COURT MARTIAL

Citation: *R. v. Pear,* 2015 CM 3018

Date: 20150409
Docket: 201366

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Warrant Officer W.L. Pear, Applicant

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

REASONS FOR DECISION ON PLEA IN BAR OF TRIAL CONCERNING JURISDICTION OF THE COURT ON WARRANT OFFICER PEAR

(Orally)

[1] This is an application for a plea in bar made by Warrant Officer Pear, the accused in this trial, brought pursuant to subparagraph 112.05(5)(*b*) of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). It is presented at the beginning of the trial, prior to the judge asking the accused to enter a plea on the three charges on the charge sheet.

[2] Warrant Officer Pear is charged with one service offence punishable pursuant to section 97 of the *National Defence Act* (*NDA*) for drunkenness while at a mess dinner on Canadian Forces Base Petawawa on or about 1 November 2012, and with two service offences punishable under section 85 of the *NDA* for having used insulting language to a superior officer at the same mess dinner.

[3] Warrant Officer Pear is pleading in bar of trial that this Standing Court Martial has no jurisdiction in order to dispose of the charges before it, because he is not a

person subject to the Code of Service Discipline since his release from the Canadian Armed Forces more than two years ago. Basically, he told the court that there is no justifiable purpose to hold this trial before a military tribunal for prosecuting him, being now a civilian.

[4] As a matter of evidence, were introduced by the applicant the notice of application, an affidavit from an employee of Michel Drapeau Law Office, Mrs Nicole Bélanger-Drapeau, and an affidavit from Mrs. Leeann Jamieson, Administrative Assistant of the Prosecutor. No witnesses were heard and no further evidence was adduced by both parties.

[5] On or about 1 November 2012, it is alleged that Warrant Officer Pear, who was a member, at that time, of the 2 Service Battalion, Canadian Armed Forces, Regular Force, was drunk and used insulting language toward two persons of the rank of lieutenant during a mess dinner that took place at Reichwald Warrant Officers' and Sergeants' Mess on Canadian Forces Base Petawawa, province of Ontario.

[6] A complaint was made on 2 November 2012 regarding the alleged inappropriate conduct of Warrant Officer Pear. Charges against Warrant Officer Pear were laid on 22 March 2013. Further to the choice made on 19 April 2013 by Warrant Officer Pear to be tried by a court martial, his commanding officer made an application to the Referral Authority for disposal of the charges.

[7] The Referral Authority disposed of the charges on 26 July 2013 and recommended to the Director of Military Prosecutions that the matter proceed by the way of court martial. On 2 August 2013, the Director of Military Prosecutions preferred the three charges against the accused. Initial disclosure to defence counsel on this matter was made by the prosecution on 22 August 2013.

[8] On 6 September 2013, the applicant was released from the Canadian Armed Forces.

[9] On 12 December 2013, the prosecution notified defence counsel about the witnesses whom it proposed to call, including the purpose and the nature of their evidence.

[10] In January 2014, disclosure issues were raised by defence counsel, which initiated further written exchanges with the prosecution and the release of additional disclosure.

[11] However, defence counsel was not still ready to set a trial date, considering further disclosure issues, and an application was made by the prosecution at the end of May 2014 for that purpose, which ended up with an order by me, as the presiding military judge assigned by the Chief Military Judge to preside at this court martial, setting a trial date for 13 April 2015. A General Court Martial was, then, accordingly convened by the Court Martial Administrator on 5 November 2014.

[12] On 10 November 2014, I held a pre-trial conference with counsel. Further to some discussions that took place during that conference call, counsel presented a joint application for setting an earlier trial date in order to allow the court martial to hear preliminary matters sooner.

[13] On 13 November 2014, I ordered a new trial date accordingly and, on 22 January 2015, the Court Martial Administrator issued a new convening order for the Standing Court Martial of Warrant Officer Pear to take place on 26 January 2015 in Petawawa.

[14] However, with the agreement of both counsel, I ordered that, for preliminary matters only, this court martial shall be held on that date, but at the Asticou courtroom in Gatineau. On 26 January 2015, I then proceeded with the hearing of those applications, including the present one.

[15] The applicant would like to see the court apply the military nexus theory to subsection 60(2) of the *NDA* and, as a result, conclude that it has no jurisdiction to deal with this matter because he is no longer a person subject to the Code of Service Discipline since he was released from the Canadian Armed Forces on 6 September 2013.

[16] The prosecution takes the position that subsection 60(2) of the *NDA* addresses the continuing liability of Canadian Armed Forces members even after their release from the service and, consequently, considers that this court martial has jurisdiction over Warrant Officer Pear to deal with the charges on the charge sheet. From its perspective, the military nexus doctrine does not apply in such a context because the effects of this concept is limited to the issue of jurisdiction by a court martial over service offences only, as indicated by Court Martial Appeal Court decisions on this matter.

[17] As a matter of law, the specific provision dealing with the issue of jurisdiction over a person subject to the Code of Service Discipline, once released from the Canadian Armed Forces, for a service offence that would have been allegedly committed while that person was subject to the Code, is clearly subsection 60(2) of the *NDA*, which reads as follows:

> Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

[18] The military nexus theory was enunciated by the Supreme Court of Canada by McIntyre J. in the decision of *MacKay v. The Queen*, [1980] 2 S.C.R. 370, at page 410 in the following terms:

> The question then arises: how is a line to be drawn separating the service-related or military offence from the offence which has no necessary connection with the service? In my view, an offence which would be an offence at civil law, when committed by a civilian, is as well an offence falling within the jurisdiction of the courts martial and within the purview of military law when committed by a serviceman if such offence is so connected with the service in its nature, and in the circumstances of its commission, that it would tend to affect the general standard of discipline and efficiency of the service. I do not consider it wise or possible to catalogue the offences which could fall into this category or try to describe them in their precise nature and detail. The question of jurisdiction to deal with such offences would have to be determined on a case-by-case basis. A serviceman charged in a service court who wished to challenge the jurisdiction of the military court on this basis could do so on a preliminary motion. It seems, by way of illustration, that a case of criminal negligence, causing death resulting from the operation of a military vehicle by a serviceman in the course of his duty, would come within the jurisdiction of the court martial, while the same accident, occurring while the serviceman was driving his own vehicle on leave and away from his military base or any other military establishment, would clearly not. It may be observed that, on an admittedly different constitutional basis, this approach has been taken in American courts where a possible conflict of jurisdiction had arisen between the military tribunals and the civil courts.

[19] Clearly, the military nexus theory is in direct relation with the jurisdiction of a court martial over the offence and not over a person.

[20] This view was commented and is supported by the Court Martial Appeal Court in its decision of *R. v. Reddick*, CMAC-393. That court was dealing with the issue of Parliament's authority to deem a civilian, as a former member of the Canadian Forces, to be subject to the Code of Service Discipline. Subsection 60(2) of the *NDA* was at the heart of the decision, as it is in this application. Chief Justice Strayer, on behalf of the court said:

> Parliament has thus struck a balance as to when civilians or civilian offences ought to be tried in courts martial. That definition is entitled to the presumption of validity and there is no onus on the Crown to prove a "nexus" based on some other criteria.

[21] In *R*. v. *Moriarity*, 2014 CMAC 1, Chief Justice Blanchard, on behalf of the Court, clearly confirmed this reading and interpretation of the *Reddick* decision in those terms, at paragraph 57:

> The issue in *Reddick* was about Parliament's power to deem a civilian to be a person subject to the CSD. This issue was unrelated to the question of military nexus or to the jurisdiction of the military tribunal to try service offences. The issue was properly framed by the Court as a division of powers issue: whether Parliament had the power to enact the impugned provision? The Court ruled, in my view correctly, that "the nexus doctrine is superfluous and potentially misleading in a distribution of powers context."

[22] Then, contrary to what was advanced by the applicant that the decision of *Moriarity* put on the prosecution the obligation of discharging of the burden to show that the offences have the necessary nexus concerning the court martial's jurisdiction over him, this court martial concludes that there is no such burden, from a legal perspective, on the prosecution to do so.

[23] Reality is that it is the applicant who raised that this court martial has no jurisdiction over him because, being now a civilian, he is no longer a person subject to the Code of Service Discipline since his release from the Canadian Armed Forces in September 2013.

[24] The reading and interpretation by the Court of subsection 60(2) of the *NDA* and the facts adduced before it does, however, clearly establish that this court martial has jurisdiction over the applicant in order for him to be tried before this court martial for the incident that occurred while he was a member of the Canadian Armed Forces.

[25] Warrant Officer Pear was a non-commissioned member of the Regular Force, as established before this Court, at the time of the alleged incident on 1 November 2012 and to which particulars of the three charges are referring to, and he continues to be liable to be tried by this court martial in respect of those offences under the Code of Service Discipline, notwithstanding his release from the Canadian Armed Forces in September 2013.

FOR THESE REASONS, THE COURT:

[26] **DISMISSES** the application made by the applicant regarding the jurisdiction of the court over the Applicant to be tried by it;

[27] **DECLARES** that this Standing Court Martial has jurisdiction over the applicant to proceed with the charges on the charge sheet; and

[28] **PROCEEDS** with the trial on those charges.

Counsel:

The Director of Military Prosecutions as represented by Major A.-C. Samson and Captain M.L.P.P. Germain

Mr M. Drapeau and Mr J.M. Juneau, Michel Drapeau Law Office, 192 Somerset Street West, Ottawa, Ontario K2P 0J4, Counsel for Warrant Officer W.L. Pear