COURT MARTIAL

Citation: *R v Souka*, 2011 CM 2023

Date: 20111208
Docket: 201057

General Court Martial

Canadian Forces Base Winnipeg
Winnipeg, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.J. Souka, Accused

Before: Commander P.J. Lamont, M.J.

REASONS FOR DECISION WITH RESPECT TO UNREASONABLE DELAY

(Orally)

[1] At the opening of his trial by General Court Martial on charges of assault causing bodily harm and drunkenness, the accused, Corporal Souka, applied for a stay of proceedings on the ground that his right to trial within a reasonable time guaranteed by section 11(b) of the *Canadian Charter of Rights and Freedoms* was infringed or denied.

[2] After hearing evidence and argument on the application, I dismissed the application and undertook to provide reasons for so doing in due course. These are those reasons.

[3] The analytical framework to deal with an application such as this was set out by the Supreme Court of Canada in the case of *R v Morin*, [1992] 1 S.C.R. 771, and was authoritatively applied to court martial proceedings by the Court Martial Appeal Court in the case of *R v Legresley*, 2008 CMAC 2.

[4] The first issue requires the court to look at the time period from the time the charges were first laid until the end of the trial. In this case the charges appear in a Record of Disciplinary Proceedings, dated 1 June 2010.

[5] It was argued that, in fact, charges had been laid by 23 April of 2010 because as agreed by the parties legal advice was provided to the charging authorities under Queen's Regulations and Orders, article 107.11. It was suggested that charges must have been in existence at that time because legal advice is only given pursuant to that provision once charges are laid. The agreed facts on the application, Exhibit M1-2, also disclosed that pre-charge legal advice was given on the same date.

[6] On these facts I am not prepared to infer that, in fact, charges of assault causing bodily harm and drunkenness were laid on 23 April. It would be a simple matter to prove a record of disciplinary proceedings dated prior to 1 June, but I have not been shown such a document. For present purposes, I consider that the charges before me of assault causing bodily harm and drunkenness said to have occurred on 16 December 2009 were first laid 1 June 2010.

[7] As a result the time period under consideration is just over 18 months to the trial date. The prosecution concedes that on its face this period of delay to trial at court martial requires an analysis of the other *Morin* factors. The prosecution also concedes that no part of the 18 month period was waived by the defence.

[8] The time periods for the major steps to bring this case to trial are set out in the Agreed Statement of Facts, Exhibit M1-2, on this application. It appears that the case was first put into the hands of the military prosecuting authority on 7 July 2010, and following a request disclosure material was received from the investigators on 6 August 2010, and supplied to the Directorate of Defence Counsel Services a few days later. At that time, Major Charland was assigned as defence counsel for Corporal Souka. On 30 September 2010, the charges before the court were preferred for court martial. Almost two months later on 25 November 2010 the defence indicated their choice of trial by General Court Martial. By this point, Major Berntsen had taken over the conduct of the defence from Major Charland. The defence replied to an enquiry from the prosecution as to their availability for trial and the defence advised that a period of three weeks in February of 2011 was available. Thereafter, the defence made some requests for additional disclosure. It appears that the prosecution was attempting to satisfy the additional disclosure requests as late as 7 January of 2011, but I have not been provided with any detail as to what additional disclosure was sought, nor whether the requests for outstanding disclosure were delaying the setting of trial time. It was not until a 22 July 2011 request from the Court Martial Administrator addressed to both the prosecution and defence seeking to set a trial date that the parties seem to have again addressed their minds to setting trial time. In a conference telephone call held 12 August 2011, the parties agreed to schedule the trial to commence 5 December 2011. By that point, both parties had pre-existing commitments that prevented scheduling the trial from September through to November of 2011.

[9] On all the evidence it appears to me that the prosecution did not take any steps to bring this case to trial for a period of approximately seven months between January and August of 2011. It is not clear to me whether outstanding requests for disclosure were the reason for all or some part of this period of delay, but on all the evidence I am not satisfied that this period of delay is adequately explained by the prosecution.

[10] In so finding, it is not my purpose to blame one side or the other for the delay to trial, but simply to point out the reasons for delay so far as I can determine them from the evidence.

[11] The other factor of significance on this particular application is the question of prejudice. The applicant led evidence from witnesses including the applicant himself addressing the question of prejudice. In this case prejudice is said to relate to the stress caused to the applicant by the period of delay to trial, the damage to his reputation and the loss of an opportunity to take a course he would otherwise have been offered if his unit was not concerned that the benefit of his training on that course would be lost if he were to undergo punishment or was otherwise lost to the unit for some period following the upcoming trial.

[12] I do not wish to be taken as minimizing the stress caused to the applicant by the delay to trial in this case, but I do not consider that the stress level was significantly higher for this applicant than for anyone else in a similar position. Certainly, the applicant does not appear to have required any sort of professional intervention to deal with it. As for damage to reputation, I consider that that is much more likely due to rumour within the unit or perhaps the formal laying of charges rather than any delay in dealing with the charges. Nonetheless the damage to reputation would likely persist until the applicant was vindicated at trial, and I, therefore, find that there was some prejudice.

[13] I do not attach much significance to the loss of a course opportunity. The evidence as a whole does not support a reasonable conclusion that the applicant's career prospects in the Canadian Forces were substantially impeded by the delay to trial in this case.

[14] Ultimately, the task of the court is to weigh the various *Morin* factors, including the reasons for delay and the measure of prejudice suffered as a result against the undoubted public interest in a trial on the merits of the serious allegation of an assault upon another soldier causing bodily harm in some degree. Principally I am concerned with an unexplained period of delay of some seven months and what I consider to be a minimal amount of prejudice suffered by reason of the delay.

[15] On balance I find that the interest in proceeding to trial outweighs the countervailing factors and accordingly the application was dismissed.

Counsel:

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