COURT MARTIAL

Citation: *R. v. Paradis*, 2010 CM 3026

Date: 20101202
Docket: 201039

Standing Court Martial

Academy of Valcartier Garrison
Quebec, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant M.J.M. Paradis, applicant

Restriction on publication: By order of this Court under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could identify the persons described in this judgment as the victim shall not be published in any document or broadcast or transmitted in any way.

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

OFFICIAL ENGLISH TRANSLATION

REASONS FOR DECISION ON APPLICANT'S APPLICATION FOR RELEASE FROM IMPRISONMENT PENDING APPEAL

(Rendered orally)

[1] Lieutenant Paradis, the applicant in these proceedings, was sentenced this morning to a punishment of imprisonment for 45 days by Standing Court Martial held before me. In accordance with section 248.1 of the *National Defence Act*, he applied to the Court for release pending appeal. The hearing was held in accordance with article 118.04 of the *Queen's Regulations and Orders for the Canadian Forces*, the QR&Os.

[2] The evidence filed at the hearing consisted of the application for release pending appeal, Exhibit LPA-1 and Lieutenant Paradis' testimony.

[3] For the Court to direct that the appellant be released from imprisonment pending appeal, the appellant must establish, on a balance of probabilities, each of the following conditions in accordance with section 248.3 of the *National Defence Act*, where paragraph 248.3(*a*) of the *National Defence Act* states that

> (*a*) in the case of an application under section 248.1,

the applicant (the person) must establish

> (i) that the person intends to appeal,
>
> (ii) if the appeal is against sentence only that it would cause unnecessary hardship if the person were placed or retained in detention or imprisonment,
>
> (iii) that the person will surrender himself into custody when directed to do so, and,
>
> (iv) that the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces . . . .

[4] Unlike the *Criminal Code*, no provision of the *National Defence Act* states that, in such a case, the person intending to appeal does not have to establish the merits or merely certain meritorious elements regarding the grounds for appeal. Therefore, the applicant does not have to establish the merits of the appeal or certain aspects of the merits of the appeal.

[5] These proceedings must be considered in a different light than a situation where the applicant intends to appeal against both the findings of guilty and the sentence. It has been established on a balance of probabilities, and I have no problem with that, that the applicant intends to appeal, but this would be an appeal against the sentence, since he pleaded guilty to both charges. That is, the Court recorded and accepted his plea of guilty to both charges on the charge sheet.

[6] It must be kept in mind that at this stage, it is clear that the offender or the person making the application no longer benefits from the presumption of innocence—we are far beyond that stage. So, we have to approach this from the perspective that it is only a matter of the sentence. Therefore, the applicant is not intending to challenge the merits of the finding of guilty.

[7] To illustrate my remarks, I am guided by an excerpt from the Court Martial Appeal Court's decision in *Wilcox*,[1] at paragraph 9, quoting Justice McEachern of British Columbia, who wrote the following:

> Bail is distinct from the sentence imposed for the offence . . . .

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[1] *R. v. Wilcox*, 2009 CMAC 7

That is from the excerpt translated into French, and I quote as follows:

> Bail is distinct from the sentence imposed for the offence and it is necessary to recognize its different purpose which, in the context of this case, is largely to ensure that convicted persons will not serve sentences for convictions not properly entered against them.

[8] Therefore, the mechanism we usually find ourselves in has two branches. If the applicant is challenging the finding of guilty, which the applicant has every right to do—no one is denying that—at that point, it is much more difficult to consider having this person serve the punishment of imprisonment or detention. And the second branch, where it is just a matter of the sentence—at that point, the merits of the finding of guilty are not really in issue, and paragraph 248.3(ii)(*a*) sets out the criterion that when the appeal is against sentence only, and that is why this is mentioned, it would cause unnecessary hardship if the person were placed or retained in detention or imprisonment. So, that is—but, understand, that is not the only criterion. However, I truly wished you to understand the Court's perspective in considering the application made by the applicant.

[9] It is clear that it has been established on a balance of probabilities from Lieutenant Paradis' testimony that he will surrender himself into custody when directed to do so. The Court has no doubts on that account. You were charged in the past year, as your counsel noted, and an arrest warrant was never issued in relation to that matter. At no time did your unit commander or a Canadian Forces authority believe it necessary to impose any particular conditions on you to ensure that you would report when required. You have attended all of the hearings in this Court from the beginning. Therefore, the Court has no doubts on that account. Be it through your testimony in the context of sentencing or your testimony today in the context of this application, that element has been established at least on a balance of probabilities, although it is not an element in issue.

[10] Through your testimony in the context of sentencing or today in the context of this application, it has been established at least on a balance of probabilities, although this is not an element in issue, that your detention or imprisonment, in this case, your imprisonment, is not necessary in the interest of the public or the Canadian Forces, just as in the Court Martial Appeal Court in *Wilcox*—let us say that the interest of the Canadian Forces is greatly diminished in a case where the person has been released from the Canadian Forces. Therefore, all that remains for the Court to decide is whether it is in the interest of the public alone.

[11] In my decision on the sentence, I strongly emphasized or, rather, went into detail on the nature of the offences and their gravity. But that is not the only criterion that must be taken into account. There is also the matter of your conduct. One of the things that was clear from the evidence I had before me on sentencing, which I mentioned in my decision, is the that the prospect of your reoffending is very unlikely. In his report, the therapist considered it to be very unlikely, for all sorts of good reasons he gave that show your stability on numerous levels. That means that there's no risk whatsoever or, in any case, the risk of your reoffending is as likely as those

circumstances happening again. Considering the everyday activities in your life that you described to the Court, that is, your job, your interests and the fact [transcription error in French text: reads "l'effet" instead of "le fait"] that you go to school, I think that you are busy enough that you will not find yourself in similar circumstances. In that regard, I must conclude that you have proven, on a balance of probabilities, that your imprisonment is not necessary in the interest of the public.

[12] In fact, the question that took up all of my time is really this prospect, the criterion I mentioned a little earlier in more general terms, which is, "if the appeal is against sentence only, that it would cause unnecessary hardship if the person were placed or retained in detention or imprisonment".

[13] I have previously been faced with a situation where my decision was published, a similar situation, that is, a situation where the offender pleaded guilty to charges and was sentenced to detention. That was in *Dandrade*, 2008 CM 3025, a decision I delivered on October 16, 2008, in which I had to analyze that criterion. My starting point, among others, was a decision of the Chief Military Justice, then Dutil M.J., in *Nadeau*, a decision from 2003, I presume dated December 11, 2003, in which Dutil M.J. had to analyze that criterion. It's the notion of unnecessary hardship that presents a certain problem of interpretation—the meaning of that expression. In those two decisions, Dutil M.J. and I had to determine the meaning of unnecessary hardship, or "préjudice inutile" in French. In *Nadeau*, Dutil M.J.—and, what I am going to do—he delivered it in English and I do not have a French translation of it, but I do have a French translation of *Dandrade*—I will simply read it. It was translated into French as part of the decision in *Dandrade*. And I quote Dutil M.J., as follows:

> The issue here, this morning, as I was saying, is whether or not it would cause unnecessary hardship if the accused was placed or detained in imprisonment. The term "unnecessary hardship" is not defined in the *National Defence Act*, and it's not defined, either, in the regulations.

And since this is written from the perspective of an English speaker,

> The Concise Oxford Dictionary defines unnecessary as simply "more than necessary." Hardship is defined as "the hardness of fate or circumstance," as well as "severe suffering or privation."
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> I understand from these terms that the term "unnecessary hardship" means severe suffering or privation which is more than required in the circumstances, and implies an irreparable harm. In other words, it means more than simply having to undergo imprisonment pending an appeal through severity of punishment. While incarceration is hardship in itself, it cannot, in my view, be described as unnecessary hardship unless other factors bear upon it.

[14] And that is sort of what I had to revisit, but in terms—this trial is being held in French, which is perfectly fine—but you kind of have to consider the term "prejudice inutile" as the equivalent of "unnecessary hardship". So, that is why I went to check the definition of the French word "inutile" ([TRANSLATION] "unnecessary") to see what it is in the dictionary. Here is what the *Petit Robert* says: [TRANSLATION] "1. That which is

useless, of no use. 2. That which serves no purpose"—that is the second meaning. Taking some guidance from what I just described to you from Dutil M.J.'s decision in *Nadeau*, and also the position I adopted, which is the same as Dutil M.J.'s, I came to the conclusion that "unnecessary hardship" is really what we call irreparable harm, which cannot be remedied, cannot be mended, is irreparable. So, that is something that is really quite substantial, and in that sense I had to undertake an analysis on the basis of the evidence submitted to me by the parties.

[15] The evidence before me in the context of this application is your testimony. The prosecution did not submit any evidence, so I had to look at the elements you brought up in your testimony. But before I address your testimony, I want to clarify one thing: I want to clarify my thought process and the test, as I see it, for the Court to find that it has been established on a balance of probabilities that the applicant would suffer irreparable, irreparable and unnecessary hardship, which cannot be repaired if the applicant were imprisoned, on a balance of probabilities. At that point, the fourth criterion would be met, and the Court would have to direct your release from imprisonment as you request.

[16] Now, to understand or interpret this question of irremediable, irreparable, unnecessary hardship, it is necessary to analyze the evidence. That is what I want to rely on. You referred first to your employer and your employment, stating that if you were imprisoned, you would be replaced. It is not clear that this would automatically lead to a loss of employment but, rather—and you were examined and cross-examined by the parties—it would instead be a replacement but without any guarantee of remaining in exactly the same job, although you could go back to a similar job working for the same employer, but perhaps not an identical job with identical duties. As I understand it from my perusal of all of the evidence, the position of assistant manager is different from other positions at the hotel, but there would be that aspect: the aspect of having a job. There is no evidence before me that it would be less well paying, but at least I understand that there would be no loss of employment as such as well, *a contrario*.

[17] You were also examined, cross-examined by the prosecution regarding your studies. The Court understands that your spending time in prison, serving your punishment of imprisonment, would delay your studies. If I understand correctly, you are in the process of completing your vocational diploma, and with your principal's permission you were able to take a break of one month. If you begin serving your prison sentence today, it would delay the completion of your vocational diploma; however, look at it from the opposite perspective, it would not eliminate the possibility of never obtaining that diploma. I also have nothing before me as to whether a further consequence is attached to the fact of not obtaining it right away or of obtaining it between now and the end of the year, for example. I do not know because it is not in the record. That is not a reproach, it is just that—if I consider the nature of the hardship for your studies, the only conclusion that I can draw from the evidence at this time is that there would be a delay. It would go as far as to postpone the beginning of your studies until January or September 2011, if I understand correctly.

[18] Regarding your budget, if I understood what you said, which was somewhat summarized by your counsel during the examination, there would be an impact, certainly. Because you are not working, you are not being paid, and that would require you to reorganize your budget significantly. This reorganization of your budget is significant, but does not connote an irreparable impact that would cause you to lose out on an opportunity or cause you such hardship that you would never be able to get back on your feet one way or another.

[19] In the evidence that—in your testimony, that's about the sum of the evidence relating to this criterion. The fact that you have no previous offences is much more closely related to the issue of whether or not your imprisonment is in the interest of the public. I think this fact relates much more to that aspect. The question on the appeal or the grounds—the question I asked was mainly to clarify—sometimes judges speak at length; I was aware that I had spoken at length, but the purpose of my question was mainly to make sure that you had indeed understood that the Court had agreed in part with the recommendation that had been made. It was particularly for that reason that I was asking the question, but I am unable to connect any other pieces of evidence to the four criteria here.

[20] I understand very well that the prosecution does not object to your release, in the circumstances, and is not requiring that any other conditions be met.

[21] The question relating to the fact that you would serve part or all of the sentence of imprisonment before the appeal is heard because you are—your intention is to appeal against the sentence—that is a factor but, in and of itself, as Dutil M.J. underscored and as I emphasized in other decisions, in and of itself it is not a factor allowing the Court to find that there is unnecessary hardship. However, it is a factor that, if it were combined with other existing factors, would mean that the burden of proof was met.

[22] On that approach to that factor, I refer, among others, to a decision of the Quebec Court of Appeal in *R. c. Garneau*, 1997 CanLII 9947, which considered the criterion of public interest, the criterion we have here, and confirmed that the mere fact of serving the sentence, in and of itself, is not a sufficiently weighty factor to meet the burden of proof; it has to be combined with others.

[23] Therefore, in the circumstances, I have made the finding—I think I have pretty much gone over all of the elements related to my decision—in the circumstances I find that the first, third and fourth criteria have all been established on a balance of probabilities but, as to whether you would be subjected to unnecessary hardship if you were placed or retained in imprisonment, on the basis of the evidence presented before this Court, I find that this has not been established on a balance of probabilities before this Court, and in that respect I must find—I must deny the application presented to me.

[24] That said, you still have legal representation, and I ask that you discuss this with your counsel because you have the right to receive legal advice following my decision.

[25] Now that I have disposed of the application at this stage, the proceedings in the Standing Court Martial of Lieutenant Paradis are concluded.

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