Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20201029

Docket: CMAC-605

Citation: 2020 CMAC 4

[ENGLISH TRANSLATION]

CORAM: CHIEF JUSTICE BELL

BETWEEN:

CAPT. ÉRIC DUQUETTE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard by teleconference at Ottawa, Ontario, on September 18, 2020.

Reasons for Order delivered at Ottawa, Ontario, on October 29, 2020.

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REASONS FOR ORDER

BELL C.J.

I. Overview of the motion

[1] On November 23, 2019, a military judge of the Standing Court Martial found Captain J.R.É. Duquette (the appellant) guilty of the following three charges:

1. an offence punishable under section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA), for a sexual assault contrary to section 271 of the *Criminal Code*, R.S.C. 1985, c. C-46 (Code);

2. conduct to the prejudice of good order and discipline contrary to section 129 of the NDA; and
3. ill treatment of a person who by reason of rank was subordinate to him contrary to section 95 of the NDA.

[2] Consequently, the military judge imposed a sentence on the appellant ordering a reduction in rank to the rank of captain and ordering that he register on the sex offender registry. Before this Court, the appellant appealed the legality of the findings of guilty and of the sentence imposed on him. Considering that he will be released from the Canadian Armed Forces in November of this year, the appellant filed this motion requesting that this Court stay the execution of the reduction in rank from the rank of major to the rank of captain until this Court has disposed of the appeal.

[3] The appellant submits that when he is released from the Canadian Armed Forces, he will receive the usual documents in accordance with the release policy, including letters of appreciation presented before his family and colleagues. The appellant states that if this Court does not stay the execution of the order, those documents will be issued in the name of Captain Duquette instead of Major Duquette. He also argues that during his meeting with his commanding officer, he will be addressed as “captain” instead of “major”. This would put him in an embarrassing situation and reduce the significance of the event. He also notes that, at the time of his release, he will be notified of his right to use his rank after his release. He submits that these factors militate in favour of a stay of execution of his reduction in rank until this Court disposes of his appeal.

II. Legislative scheme

[4] The relevant provision of the NDA is section 230. It reads, in part, as follows:

Appeal by person tried	**Appel par l'accusé**
230 Every person subject to the Code of Service Discipline has, subject to subsection 232(3), the right to appeal to the Court Martial Appeal Court from a court martial in respect of any of the following matters:	230 Toute personne assujettie au code de discipline militaire peut, sous réserve du paragraphe 232(3), exercer un droit d'appel devant la Cour d'appel de la cour martiale en ce qui concerne les décisions suivantes d'une cour martiale :
(a) with leave of the Court or a judge thereof, the severity of the sentence, unless the sentence is one fixed by law;	(a) avec l'autorisation de la Cour d'appel ou de l'un de ses juges, la sévérité de la sentence, à moins que la sentence n'en soit une que détermine la loi;
(a.1) the decision to make an order under subsection 745.51(1) of the *Criminal Code*;	a.1) la décision de rendre l'ordonnance visée au paragraphe 745.51(1) du *Code criminel*;
(b) the legality of any finding of guilty;	(b) la légalité de tout verdict de culpabilité;
(b) the legality of the whole or any part of the sentence;	(c) la légalité de la sentence, dans son ensemble ou tel aspect particulier;

III. Issues

[5] There are two issues in this motion:

1. does the Court Martial Appeal Court of Canada (CMACC) have jurisdiction to stay the execution of the reduction in rank?
2. if the answer to the first question is yes, under the circumstances, should the CMACC order that the execution of that part of the sentence be stayed?

IV. Analysis

A. *Does the CMACC have jurisdiction to stay the execution of the reduction in rank?*

[6] The issue of an appellate court's jurisdiction to order stays of execution is a matter that has been the subject of much debate in the case law. In *R. v. Doiron*, [2011] N.B.J. No. 472, 383 N.B.R. (2d) 25 [*Doiron*], the New Brunswick Court of Appeal found that, as a statutory court, its jurisdiction is limited by the legislative scheme. In *Doiron*, the appellant had been convicted of charges of assault and mischief in relation to property contrary to paragraph 267(a) and subsection 430(4) of the Code. The appellant asked the Court to stay the firearms prohibition order and the order that he provide DNA samples. The Court analyzed the legislative scheme under subsection 683(5) of the Code, which sets out the circumstances in which a court has such jurisdiction. Ultimately, at the time of that decision, the legislative scheme was silent regarding the power to stay the execution of mandatory prohibitions against possessing a firearm and the collection of DNA samples.

[7] In *R. v. Bichsel*, 2013 B.C.C.A 164, [2013] B.C.J. No. 780, the appellant requested a stay of execution of the order requiring him to be registered under the *Sex Offender Information Registration Act*, S.C. 2004, c. 10. At paragraph 6 of that decision, the Court referred to

10 judgments in which appellate courts found that a statutory court does not have jurisdiction to stay the execution of a mandatory order unless such power to stay the execution is found in the legislation. The following decisions were cited: *R. v. Banks*, [1990] B.C.J. No. 2520, 61 C.C.C. (3d) 189; *R. v. Howells*, 2009 B.C.C.A. 297, [2009] B.C.J. No. 1236; *R. v. Bader*, 2010 B.C.C.A. 515, [2010] B.C.J. No. 2580; *Doiron*, above; *R. v. F. (T.C.)*, 2012 N.S.C.A. 74, [2012] N.S.J. No. 370; *R. v. Zurowski*, 2003 A.B.C.A. 174, [2003] A.J. No. 693; *R. v. Purdy*, 2010 B.C.C.A. 413, 261 C.C.C. (3d) 33; *R. v. Lin*, [1997] B.C.J. No. 1679, 95 B.C.A.C. 73, and *Kourtessis v. Canada (Minister of National Revenue – M.N.R.)*, [1993] 2 S.C.R. 53, [1993] S.C.J. No. 45. See also, *R. v. Bugden* [1992] N.J. No. 15, 99 Nfld & P.E.I.R. 102.

[8] However, in *R. v. Taylor*, 2006 B.C.C.A. 297, [2006] B.C.J. No. 1343; *R. v. Keating (NSCA)*, [1991] N.S.J. No. 356, 106 N.S.R. (2d) 63; and *R. v. Dempsey*, [1995] N.S.J. No. 4, 138 N.S.R. (2d) 110, the courts found that an appellate court does have the power to stay the execution of an order. They reached this conclusion on the basis of subsection 482(1) of the Code, as well as the provincial rules of procedure applicable to appeals in criminal law.

[9] This Court has previously considered its jurisdiction with respect to motions to stay a reduction in rank. In *R. v. Lyons*, [1992] C.M.A.J. No. 1, 5 C.M.A.R. 121 [*Lyons*], the appellant had pleaded guilty to four charges and was sentenced to 30 days' imprisonment and a reduction in rank. He sought an order to stay the execution of his reduction in rank until this Court had disposed of the appeal. Contrary to the decisions cited at paragraph 7, this Court found that it has inherent jurisdiction in appropriate circumstances to stay the execution of a punishment. The Court recognized that this Court had already found that it has such jurisdiction and had exercised

it in *Gingras v. R.*, 4 C.M.A.R. 225 [*Gingras*]. In *Lyons*, Chief Justice Mahoney cited with approval the majority in *Gingras*, in which Justice Hugessen, with Justice Addy concurring, stated the following:

> In my opinion the power to suspend the execution of the sentence is necessarily included in the power of this Court to quash the sentence. This power, in my view, must be exercised with caution owing to the special requirements of military justice, which are not necessarily the same as the requirements of civil justice.

[10] According to Chief Justice Mahoney's analysis of paragraph 140(f) of the NDA, if this Court has the express jurisdiction to quash a sentence, then it must also have the power to order a stay of that sentence. I consider myself bound by this Court's judgment in *Gingras*, which was rendered by a panel of three judges. And even if I were not bound by it, I would follow it for reasons of judicial comity.

[11] Before proceeding any further with these reasons, I want to distinguish my decision in *R. v. Royes*, [2016] C.M.A.J. No. 3 [*Royes*]. In *Royes*, this Court dismissed the appeal of MCpl. Royes. Consequently, MCpl. Royes, having been released by the trial judge, could be incarcerated. That case involved the issue of this Court's power to order the release of a detainee pending his appeal before the Supreme Court of Canada. I concluded that pursuant to the NDA, given its silence on this issue, this Court did not have jurisdiction to order the appellant's release pending the Supreme Court of Canada's decision on his application for leave to appeal. Our power to render such an order, under the circumstances, was provided for in subsection 65.1(1) of the *Supreme Court Act*, R.S.C. 1985, c. S-26. Regarding the lack of jurisdiction under the NDA, I stated the following at paragraph 17:

> If Parliament had intended to extend s. 248.2 to determinations of appeals before the Supreme Court of Canada, it could easily have done so. In this regard, I note that the *Criminal Code*, R.S.C., 1985, c. C-47 [the Code], paragraph 679(1)(*c*) (see Appendix 'A') explicitly permits provincial and territorial appellate courts to order interim release pending the determination of an appeal to the Supreme Court. In my view, the omission of such language in the Act is demonstrative of the legislative intent that this Court is not clothed, under the Act, with such jurisdiction.

[12] The decision in *Royes* is distinct from the decisions in *Gingras* and *Lyons* because, at the time of the application for release, there was no appeal before the CMACC. This Court was *functus* with respect to the appeal.

[13] *Lyons*, like this case, also concerned a reduction in rank. In that case, this Court found that it has jurisdiction to order a stay of execution of the sentence. On the basis of that decision, I find that I have jurisdiction to stay the execution of the appellant's reduction in rank pending the decision on his appeal.

B. *Under the circumstances, should the CMACC order that the execution of the reduction in rank be stayed?*

[14] The test for whether the Court should order a stay of proceedings or a stay of execution is set out in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, [1987] S.C.J. No. 6, reaffirmed in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, [1994] S.C.J. No. 17 [*RJR-MacDonald*]. See also *Royes*. Applying the methodology in *RJR-MacDonald*, the following three factors must be considered:

i. there is a serious issue to be determined;

ii. there would be irreparable harm if the relief were not granted; and

iii. the balance of convenience favours granting the relief sought.

[15] For the purposes of this analysis, I will assume that there is a serious issue to be determined.

[16] With regard to the second part of the test, I am not satisfied that the appellant will suffer irreparable harm if the stay of execution is not granted. The *Canadian Forces Administrative Orders* [CFAO] provide that a request may be submitted to have a certificate of service corrected (Annex D of the CFAO 15-2 Release – Regular Force). If the appellant's appeal succeeds, he will simply need to apply to have the documents reissued to indicate his previous rank of major. Furthermore, subsection 30(4) of the NDA provides that a member released by reason of a sentence or a finding by a service tribunal may be reinstated. I am of the view that the NDA provides partial relief for the appellant. It is true that the captain will not have the opportunity to repeat his final interview with his commanding officer or the release ceremony in the presence of his family. During those events, he will be addressed as "captain." Nevertheless, in light of the possibility of having the release documents corrected, I do not consider the harm to be irreparable.

[17] Given that there is a serious charge and a conviction by a court martial and that the NDA provides for changes to the release documents in the event that this Court renders a decision favourable to the appellant, I find that the balance of convenience favours the respondent. The harm, if any, does not outweigh the interest of upholding the order issued by the military judge. I note that Chief Justice Mahoney arrived at the same conclusion at paragraph 8 of *Lyons* when he

found that the Court's power to stay the execution of a sentence must be exercised "to preserve the substance of the right to appeal, not to suspend entirely the consequences of conviction."

V. Conclusion

[18] In light of the foregoing, I dismiss the appellant's motion for a stay of the order to reduce his rank to the rank of captain.

"B. Richard Bell"
Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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