Citation: *R. v. Ex-Corporal S.C. Chisholm,* 2006 CM 07

Docket:C200607

STANDING COURT MARTIAL
CANADA
ONTARIO
CANADIAN FORCES BASE BORDEN

Date:22 March 2006

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

HER MAJESTY THE QUEEN
v.
EX-CORPORAL S.C. CHISHOLM
(Accused)

DECISION RESPECTING A PLEA IN BAR OF TRIAL UNDER QUEEN'S REGULATIONS AND ORDERS ARTICLE 112.24 AND SUBMITS THAT SECTION 165.14 OF THE *NATIONAL DEFENCE ACT* IS UNCONSTITUTIONAL AS IT IS INCONSISTENT WITH SECTION 7 OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS.*

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[1] Section 165.14 of the *National Defence Act*[1] reads as follows:

> When the Director of Military Prosecutions prefers a charge, the Director of Military Prosecutions shall also determine the type of court martial that is to try the accused person and inform the Court Martial administrator of that determination....

[2] At the opening of his trial by Standing Court Martial the applicant, Ex-Corporal Chisholm, raises a plea in bar of trial under Queen's Regulations and Orders article112.24, and submits that section 165.14 is unconstitutional as it is inconsistent with section 7 of the *Canadian Charter of Rights and Freedoms*. Section 7 guarantees the right to security of the person and the right not to be deprived of that right except in accordance with the principles of fundamental justice. It is argued that section 165.14 confers a decision-making authority on the Director of Military Prosecutions to choose the mode of trial by court martial, that the choice of mode of trial by court martial ought

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[1] R.S.C.1985, c.N-5 as amended

to be a decision made by the accused, and the section should therefore be declared to be of no force or effect pursuant to section 52 of the *Charter*.

[3] It is further argued that if the section is unconstitutional the Director of Military Prosecutions did not have the authority to prefer charges against the accused in the present case for trial by Standing Court Martial, and, therefore, this court is without jurisdiction to proceed.

[4] Ex-Corporal Chisholm is charged with two offences of disobeying a lawful command, one offence of knowingly making a false accusation against a non-commissioned member, and an alternative charge of committing an act to the prejudice of good order and discipline, all contrary to the *National Defence Act*. The offences are alleged to have been committed when the accused was a member of the Reserve Force. In this case, therefore, at the time the charges were preferred on 20 September 2005, the Director of Military Prosecutions (DMP) had the option to require a trial by Standing Court Martial, that is, a military judge sitting alone, or a General or a Disciplinary Court Martial in which a military judge would sit with a panel of five or three members of the Canadian Forces whose role would be similar to that of a jury hearing a trial on indictment under the Criminal Code.

[5] Acting pursuant to section 165.14 the DMP chose trial by Standing Court Martial.

[6] It is useful, I think, to remember what this application is *not* about. In the first place, the applicant is not seeking an order that these charges be tried by a jury, although counsel submits that a civilian court would have jurisdiction to try these offences under the *National Defence Act*. I have substantial doubt that this proposition is accurate, but I do not have to decide that issue here.

[7] Secondly, counsel for the applicant is not seeking an order from this court that he be tried by either a General or a Disciplinary Court Martial on these charges. Indeed, counsel submits that the court does not have jurisdiction to make such an order because it would effectively overrule the decision of the DMP.

[8] Thirdly, the applicant does not attack the decision of the DMP in this case to require trial by Standing Court Martial on grounds of fairness, for example, or on any other ground. He submits, though, that the section of the *National Defence Act* authorizing the decision made by the DMP violates the *Charter*-guaranteed right and is therefore unconstitutional.

[9] The applicant bases his argument on the judgment of the Honourable Mr. Justice Létourneau speaking for the Court Martial Appeal Court in the case of *R. v.*

Nystrom.[2] In that case the accused was charged with an offence of sexual assault causing bodily harm. At his trial by Standing Court Martial, and again on appeal from the conviction for the included offence of sexual assault, the accused raised this same issue of the constitutional validity of section 165.14.

[10] Justice Létourneau expressed his deep concern over this provision of the *National Defence Act*, particularly because the jurisdiction of courts martial was extended in 1999 to include the trial of sexual offences with a concomitant loss of the right to a jury trial if such offences were prosecuted before a military court instead of a civilian court. He wrote, at paragraph 70:

> Were it not for section 165.14, which is being challenged here, it would not necessarily be unreasonable to think that this loss is to some degree compensated by the possibility of obtaining a trial before either a Disciplinary Court Martial (section 169 of the Act) or a General Court Martial (section 166), which resembles a trial by jury, although it is not. The accused can then be tried by a panel of three or five members of the military, assisted by a military judge, instead of by a military judge alone. But—and this is where the problem lies—the prosecution has the choice of these modes of trial while, as we know, if a soldier were prosecuted before the civilian courts for the same offence giving rise to an election as to mode of trial, the choice ... would belong to him or her, not the prosecution.

And at paragraph 79:

> There is no doubt in my mind that the choice of mode of trial conferred by section 165.14 is an advantage conferred on the prosecution that could be abused....

[11] After referring to statistics showing that since September of 1999 a total of 220 courts martial had been held among which only four were either a General or a Disciplinary Court, and no such panel courts had been held among the 120 to 125 courts martial held since 2003, Justice Létourneau concluded that these figures "point to the virtually inescapable conclusion that the power under section 165.14 is being abused."

[12] The court observed, at paragraph 78:

> ... I am of the opinion that the choice of mode of trial partakes of a benefit, an element of strategy or a tactical advantage associated with the right ... to present full answer and defence and control the conduct of his or her defence. This right is recognized as a principle of fundamental justice...

[13] But the court did not go on to expressly find that section 165.14 was unconstitutional. Rather, the court decided that the verdict of guilty against Nystrom was unreasonable, and therefore the court substituted a verdict of acquittal.

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[2] [2005] C.M.A.J. No.8

[14] Justice Létourneau noted that given his conclusion as to the reasonableness of the verdict, "it is not necessary to discuss the constitutionality of section 165.14 …" The question therefore arises, whether this court is bound by the doctrine of precedent, or *stare decisis*, to follow the reasoning of Justice Létourneau in deciding the issue of the constitutional validity of section 165.14.

[15] Lower courts are bound to follow the direction of higher courts on matters of interpretation of the law, but, generally speaking, this rule applies only to what the higher court actually decided, and not necessarily to each and every observation made by the higher court in arriving at its decision.[3] After anxious thought, and not without considerable hesitation, I have concluded that I am not bound by what was said in the course of the ruling in *Nystrom* to hold that section 165.14 is unconstitutional.

[16] Under the military law of England, a court martial consisted of a panel of officers appointed to hear a particular case. In the case of a General Court Martial the court was assisted by a Judge Advocate, a legally-trained officer, who, among other duties, advised the court on legal points. The choice of type of court martial, whether a General, a Regimental, or a Field General Court Martial, was dictated by the nature of the offence alleged and the rank of the accused, or was made by service authorities without regard for the wishes of the accused.

[17] Canada inherited these processes, and the same were contained in the *National Defence Act* of 1950.[4] That *Act* also provided for a Standing Court Martial consisting of one legally-trained officer to act as judge both of the law and the facts, but only to be constituted in an emergency.

[18] The history of the Standing Court Martial as an institution is traced by Chief Justice Maloney of the Court Martial Appeal Court in the case of *R. v. Ingebrigtson* (1989) 5 CMAR 87, pages 91-94. It was only in 1967 that the precursor to the current form of Standing Court Martial, with jurisdiction over nearly all members of the service for any service offence, but with a limited power of punishment, came into existence. General and Disciplinary Courts Martial continued to exist of course, and the determination as to which kind of court would hear the case was made by the convening authority.

[19] As a result of the amendments to the *National Defence Act* effected by Bill C-25 in 1998, the power formerly exercised by the convening authority to choose the mode of trial by court martial now rests with the Director of Military Prosecutions acting under section 165.14.

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[3] *R. v. Henry* 2005 SCC 76.

[4] S.C.1950, c.43

[20] As Justice Létourneau noted in the case of *Nystrom*, a General or Disciplinary Court Martial is not a jury trial. Nonetheless there are important similarities between a jury trial under the Criminal Code and a General or Disciplinary Court Martial under the *National Defence Act*. In both cases, the important role of finder of facts and determiner of a verdict is discharged by non-legally trained persons, drawn from the same community as the accused, who act collectively, with the benefit of judicial instruction, to determine the facts of the case, to make judgements concerning the credibility of witnesses, and to determine whether the accused is guilty or not guilty.

[21] I wish to respectfully record my agreement with the observation of Justice Létourneau in *Nystrom* that the choice of mode of trial by court martial must be considered to be a tactical choice that can properly be made in the interests of the party with the power to make that choice. Where that choice is made by the prosecution, it is not solely a matter of the discretion of the prosecutor, with which this court, on all the authorities, should be reluctant to interfere. It is a tactical choice that can be made in the interests of seeking a finding of guilty. As such, it is a choice that cannot be permitted to result in an unfair trial for the accused.

[22] It is true that the effect of section 165.14 is to deny that tactical choice to an accused at court martial, but I cannot conclude that the failure to accord the accused at court martial the untrammelled right to choose the mode of trial by court martial violates the principles of fundamental justice. In my view, and with the greatest of respect for those who would hold otherwise, the ability to make the tactical choice of mode of trial should vary with the circumstances of the case.

[23] For example, the more serious the alleged offence, as judged by the maximum punishment prescribed for the offence by statute, the greater is the interest of the accused in exercising the tactical choice of mode of trial. This is the very touchstone by which the right to a jury trial is enshrined in the Criminal Code. More serious offences under the Criminal Code are prosecuted on indictment, and these cases are presumed to be jury trials unless the accused elects trial by judge alone[5] (subject to the right of the Attorney General to require a jury trial). As well, of course, the *Charter*, in section 11*(f),* guarantees the constitutional right to a jury trial for offences that may be punished by a maximum of five years imprisonment or more.

[24] By way of further example, the accused may have a substantial interest in the tactical choice of mode of trial where the central issue in the trial is going to be the credibility of a single witness pitted against the credibility of the accused. General and Disciplinary Courts Martial reach their findings of guilty or not guilty by majority vote. An accused may well consider that his prospects of raising a doubt as to his guilt

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[5] *Criminal Code* R.S.C.1985, c.C-46, s.471

in the minds of a majority of members of a panel are better than the odds of raising such a doubt in the mind of a single judge sitting alone. This is the kind of strategic calculation that is routinely made in the conduct of a defence to charges under the Criminal Code. It is a valid and acceptable means of conducting one's defence to a criminal charge.

[25] There may be other kinds of circumstances in which the interest of the accused in making the tactical choice as to mode of trial by court martial is such as to justify overriding the choice made by the DMP under section 165.14.

[26] I am far from saying that an accused should always have a right to exercise that tactical choice, but by the same token, circumstances are bound to arise in which, out of concerns of fairness, an accused at court martial ought to be permitted to require the question of guilt or innocence to be decided by a panel. In my view these questions ought to be resolved on a case-by-case basis in the context of the constitutional guarantee to a fair trial contained in section 11*(d)* of the *Charter*.

[26] An accused is always at liberty to request of the prosecution that his or her court martial proceed as a panel court. Where an issue arises between the accused and the prosecution as to the mode of trial, a pre-trial application can be made to the military judge. On such an application, the burden would be upon the accused to demonstrate that the exercise of discretion by the prosecution to determine the mode of trial by court martial should be reviewed because constitutional considerations are engaged, as where the discretion has been exercised arbitrarily, capriciously, or for some improper purpose or motive, or for an abuse of process.[6]

[27] This approach addresses the difficulty identified by Justice Létourneau when he referred to the possibility that the prosecution may abuse its statutory right to choose the mode of trial by court martial.

[28] Similar issues arise in the civilian context when the prosecution declines to consent to a re-election by the accused as to mode of trial under the Criminal Code. See, for example, *R. v. McGregor* (1999) 43 O.R. (3d) 455. The correct approach, in my view, is not to dispense altogether with the statutory requirement under the Criminal Code for the consent of the prosecution to a re-election because on occasion the right to withhold consent may be abused, but rather to enable the court to weigh the competing interests and, in proper cases, grant a remedy that ensures a fair trial for the accused.

[29] It follows from the above that I do not agree with the submission of counsel for the applicant that the court does not have jurisdiction to remedy an

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[6] *R. v. Nosworthy* 2002 CanLII 6581 (On S.C.)

unfairness occasioned to the accused by reason of the choice of mode of court martial made by the DMP under section 165.14.

[30] For these reasons I conclude that section 165.14 is not invalid as depriving the accused of his constitutional right to liberty and security of the person, and the right not to be deprived thereof, except in accordance with the principles of fundamental justice. A fair trial, as guaranteed by section11*(d)* of the *Charter*, is sufficient to protect the section 7 right in this context. Any unfairness in the trial process, occasioned by the exercise by the prosecution authorities of the right to determine the mode of trial by court martial, can be remedied in a proper case by the court itself.

[31] The plea in bar of trial is dismissed.

COMMANDER P.J. LAMONT, M.J.

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