome of this application, as counsel agreed yesterday to limit the scope of this application to the competence of the CMA to select the place of trial as opposed to the propriety of her decision. The parties have also made oral submissions. The applicant submits that the Court Martial Administrator has improperly convened this General Court Martial in Canada. He advances that the Court Martial Administrator has no statutory or implied authority to convene a court martial at a place other than where an alleged offence was committed. The applicant argues that the location of trial at courts martial is determined solely on the common law rule that a trial should take place where the alleged offence was committed. Nothing in the *National Defence Act* or in the regulations would trump the said rule, which he argues has been in place for centuries. In this case, the offences are alleged to have occurred in Afghanistan.

POSITION OF THE PARTIES

Applicant

[3] In support of his submission, counsel for the applicant relies mostly on the decisions rendered by the Ontario Court of Appeal in *R. v. Suzack*, (2000) 141, C.C.C. (3d) 449; the Ontario Court of Justice in *R. v. Robson*, (2004) 122 C.R.R (2d) 137, [although the applicant inadvertently mentioned in his factum that *Robson* was decided by the Ontario Court of Appeal, it is a decision from the Ontario Court of Justice]; and also on a judgement from La Cour d'appel du Québec in *R. c. Gagné*, (1990) 59 C.C.C. (3d), 282.

[4] In *R. v. Suzack*, the court stated at paragraph 30:

> It is a well-established principle that criminal trials should be held in the venue in which the alleged crime took place. This principle serves both the interests of the community and those of the accused....

[5] In *R. v. Robson*, Zuraw, J. stated the following at paragraph 22:

> McRuer C.J.H.C. in the case of *Rex v. Adams* (1946) 2 C.R.N.S. 56 (O.H.C.) ... refers to the long tradition of where trials should be held [unless expedient to the ends of justice to do otherwise], quoting with approval the case of *Rex V. Harris* et al, 3 Burr. 1330, 1334, 97ER, 858. As His Lordship stated:
>
> "As early as 1762 it was said:

> 'There was no rule better established than ... all causes shall be tried in the county, and by the neighbourhood of the place, where the fact is committed.'"

Then, he continues:

> See too Salhany, Canadian Criminal Procedure 6th ed., 2-470:
>
> "As a general rule, the court is reluctant to change the place of trial since the county or district where the offence is alleged to have been committed has *prima facie* jurisdiction."
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> Similarly, Mr. Justice Graburn in *R. v. Kellar* (1973), 24 C.R.N.S. 71, p. 77 states,
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> "... *prima facie* rule that an accused should be tried at the place which the offence is alleged to have been committed ought to be given full force and effect."
>
> Justice Graburn later ruled that the convenience of crown witnesses ought to be considered but is "minor and secondary" ....
>
> And again, our Court of Appeal in *R. v. Suzack* 141 C.C.C. (3d) 449 per Doherty, J.A., p. 30:
>
> "It is a well established principle that accused's trials should be held in the venue in which the alleged crime took place. This principle serves both the interests of the community and those of the accused."

[6] The applicant submits that the power of the Court Martial Administrator does not include the selection of the place of trial. He further argues that the only mention of the place of trial occurs when the content of the convening order is described in QR&O 111.02 (2), which requires that the CMA:

> (*b*) state the type of court martial convened, the date and time proceedings commence, the place where it will be held and the language of the proceedings chosen by the accused.

[7] Counsel for the applicant submits that stating the where the trial will take place does not confer the discretion to choose the place of trial to the Court Martial Administrator. According to the applicant, the place of trial is simply something that has to be included in a Convening Order because the Court Martial Administrator's role in issuing a Convening Order is purely administrative. The CMA would be involved in matters like which building or room will be used for the trial, not which municipality or base would be selected.

[8] The applicant also argues that the Court Martial Administrator made an error that can be corrected by quashing the Convening Order dated 17 December 2009, and by ordering the CMA to issue a new Convening Order requiring the trial to take place in Afghanistan.

The Respondent

[9] The respondent submits that the application should be dismissed. He offered very short submissions. He submits that in the military justice system, unlike the civilian criminal justice system, there is no principle that suggest that service tribunals should occur near the location of the alleged offence. According to counsel for the respondent, it is the CMA, who determines the location of a court martial and he argues that this must be inferred from a reading of ss. 165.19 to 165.193 and QR&Os articles 111.02(2)(b), (2)(d), 111.13 (1), and 111.13 (2) as a natural component of the meaning of the word "convene."

[10] In his written submissions, counsel for the respondent submitted that the *Interpretation Act*,[1] at paragraph 31, provides that where legislation obliges an administrative authority to carry out a certain duty, it may be inferred that the administrative authority may carry out any incidental functions necessary to the exercise of that duty,: and he quotes the paragraph: "Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given."

DECISION

Legal Analysis

[11] The court will address the issues raised in this application in examining the following questions:

1. Does the Court Martial Administrator have the authority to select the location of a trial by court martial?

2. If the answer to the first question is no, does this affect the validity of the convening order issued on 17 December 2009 for the General Court Martial of Captain Semrau?

Does the Court Martial Administrator have the authority to select the location of the trial by court martial?

[12] The role and functions of the Court Martial Administrator are set out in the *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces*. Section 165.19 of the *National Defence Act* provides:

> (1) The Court Martial Administrator performs the duties specified in sections 165.191 to 165.193 and, if he or she convenes a General Court Martial, shall appoint its members.

[1] R.S.C. 1985, c. I-21, s. 31(2)

> (2) The Court Martial Administrator performs such other duties as may be specified by this *Act* or prescribed by the Governor in Council in regulations.

[13] 165.191, 165.192, and 165.193 provide the regime applicable to the type of court martial that will try the accused based on the alleged offence. However, the Court Martial Administrator shall also convene a court martial in other instances. I will simply draw your attention to ss. 196.16, 202.1, 202.12, 202.121, 227.1, and 227.12 of the *Act*, where the Court Martial Administrator shall convene a court martial in the context of a hearing to authorize the taking of bodily substances for DNA analysis and in the context of division 7 of the *Act;* that is, mental disorder.

[14] Whatever triggers the convening of a court martial, the Court Martial Administrator shall issue a Convening Order pursuant to QR&O article 111.02 which reads as follows:

> 111.02 – CONVENING OF COURTS MARTIAL
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> (1) Subsection 165.19(1) of the *National Defence Act* provides:
>
> "165.19(1) The Court Martial Administrator performs the duties specified in ss. 165.191 to 165.193 and, if he or she convenes a General Court Martial, shall appoint its members."
>
> (2) The order convening a court martial shall:
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> (*a*) state the date the Director of Military Prosecutions or other authorized officer preferred charges against the accused;
>
> (*b*) state the type of court martial convened, the date and time proceedings commence, the place where it will be held and the language of proceedings chosen by the accused;
>
> (*c*) identify by name, service number and rank if applicable, the accused person, the military judge assigned to preside at the court martial and, in the case of a General Court Martial, the members and alternate members; and
>
> (*d*) require the members and alternate members to assemble on the date, time and place specified in the convening order subject to any direction by the military judge assigned to preside at the court martial.

[15] The word "convene" does not convey a special meaning. Counsel for the respondent referred to the Concise Oxford English Dictionary 11th Edition that provides a simple definition of "convene." It means "come or bring together for a meeting or activity." I would add that the French dictionary, *Le Petit Robert,* does not expand much further other than to make it imperative. It defines the verb "*convoquer*" as "a*ppeler à se réunir, de manière impérative*."

[16] It is not in dispute that when the Court Martial Administrator convenes a court martial, he or she does not select the prosecutor, the defence counsel, the military judge, nor does he or she select the language of the proceedings. These elements are specifically provided elsewhere in the *Act* or regulations. However, does the information that

he or she provides as to where the trial will take place merely administrative and can only reflect the common law principle alleged by the applicant?

[17] Under the *National Defence Act*, a person subject to the Code of Service Discipline may be tried wherever the offence was committed and either in Canada or outside Canada.[2] The applicant submits that these statutory provisions do not displace the common law principle that an accused's trial should be held in the place in which the alleged crime took place. The said principle must, however, be put in proper context. In both *Suzack* and *Robson*, the courts were referring to the principle in the context of venue.

[18] In the context of territorial limitation, Salhany[3] properly enunciates the stated principle:

> **2.30** Long ago it was established as a fundamental principle of the common law of England that all crime was local and the courts of one country ought not to exercise jurisdiction over crimes committed in another country. The general rule was that an English court could try a criminal offence only if that offence was committed on English territory.

[19] In considering the question of territorial jurisdiction, Salhany[4] moves on to highlight the Canadian perspective at paragraph 2.70:

> **2.70** In Canada, the problem of territorial jurisdiction over an offence is particularly complicated by the fact that Canada is divided into ten separate provinces and three territories, each exercising jurisdiction over the administration of criminal law within its boundaries. The *Criminal Code* does attempt to assist in defining the extent of jurisdiction outside these boundaries, not only beyond the territorial limits of Canada but also between provinces. There also exists between the provinces themselves separate territorial divisions where issues of conflicting jurisdiction frequently arise. The *Criminal Code* defines "territorial divisions" to include "any province, county, union of counties, townships, city, town, parish or other judicial division or place to which the context applies." Thus, for the purposes of discussion, the question of jurisdiction should be divided into three categories: extra-Canadian territorial jurisdiction; interprovincial territorial jurisdiction, and intra-provincial territorial jurisdiction.

[20] According to Salhany,[5] "venue" is linked to the concept of intra-provincial jurisdiction as opposed to extra-provincial jurisdiction. The following excerpts found at paragraphs 2.350 and 2.360 provide the rationale behind the notion that an accused be tried where the offence was alleged to have been committed.

> **2.350** In the early common law, a grand jury of local inhabitants was summoned by the King's commissioners from time to time and required to report what crimes, to their own knowledge, had been committed in the community. From these same jurors was selected a petit jury which then tried the accused on their own knowledge of the facts. It was, therefore, essential that the accused be tried by a jury summoned from the lo-

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[2] Ss. 67 - 69
[3] *Canadian Criminal Procedure* 6th ed., 2.30
[4] Ibid.
[5] Ibid.

> cality where the offence occurred. From this requirement arose the rule that a person accused of a crime could be tried only in the county where the offence was alleged to have been committed. The common law term for the neighbourhood from which the jury came was known as the "venue."
>
> **2.360** The rule that the accused could be tried only in the county where the offence was committed continued to apply even after the jury ceased to try a case on their own knowledge of the facts. Thus the term 'venue' in time came to mean the place where the accused was to be tried. Absurdities developed from this rule, such as the inability of a jury to take cognizance of a crime partially committed in one county and partially committed in another. As time went on, many of these defects were cured by statutory enactments and by legal fictions. Eventually, the law in England was changed to authorize a person charged with an indictable offence to be proceeded against, indicted, tried, and punished in any place in which he was apprehended or was in custody or had appeared in answer to a summons on that same charge just as if the offence had been committed in that place.

[21] The *National Defence Act* occupies the field of territorial jurisdiction in its entirety, in ss. 67 and 68. I agree with the applicant that the concept of "venue" is not covered in the *Act* or the regulations, nor does it have to be. However, this fact does not enhance the applicant's position. The rationale of the early common law has no application in the Canadian military justice system because of the statutory framework. "Venue," as it is understood in the context of the jurisprudence cited by the applicant, does not apply to the Canadian military justice system as the concept of "convening" does not exist in criminal courts. That is not to say that the factors applicable to a change of venue in ordinary criminal courts are irrelevant when the parties seek to change the location of the trial or portions of a trial. Nothing prevents also the Court Martial Administrator to solicit the recommendations of both prosecution and defence to select the place where the proceedings will begin.

[22] This decision clearly falls within the competence of the Court Martial Administrator in fulfilling her role to convene the court martial, not that this decision is not reviewable. Once convened, a party can ask the judge assigned to preside at a court martial to modify this selection for one or more other locations as a matter of procedure. "Venue" is and remains always procedural and not jurisdictional in nature. I therefore conclude that the Court Martial Administrator has the authority to select the location of a trial by court martial under the statutory framework.

[23] The application is dismissed.

Counsel:

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