Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20230413

Docket: CMAC-625

Citation: 2023 CMAC 5

Present: **SCANLAN J.A.**

BETWEEN:

NAVAL CADET REMINGTON

Applicant

and

HIS MAJESTY THE KING

Respondent

Heard at Ottawa, Ontario, on March 10, 2023.

Order delivered from the Bench at Ottawa, Ontario, on March 10, 2023, with reasons to follow. These are those reasons.

REASONS FOR ORDER BY: SCANLAN J.A.

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REASONS FOR ORDER

SCANLAN J.A.

[1] I have been asked to consider an application for a Stay of Execution pursuant to s. 65 of the *Supreme Court Act*, R.S.C., 1985, c.s-26 (the "*Act"*). As I indicated to counsel during

submissions, prior to the Supreme Court of Canada granting leave to appeal on *R. v. Edwards*; *R. v. Crépeau*; *R. v. Fontaine*; *R. v. Iredale* 2021 CMAC 2, *R. v. Proulx; R. v. Cloutier* 2021 CMAC 3, and *R. v. Christmas* 2022 CMAC 1 ("*Edwards et al*"), I was of the view that there was no merit to the appeal in *Edwards et al*. I was of the same opinion in this case, and I signed an order that dismissed the appeal, following the reasons set out by this Court in *Edwards et al*. The Supreme Court of Canada has granted leave to appeal in *Edwards et al* and that has an impact on this Stay application. In saying that I recognize the law is as set out in *Edwards et al*, and cases following it are still good law.

[2] Since the Supreme Court of Canada does not give reason in its leave decisions, we cannot be sure on what basis the Court granted leave in *Edwards et al*. Section 40 of the *Act* explains when leave may be granted. I set out below the relevant portion for this decision:

> (40)(1) Subject to subsection (3), an appeal lies to the Supreme Court from any final or other judgment of the Federal court of Appeal or of the highest court of final resort in a province, or a judge thereof, in which judgment can be had in the particular case sought to be appealed to the Supreme Court… where, with respect to the particular case sought to be appealed, the Supreme Court is of the opinion that any question involved therein is, by reason of its public importance or the importance of any issue of law or any issue of mixed law and fact involved in that question, one that ought to be decided by the Supreme Court, or is, for any other reason, of such a nature or significance as to warrant decision by it, and leave to appeal from that judgment is accordingly granted by the Supreme Court.

That section does not in any way suggest the granting of leave is an indication as to the merits of the appeal.

[3] The parties to this application agree the authority of this Court to grant a Stay is found in s. 65.1 of the *Act*. I agree.

[4] As noted by the Respondent, the facts of this case are very important, as are the circumstances of the Applicant in terms of what has occurred since he has been released pending trial and after his conviction. He has been on one form of release or another since 2018, when he was initially charged.

[5] In November of 2018, the Applicant was accused of sexual assault on an incapacitated complainant. The assault lasted more than three hours and consisted of numerous sexual acts, including choking of the complainant. Immediately after the conviction the Applicant gave what was apparently a confession or admission, saying he committed the offence as alleged. The circumstances of those admissions have not been considered by any court. The Applicant was found guilty on September 8, 2021, and was sentenced to two years' incarceration.

[6] Immediately after the trial judge imposed the sentence on April 22, 2022, she ordered the release of the accused. There are no assertions by the Crown that the Applicant has at any time breached any condition of his release although the Crown did say the release conditions have never been onerous: No intoxicating substances, no contact with the complainant and no pornography.

[7] As I said, there is no indication the Applicant failed to comply with his release conditions or that he re-offended. There have been no subsequent charges. This Applicant has been very

forthright in terms of informing the Court as to steps he has taken to improve himself while on release, and advising as to his changing educational, employment and living circumstances. Even as late as March 10, 2023 he informed the Court, through his counsel's affidavit, he no longer has the job he was trying to protect (through the Stay application). That affidavit suggests that job was not lost because the Applicant did anything wrong. His strengths on the technical side are good but his strengths on the carpenter side were not what his employer was looking for. He simply was not a good fit.

[8] It is of note as well that the Applicant, since his initial release, and continued after the release of April 22, 2022, has made substantial strides in his effort to make positive contributions to society by further continuing his education. The Applicant's unchallenged affidavit says that even though his conviction has been appealed, it has had an impact on him. Because of the conviction he has lost an earlier job he had. The conviction has already had a negative impact on him, even though it is under appeal. His original affidavit suggested incarceration at this time would impair his efforts to complete his educational program. I now understand he has completed that program. I understand he is now trying to secure another job.

[9] All of that said the Applicant does stand convicted of a very serious offence. His only ground of appeal relies upon the same grounds as in *Edwards et al*.

[10] The complainant and the public have an interest in seeing justice done. Justice includes having an offender serve a sentence imposed upon conviction.

[11] Counsel both agree Naval Cadet Remington is not a flight risk. There is material suggesting Naval Cadet Remington has been assessed and found to be a low risk to re-offend.

[12] Prior to February 2, 2023, when the Supreme Court of Canada granting leave in *Edwards et al* I would have said, together with other judges of this Court, have stated the law; the Applicant was convicted by a properly constituted, independent and impartial court. At this point we do not know what the Supreme Court of Canada will say on the merits of the *Edwards et al* appeal. Section 40 of the *Act* makes it clear that I must not read too much into the granting of leave. It may be that they simply granted leave because the Court wants to pronounce, once and for all, that Mr. Edwards and other were tried by an independent court. The other possibility is that the decision in *Edwards et al* is overturned. It is not for me to speculate on the outcome.

[13] Any accused in any trial is entitled to a trial by an independent and impartial judge; one who's verdict is not influenced by forces or factors outside of the courtroom or by anybody to whom they must answer. The right to be tried in an independent and impartial court is every bit as important to the public as any competing interest.

[14] Pending a final decision in *Edwards et al* this court is in a difficult position. Had leave not been granted I would have focused just on the law as it is at this point saying it is time for the Applicant to serve his sentence. Instead, I must wrestle with the issue of whether this Applicant, in these circumstances, should be released by way of a Stay, pending the determination of the *Edwards et al* appeal in the Supreme Court of Canada.

[15] The first hurdle and second hurdle as set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1995] 3 S.C.R., 127 D.L.R. (4th) 1 are conceded by the Respondent. They say however, the Applicant would not suffer irreparable harm if the Stay is not granted, and the independence or the impartiality of tribunal is successfully challenged. To a certain extent here today the Respondent suggests 'well he's going to be convicted anyways'. In saying this the Respondent references the findings of the Military Court and the so called confession.

[16] Nothing is absolute when it comes to convictions. In any trial an accused is entitled to a presumption of innocence until the announcement of the verdict by the independent and impartial trier. I am not about to pre-judge this case should it go before another court should that be required.

[17] The public interest factor is an important aspect of the balancing of convenience test. It doesn't just stop at the point where we consider the seriousness of the offence. I referred, counsel, as you were making submissions to *Oland*, 2017 SCC 17, [2017] 1 S.C.R. 250 where there had been a conviction for murder, and the decision on bail was upheld permitting release pending trial.

[18] I consider the argument by the Respondent that public safety is a consideration. I look at the fact the Applicant has been on release since he was originally charged and has not re-offended. It concerns me, as it would concern every judge, that the conviction involved a very serious offence. It may be suggested there is a risk he would commit that type of offence again

but that would be little more than speculation at this point. It is not appropriate for me to presume his conviction is going to be upheld based on *Edwards et al*.

[19] Public confidence in the administration of justice has two aspects. Firstly, there is a public safety and I refer to the fact that by all accounts this was a very serious offence, attracting a sentence of two years, which has not been appealed. I accept that such a harsh sentence imposed on a first time, somewhat youthful offender, speaks to the severity of the crime. As for the public safety aspect of it, I have already referred to the fact that he has been in the community since his original release in 2018 and would not appear to present an imminent threat to public safety.

[20] Public confidence in the administration of justice is really where this case turns. The public confidence is to be viewed through the eyes of a reasonable person, one who is a dispassionate person and respectful of societal values. I can say in terms of any assessment of societal values, no reasonable person would find the offence as alleged to have occurred here to be in any way acceptable.

[21] As stated earlier, until February 2, when leave was granted in *Edwards et al* many judges would have said the Applicant was convicted by an independent and impartial court and further challenge to the Courts Martials were without merit. I now find myself saying it is possibly an issue.

[22] I want to emphasize that what I do here today does not mean all sentences are to be stayed pending the decision in *Edwards et al.* The Court will have to assess each case considering the risk to society and what a reasonable person in each case would consider appropriate.

[23] I understand and recognize the Complainant in this case would want closure. The public expects closure. The public also demands and expects any accused in any criminal proceeding would be tried in an independent court. That is something we have guarded jealously through history for decades, if not centuries.

[24] I can say to the Complainant in this case that if the *Charter* challenge is not successful in *Edwards et al,* Mr. Remington will serve his sentence. His sentence has not been appealed and the only ground of appeal is based on *Edwards et al.* The flip side to that however is that if I were to deny the Stay today it means the Applicant will never get the time back. If he goes to jail for 6 days, 6 months or two years, that time is gone.

[25] I want to make it clear for this and for other cases that may follow, if I were convinced by any standard that this Stay presented an unreasonable or immediate risk to the public or to this victim, the balance of convenience would not support a Stay even with the uncertainty created by the granting of leave in *Edwards et al*.

[26] I distinguish both *R. v. Sergeant A.J.R. Thibault* 2022 CMAC 6 [*Thibault*] and *R. v. Corporal D.D. Royes* 2016 CMAC 3 [*Royes*]. In those cases, when the decisions were rendered

there had been no decision on leave in *Edwards et al*. That was an important consideration in the reasons as delivered by Chief Justice Bell in *Thibault*. The same goes for *Royes*. The decision of this court in *Edwards et al* and other cases closed the door to the challenge to the independence and impartiality of the Military Courts. That door is opened at least a crack now.

[27] In this case I am satisfied that there is no reasonable risk of this accused either fleeing the jurisdiction or presenting any risk to the Complainant or to other members of the public. The Complainant, as I said, can rest assured that if the appeal in *Edwards et al* is dismissed, the Applicant will go to jail.

[28] For now, I grant the Stay of Execution of sentence.

"J. Edward Scanlan"

J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-625
STYLE OF CAUSE:	NAVAL CADET REMINGTON v. HIS MAJESTY THE KING
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 10, 2023
REASONS FOR ORDER BY:	SCANLAN J.A.
DATED:	APRIL 13, 2023

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