Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20200422

Docket: CMAC-598

Citation: 2020 CMAC 2

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

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

LIEUTENANT J.C. BANTING

Respondent

The motion for costs proceeded on the basis of written submissions from the parties, without personal appearance.

Reasons for Order delivered at Ottawa, Ontario, on April 22, 2020.

REASONS FOR ORDER BY: THE COURT

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REASONS FOR ORDER OF THE COURT

I. Background and Position of the Parties

[1] On April 4, 2019, Military Judge Sukstorf acquitted Lieutenant J.C. Banting of one (1) count, which alleged he had conducted himself in a manner prejudicial to good order and discipline contrary to s. 129 of the *National Defence Act*, R.S.C. 1985, c. N-5. The Crown based

the charge upon comments made by Lieutenant Banting while he was instructing on emergency medical techniques that soldiers might be required to employ in a battlefield environment. During the course of the instruction, Lieutenant Banting used double entendre nuances, with some degree of sexual innuendo, as mnemonic devices. Military Judge Sukstorf concluded the prosecution had not established a *prima facie* case. She dismissed the charge without referring the matter to the trier of fact, the General Court Martial panel.

[2] The Crown appealed. In his written submission, Respondent Lieutenant Banting sought dismissal of the appeal with costs. At the close of the Appellant's oral argument, this Court advised Lieutenant Banting's counsel it did not need to hear from him. We dismissed the Crown appeal. This Court, neither in its oral reasons given from the Bench, its brief written reasons, nor in its formal judgment, addressed the issue of costs.

[3] On November 7, 2019, Lieutenant Banting filed a motion pursuant to Rule 21 of the *Court Martial Appeal Court Rules*, SOR/86-959 ("*CMAC Rules*") seeking costs at trial and on appeal, on a solicitor-client basis. The total amount claimed is $61,155.00. The Appellant filed its response on December 19, 2019. Both parties declined the opportunity to participate in an oral hearing on the issue of costs.

[4] Lieutenant Banting contends costs on a solicitor-client basis are appropriate in the circumstances for the following reasons: (1) the Appellant made many false and misleading statements in its oral and written submissions; (2) the ground of appeal was frivolous; (3) there was no evidence to support the Appellant's position; (4) the Appellant committed an abuse of

process; (5) and, finally, the Appellant "improperly used the legal system in an attempt to achieve a theoretical end, and this has caused prejudice to the Respondent, in terms of cost, time and additional reputational and professional damage". Lieutenant Banting contends an abuse of process results in this case, because, among other considerations, the Appellant requested this Court to infer prejudice, from an "inferred harm", visited upon an "inferred victim, who never came forward".

[5] The Appellant contends this Court is without jurisdiction to consider the motion given that it is now *functus officio*, having already decided the appeal and having failed to make an order of costs. In the alternative, the Appellant acknowledges there were misstatements contained within both its written and oral submissions, but contends it corrected them at the beginning, and in the course of, the oral hearing. In the event this Court should decide to award costs, the Appellant contends they should be limited to party-and-party costs on the appeal.

[6] For the reasons set out below, we are of the view an award of party-and-party costs on appeal is appropriate in the circumstances.

II. Analysis

A. *Is the Court functus officio?*

[7] In *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848, 62 D.L.R. (4th) 577, the Supreme Court held that a decision cannot be re-visited simply because a court has changed its mind, made an error within its jurisdiction or because there has been a change of

circumstances. It can only do so if authorized by statute, there has been a slip in preparing the decision, or there has been an error in expressing the manifest intention of the court. *Chandler* instructs as follows:

> The general rule that a final decision of a court cannot be reopened derives from the decision of the English Court of Appeal in *In re St. Nazaire Co.* (1879), 12 Ch. D. 88. The basis for it was that the power to rehear was transferred by the *Judicature Acts* to the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions: (1) where there had been a slip in drawing it up, and, (2) where there was an error in expressing the manifest intention of the court. See *Paper Machinery Ltd. v. J. O. Ross Engineering Corp.*, [1934] S.C.R. 186. (At p. 860.)

[8] The principle of *functus officio* prevents courts from continually hearing applications to change their decisions. See, *Ontario (Energy Board) v. Ontario Power Generation Inc*., 2015 SCC 44, [2015] 3 S.C.R. 147, at para. 65; *Doucet-Boudreau v. Nova Scotia (Minister of Education)*, 2003 SCC 62, [2003] 3 S.C.R. 3, at para. 79; *Reekie v. Messervey*, [1990] 1 S.C.R. 219, 66 D.L.R. (4th) 765, at pp. 222-23.

[9] This Court is not *functus officio* on the issue of costs. Neither party addressed that issue at the oral hearing. Neither the reasons from the Bench, the brief written reasons, nor the Court's formal judgment make any reference to costs. Furthermore, Rule 21 of the *CMAC Rules* permits the bringing of such a motion. In the absence of a decision on the matter, we consider the motion for costs to be properly before the Court. We note that a similar situation arose before the Supreme Court in *R. v. Trask*, [1987] 2 S.C.R. 304, 37 C.C.C. (3d) 92. In *Trask*, the order granting the accused leave to appeal provided that "costs of this application are to be decided upon the hearing of the appeal". On the appellant's motion under Rule 51 of the *Rules of the*

Supreme Court of Canada, SOR/83-74, the Court ordered a re-hearing, limited to the question of costs. No issue was raised as to whether the Court was *functus officio* because it had failed to address the question on the "hearing of the appeal".

B. *This Court's jurisprudence on the issue of costs to a successful accused appellant or respondent*

[10] This Court has not spoken consistently regarding the circumstances in which costs will be awarded. In some cases, costs seem to have been awarded routinely, while in others, special circumstances were required before making such an award.

[11] In *R. v. Walsh* (1993), CMAC-351, in a decision allowing an appeal from sentence, the Court simply allowed the appeal with costs. The Court undertook no analysis to determine whether there existed special or other circumstances to justify the award. In *R. v. Boivin* (1998), CMAC-410, the Court awarded "costs to be taxed in accordance with these reasons". While there is no analysis as to why costs were awarded, it can be inferred that the award resulted from an unreasonable verdict at trial following the misapplication of the hearsay rule. A successful appeal on such a basis is not, in our view, extraordinary. In *R. v. Scott*, 2004 CMAC 2, although the appeal involved a Charter violation based upon religion, it does not appear that violation resulted in the cost award. The unanimous Court simply stated "since his appeal succeeds, he should have his costs on the appeal […]". Finally, in *R. v. Baptista*, 2006 CMAC 1, the Court allowed an appeal from sentence. The Court undertook no analysis regarding costs. However, the concluding paragraph reads "[t]he appellant is entitled to costs to be assessed under the Federal Court Tariff".

[12] In *Walsh*, *Boivin*, *Scott*, and *Baptista*, this Court appears to have routinely awarded costs to the successful accused appellant.

[13] In contrast, other decisions of this Court required special circumstances before making such an award. In *R. v. Laflamme*, 2014 CMAC 11, 469 N.R. 200, the Court refused to award costs to the successful accused appellant. The Court stated:

> An accused is generally not entitled to costs, whether he or she is successful or unsuccessful on the merits of the case. A court of appeal will deny costs to an accused who has successfully appealed a criminal matter except where the case of the accused is remarkable or where there is oppressive or improper conduct on the part of the prosecution. See *R. v. M. (C.A.)* 1996 1 S.C.R. 500, para. 97; *R. v. Trask* 1987 2 S.C.R. 304; *Tele-Mobile co. v. Ontario* 2008 1 S.C.R. 305, 2008 SCC 12, para. 55; *Attorney General v. Foster* (2006), 215 C.C.C. (3d) 59 (Ont. C.A.), paras 62-69. (At para. 2.)

[14] Similarly, in *R. v. Rose*, 2005 CMAC 4 (September 28, 2005), the Court refused to award costs to a successful accused appellant. McFadyen, J.A., for the Court, stated:

> Under Rule 21(2) of the Court Martial Appeal Rules, the Court has discretion to award costs. Although the Rule gives the Court a broad discretion, the Court does not award costs routinely. Nothing in the conduct of this prosecution, nor in the complexity of the issues raised, takes this case out of the ordinary so as to persuade us to award costs. (At para. 2.)

[15] Finally, in *R. v. Dominie*, 2002 CMAC 8, the Court allowed the accused's appeal, but only with respect to costs. Following a finding of misconduct on the part of the police and the prosecutor, the Court awarded "costs in the amount of $3,000.00 because of the egregious conduct of the military police and participation in that conduct by the prosecutor's efforts in tendering that evidence on a futile voir dire" (at para. 8).

C. *Supreme Court guidance on the issue of costs to a successful accused*

[16] In considering the Supreme Court's jurisprudence on costs, it is important to consider the different language employed by the *Supreme Court Act*, R.S.C. 1985, c. S-26 and the *CMAC Rules* regarding each court's jurisdiction to award costs. The differing versions are set out below:

Supreme Court Act	**CMAC Rules**
Payment of costs	**Fees and Costs**
47 The Court may, in its discretion, order the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal, or any part thereof, whether the judgment is affirmed, or is varied or reversed.	**RULE 21 (1)** Where a party other than the Minister is represented by counsel, the Court may direct that all or any of the counsel's fees in relation to the appeal or application be paid, as taxed by an assessment officer in accordance with the applicable tariff of the Federal Court Rules, 1998. (2) The Court may direct that all or any of the party's costs in the Court in relation to the appeal or application be paid, as taxed by an assessment officer in accordance with the applicable tariff of the Federal Court Rules, 1998.
Loi sur la Cour suprême	**Règles de la Cour d'appel de la cour martiale**
Paiement des frais	**Honoraires et dépens**
47 La Cour a le pouvoir discrétionnaire d'ordonner le paiement des dépens des juridictions inférieures, y compris du tribunal de première instance, ainsi que	**RÈGLE 21 (1)** Si une partie, autre que le ministre, est représentée par avocat, la Cour peut ordonner que soient payés tout ou partie des honoraires de l'avocat relatifs

des frais d'appel, en tout ou en partie, quelle que soit sa décision finale sur le fond.	à l'appel ou à la demande taxés par l'officier taxateur selon le tarif applicable des Règles de la Cour fédérale (1998). **(2)** La Cour peut ordonner que soient payés tout ou partie des dépens d'une partie relatifs à l'appel ou à la demande taxés par l'officier taxateur selon le tarif applicable des Règles de la Cour fédérale (1998).

[17] It is common ground that words in a statute are to be given their plain meaning unless the context requires otherwise: see, Ruth Sullivan, *Statutory Interpretation*, 3rd ed (Toronto: Irwin Law, 2016) at pp. 59-60. Nothing in the context of the *CMAC Rules* would suggest the Court apply other than a plain meaning approach to interpretation in this case. In fact, the context supports a plain meaning interpretation. The *Supreme Court Act* demonstrates that it is clothed with jurisdiction to award costs "of the court appealed from, of the court of original jurisdiction, and of the appeal". In contrast, no such jurisdiction appears to exist in this Court. Based upon both context and a plain reading of Rule 21, costs are limited to counsel fees in relation to the appeal or application. I also note that in this case, no costs were sought at trial, nor were any awarded.

[18] Abuse of process constitutes a basis upon which a court may make an award of costs in a civil matter. Abuse of process is defined by the Supreme Court of Canada as the bringing of proceedings that are unfair to the point they are "contrary to the interest of justice" or could be considered as "oppressive treatment". See *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26,

[2013] 2 S.C.R. 227, at para. 39; *Gonzalez v. Gonzalez*, 2016 BCCA 376, 91 B.C.L.R. (5th) 221, at para. 18. In *Behn*, Justice LeBel states the following:

> As can be seen from the case law, the administration of justice and fairness are at the heart of the doctrine of abuse of process. In *Canam Enterprises* and in *C.U.P.E.*, the doctrine was used to preclude relitigation of an issue in circumstances in which the requirements for issue estoppel were not met. But it is not limited to preventing relitigation. For example, in *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 S.C.R. 307, the Court held that an unreasonable delay that causes serious prejudice could amount to an abuse of process (paras. 101-21). The doctrine of abuse of process is flexible, and it exists to ensure that the administration of justice is not brought into disrepute. (At para. 41.)

[19] Similarly, the Supreme Court has held that costs may be awarded in criminal matters, regardless of whether the accused is successful on the appeal. In conducting its analysis, the Court is to consider whether there is anything remarkable about the case or whether the Crown conducted itself in an oppressive or improper manner. In *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500, 105 C.C.C. (3d) 327, at para. 97, Lamer, CJC stated as follows:

> Finally, the respondent has filed a request for costs on a solicitor-client basis under this Court's discretionary authority under s. 47 of the *Supreme Court Act*, R.S.C. 1985, c. S-26. We have previously acknowledged that this discretionary power extends to making an order for costs in a criminal case, including both summary conviction matters (*R. v. Trask*, [1987] 2 S.C.R. 304 (costs denied)) and indictable matters (*R. v. Olan*, No. 14000, October 11, 1977 (costs allowed)). But the prevailing convention of criminal practice is that whether the criminal defendant is successful or unsuccessful on the merits of the case, he or she is generally not entitled to costs. See *Berry v. British Transport Commission* (1961), [1962] 1 Q.B. 306 (C.A.), at p. 326, *per* Devlin L.C.J. The *Criminal Code* codifies this convention as a matter of appellate practice before provincial courts of appeal in cases involving indictable offences. See s. 683(3) of the *Code*, but see. s. 839(3) regarding summary conviction cases. Consistent with this established convention, in *Trask*, we denied costs under s. 47 to a criminal defendant following a <u>successful</u> appeal of a

> summary conviction matter, as there was nothing "remarkable" about the defendant's case, nor was there any "oppressive or improper conduct" alleged against the Crown (At pp. 307-308.)

[20] In *R. v. Curragh Inc.*, [1997] 1 S.C.R. 537, 113 C.C.C. (3d) 481, at paras. 13-14, the Court awarded costs to the accused, despite the dismissal of his appeal, in order to compensate him for the financial burden of his legal fees. While the Court found that such costs should ordinarily be borne by those charged with criminal offences, the unique circumstances of that case merited a costs award. The delays and much of the legal costs arose from systemic problems that were, to a large extent, caused by the words and actions of the trial judge. The trial judge's conduct resulted in a reasonable apprehension of bias over which the accused had no control. See also, *R. v. Olan*, SCC Case No. 14000, October 11, 1977 [unreported] where the Court awarded costs against the Crown in an appeal arising from an indictable offence.

[21] In addition, costs may be awarded in a criminal matter, in favour of an accused, where the issue raised, either by the Crown or the accused, is one important to the legal system as a whole. The Court has held that costs of litigating such an issue should not be borne by an individual accused or defendant. This, even if the accused is unsuccessful on appeal. See, *R. v. Osborn*, [1971] S.C.R. 184; *Trask*, at para. 7; *R. v. Caron*, 2015 SCC 56, [2015] 3 S.C.R. 511, at paras. 110-114.

D. *Provincial Courts of Appeal guidance on the issue of costs to a successful accused*

[22] Provincial courts of appeal are bound by costs provisions in the *Criminal Code*, R.S.C. 1985, c. C-46 [*Code*]. Those appellate courts are precluded from awarding costs in indictable

offence appeals by application of subsection 683(3) of the *Code*. However, they may award costs in summary conviction appeals pursuant to section 826 and subsection 839(3):

Procedure on Appeal	**Procédure sur appel**
Costs	**Frais**
826 Where an appeal is heard and determined or is abandoned or is dismissed for want of prosecution, the appeal court may make any order with respect to costs that it considers just and reasonable.	826 Lorsqu'un appel est entendu et décidé ou est abandonné ou est rejeté faute de poursuite, la cour d'appel peut rendre, relativement aux frais, toute ordonnance qu'elle estime juste et raisonnable.
[…]	[…]
Appeals to Court of Appeal	**Pourvois devant la cour d'appel**
Costs	**Frais**
839 (3) Notwithstanding subsection (2), the court of appeal may make any order with respect to costs that it considers proper in relation to an appeal under this section.	**839 (3)** Nonobstant le paragraphe (2), la cour d'appel peut rendre toute ordonnance, quant aux frais, qu'elle estime appropriée relativement à un appel prévu par le présent article.

[23] Provincial appellate jurisprudence in this regard largely mirrors that of the Supreme Court. Although the basis for awarding costs is not exhaustive, they have generally been awarded in one of two (2) circumstances. First, where the conduct of the prosecution merits sanction, such as when it acts in a manner that is a marked and unacceptable departure from the reasonable standards expected of it, or, it acts in bad faith. In such a case, the costs are punitive (*Laval (Ville) v. Gagnon* (2000), 147 C.C.C. (3d) 184, at para. 19 (Que. C.A.)). Second, where other exceptional circumstances exist such that fairness requires that the individual litigant not carry

the financial burden, such as where the Crown pursues a test case. Generally, costs in this category are awarded where there is high public interest in the question to be resolved, little or no personal significance to the party awarded costs, and an element of fairness favouring the party awarded costs (*R. v. Haryett & Company (Representing the Interests of Legal Aid Alberta)*, 2019 ABCA 369, 50 M.V.R. (7th) 177, at paras. 11 and 17; *R. v. Garcia* (2005), 194 C.C.C. (3d) 361, 29 C.R. (6th) 127, at para. 26 (Ont. C.A.)). In this second category, the costs are considered compensatory (*Gagnon*, at para. 19). In general, see, *Haryett & Company*, at paras. 7, 11-13, 17; *R. v. Yang*, 2017 BCCA 349, at para. 12, leave to appeal to S.C.C. refused, 37091 (19 April 2018); *R. v. Munkonda*, 2015 ONCA 309, 324 C.C.C. (3d) 9, at paras. 142-144; *Garcia*, at para. 13; *Gagnon*, at para. 23. Regardless, these two (2) categories cannot be considered exhaustive. In both Ontario and British Columbia, courts of appeal have been reluctant to set limits as to the scope of circumstances which may result in an award of costs in the criminal law context (*Haryett & Company*, at para. 12 citing *France (Republic) v. Foster* (2006), 215 C.C.C. (3d) 59, 274 D.L.R. (4th) 253, at paras. 66 and 69 (Ont. C.A.); *Munkonda*, at para. 142 citing *R. v. King* (1986), 26 C.C.C. (3d) 349 (B.C.C.A.)).

E. *Application of the jurisprudence to the case at bar*

[24] We are satisfied that costs should not be routinely awarded, either at trial or on appeal, in favour of a successful accused. There must be some evidence assessed by the military judge or this Court, as the case may be, which creates special circumstances that justify an award of costs. While the list is not closed, special circumstances include the following: Charter breaches; police or Crown misconduct; the institution of a frivolous or vexatious prosecution or appeal; unreasonable delay, all of which may, otherwise be described, as oppressive conduct by the

Crown. Special circumstances may also include the pursuit of a "test case" where the Crown, even in good faith, is unsuccessful in its efforts to settle an area of law that will have major implications across the whole of the military justice system. In the case of the latter example, it would be unfair to expect a successful individual litigant to bear all of his or her costs.

[25] We now turn to the facts we consider relevant to this motion. First, the Appellant admits it made misstatements both in its written and oral submissions before this Court. However, the Appellant acknowledged all errors, either at the outset of the hearing or in the course of responding to questions from the Court. The Respondent accused was never seriously placed in jeopardy by those misstatements. The proof lay in the fact the Court dismissed the appeal without the necessity of calling upon Respondent's counsel. Second, both at trial and on appeal, there were clearly weaknesses in the approach taken by the Appellant. The invitation to apply inferential reasoning in circumstances where it was clearly inappropriate is but one example. However, unsuccessful advocacy, provided there is no evidence of bad faith, should not form the basis of a costs award against the Crown.

[26] In the circumstances, there is no evidence of a Charter violation, police or Crown misconduct, nor is there any evidence of unreasonable delay on the part of the Crown.

[27] We now turn to whether the prosecution of Lieutenant Banting, and the subsequent appeal brought by the Crown, amount to frivolous or vexatious conduct. In considering this issue, the Court is mindful of its decisions in *R. v. Golzari*, 2017 CMAC 3 and *Canada v. Bannister*, 2019 CMAC 2. Those decisions spawned discussion among members of the military

bar and military judges regarding the parameters of the offence of conduct prejudicial to good order and discipline and disgraceful conduct. Prosecution authorities found themselves attempting to assess and define the parameters of *Golzari* and *Bannister* against the backdrop of Operation Honour, at the expense of Lieutenant Banting. That does not lead us to conclude the proceeding was frivolous or vexatious.

[28] That said, we do wish to state categorically that while the prosecution of Lieutenant Banting may not have risen to frivolous or vexatious conduct, we do consider the prosecution and the subsequent appeal, to have been questionable. It is apparent that military commanders and the prosecution intended to use Lieutenant Banting's circumstances to test the limits of this Court's reasoning in *Golzari* and *Bannister*. Those same commanders and the prosecution chose to use Lieutenant Banting's circumstances to test the reach of Operation Honour within the military justice context. They chose to pursue the case against Lieutenant Banting in circumstances where a court would eventually conclude there existed no *prima facie* case and where the Canadian Armed Forces training manual authorized the acronym F.U.C.K. (Fight the fight; Uncontrolled bleeding; Communicate; Keep moving) as a mnemonic device. Based upon the subjective sensibilities of at least one of the perceived "complainants" in this case, that acronym would seem more offensive than any of the double entendres employed by Lieutenant Banting. The test case failed miserably. Only one question arises: should Lieutenant Banting's costs be borne exclusively by him? We conclude they should not. The successful accused in this case should not bear the costs of a test case with major implications across the whole of the military justice system.

[29] The remaining question is whether to award costs on a party-and-party basis or on a solicitor-client basis. Party-and-party costs are intended to produce a partial indemnity, whereas costs on a solicitor-client scale are intended to result in full indemnity to the beneficiary of the award. Solicitor-client costs are generally awarded on those very rare occasions where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties (*Young v. Young*, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193, at p. 134; *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 26; *Mackin v. New Brunswick (Minister of Finance); Rice v. New Brunswick*, 2002 SCC 13, [2002] 1 S.C.R. 405, at para. 86; *Caron*, at paras. 112-113).

[30] Although the Appellant's conduct was negligent at best, we are satisfied it does not reach levels of reprehensibility, scandal or outrageousness to justify an award of solicitor-client costs. We are of the view that a significant award of party-and-party costs, which will partially compensate Lieutenant Banting, is appropriate in this test case. We are satisfied that an award of $10,000 of costs on appeal, all inclusive of disbursements, is reasonable in the circumstances.

"B. Richard Bell"
Chief Justice

"Richard G. Mosley"
J.A.

"J.E. Scanlan"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-598
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v. LIEUTENANT J.C. BANTING

DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ORDER OF THE COURT:	CHIEF JUSTICE BELL MOSLEY J.A. SCANLAN J.A.
DATED:	APRIL 22, 2020

IN WRITING:

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