COURT MARTIAL

Citation: *R v Lough*, 2011 CM 2020

Date: 20111024
Docket: 201125

Standing Court Martial

Canadian Forces Base Cold Lake
Cold Lake, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Ex-Corporal A.M. Lough, Accused

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

REASONS FOR DECISION WITH RESPECT TO DISQUALIFICATION

(Orally)

[1] The applicant, Corporal A.M. Lough, is charged in a charge sheet with a number of offences of sexual assault alleged to have been committed in early August of 2010 at Canadian Forces Base Cold Lake, Alberta. By a Notice of Application, Exhibit PP1-1, dated 11 October and returnable 14 October 2011, he applied through his counsel for an order that I disqualify myself from hearing the trial of the charges by way of Standing Court Martial. The application rested upon the basis that in August of 2010, some days after the arrest of Corporal Lough on these charges, I conducted a review of the custody order made against Corporal Lough by the custody review officer who had ordered him to be retained in custody pending his trial.

[2] At the conclusion of the argument on the application I reserved my ruling until 20 October 2011 when I dismissed the application and undertook to give reasons for so doing in due course; these are those reasons.

[3] The applicant acknowledged in the written Notice of Application and in argument that it is not suggested that I am biased or partial against the interests of the applicant. Rather it was argued that even if the legal test for bias or partiality is not met in the present case, as a matter or prudence the court should recuse; that is, decline to hear the case because of circumstances specific to the individual judge, and permit the case to proceed with the assignment of another judge. The prosecutor supported the position of the applicant.

[4] Neither party called any evidence on the application. In the course of argument I intimated to both counsel that I was uneasy about deciding the application without hearing some detail as to what had transpired before me on the earlier proceeding in August of 2010. Both counsel agreed that if I thought it proper, I should listen to the recording of the earlier proceedings, and I have done so.

[5] The proceeding in August of 2010 was a review of custody hearing under section 159 of the *National Defence Act*. The applicant was then in military custody on the order of a custody review officer acting under section 158.2 of *National Defence Act*. Before me, the prosecutor sought to maintain the order for the continued retention of the applicant in custody. The hearing proceeded with the filing of written allegations made by the prosecutor as to the facts underlying the charges before the court that at that time were contained in a Record of Disciplinary Proceedings. There did not appear to be any issue between the parties at the hearing as to the nature of the allegations against the applicant. Although the *viva voce* evidence of witnesses was called at the hearing there was no real issue as to the credibility of the witnesses who gave evidence. The applicant himself did not give evidence and no issue arose as to the credibility of the applicant. In the course of my ruling on the review, I identified a likely issue for trial as being whether it was in fact the applicant who entered the private accommodation of three persons, and I described the case for the prosecution as being "relatively strong."

[6] At the conclusion of the hearing I made an order that the applicant be retained in custody. On a motion filed by the applicant to the Court Martial Appeal Court that court, on September 20th, 2010, permitted the applicant to bring his motion for release back before me in order for me to consider whether there was a change of circumstances since my order of August 10, 2010 that would warrant the applicant's release from custody pending the trial.

[7] By that point the circumstances of the applicant had indeed changed since the time of my detention order on 10 August and the prosecutor and defence counsel agreed to a series of conditions upon which I ordered the release of the applicant pending the trial.

[8] The test in Canadian law for bias on the part of a decision maker has been well settled since the late 1970s. In *R v S.(R.D.)*, [1997] 3 S.C.R. 484, Cory J. wrote:

> The manner in which the test for bias should be applied was set out with great clarity by de Grandpré J. in his dissenting reasons in *Committee for Justice and Liberty v. National Engery Board*, [1978] 1 S.C.R. 369, at p. 394:
>
> > [T]he apprehension of bias must be a reasonable one, held by reasonable and right-minded persons, applying themselves to the question and obtaining thereon the required information....[The] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude...."

I'll continue with the quote from Cory J.:

> This test has been adopted and applied for the past two decades. It contains a two-fold objective element: the person considering the alleged bias must be reasonable, and the apprehension of bias itself must also be [a] reasonable [one] in the circumstances of the case. See *Bertram, supra*, at pp. 54-55; *Gushman, supra*, at para. 31. Further the reasonable person must be an informed person, with knowledge of all the relevant circumstances, including "the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties the judges swear to uphold": R. v. Elrick, [1983] O.J. No. 515 (H.C.), at para. 14. See also Stark, supra, at para. 74; R. v. Lin, [1995] B.C.J. No. 982 (S.C.), at para. 34.

And later:

> ... the threshold for a finding of real or perceived bias is high. It is a finding that must be carefully considered since it calls into question an element of judicial integrity. Indeed an allegation of reasonable apprehension of bias calls into question not simply the personal integrity of the judge, but the integrity of the entire administration of justice. See *Stark*, *supra*, at paras. 19-20. Where reasonable grounds to make such an allegation arise, counsel must be free to fearlessly raise such allegations. Yet, this is a serious step that should not be undertaken lightly.
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> The onus of demonstrating bias lies with the person who is alleging its existence: *Bertram, supra*, at p. 28; *Lin, supra*, at para. 30. Further, whether a reasonable apprehension of bias arises will depend entirely on the facts of the case.

[9] In the course of argument I was referred by counsel to several decisions in which a judge presided at more than one proceeding involving an individual accused person as a result of which an application seeking relief in the nature of recusal was brought. One such case authority, not referred to by counsel, is the Ontario case of *R v Perciballi*, (2001) 154 CCC (3d) 481. In that case, the Ontario Court of Appeal dealt with an allegation of reasonable apprehension of bias on the part of a judge who had granted an authorization to intercept private communications against an accused having earlier presided over an unsuccessful bail review application by the same accused person. Madame Justice Charron delivered the judgement of the court. She noted that the issues for determination in the two proceedings over which the judge had presided were different and stated at paragraph 21:

> .... The mere prior involvement of the authorizing justice in an earlier proceeding does not, without convincing evidence to the contrary, displace the presumption of judicial integrity and impartiality. Hence, the bare allegation that Hamilton J. heard "prejudicial

> evidence" on the bail review that did not form part of the authorization package is meaningless. Trial judges routinely exclude evidence that they have heard on a *voir dire*, or hear confessions or guilty pleas by co-accused, and go on to preside over the trial of an accused.

[10] I believe that this quotation accurately states the law. There is no absolute bar to a judge hearing a proceeding such as a trial simply because the judge has presided over earlier proceedings such as a bail application or review involving the same accused person. But all the circumstances must be examined to determine whether the presumption of judicial impartiality is displaced by cogent evidence that raises a reasonable apprehension of bias, see also *R v Manning*, Newfoundland and Labrador Provincial Court, September 28th, 2010 per Porter P.C.J. and the authorities cited therein.

[11] In the present case I am not satisfied that the presumption of judicial impartiality is displaced. The observation I made in the course of the bail review as to the apparent strength of the case for the prosecution at that stage addressed an issue that properly arises in bail review proceedings. I cannot conclude that a proper reference to the strength of the case for the prosecution at that stage disqualifies the judge from hearing the trial. The issues are quite different at trial and the evidence may well have changed since the time of the bail review. Importantly, the admissibility of the evidence at trial appears to be a live issue between the parties now, whereas no such issue of admissibility was raised on the earlier bail review proceeding.

[12] I conclude that the demanding test for judicial recusal; that is, a reasonable apprehension of bias as I have described it, is not met in the present case, but that does not end the matter. Both parties before me on the application seem to acknowledge that the onerous test for judicial recusal may not have been met in this case, but went on to argue that based on the same facts and as a matter of prudence and fairness I should withdraw from the case. My attention was called to two previous cases in which the learned judges did exactly that.

[13] In *R v Bird*, [1997] O.J. No. 2074, Justice McIsaac was asked to withdraw from presiding over a judge alone trial in a case where the same justice had presided over certain pre-trial matters including a bail hearing at which the justice had ordered the accused to be detained in custody pending the trial. He held that the test for recusal was not met and dismissed the application for judicial disqualification. He went on, however, to note that the accused, at paragraph 10:

> ... feels a certain discomfort in having me preside over his trial especially now that he has lost his right to a jury.

And went on to withdraw as the trial judge.

[14] In *R v M.R.K.*, [2004] N.J. No. 148, His Honour Judge Porter of the Newfoundland and Labrador Provincial Court acceded to a joint request of counsel to withdraw from hearing the trial after hearing a bail application and discussing the meaning of a guilty plea with the accused. Although it appears that Judge Porter was not satisfied

that the test for recusal had been met, he nevertheless acceded to the joint request of the parties.

[15] I have given careful attention to this submission, but have ultimately concluded that I should not withdraw. In my view it would be a very rare case indeed where a judge properly appointed to hear a case should decide not to hear it despite the fact that the legal test for a reasonable apprehension of bias is not met. In *M.R.K.*, Judge Porter referred to the Alberta case of *R v Kochan*, [2001] A.J. 555, which in turn quoted Mason J. in the Australian case of *Re J.R.L.* 161 C.L.R. 342 as follows:

> Although it is important that justice must be seen to be done, it is equally important that judicial officers discharge their duty to sit and do not, by acceding too readily to suggestions of appearance of bias, encourage parties to believe that by seeking the disqualification of a judge, they will have their case tried by someone thought to be more likely to decide in their favor.

[16] In a military context, the power to assign judges to a particular matter is statutory. Section 165.25 of the *National Defence Act* reads:

> The Chief Military Judge assigns military judges to preside at courts martial and to perform other judicial duties under this Act.

In my view, it would undermine the authority of the Chief Military Judge in the assignment of judges to cases if a military judge were to accede to a request of the parties to withdraw from a case to which the judge has been properly assigned simply on the basis that one or even both parties might have some discomfort with the assignment of a particular judge.

[17] The application was accordingly dismissed.

Counsel:

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