Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20210219

Docket: CMAC-611

Citation: 2021 CMAC 1

Present: **BELL C.J.**

BETWEEN:

SAILOR THIRD CLASS S.J.M. CHAMPION

Applicant

and

HER MAJESTY THE QUEEN

Respondent

Motion to proceed despite mootness, decided without appearances of the parties.

Applicant's written submission filed: December 11, 2020

Respondent's written submission filed: January 21, 2021

Reasons for Order delivered at Ottawa, Ontario, on February 19, 2021.

REASONS FOR ORDER BY: CHIEF JUSTICE BELL

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REASONS FOR ORDER

CHIEF JUSTICE BELL

[1] On November 13, 2020, military police at CFB Esquimalt arrested Sailor Third Class S.J.M. Champion (Sailor Champion) for alleged drunkenness. On November 14, 2020, a Custody Review Officer released Sailor Champion on conditions, one of which was that he remain in barracks. On November 15, 2020, Sailor Champion was again arrested, this time for alleged drunkenness and breach of conditions.

[2] On November 17, 2020, a military judge released Sailor Campion on conditions. At the time of his release, Sailor Champion had not been charged with any offence. On November 23, 2020, Sailor Champion filed and served a notice of motion, the operative parts of which read:

> TAKE NOTICE THAT the Court will be moved by the Applicant for an order that the Form of Direction and Undertaking imposed upon S3 Champion on 17 Nov 2020 as conditions of his release be cancelled and that S3 Champion be released without conditions.
>
> […]
>
> g) The applicant will submit that if a charge is not laid by the time a member appears at a custody review hearing the presiding military judge should release the member without conditions. (*R. v. Larocque* 2001 CMAC 2, paragraph 16).

[3] On November 23, 2020, charges were laid against Sailor Champion. On November 24, 2020, Sailor Champion's commanding officer decided not to proceed with any charges related to the November 13, 2020 incident and stayed the charges. Similarly, on November 27, 2020, Sailor Champion's commanding officer stayed the charges relating to the events of November 15, 2020.

[4] All parties agree that the issues raised in the notice of motion are now moot. Given that I was scheduled to hear the motion brought by the applicant, a case management conference was held on November 30, 2020. At that time, the applicant requested the matter be heard even though it is now moot. The applicant contended the military justice system would benefit from clarity as to whether charges should be laid before a detention review held by a military judge. According to him, there is confusion surrounding the procedures to be followed. As a result, I issued a Direction on December 2, 2020, in which I directed, in part:

> [...] the moving party shall provide additional affidavit evidence, his submissions on the motion and his submissions as to why the matter should be heard, even though it is moot, by December 15, 2020. The Responding party is directed to provide additional evidence, it submission on the motion and its submission on why the matter should or should not be heard, even though moot, by January 21, 2021.

Both parties have provided extensive written submissions.

[5] In *R. v. Smith*, 2004 SCC 14, 2004 1 S.C.R. 385, and, more recently, in *R. v. Paulin* 2019 SCC 47, the Court set out five (5) non-exhaustive factors which should be considered in determining whether a matter that is moot should, nevertheless, be considered by the court. With some slight modifications due to different circumstances, those five (5) factors may be summarized as follows:

i. Whether the matter will proceed in a proper adversarial context;

ii. The strength of the case;

iii. Whether there are special circumstances which transcend the mootness issue such as, for example; whether there is an issue of general public importance, a systemic issue related to the administration of justice, or others;

iv. Whether the nature of the order to be made by the appellate court is otherwise evasive of appellate review;

v. Whether continuing the appeal (in this case the motion before the appeal court) would go beyond the judicial function and involve the Court in making pronouncements better left to the legislature.

[6] With respect to the first of the five (5) factors to be considered, there is no doubt that if this matter proceeds to a hearing, it will proceed in a proper adversarial context. Both parties are

represented by experienced counsel, financed by the state, through the offices of the Judge Advocate General. Such access to legal counsel represents but one of the many benefits of the Canadian military justice system as currently constituted.

[7] Not having yet heard oral arguments, and given that I intend to sit on this matter, it is inappropriate to comment upon the strength of the case. That being said, I note that at least one judge of this Court, Justice Létourneau, in *obiter*, observed in *R. v. Larocque* 2001 CMAC 2 at para. 16 [*Larocque*] that he would expect charges to have been laid by the time of the detention review before a military judge. In *Larocque*, the issue concerned delay and alleged violation of the right to be tried within a reasonable time as required by section 11(*b*) of the *Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of the *Constitution Act,* 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11. The Court was not called upon to address the issue that is now before it. Importantly, *Larocque* resulted in three (3) separate opinions, in which neither of the other justices commented upon Justice Létourneau's *obiter* observations.

[8] In my view, *Larocque* creates special circumstances that militate in favour of proceeding with this matter despite its mootness. *Larocque* has created confusion among commanding officers, prosecuting authorities and even military judges on whether charges must be laid prior to a detention review. Clarity in the law would be useful.

[9] With respect to the fourth factor, there is no doubt that only this Court and the Supreme Court of Canada are clothed with the jurisdiction to pronounce upon the constitutional issue raised by the applicant. It is evasive of appeal but for review to this Court and potential appeal to

the Supreme Court of Canada pursuant to section 245(1) of the *National Defence Act*, R.S.C., 1985, c. N-5, presuming leave is granted.

[10] Fifth, in the event this Court proceeds with the motion despite its mootness, might it be seen as interfering with the legislative function? I think not. It is the role of the courts to interpret and apply the Constitution. By ruling upon the issue raised by the applicant, this Court cannot usurp the function of the legislator. That said, I fully acknowledge that if the Court concludes that any conduct or enactment violates the Constitution, the acceptance of some remedies proposed by the parties might constitute a usurpation of Parliament's role. However, the issue of remedies is separate and distinct from the issue of rights' determination.

[11] In my Direction made on December 2, 2020, I invited the parties to make observations regarding whether the issue raised should be framed as a stated case to a full panel of this Court pursuant to Rule 28(3) of the *Court Martial Appeal Court Rules* (SOR/86-959). I have concluded a stated case would not be appropriate in the circumstances, for the following reasons.

[12] First, the applicant has already framed the question he wishes this Court to decide. That question arises from a discrete fact situation, which enables the Court to address the narrow issue raised.

[13] Second, the parties have already filed their written submissions on the motion. Those submissions are fulsome. The only remaining step in the procedure is for this Court to hear oral arguments. Were I to frame a stated case, delays would be encountered because of the need for

further written submissions from both parties and the requirement that I strike a panel to hear the matter.

[14] Third, since this issue was not before the Court in *Larocque* and there was no majority opinion in that case, any decision rendered by this Court on the motion will be precedential until overturned by the Supreme Court of Canada or a contrary opinion is rendered by a majority of a panel of this Court.

[15] Fourth, judicial economy militates in favour of the matter being heard by a single judge. As noted above, the parties have filed their submissions and the matter is ready to be heard. Furthermore, given the constitutional issue raised, whether the matter is decided by a panel of three (3) on a stated case, or by a single judge on motion, there is an equal possibility that one party might seek leave to appeal to the Supreme Court of Canada. There is no utility in delaying access to the procedures available to the parties.

[16] For all of the above reasons:

IT IS ORDERED THAT the within motion be set down for hearing despite its mootness.

"B. Richard Bell"

Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-611
STYLE OF CAUSE:	SAILOR THIRD CLASS S.J.M. CHAMPION v. HER MAJESTY THE QUEEN

DEALT WITH IN WRITING WITHOUT APPEARANCE OF THE PARTIES

REASONS FOR ORDER BY:	CHIEF JUSTICE BELL
DATED:	FEBRUARY 19, 2021

APPEARANCES:

LCol Bernsten D.	FOR THE APPLICANT
Major Stephen Poitras	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Defence Counsel Services Saanich, British Columbia	FOR THE APPLICANT
Canadian Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENT