Citation: *R. v. Sergeant J. Faught*, 2006CM30

Docket: P200630

STANDING COURT MARTIAL
CANADA
MANITOBA
CANADIAN FORCES BASE SHILO

Date: 28 February 2006

PRESIDING: COMMANDER P. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
SERGEANT J. FAUGHT
(Accused)

DECISION RESPECTING A PLEA IN BAR OF TRIAL UNDER QUEEN'S REGULATIONS AND ORDERS SUBPARAGRAPH 112.24(1)(a).
(Rendered orally)

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[1] Sergeant Faught is charged with one offence of drunkenness contrary to section 97 of the *National Defence Act*. At the opening of his trial by Standing Court Martial, counsel on behalf of Sergeant Faught submits a plea in bar of trial under Queen's Regulations and Orders Article 112.24(1)(*a*) submitting that the court is without jurisdiction.

[2] A Standing Court Martial is an inferior court, and its jurisdiction is derived from statute, the *National Defence Act*[1]. Its jurisdiction is not presumed and when it is challenged, as in this case, the court must be satisfied that it does indeed have jurisdiction over the accused and over the charge before it.[2]

[3] The evidence before me on the plea discloses that Sergeant Faught was charged with the offence of drunkenness and named in a charge sheet dated 31 May 2005. On 26 July 2005, the Court Martial Administrator, M. Cotter, acting pursuant to QR&O

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[1] R.S.C. 1985, c. N-5
[2] *R. v. Ryan* (1987) 4 C.M.A.R. 563

112.02 and Section 165.19(1) of the *National Defence Act*, signed a convening order setting a trial date of 29 November 2005 at Canadian Forces Base Shilo.

[4] On 1 November 2005, the Court Martial Administrator wrote to Sergeant Faught's commanding officer, the assigned prosecutor and defence counsel for Sergeant Faught, and the court reporter, the assigned military judge, and others advising that because of scheduling changes "No military judge is available to preside at the subject court martial on 29 November '05" and purporting to withdraw the convening order dated 26 July 2005.

[5] Thereafter a new convening order dated 27 January 2006 was signed by the Court Martial Administrator ordering Sergeant Faught to appear for trial before me on 28 February 2006.

[6] Defence Counsel concedes that the convening order of 26 July 2005 was properly issued, and that the court would have had jurisdiction to hear the case if it had proceeded on 29 November 2005. He submits though, that the Court Martial Administrator did not have the authority to withdraw the convening order of 26 July 2005, nor to issue the new convening order dated 27 January 2006. Counsel relies on the decision of the Supreme Court of Canada in *R. v. Krannenburg*[3] and submits that when the scheduled trial date of 29 November 2005 arrived and nothing was done on that date by way of proceeding with the charge, the court lost jurisdiction to proceed further.

[7] In *Krannenburg*, the accused and counsel attended court as required, but the case was erroneously called in the wrong courtroom, and when the accused did not answer an arrest warrant was issued. The accused argued that jurisdiction over the offence was lost by reason of the fact that the court did not deal with the case on the date set. Dickson J., as he then was, delivered the judgement of the Supreme Court of Canada and stated:[4]

> It has long been recognized in our law that an inferior court may suffer loss of jurisdiction by reason of some procedural irregularity, as for example: when the date to which an accused is remanded or to which a case is adjourned for trial comes and goes without any hearing or appearance, 'with nothing done'.

[8] He then went on to discuss whether the loss of jurisdiction of the facts of that case was cured by a provision of the *Criminal Code,* and held that the defect of jurisdiction was not cured.

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[3][1980] 1 S.C.R. 1053
[4]*Ibid.,* p.1053

[9] In my view the circumstances of the present case are quite different. A Standing Court Martial is not the kind of court of which the Supreme Court spoke in the *Krannenburg* case. A Standing Court Martial only comes into existence when a convening order is properly made by the Court Martial Administrator. In the absence of such an order, there is no military authority with jurisdiction to try an accused by court martial.

[10] Unlike the situation in *Krannenburg*, this was not a case of nothing being done on an adjourned date. The Court Martial Administrator had established a date for trial and incorporated this date into the first convening order. Then the assigned judge became unavailable, and it was therefore necessary to change the trial date, or perhaps to assign another judge. For either purpose another convening order was necessary if there were to be any authority with jurisdiction to try the accused.

[11] Counsel submits that the powers of the Court Martial Administrator in respect of the convening of courts martial are set out in Section 165.19(1) of the *National Defence Act* which reads:

> 165.19 (1) When a charge is preferred, the Court Martial Administrator shall convene a court martial in accordance with the determination of the Director of Military Prosecutions under section 165.14 and, in the case of a General Court Martial or a Disciplinary Court Martial, shall appoint its members.

[12] It is argued that the *National Defence Act* does not give the Court Martial Administrator the authority to withdraw a convening order, or to replace a convening order with a new order setting a new trial date, and therefore the Court Martial Administrator acted beyond her authority.

[13] In my view, these submissions are fully answered by the provisions of Section 31 of the *Interpretation Act*[5] which provide in subsections (2) and (3) as follows:

> (2) Where power is given to a person, officer or functionary to do or enforce the doing of any act or thing, all such powers as are necessary to enable the person, officer or functionary to do or enforce the doing of the act or thing are deemed to be also given.
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> (3) Where a power is conferred or a duty imposed, the power may be exercised and the duty shall be performed from time to time as occasion requires.

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[5] R.S.C. 1985, c.I-21

[14] One of the functions of the Court Martial Administrator is to require the accused to attend before the court martial on a date and at a time and place specified by the Court Martial Administrator in a convening order.[6] If circumstances arise after the making of a convening order that prevent the Court Martial Administrator from carrying out her duty to ensure the accused is present for his trial (as for example, if the location of the court must be changed, or a different judge assigned), a further convening order can be issued under the power granted by subsection 31(3) of the *Interpretation Act.*

[15] In such circumstances the Court Martial Administrator might be well advised to formally withdraw the original convening order so that no confusion could arise in the minds of any of the parties concerned. I consider that such a power is necessary to the proper exercise of the powers explicitly granted to the Court Martial Administrator by the *National Defence Act*, and therefore the power to withdraw a convening order is deemed to be given to the Court Martial Administrator by subsection 31(2) of the *Interpretation Act*.

[16] It follows that the Court Martial Administrator acted within her authority in the present case.

[17] Once the original convening order was withdrawn it was no longer necessary for any party to appear on 29 November 2005. No jurisdiction was lost simply by reason of the failure of the court to do anything on that date. The jurisdiction that the court might have exercised on 29 November 2005 was already taken from it by the withdrawal of the original convening order. Jurisdiction was restored by the proper issuance of the second convening order setting the new trial date.

[18] I am satisfied that the jurisdiction of the court in the present case has been established and the plea in bar was therefore denied.

COMMANDER P. LAMONT, M.J.

Counsel

Captain T. Bussey, Regional Military Prosecutor Western
Counsel for Her Majesty The Queen
Major M. Reesink, Directorate of Defence Counsel Services Ottawa

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[6] see *R. v. Larocque* at a Standing Court Martial decided Oct. 13, 2000.

Counsel for Sergeant T. Faught