Citation: *R. v. Master Corporal C. A. Matusheskie,* 2008 CM 3013

Docket: 200770

STANDING COURT MARTIAL
CANADA
CFB PETAWAWA
ONTARIO

Date: 13 March 2008

PRESIDING: LIEUTENANT-COLONEL L.-V. D'AUTEUIL, M.J.

HER MAJESTY THE QUEEN
v.
MASTER CORPORAL C. A. MATUSHESKIE
(Accused)

DECISION RESPECTING AN ALLEGED VIOLATION OF SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ABUSE OF PROCESS BY THE PROSECUTION
(Rendered orally)

INTRODUCTION

[1] Master Corporal Matusheskie is charged with one offence of disobedience of a lawful command of a superior officer contrary to section 83 of the *National Defence Act*, the *NDA*.

[2] At the opening of this trial by Standing Court Martial on 11 March 2008, prior to plea, and after the oaths were taken, Master Corporal Matusheskie's defence counsel verbally notified the court of her intent to make immediately an application for a stay of proceedings under subsection 24(1) of the *Canadian Charter of Rights and Freedoms*, the *Charter*, alleging an infringement of the right of the accused guaranteed by section 7 of the *Charter*. More specifically, she contends that the withdrawal of a charge made in accordance with subsection 165.12 (2) of the *NDA* by the prosecution, four days before the beginning of the court martial, and the preferral of the same one with additional words in the particulars on the same day, which is the one before this court now, constitutes an abuse of process by the prosecution that warrants judicial intervention by a stay of proceedings.

[3] The preliminary motion is brought by way of an application made under Queen's Regulations and Orders, QR&O, article 112.05(5)(e) as a question of law or mixed law and fact to be determined by this court.

[4] The court permitted the presentation of the application in accordance with QR&O article 112.04(3). The intent to withdraw the charge and prefer the same one with additional words in the particulars was notified by email by the prosecutor to the defence counsel on 6 March 2008. The defence counsel immediately replied by email to the prosecutor that she intended to oppose such thing, as it appears from exhibit VD 1-9. On 7 March 2008, the Deputy Director of Military Prosecutions withdrew the charge, and the same one with additional words in the particulars was preferred the same day. Then, a new convening order was signed by the Deputy Court Martial Administrator to convene this court for 11 March 2008, which is the exact same date that could be found on the previous convening order, VD 1-7. The accused was served with the new convening order and with the new charge sheet on 10 March 2008, which is just the day before this Standing Court Martial started.

[5] The prosecutor learned, on 6 March 2008, that the accused intended to do something about the preferral of the same charge with additional words in the particulars; however, it is only on the morning of 11 March 2008, the day set for the commencement of the trial, that he learned it would be by the way of an application under subsection 24(1) and section 7 of the *Charter*. Despite this fact, the prosecutor clearly stated that he was satisfied and ready to proceed on the application, considering that he had sufficient details about the nature of it.

[6] Considering the very recent nature of those facts, and considering the position taken by the prosecution in this case, the court considers that reasonable cause was shown by the accused for the failure to give notice in writing, and permitted the presentation of the application.

THE EVIDENCE

[7] The evidence on the application consisted only of a number of documentary exhibits, which are:

> Exhibit VD1-1, the agreed statement of facts;
>
> Exhibit VD1-2, a record of disciplinary proceedings (RDP) concerning Master Corporal Matusheskie signed on 20 March 2007;
>
> Exhibit VD1-3, a written statement made by Sergeant S. D. Mercredi;
>
> Exhibit VD1-4, a letter from the Deputy Director of Military Prosecutions signed on 16 October 2007 about the preferral of a charge for Master Corporal Matusheskie;

Exhibit VD1-5, a cover letter from the Deputy Director of Military Prosecutions signed on 16 October 2007 transmitting a copy of a charge sheet to be served to Master Corporal Matusheskie;

Exhibit VD1-6, a charge sheet for Master Corporal Matusheskie with only one charge referring to section 83 of the *NDA* and signed by the prosecutor on 15 October 2007;

Exhibit VD1-7, a convening order signed by the Court Martial Administrator on 10 December 2007 concerning a Standing Court Martial for Master Corporal Matusheskie to be held at 0900 hours on 11 March 2008 at CFB Petawawa;

Exhibit VD1-8, a 7-page written summary of a phone conversation that took place on 10 October 2007 between the prosecutor and Sergeant Mercredi;

Exhibit VD1-9, the hard copy of an email exchange that took place between the prosecutor and the defence counsel on 6 March 2008;

Exhibit VD1-10, a convening order signed by the Deputy Court Martial Administrator on 7 March 2008 concerning a Standing Court Martial for Master Corporal Matusheskie to be held at 0900 hours on 11 March 2008, at CFB Petawawa;

Exhibit VD1-11, a charge sheet for Master Corporal Matusheskie with only one charge referring to section 83 of the *NDA* and signed by the prosecutor on 7 March 2008;

A graphic identifying the cocking handle and the cocking lever of a C7 rifle taken from the manual on the Rifle 5.56 mm C7 and the Carbine 5.56 mm C8, B-BL-317-018/PT-001, issued on the authority of the Chief of the Defence Staff;

The judicial notice taken by the Court of the facts in issues under Rule 15 of the Military Rules of Evidence, and more specifically, the judicial notice of the content of the manual on the Rifle 5.56 mm C7 and the Carbine 5.56 mm C8, B-BL-317-018/PT-001, issued on authority of the Chief of the Defence Staff in accordance with subsection 15(2) of the Military Rules of Evidence.

THE FACTS

[8] The incident which constitutes the basis of the charge before this court allegedly occurred on 15 and 16 January 2007, at the unit location of the 3rd Battalion of the Royal Canadian Regiment, 3 RCR, Canadian Forces Base Petawawa. According to the

documentation put before this court, Sergeant Mercredi worked, at the time, in the 3 RCR small arms weapons section, and Master Corporal Matusheskie was working under his authority.

[9] It is alleged that Sergeant Mercredi gave a direct order on 15 January 2007 to Master Corporal Matusheskie for not proceeding with modifications to the cocking handles to be installed on the C7 rifles belonging to Operation OMLT personnel until he received confirmation it can be done by Ottawa.

[10] However, on 16 January 2007, it is alleged that Sergeant Mercredi found out that Master Corporal Matusheskie proceeded that day with modifications on cocking handles and installed them on C7 rifles. Then, he ordered Master Corporal Matusheskie to remove the cocking handles he installed on the C7 rifles and disassemble them.

[11] Further to a statement made by Sergeant Mercredi, VD 1-3, Master Warrant Officer R. J. Duncan laid a charge on 20 March 2007, under section 129 of the *NDA*, against Master Corporal Matusheskie for having replaced usual cocking handles on C7 rifles with Badger model cocking handles without having the appropriate work order. The specific particulars of the charge on the RDP, VD 1-2, are:

> "In that he, on 16 January, 2007, at the Canadian Forces Base/Area Support Unit Petawawa, Ontario, conducted modifications to C7 weapons to wit: replacing cocking handles with Badger model cocking handles, without a work order having been issued authorizing the modifications."

[12] In the course of his post-charge screening, the prosecutor called, on 10 October 2007, Sergeant Mercredi to discuss the matter. The summary of the phone conversation was put in writing by a paralegal that attended it, VD 1-8. From that summary, it is clear that a Badger cocking handle is a cocking handle modified. In order to allow the installation of a Badger cocking handle, Sergeant Mercredi wanted to be sure it could be done, and it explains why he was looking for the authorization of somebody in Ottawa to proceed. As a weapons technician, installing the Badger cocking handle on the C7 rifles without knowing if it was possible would have been the equivalent for him to proceed with an unauthorized modification to a weapon.

[13] The written summary also reflects the fact that the main subject of the conversation was the replacement of the usual cocking handle on the C7 rifle by the Badger cocking handle. It is true that a lever was mentioned a couple of times during the conversation, but nowhere was discussed the fact that by modifying the lever on the usual cocking handle it becomes a Badger cocking handle.

[14] As explained by the prosecutor, and as illustrated on the graphic before this court, VD 1-12, the cocking lever is a part of the cocking handle. However, at the time of the preferral made by the prosecutor in October 2007, the focus of the disciplinary proceedings was mainly on Master Corporal Matusheskie allegedly replacing normal cocking handles by Badger cocking handles on the C7 Rifles of OMLT personnel, contrary to an order he received from a superior officer.

[15] Then, the charge preferred by the Director of Military Prosecutions was about modifying C7 rifles by Master Corporal Matusheskie, contrary to the order he received. The charge was now referring to section 83 of the *NDA* for disobeying a lawful command, VD 1-6. The particulars of the charge on the charge sheet signed on 15 October 2007 by the prosecutor go as follows:

> "In that he, on or about 16 January 2007, at or near Canadian Forces Base Petawawa, Ontario, conducted modifications to C7 rifles after being ordered not to do so by Sergeant Mercredi, S. D."

[16] The charge was preferred on 16 October 2007, VD 1-4, and a copy of the charge sheet was sent to Master Corporal Matusheskie Commanding Officer in order to be served to the accused, VD 1-5.

[17] A convening order was signed by the Court Martial Administrator on 10 December 2007, ordering the accused to appear before a Standing Court Martial at 0900 hours on 11 March 2008, at CFB Petawawa, in order to deal with the charge set out on the charge sheet, VD 1-7.

[18] On 6 March 2008, further to a phone conversation with Sergeant Mercredi for administrative requirements related to the court martial, the prosecutor learned that this witness saw Master Corporal Matusheskie with a box of cocking handles on 16 January 2007, the day of the incident. Twenty minutes later, the prosecutor called back the witness because what was said did not make any sense to him. He then learned from Sergeant Mercredi that the cocking handles for which the lever was modified in order to become Badger cocking handles were never put on the C7 rifles belonging to the Operation OMLT personnel. The cocking handles were ordered in a separate manner, as the cocking lever. The idea was to modify the cocking handles ordered by putting the new cocking lever on them, and then replace the usual cocking handles on the C7 rifles by the new one modified. According to the witness, the situation was that Master Corporal Matusheskie would allegedly have modified cocking handles without putting them on any rifle, which would be different from putting a modified part of a weapon on the weapon itself.

[19] About an hour after that final conversation with the witness, the prosecutor informed, by email, the defence counsel, VD 1-9, of this new version of the events as reported by Sergeant Mercredi. He then informed her that he will withdraw the charge as it was on the charge sheet, VD 1-6, and prefer the same one with additional words in the particulars that will reflect the fact that it was a part of the C7 rifle, the cocking handle, and not the C7 rifle itself, that was modified. As a response, the defence counsel replied by email that she would oppose.

[20] On 7 March 2008, the Deputy Director of Military Prosecutions withdrew the charge, and the same one with additional words in the particulars was preferred. On the same day, a new convening order was signed by the Deputy Court Martial Administrator,

VD 1-10, ordering the accused to appear before a Standing Court Martial for the same time, date, and place as the previous one.

[21] The new charge sheet signed by the prosecutor on 7 March 2008, VD 1-11, was referring to the same offence as the previous one, which is section 83 of the *NDA*. In fact, the new charge sheet was the same as the previous one, except for what was modified, which is the cocking handles of C7 rifles instead of the C7 rifles themselves. The particulars of the new charge that is before this court are the following ones:

> "In that he, on or about 16 January 2007, at or near Canadian Forces Base Petawawa, Ontario, conducted modifications to cocking handles for C7 rifles after being ordered not to do so by Sergeant Mercredi, S. D."

This new charge was served to the accused on Monday, 10 March 2008.

ANALYSIS

[22] Section 7 of the *Charter* reads as follows:

> " **7.** 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."

[23] The conduct of the state while prosecuting an individual can be scrutinized, especially when the fairness of the trial is at stake. As stated by the Supreme Court of Canada in *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paragraph 73:

> " As I have already noted, the common law doctrine of abuse of process has found application in a variety of different circumstances involving state conduct touching upon the integrity of the judicial system and the fairness of the individual accused's trial.… In addition, there is a residual category of conduct caught by s. 7 of the *Charter*. This residual category does not relate to conduct affecting the fairness of the trial or impairing other procedural rights enumerated in the *Charter*, but instead addresses the panoply of diverse and sometimes unforeseeable circumstances in which a prosecution is conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process."

[24] The court considers that the factual background of this application calls for an analysis under this residual category of conduct identified by the Supreme Court of Canada and caught by section 7 of the *Charter*.

[25] First, this court must determine if the withdrawal of a charge and the preferral of the same one with additional words in the particulars just four days before the trial constitutes an abuse of process by the prosecution. Then, if the court concludes that there is an abuse of process, it will have to determine the appropriate remedy, which may include the stay of the proceedings.

[26] As stated earlier, the DMP decided, on 7 March 2008, to withdraw the charge preferred on 15 October 2007 against the accused, Master Corporal Matusheskie. This

withdrawal of the charge was made pursuant to the authority given to DMP at subsection 165.12(2) of the *NDA*

> "165. (2) The Director of Military Prosecutions may withdraw a charge that has been preferred, but if a trial by court martial has commenced, the Director of Military Prosecutions may do so only with leave of the court martial."

[27] It is very important to note that the charge was withdrawn before the court martial commenced, considering that the Standing Court Martial convened for this charge was scheduled for 11 March 2008. Then, the DMP has the entire discretion to do so and had not to seek leave of the court to proceed.

[28] On that same day, 7 March 2008, the prosecutor signed a new charge sheet and consequently the same charge with additional words in the particulars was preferred by the DMP. As mentioned above, the charge was the same, but the particulars were modified. In fact, three words were added to the particulars. As stated at subsection 165.12(3) of the *NDA*, the fact to withdraw a charge does not preclude the DMP to proceed with it at a later time:

> "165. (3) Withdrawing a charge does not preclude it from being proceeded with at any subsequent time."

[29] The exercise of the legal authority by the DMP to withdraw a charge before the court martial commences and proceed with it later does not constitute, by itself, an abuse of process. To the contrary, and as well explained by the Court Martial Appeal Court in *R. v. Forsyth*, 2003 CMAC 9, at paragraph 22, it is not an abuse of process:

> "22. It cannot be an abuse of process to request the withdrawal of an information. That is the right of the Crown, before or after plea. The possibility of a new charge being laid is implicit in a decision to withdraw a charge. Indeed, the preservation of that right is often a purpose of such a request. The legal consequence of a withdrawal of a criminal charge is the preservation of the Crown's ability to lay a new charge should it be so advised, until the expiration of any applicable limitation period (see *R.* v *Karpinski supra* paragraph 15)."

[30] However, even though the prosecution was legally authorized to withdraw a charge and prefer the same one with very similar particulars, it does not preclude this court to scrutinize the prosecution's motives for such conduct.

[31] It is good to remember, as Justice McLachlin said in the Supreme Court of Canada decision of *R.* v. *Scott*, [1990] 3 S.C.R 979, at page 1007:

> "In summary, abuse of process may be established where: (1) the proceedings are oppressive or vexatious; and, (2) violate the fundamental principles of justice underlying the community's sense of fair play and decency. The concepts of oppressiveness and vexatiousness underline the interest of the accused in a fair trial. But the doctrine evokes as well the public interest in a fair and just trial process and the proper administration of justice. I add that I would read these criteria cumulatively."

[32] It belongs to the accused to prove, on a balance of probabilities, the existence of an abuse of process. It is clear from the facts that it is only on 6 March 2008 that the prosecution was made aware, by its main witness, that the subject of the modification alleged in the charge preferred was not the C7 rifle, but the cocking handle of the C7 rifle, and, when it was allegedly done by the accused, the said cocking handle was never installed on the rifle. It was new information for the prosecutor. Up to that time, the prosecution was allowed to believe, as it was demonstrated to the court, that the available evidence was to the effect that a modified cocking handle had been installed on a C7 rifle.

[33] Considering that the trial was scheduled to take place in 4 days, it is within less than an hour that the prosecutor made the decision to withdraw the charge and to prefer the same one with additional information in the particulars. As soon as the prosecutor made that decision, he informed the defence counsel of it. Within less than a day, the charge was withdrawn and the same one was preferred with additional details, allowing the Deputy Court Martial Administrator to issue a new convening order on the same day. The prosecutor provided access to the witness to the defence counsel in order to challenge this new information.

[34] As it was said by the Court Martial Appeal Court at paragraph 23 of the *Forsyth* decision quoted above, "[T]he evidence in this case falls far short of overwhelming evidence of improper motive or of bad faith or of an act so wrong that it violates the conscience of the community required to constitute an abuse of process." Additionally, the court considers that no oblique motive, or oppression or undue hardship upon the accused was demonstrated on a balance of probabilities. At most, the accused demonstrated that some additional time might be required for him to prepare his case, considering that he is charged now for modifying a part of a C7 rifle instead of the C7 rifle itself. In fact, the court was told that some additional witnesses might be required for his defence and that they could not be found on a short notice.

[35] The defence counsel agreed that except for the new information provided by Sergeant Mercredi, there was no additional disclosure to consider. She also agreed that once she would have found all the witnesses she need for the presentation of the accused's defence, the latter wouldn't be in an unfair position. To the contrary, the accused will be ready to proceed, considering that he obtained all the evidence and the information under the control of the prosecution. It is also the conclusion of the court that the accused was not misled or prejudiced by the decision of the prosecutor to prefer a second time the same charge with additional information in the particulars.

[36] The defence counsel raised the issue of the procedure being delayed by the decision of the prosecution to prefer the same charge with additional information in the particulars. It is clear for the court that the prosecution is still ready to proceed in this case, and it is the fact that the defence counsel may need additional time to prepare the case that may result in a delay to proceed. This delay could be, at this stage, no more than three months, considering the availability of all the actors involved in this court martial and the preparation time requested by the defence counsel. The court does not consider this as having an unfair impact on the accused at this stage, and, if he finds it

appropriate, it could be dealt with later through an application before this court for unreasonable delay under subsection 11(b) of the *Charter*.

[37] Then, it is the conclusion of this court that the accused has not demonstrated on a balance of probabilities that the withdrawal of a charge and the preferral of the same one with additional words in the particulars just four days before the trial constitutes an abuse of process by the prosecution.

[38] However, if the court had concluded that there was an abuse of process by the prosecution, it would have been necessary for the court to determine the appropriate remedy in accordance with subsection 24(1) of the *Charter*. The defence counsel suggested that, in such a case, the only appropriate remedy would have been a stay of the proceedings.

[39] The stay of proceedings must be applied in the clearest of cases, see *R. v. O'Connor*, [1995] 4 S.C.R. 411, at paragraph 68. As stated by the Supreme Court of Canada in the decision of *R*. v. *Regan*, [2002] 1 S.C.R. 297, at paragraph 54:

> "Regardless of whether the abuse causes prejudice to the accused, because of an unfair trial, or to the integrity of the justice system, a stay of proceedings will only be appropriate when two criteria are met:
>
> (1) the prejudice caused by the abuse in question will be manifested, perpetuated or aggravated through the conduct of the trial, or by its outcome; and
>
> (2) no other remedy is reasonably capable of removing that prejudice. [*O'Connor*, at para. 75]"

[40] I would have concluded that those two criteria were not met. Mainly, the defence counsel raised the fact that delaying the proceedings would have a serious impact on the accused's right to a full and fair defence. To the contrary, the conclusion of the court, considering that this court martial would have proceeded within the next three months, would have been that the delay had no irremediable impact on the trial. The appropriate remedy in this case would have been the granting of an adjournment to the accused in order to provide him a good opportunity to reassess how to use the new information in advancing a defence or otherwise making any other decision which could affect the conduct of the defence.

[41] The application made by the accused for an abuse of process under subsection 24(1) and section 7 of the *Charter* is accordingly dismissed.

LIEUTENANT-COLONEL L-V. D'AUTEUIL, M.J.

COUNSEL:

Major A.M. Tamburro, Regional Military Prosecutions Central
Counsel for Her Majesty the Queen

Major L. D'Urbano, Directorate of Defence Counsel Services
Counsel for Master Corporal C.A. Matusheskie