

Citation: *R. v. Ex-Corporal D.D. Beek*, 2005 CM 32

Docket: CR200532

**STANDING COURT MARTIAL
CANADA
EDMONTON, ALBERTA
1 COMBAT ENGINEER REGIMENT**

Date: 24 November 2005

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN

v.

EX-CORPORAL D.D. BEEK

(Person in custody)

DECISION ON CUSTODY

(Rendered orally)

[1] This is an application by ex-Corporal Derek Beek seeking his release from military custody pending the resumption of his trial by Standing Court Martial on nine charges of trafficking methylenedioxiamphetamine, cocaine and methamphetamine contrary to section 5 subsection (1) of the *Controlled Drugs and Substances Act*.

[2] In accordance with a convening order dated 4 July 2005, and signed by the court martial administrator, this trial began on 17 August 2005. On that date, the accused appeared with his counsel, Mr William Tatarchuk of Edmonton. After the charges were read, Mr Tatarchuk applied to withdraw as counsel as he had no instructions from the accused and had only met him again the morning of the trial. He had had no contact with the accused since he was originally retained and his correspondence to him was returned marked "moved." Mr Tatarchuk had some indication that the accused had retained new counsel, Mr Darin Slaferek of Edmonton, but he had had no contact from Mr Slaferek regarding the accused. The application of Mr Tatarchuk was granted. During an adjournment, Mr Slaferek was contacted and he attended this court in the afternoon and sought and was granted an adjournment of the trial to 9 November 2005.

[3] On 9 November the accused failed to appear before me. Mr Brubaker, a lawyer associated with Mr Slaferek, appeared and advised that Mr Slaferek was hospitalized

from 24 October and was not expected to be released until December. He applied to permit Mr Slaferek to withdraw as counsel citing the fact that there had been no communication between the accused and Mr Slaferek. The application was granted. Upon the application of the prosecution I issued a warrant for the arrest of the accused for his failure to attend before this court martial as required. The accused was arrested when he surrendered to the military police on 15 November 2005, and has been detained at the military police guardhouse in Edmonton since that time. He is now represented by Major Turner.

[4] The application is made pursuant to Queen's Regulations and Orders article 112.665 entitled, "Custody During Court Martial Proceedings." It reads as follows:

(1) An accused person is not in custody during proceedings before a court martial unless the accused person was in custody immediately prior to the commencement of the proceedings or is ordered into custody during the proceedings.

(2) An accused person may be ordered into custody or released from custody for all or part of the proceedings, including any adjournment by the military judge presiding at the court martial.

[5] I was invited by both counsel, Major Turner for the defence and Captain Simms for the prosecution, to apply to this application the provisions of sections 159 and following of the *National Defence Act*. These sections deal with the review by a military judge of a pre-trial custody order made by custody review officer. Those provisions contain a comprehensive code for the review of pre-trial custody orders, including the factors to be taken into account, the burden on one party or the other to show cause, and a scheme of undertakings, with or without conditions, to secure the attendance of the accused for his trial, the variation of such an undertaking and review by the Court Martial Appeal Court.

[6] QR&O article 112.665 contains no such detail. It is silent as to the basis upon which an order for release or an order into custody is to be made. However helpful it might be for the court, or advantageous it might be for either of the parties before me, I find I cannot read article 112.665 as if it read the same as sections 159 and following of the *National Defence Act*. I am left with the bare wording of the regulation.

[7] The applicant seeks an order of release from custody upon suggested terms which seem designed to secure his attendance for trial in the future and to secure his good behaviour until that time. The prosecution opposes his release from custody until the conclusion of the trial on the ground that continued custody is necessary to secure his attendance for trial. The prosecution appears to agree with the defence that conditions may be imposed upon the accused by the court if he is to be released.

[8] In my view, while it might be desirable that the court have the authority

to impose conditions of release in these circumstances, the imposition of conditions is not contemplated by the *National Defence Act* or Queen's Regulations and Orders. I cannot read article 112.665 sub (2) as if the words "on such reasonable conditions as are specified" were to be added to the end of the subsection. Nor is there a mechanism by which the violation of any such conditions could be charged as an offence under the Code of Service Discipline because section 101.1 of the *National Defence Act* creates the offences only of failing to comply with a condition imposed under Division 3, entitled, "Arrest and Pre-trial Custody", or Division 10, "Release Pending Appeal" to the Court Martial Appeal Court.

[9] I consider, therefore, that the issue before me is whether the accused is to be released until his trial or is to remain in custody. In this connection, I have considered several factors. Firstly, the seriousness of the charges. These are very serious charges, especially in a military context. If convicted, a sentence involving incarceration is very likely. Thus, the accused has a motivation not to appear for his trial. Nonetheless, it must be recalled that these are but allegations only. The accused is presumed to be innocent unless and until he is found guilty after a proper trial.

[10] Secondly, the behaviour of the accused. He has not been diligent in instructing counsel in his defence. He failed to appear for trial on 9 November. I must consider the reasons he gave for not attending. He testified that Mr Slaferek told him in mid-October that he, Mr Slaferek, was ill and the trial would have to be adjourned. The accused seems to have thought that because of this, he did not have to appear on 9 November. In my view, his failure to appear was irresponsible, but he did not go into hiding to avoid the processes of this court. Indeed, when he became aware that there was a warrant for his arrest, after some delay, he engaged new counsel and made arrangements to surrender.

[11] Next, I have considered the consequences of the continued custody of the accused pending his trial. The trial will now be scheduled for the time period 24 May to 2 June 2006. This is the earliest date that the court can provide given the state of the court calendar and given that the prosecution cannot proceed with the assigned prosecutor in January of 2006. Thus a period of some 6½ months pre-trial detention would elapse before the trial concluded. Even if the accused were convicted and a jail sentence were imposed, the effective time spent in custody before trial might well exceed the time the accused would serve under a fit sentence of this court.

[12] The prosecution says in answer to this concern that the prosecution authorities would give priority to this case in the event that the accused were ordered to remain in custody pending a trial in late May. By this I understand the prosecutor to mean that she would consult with her superiors in the office of the Director of Military Prosecutions with a view to seeing if an earlier trial date could be scheduled for this trial. It is clear from the state of the court calendar that if such an arrangement were to be made, then other cases

that are presently scheduled before this court would have to be postponed.

[13] This court is in no position to make those unilateral alterations to the schedule on the basis of an undefined criterion of importance of the case. In the absence of a properly prepared submission, by either the prosecution or the defence, there is no plan put forward that I can rely upon which can give a reasonable assurance that the case of Mr Beek could be heard any earlier than 24 May to 2 June of next year.

[14] In addition, I have considered that the circumstances of pre-trial incarceration in the MP guardhouse are much more onerous than would be the case if a similar period of time was spent in the Service Detention Barracks under sentence. I accept the evidence of Warrant Officer Ramsey on these points.

[15] Lastly, I have considered the likely effect upon the accused of spending the last 9 days in military custody at the MP guardhouse. He is now aware, if he wasn't before, of the seriousness of his situation. He is certainly aware now of the serious consequences of failing to attend this court. In my view, he is unlikely to be as irresponsible about his obligations to this court in the future as he has been in the past.

[16] Therefore, pursuant to Queen's Regulations and Orders article 112.665, I order that the accused be released from custody until the resumption of his trial by court martial on 24 May 2006, at 1000 hours. The matter of the continued release of the accused after that date and time may be raised by counsel with me on 24 May.

COMMANDER P.J. LAMONT, MJ

Counsel:

Captain T. Simms, Regional Military Prosecutions Western
Attorney for Her Majesty The Queen
Major S.E. Turner, Directorate of Defence Counsel Services
Attorney for Ex-Corporal D.D. Beek