COURT MARTIAL

Citation: *R v Royes,* 2013 CM 4032

Date: 20131204
Docket: 201339

Standing Court Martial

Canadian Forces Base Wainwright
Denwood, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal D.D. Royes, Applicant

Presiding: Lieutenant-Colonel J.G. Perron, M.J.

RESTRICTION ON PUBLICATION

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that could disclose the identity of the person described in this judgment as the complainant or any other witness shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR DECISION

(Rendered orally)

[1] The applicant, Master Corporal Royes, is charged under section 130 of the *National Defence Act* of having committed a sexual assault contrary to section 271 of the *Criminal Code of Canada*. He has made an application under subparagraph 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (*QR&O*) and is seeking an order declaring that subparagraph 130(1)(*a*) of the *National Defence Act* (the *NDA*) to be of no force or effect pursuant to section 52 of the *Constitution Act*, 1982 because it is inconsistent with section 7 of the *Canadian Charter of Rights and*

Freedoms, (the *Charter*) and cannot be saved by section 1 of the *Charter*. He also requests at page 4 of his notice of application that he be acquitted.

[2] The application was heard at the end of the prosecution's case. Counsel suggested the court render its decision before the defence presented its case. The evidence is composed essentially of the following: judicial notice under Military Rule of Evidence 15 and the testimony of the five prosecution witnesses.

[3] Firstly, I will review the facts in this application. It is alleged that Master Corporal Royes left a bar in the town of Wainwright at approximately 0200 hours on 12 February 2012 with the complainant and two friends. The complainant was inebriated to the point that she could not tell her fellow soldiers where she resided on Canadian Forces Base (CFB) Wainwright. She was brought to Master Corporal Royes' room at CFB Wainwright. Master Corporal Royes would have had sexual intercourse with the complainant without her consent. Master Corporal Royes would then have driven the complainant to her room on base the morning of 12 February.

[4] Counsel for the applicant has indicated this application is identical to the applications presented in various courts martial such as *R v Moriarity*, 2012 CM 3017, 18 October 2012; *R v Arsenault*, 2013 CM 4006, 23 April 2013; and *R v Hannah*, 2013 CM 2011, 15 May 2013. He is not presenting any new substantive legal argument. Counsel for the respondent has also not presented any new substantive legal argument. The only difference between this application and the previous ones are the specific facts of the case and the exact offences charged.

[5] In *Arsenault*, I quoted the following passage from Chief Justice Lamer's decision in *R v Généreux* [1992] 1 SCR 259 at paragraph 31 when he addressed the dual purposes of the Code of Service Discipline:

> Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare....Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline. Indeed, an accused who is tried by a service tribunal cannot also be tried by an ordinary criminal court (ss. 66 and 71 of the *National Defence Act*).

[6] Later in that decision, Chief Justice Lamer described the purpose of a system of military tribunals at paragraph 60 as follows:

> The purpose of a separate system of military tribunals is to allow the Armed Forces to deal with matters that pertain directly to the discipline, efficiency and morale of the military. The safety and well-being of Canadians depends considerably on the willingness and readiness of a force of men and women to defend against threats to the nation's security. To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct. As a result, the

> military has its own Code of Service Discipline to allow it to meet its particular disciplinary needs. In addition, special service tribunals, rather than the ordinary courts, have been given jurisdiction to punish breaches of the Code of Service Discipline. Recourse to the ordinary criminal courts would, as a general rule, be inadequate to serve the particular disciplinary needs of the military. There is thus a need for separate tribunals to enforce special disciplinary standards in the military. I agree, in this regard, with the comments of Cattanach J. in *MacKay v. Rippon*, [1978] 1 F.C. 233 (T.D.), at pp. 235-36:
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> > Without a code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.
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> > Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence. In civilian life it is the right of the citizen to refuse to work but for a soldier to do so is mutiny, a most serious offence, in some instances punishable by death. Similarly a citizen may leave his employment at any time and the only liability he may incur is for breach of contract but for a soldier to do so is the serious offence of absence without leave and if he does not intend to return the offence is desertion.

[7] In reaching my decision in this application, I will repeat some of the passages of my decision in *Arsenault*. The Code of Service Discipline is defined in section 2 of the *National Defence Act* as being the provisions of Part III of the *Act*. Part III consists of sections 60 to 249.26. The Code of Service Discipline assigns jurisdiction, creates offences, establishes arrest and detention powers, establishes service tribunals, namely, summary trials and courts martial, and other procedural measures necessary for the proper administration of military justice. In other words, these sections as well as Volume II of the *Queen's Regulations and Orders for the Canadian Forces* govern the application of military penal law.

[8] Military tribunals are a part of the Code of Service Discipline but the Code of Service Discipline is much more than tribunals. Section 130 creates a service offence consisting of an act or omission that is punishable under Part VII of the *Act*, the *Criminal Code* or any other Act of Parliament. It is not section 130 that confers

jurisdiction on a service tribunal but the Code of Service Discipline and many sections of the *NDA* and the *QR&O*, but primarily sections 2, 60, 67, 68, 69, 130 and 173 of the *National Defence Act* in our case.

[9] A Standing Court Martial may try any person who is liable to be charged, dealt with and tried on a charge of having committed a service offence (see section 173). Section 60 describes who is subject to the Code of Service Discipline. Sections 67 and 68 establish territorial jurisdiction for the commission of the offence and the place of trial. Section 70 limits the jurisdiction of service tribunals to try certain offences committed in Canada, namely, murder, manslaughter and abduction of children and persons under sixteen years of age.

[10] As I stated in *Arsenault*, the purpose of the Code of Service Discipline is not as limited as the applicant suggests. The Supreme Court of Canada also attributes a public function to it because the Supreme Court of Canada accepts that the military justice system plays the same role as the civil criminal justice system, allowing service tribunals to punish conduct that threatens public order and welfare. As indicated in paragraph 49 of *R v Heywood* [1994] 3 S.C.R. 761, the court must consider whether subparagraph 130(1)(*a*) is necessary to achieve the State's objective.

[11] Counsel for the applicant spent much time on the topic of the doctrine of the military nexus. As I stated in *Arsenault*:

> The issue of a military nexus was discussed in *Her Majesty the Queen and Sergeant Reddick* 1996 CMAC 393. The proceeding before the Court Martial Appeal Court was an appeal concerning the application of subsection 60(2) of the *National Defence Act* to the trial of a retired member, hence a civilian at the time of trial, with respect to acts that were criminal offences and acts that were service offences. Although *Reddick* was primarily concerned with a question of the division of constitutional powers, the Court Martial Appeal Court, referring to the *Généreux* decision, stated at paragraph 28:
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> > I therefore conclude that the nexus doctrine has no longer the relevance or force which influenced many of the earlier decisions of this Court. Indeed I think it can be put aside as distracting from the real issue which is one of the division of powers. In addressing that issue a court martial must start by considering whether the Code of Service Discipline gives it jurisdiction in the circumstances alleged in the charges. lf so, it can presume that the Code, as part of the *National Defence Act*, is constitutionally valid unless the accused can demonstrate that in his particular circumstances the application of the Code to him would have an unconstitutional consequence.

[12] Trying by court martial an alleged sexual assault by a soldier upon another soldier on a military base clearly falls within the purposes of maintaining discipline and integrity in the Canadian Armed Forces and of punishing specific conduct which threatens public order and welfare. The court also finds that the facts of this case establish a clear military nexus should that doctrine still apply and that the applicant has failed to demonstrate that, in his particular circumstances, the application of the Code of Service Discipline would have an unconstitutional consequence.

FOR THESE REASONS, THE COURT

[13] **DISMISSES** the application. The respondent argued this application should have been presented under subparagraph 112.05(5)(*b*) of the *QR&O* since the jurisdiction of the court is in issue and that this question has a bearing on the appropriate remedy. Having dismissed the application on its merits, the court does not have to decide which exact provision of the *QR&O* and remedy are applicable.

[14] The proceedings of this application are terminated.

Counsel:

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