Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20191031

Docket: CMAC-595

Citation: 2019 CMAC 4

CORAM: **CHIEF JUSTICE BELL**
MOSLEY J.A.
BROWN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LEADING SEAMAN C.D. EDWARDS

Respondent

Heard at Halifax, Nova Scotia, on June 13, 2019.

Judgment delivered at Ottawa, Ontario, on October 31, 2019.

REASONS FOR JUDGMENT BY THE COURT

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REASONS FOR JUDGMENT

I. Overview

[1] This is a Crown appeal, pursuant to s. 230.1 of the *National Defence Act*, R.S.C., 1985, c. N-5 [*NDA*] from a Standing Court Martial's acquittal of Leading Seaman C.D. Edwards [LS Edwards] on one count of conduct to the prejudice of good order and discipline contrary to

subsection 129 (2) of the *NDA*. The count contended that LS Edwards had used cocaine contrary to article 20.04 of the *Queen's Regulations and Orders* [QR&Os].

[2] In the course of rendering his decision, the military judge concluded that time and place were essential elements of the offence. Upon being satisfied that neither was proven beyond a reasonable doubt, an acquittal was entered. For the reasons set out below we allow the appeal, quash the acquittal and order a new trial before a different military judge.

II. Background

[3] At the time of the hearing of this appeal, LS Edwards was a regular member of the Canadian Armed Forces, and had been so employed since 2010. On the morning of June 12, 2017, he reported for work aboard The *HMCS Ville de Québec.* The coxswain ordered him to present himself at the Military Police National Investigation Service [NIS] offices in Halifax for purposes of being interviewed in relation to an ongoing investigation.

[4] During the investigation of another sailor for alleged drug trafficking, the NIS had received information it believed implicated LS Edwards in the purchase and use of cocaine. During his interview, LS Edwards admitted to using unlawful drugs, including cocaine, at various times during his career with the Canadian Armed Forces. He specifically mentioned that he habitually used cocaine for more than a year after he and his ex-girlfriend separated in 2013. During the interview on June 12, 2017, LS Edwards stated that he last used cocaine "about a year ago". He also admitted to having purchased cocaine from the other sailor under investigation "a few times".

[5] At the close of the interview, the investigator summarized to LS Edwards what he had understood from their exchange. The investigator suggested LS Edwards last used cocaine around the spring of 2016, while pointing to printed text messages and bank statements, none of which were offered as evidence. LS Edwards responded with "yeah, around that, it's been a while".

[6] The particulars of the charge against LS Edwards read as follows:

> In that he, between 25 September 2015 and 23 July 2017, all dates inclusive, at or near Halifax, Nova Scotia, did use a drug, to wit cocaine, contrary to Queen's Regulations and Orders 20.04.

III. Summary of the Military Judge's decision

[7] The military judge concluded time and place of the offence were essential elements to be proven by the prosecution. With respect to the issue of time, the military judge noted the difference between evidence of use of cocaine and its purchase. The military judge concluded there was uncertainty with respect to cocaine use within the time period as particularized. He concluded the confession related to cocaine use during the time period 2013-2014, a period that falls outside the dates particularized. With respect to the place of the offence, the military judge observed that the prosecution made no attempt to clarify the location of the offence. He also noted that the place of delivery of the cocaine to LS Edwards is not necessarily the place where LS Edwards would have allegedly used the substance. The military judge clearly struggled with reconciling the weakness of the evidence of use of cocaine with the evidence of purchase. While the military judge concluded that LS Edwards used cocaine while a member of the Canadian Armed Forces, he was not satisfied beyond a reasonable doubt that the use occurred between the

dates particularized in the charge. Similarly, he was not satisfied that the place of the offence had been established. He stated:

> [37] I conclude that the elements of time and place of the offence have not been proven beyond a reasonable doubt. To be clear, this is not a case where a special finding under section 138 of the *NDA* can be made: enlarging the period covered by the offence to go as far back as 2013 would be prejudicial to the defence. Defence counsel elected not to call evidence on the basis of the case to meet, which included the insufficiency as to time of the offence that the defence identified in arguments shortly thereafter. As for the place of the offence, there were no facts proven that would allow for a special finding to be made.

IV. Grounds of Appeal

[8] The Crown amended its grounds of appeal as permitted by Rules 7(3) and 7(4) of the *Court Martial Appeal Court Rules*, SOR/86-959. The amended grounds, as set out in the appellant's written submission, state in part that the "[…] military judge erred in requiring specific evidence on elements and matters that were immaterial to the proof of the offence […]" and that he "[…] failed to consider the evidence as a whole. […]".

[9] LS Edwards concedes he was not prejudiced by the particularization of the place of the offence being "at or near Halifax". Nonetheless, he contends he was prejudiced in his defence by the time period particularized. He contends he chose his defence strategy based on the case to meet, the manner in which the time of the offence was particularized, and the evidence the prosecution intended to introduce.

[10] Because we are satisfied the first ground of appeal is determinative, we need not consider the second ground.

V. Analysis

[11] Acquittals are not lightly overturned: *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595 at para. 2; *R. v. George*, 2017 SCC 38, [2017] 1 S.C.R. 1021 at para. 27; *R. v. Graveline*, 2006 SCC 16, [2006] 1 S.C.R. 609 at paras. 14-15. That said, the law is unequivocal on the issues raised in this appeal.

[12] From time immemorial, a date specified in an indictment or information has not been held to be a material matter. In *R. v. B. (G.)*, [1990] 2 S.C.R. 30, 111 N.R. 31 [*B(G)*], the Supreme Court of Canada held, at page 49, that "it is of no consequence if the date specified in the information differs from that arising from the evidence unless the time of the offence is critical and the accused may be misled by the variance and therefore prejudiced in his or her defence". Citing Ewaschuk, J., the Court observed:

> This longstanding rule of the common law is summarized by Ewaschuk J. in his text *Criminal Pleadings and Practice in Canada* (2nd ed. 1987) at para. 9:10050 as follows:
>
> > From time immemorial, a date specified in an indictment has never been held to be a material matter. Thus the Crown need not prove the alleged date unless time is an essential element of the offence or unless there is a specified prescription period. [Emphasis in original.]

[13] The common law with respect to materiality of the time of the offence has been codified in both the *Criminal Code*, R.S.C. 1985, c. C-46, ss.601(4.1) and the *NDA*, s. 138 :

Criminal Code	***Code criminel***
Variance not material	**Divergences mineures**

(4.1) A variance between the indictment or a count therein and the evidence taken is not material with respect to

(a) the time when the offence is alleged to have been committed, if it is proved that the indictment was preferred within the prescribed period of limitation, if any; or

(b) the place where the subject-matter of the proceedings is alleged to have arisen, if it is proved that it arose within the territorial jurisdiction of the court.

(4.1) Une divergence entre l'acte d'accusation ou l'un de ses chefs et la preuve recueillie importe peu à l'égard :

a) du moment où l'infraction est présumée avoir été commise, s'il est prouvé que l'acte d'accusation a été présenté dans le délai prescrit, s'il en est;

b) de l'endroit où l'objet des procédures est présumé avoir pris naissance, s'il est prouvé qu'il a pris naissance dans les limites de la juridiction territoriale du tribunal.

National Defence Act, R.S.C., 1985, c. N-5

La ***Loi sur la défense nationale***, L.R.C. (1985), ch. N-5

Where tribunal may make special finding

138 Where a service tribunal concludes that

(a) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and

(b) the difference between the facts proved and the

Verdit annoté

138 Le tribunal militaire peut prononcer, au lieu de l'acquittement, un verdict annoté de culpabilité lorsqu'il conclut que :

a) d'une part, les faits prouvés relativement à l'infraction jugée, tout en différant substantiellement des faits allégués dans l'exposé du cas, suffisent à en établir la perpétration;

b) d'autre part, cette différence n'a pas porté

facts alleged in the statement of particulars has not prejudiced the accused person in his defence,	préjudice à l'accusé dans sa défense.
the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.	Le cas échéant, le tribunal expose la différence en question.

[14] LS Edwards contends his defence strategy was premised on the notion that time and place of the offence were essential elements the prosecution was required to prove beyond a reasonable doubt. In his summation at trial his counsel stated:

> […]
>
> The defence would concede that there's no issue as to the identity of the accused. But as to the date and place of the offence, the prosecution must prove that these offences occurred beyond a reasonable doubt between the 25th of September, '15 and 23rd of July, 2016.
>
> It must also prove, according to the particulars, that this happened at or near Halifax. And I would submit that there's no evidence as to where he's alleged—or this alleged offence occurred.
>
> […]

[15] LS Edwards requests this Court accept his contention that time was material to his defence because, according to him, the prosecution must prove the time it sets out in the particulars. This could result in a circular analysis. To accept such a proposition would mean that the defence is entitled to ignore the settled common law and the statutory law. We do not accept that such a scenario was contemplated by the Supreme Court in *B(G)* when it carved out the

exceptions for those occasions when the particularized "time" is critical. An accused is not entitled to say "well, yes, I know the common law, I know the statutory law, but I'm going to run my defence based on the dates in this charge notwithstanding". With respect, accused persons do not have that latitude. Such an approach could be said to apply to any charge. It would effectively abandon the common law, said to have existed since time immemorial, and would render nugatory the clear language of not one, but at least two statutes of Parliament.

[16] In our view, an accused may only rely on the dates in a charge where time is an essential element of the offence, crucial to the defence, or the defence is misled by the particularized time. Several examples come immediately to mind. For example, where an accused raises an alibi, where the accused was required to hold a valid certificate during a particular period of time or where the age of the victim or the accused in a sexual assault, for example, is an essential element of the offence. Some examples are summarized in *B(G)*:

> In *R. v. McCrae and Ramsay, supra,* the accused were acquitted at trial of operating a plane without the proper authorization contrary to the *Aeronautics Act*. The trial judge was not sure that the offence had occurred between the dates contained in the information. The Crown appealed the acquittals alleging that the trial judge erred in concluding that the dates within which the offence was alleged to have occurred constituted an essential averment. Kennedy Co. Ct. J. dismissed the Crown's appeal on the basis that the time of the offence was an essential element of the offence since the case turned upon the holding of a valid certificate during a particular period of time. He acknowledged that time was generally not an essential element requiring strict proof but held that it could become so depending on the circumstances. He stated at p. 33:
>
> > If charged with an offence of indecent assault or forging and uttering (as were the factual situations referred to in the cases of *R. v. England*, 35 C.C.C. 141, and in the case of *R. v. Parkin*, 27 C.C.C. 35 respectively), it was held, it was only necessary to find that an offence had occurred. An offence under

> the *Aeronautics Act* which involves flying an aircraft, is not in itself an offence if it is done in a period of time in which the pilot or owner had the necessary authorization, just as driving a car is not unlawful unless done during a period where the driver was not licenced.

Another circumstance which has been held on the authorities to make the time of the alleged offence critical is when an accused defends the charge by providing evidence of an alibi for the date or time period alleged. To hold otherwise would be to deny an accused the right to make full answer and defence. For example, in the early case of *R. v. Parkin* (1), (2) (1922), 37 C.C.C. 35 (Man. C.A.), the accused was charged with indecent assault and carnal knowledge. The offences were alleged to have occurred "on or about August 8, 1920". The accused relied upon an alibi in his defence and provided evidence that he was out of the province between August 7 and 22. The trial judge instructed the jury that it was not confined to the 8th of August as the key date and that, if it found that the offence was committed during the school holidays, the accused could be convicted. He further instructed the jury that the issue before it was whether a crime had been committed around that time and the mere fact that the accused was not in the province on some of the August dates did not matter if the jury was satisfied that the offence had been committed on or about these dates. The accused was found guilty of indecent assault and appealed his conviction. A majority of the Manitoba Court of Appeal cited Dossi with approval but went on to conclude that on the facts of this case the trial judge had erred in instructing the jury that the August 8 date was immaterial and that they could convict if they were satisfied that the offence had been committed during the holidays. Dennistoun J.A. noted that the accused relied upon the date specified in the indictment in putting forward his defence of alibi. He expressed the view that the significance of the August 8 date in the context of the alibi defence was not highlighted to the jury as it should have been. On the contrary, they were told to ignore it. The accused therefore succeeded on this ground of appeal and a new trial was ordered. For more recent Canadian authority see *W. Eric Whebby Ltd. v. Gunn Prov. Magistrate*, *supra*.

More modern English authority is found in *Wright v. Nicholson*, [1970] 1 All E.R. 12 (Q.B.), in which the accused was charged with having incited a child on August 17, 1967 to commit a gross indecency. The complainant was unable to recall the date of the offence at trial and testified only that it had occurred "in August". The information was not amended and the accused provided

> evidence which, if believed, would have afforded him a complete alibi for August 17. The accused was convicted at trial the court finding that the offence had occurred sometime in August even if it could not be proven that it had occurred on August 17. On appeal, Lord Parker C.J. for the court allowed the accused's appeal and quashed the conviction. He held that the date of the offence was important because the evidence suggested that the accused could have established alibi evidence for the whole month of August by reference to work records if the information had been amended. Because of this, Dossi was distinguishable.

[17] Viewed objectively and aside from counsel's strategic decision otherwise, nothing suggests the dates in this charge were an essential element of the offence or crucial to the defence. Nor can it be said the defence was in any way misled. We agree with the observations of the Appellant when she states in her written submission that "the defence did not pursue any tangible defence or theory susceptible of conferring any materiality to the issue of time". We reject counsel's attempt to make the dates in the charge material when they were not. In reaching this conclusion we have considered the decision of the Yukon Court of Appeal in *R. v. McMillan*, [2016] Y.J. 87 (YTCA). In *McMillan* the Court concluded that time and place were, in the circumstances, essential elements of the offence on a count of possession of cocaine for the purposes of trafficking. The facts in *McMillan* differ significantly from those in the within appeal. In *McMillan* the Court concluded the case for the Crown was built upon circumstantial evidence. The evidence in the present appeal is not circumstantial. It comes in large part from the admissions of the accused. LS Edwards admitted to the possession and use of unlawful drugs. Furthermore, in *McMillan* the Court concluded the accused could have been misled regarding the transaction given the Crown's assertion the accused had been in the Yukon trafficking in drugs at a time other than that set out in the indictment. Such potential for confusion does not exist in the within appeal.

[18] With respect to place of the offence being an essential element, LS Edwards conceded in his written submission that he was not prejudiced by the particularization of the place being "at or near Halifax". Regardless, in the circumstances, place only becomes material for purposes of ensuring the court has jurisdiction: *R. v. R.M.* (2003), 180 OAC 38, at para 8; *R. v. Edwards*, 2018 CM 4018; Re *The Queen and Smith* (1973), 7 NBR (2d) 597, 16 CCC (2d) 11 at p 21 (NBSC)(AD). Courts martial are clothed with unlimited territorial jurisdiction, which extends throughout Canada and the world, but for those alleged offences arising in Canada referred to in s. 70 of the *NDA*.

VI. Conclusion

[19] We are of the unanimous view this appeal should be allowed, the verdict of acquittal be set aside and a new trial ordered.

"B. Richard Bell"
C.J.

"Richard Mosley"
J.A.

"Henry Brown"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-595
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. LEADING SEAMAN C.D. EDWARDS
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	JUNE 13, 2019
REASONS FOR JUDGMENT OF THE COURT BY:	CHIEF JUSTICE BELL MOSLEY J.A. BROWN J.A.
DATED:	OCTOBER 31, 2019

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