

**Court Martial Appeal Court
of Canada**



**Cour d'appel de la cour martiale
du Canada**

Date: 20230616

Docket: CMAC-623

Citation: 2023 CMAC 7

Present: BELL C.J.

BETWEEN:

SERGEANT V.N.E. TURNER

Appellant/Applicant

and

HIS MAJESTY THE KING

Respondent

Motion determined on the basis of written submissions filed by the Moving Party, the Appellant/Applicant, on the 9th day of June, 2023 and by the Respondent on the 13th day of June, 2023.

Reasons for Order delivered at Ottawa, Ontario, on June 16, 2023.

REASONS FOR ORDER BY:

CHIEF JUSTICE BELL

Court Martial Appeal Court
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Order restricting publication: The order of the Court Martial issued pursuant to section 179 of the *National Defence Act* (R.S.C., 1985, c. N-5) on 6 December 2021 remains in effect. No person shall publish or broadcast or transmit in any way any information that could identify any person described in these proceedings before the Court Martial Appeal Court of Canada as being a complainant.

REASONS FOR ORDER

CHIEF JUSTICE BELL

[1] On January 28, 2021, a Standing Court Martial convicted the Appellant of one count of sexual assault, contrary to s. 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 (“NDA”) as contemplated by s. 271 of the *Criminal Code*, (R.S.C., 1985, c. C-46) (“Criminal Code”). The

Military Judge sentenced the Appellant to nine months of imprisonment and a reduction in rank, among others. The Military Judge ordered Sgt. Turner's release pending the outcome of an appeal to this Court. This Court dismissed that appeal on June 9, 2023. On that same date, Sgt. Turner sought leave to appeal to the Supreme Court of Canada (the "Supreme Court").

[2] Sgt. Turner now seeks a stay of the execution of his sentence, pursuant to s. 65.1(1) of the *Supreme Court Act*, R.S.C., 1985, c. S-26 (the "Act"), pending disposition of his application for leave to appeal to the Supreme Court. His Majesty the King consents to the granting of the stay, subject to the imposition of conditions.

[3] By way of background, on February 2, 2023, the Supreme Court granted leave to appeal the following decisions of this Court with respect to the independence and impartiality of military judges: *R. v. Edwards*; *R. v. Crépeau*; *R. v. Fontaine*; *R. v. Iredale* 2021 CMAC 2; *R. v. Proulx*; *R. v. Cloutier* 2021 CMAC 3; *R. v. Christmas* 2022 CMAC 1; and *R. v. Sergeant A.J.R. Thibault* 2022 CMAC 3. Sgt. Turner intends to raise the very same issue before the Supreme Court.

[4] In considering whether a stay of the execution of sentence should be granted, this Court is bound by the jurisprudence of the Supreme Court in *R. v. Oland* 2017 SCC 17, 409 DLR (4th) 457 (*Oland*) and must apply the tri-partite test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)* [1994] 1 RCS 311, 1994 CanLII 117 (*RJR-MacDonald*). I have carefully considered the arguments advanced by both Sgt. Turner and the Respondent. Based upon those submissions, and given the consent of the Respondent, I am satisfied there exists a serious issue

to be determined, Sgt. Turner would suffer irreparable harm if the stay is not granted and the balance of convenience favours the granting of the stay. I am also satisfied that, in the circumstances, the three-part test set out in *R. v. Oland* has been met, namely: the appeal is not frivolous, Sgt. Turner will surrender himself into custody in accordance with any eventual order in that regard and his detention is not necessary in the public interest.

[5] I, however, do not wish to conclude these reasons without commenting upon one argument advanced by Sgt. Turner. He titles part of his argument as **Horizontal stare decisis** and encourages this Court to follow the decision of my colleague Justice Scanlan, in *R. v. Remington*, 2023 CMAC 5 (*Remington*). With respect, there is no issue of horizontal *stare decisis* in the circumstances. Each request for a stay of the execution of sentence or judicial interim release, must be decided on its own facts, following the jurisprudence of the Supreme Court in cases such as *Oland* and *RJR. Macdonald*. Justice Scanlan acknowledged this in *Remington*. In *R. v. Thibault* 2023 CMAC 6 (*Thibault*), applying the same legal principles, I reached a different conclusion than did Justice Scanlan in *Remington*. To speak of *stare decisis* as it relates to factual conclusions and their application to the exercise of discretion conflates questions of law, to which horizontal *stare decisis* should be applied, and questions of fact, for which there can be no *stare decisis*, horizontal or vertical. Regardless of my reasons in *Thibault* and on this application, or the reasons of Justice Scanlan in *Remington*, it remains open to a Court to refuse to stay the execution of a sentence, whether or not there is an application for leave to appeal, or, even an appeal, before the Supreme Court.

[6] The application for a stay of the execution of sentence is granted subject to the following conditions:

Sgt. Turner is to be released from custody pending the final determination of his application for leave to appeal, and any eventual appeal, to the Supreme Court subject to the following conditions. He must:

Keep the peace and be of good behaviour;

Remain under military authority unless lawfully released from the Canadian Armed Forces;

Surrender himself to 2 Military Police Regiment Detachment Kingston when ordered to do so, and, without limiting the foregoing, within 48 hours following the time when his leave to appeal before the Supreme Court is withdrawn or is dismissed, or following the time when his appeal is dismissed;

Abstain from communicating with or associating, directly or indirectly, by any means whatsoever, with the victim of his crime;

Attend all proceedings as required, if any, in the civilian and military justice systems;

Notify the 2 Military Police Regiment Detachment Kingston of any change of address or phone number, or of any travel outside of Canada, even if released from the Canadian Armed Forces.

“B. Richard Bell”

Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: CMAC-623

STYLE OF CAUSE: SERGEANT V.N.E. TURNER v.
HIS MAJESTY THE KING

**CONSIDERED IN WRITING WITHOUT PERSONAL APPEARANCE OF THE
PARTIES**

REASONS FOR ORDER BY: CHIEF JUSTICE BELL

DATED: JUNE 16, 2023

IN WRITING:

Major Francesca Ferguson

FOR THE
APPELLANT/APPLICANT

Lieutenant-Colonel Karl Lacharité

FOR THE RESPONDENT

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