Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20211014

Docket: CMAC-613

Citation: 2021 CMAC 5

[ENGLISH TRANSLATION]

CORAM: **CHIEF JUSTICE BELL**
RENNIE J.A.
CHARBONNEAU J.A.

BETWEEN:

CORPORAL M.A. LÉVESQUE

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Quebec, Quebec, and by videoconference hosted by the Registry,

on September 21, 2021.

Judgment delivered at Ottawa, Ontario, on October 14, 2021.

REASONS FOR JUDGMENT BY: CHARBONNEAU J.A.

CONCURRED IN BY: CHIEF JUSTICE BELL
RENNIE J.A.

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REASONS FOR JUDGMENT

CHARBONNEAU J.A.

I. Introduction

[1] On November 6, 2020, a military judge sentenced the appellant to three months in prison for five offences to which he had pleaded guilty and ordered that the sentence be served in a service prison.

[2] At the sentencing hearing, the appellant argued that imprisonment was not necessary under the circumstances. However, in this appeal, he is not disputing that sentence. His appeal concerns only the place where the sentence was ordered to be served.

II. Analysis

[3] Article 114.06 of the *Queen's Regulations and Orders for the Canadian Forces* reads as follows:

> 114.06 – COMMITTAL TO CIVIL PRISONS
>
> (1) Subsection 220(3) of the *National Defence Act* provides:
>
> "220. (3) A service prisoner whose punishment of imprisonment for less than two years is to be put into execution shall as soon as practicable be committed to a civil prison to undergo punishment according to law, except that a committing authority may, in accordance with regulations made by the Governor in Council, order that a service prisoner be committed to a service prison or detention barrack to undergo the punishment or part thereof."
>
> (2) Subject to paragraph (3), where the exigencies of the service make it desirable to do so, a committing authority may order that a service prisoner be committed to a service prison or detention barrack, there to undergo the punishment, or such part of the punishment as the committing authority may order.
>
> . . .

[4] Subsection 114.06(3) applies to offenders sentenced outside of the country and is not relevant for the purposes of this appeal.

[5] In light of these provisions, when a service tribunal imposes a sentence of imprisonment for less than two years, the sentence is normally served in a civil prison. The sentence is served in a service prison only if it is established that the exigencies of the service so require it. In that sense, the parties agree that civil prison is the rule and service prison is the exception.

[6] The appellant argues that the military judge made two errors in the analysis that resulted in the decision to order him to serve his sentence in a service prison.

[7] Firstly, he submits that the military judge erred in her interpretation of the meaning of the phrase “exigencies of the service”. More specifically, he submits that the exigencies of the service can virtually never require offenders who are no longer members of the Canadian Armed Forces to serve their sentence in a service prison.

[8] Secondly, he submits that the military judge reversed the burden of proof by requiring him to demonstrate that he could safely serve his sentence in a civil prison in light of the COVID-19 pandemic and the need to continue his therapeutic process for his mental health problems.

[9] I disagree with the extremely narrow definition of “exigencies of the service” proposed by the appellant. In my opinion, there can be various circumstances in which the exigencies of

the service may require incarceration in a service prison even if the offender is no longer a member of the Canadian Armed Forces at the time of sentencing.

[10] I am also sceptical of the argument that is based on a so-called reversal of the burden of proof. The military judge analyzed the evidence presented to her and drew certain conclusions from it. The issue in these circumstances is not which party has the burden of proof but rather whether the evidence demonstrates that the exigencies of the service require incarceration in a service prison.

[11] However, I am of the view that the military judge, once satisfied that a sentence of imprisonment had to be imposed, made a procedural error in failing to invite the parties to make additional submissions on the issue of the place of incarceration.

[12] Note that during the sentencing hearing, counsel focused their arguments on the issue of whether or not the appellant should be sentenced to imprisonment.

[13] They did not address the issue of the place of incarceration in any depth.

[14] In fact, counsel for the Crown did not argue that the exigencies of the service required that the sentence be served in a service prison. On the contrary, he stated that he was not requesting that such an order be made.

[15] As for the appellant, he argued that the option of imprisonment in a service prison was not available because the Crown had presented no argument that the exigencies of the service

justified it. He therefore focused, in his argument, on the reasons why he believed that imprisonment was not necessary in light of the applicable legal principles on sentencing, including the objective of his rehabilitation.

[16] Obviously, it was for the military judge to examine the evidence and draw her own conclusions. She was not bound by the position of either party. However, under the circumstances, and considering the submissions made, if she intended to order that the sentence be served in a service prison, she should have invited the parties to make additional submissions on that issue.

[17] It is true that the appellant presented evidence from an expert concerning the mental health problems he was suffering from and the risk that his therapeutic process would be threatened if he were imprisoned in a civil prison. To counter the argument against imposing a sentence of imprisonment, counsel for the Crown had established that the appellant would have certain options available to him to continue his therapy if he were imprisoned in a service prison.

[18] It seems clear to me that the military judge's decision was based on her assessment of what would be most beneficial to the appellant's physical and mental health. In my view, before drawing such a conclusion, the judge was required to give the appellant the opportunity to make submissions on this issue to have a more complete picture of his situation.

[19] For example, at the hearing of the appeal, the appellant argued that the service prison where he will be sent is in Edmonton, very far from his home, whereas there is a civil prison in the Quebec region, where he currently lives, and where his young children also live. He also

argued that he has not been a member of the Canadian Armed Forces for 13 months and feels that it would be very detrimental to him to find himself in a military environment again. He also submitted that the detention conditions in a service prison are much more restrictive than those in a civil prison. He relies on, among other things, the *Regulations for Service Prisons and Detention Barracks*, which stipulate that, in a service prison, certain relatively innocuous behaviours constitute offences punishable by disciplinary sanctions.

[20] The military judge's decision as to the place of incarceration was clearly based on issues related to the appellant's well-being, his rehabilitation, the importance of him being able to continue his therapy and his physical safety. Under the circumstances, the appellant should have had an opportunity to underscore the considerations that he submitted before this Court.

[21] Moreover, at the hearing of the appeal, counsel for the Crown confirmed that if the military judge had notified the parties that a sentence of imprisonment was going to be imposed and had asked the parties for their positions on the issue of the place of incarceration, he would not have opposed a request from the appellant to be imprisoned in a civil prison.

[22] Considering all of the circumstances, including the fact that the appellant has not been a member of the Canadian Armed Forces for over one year, his personal circumstances, and the Crown's position at both the sentencing hearing and the appeal hearing, I find that this Court's intervention is warranted and that the appellant should serve his sentence in a civil prison.

III. Conclusion

[23] For these reasons, I allow the appeal and order that the sentence of imprisonment imposed on the appellant by the military judge be served in a civil prison. I order that the appellant report to the Valcartier military police detachment without delay.

"Louise Charbonneau"
J.A.

"I concur.
B. Richard Bell, Chief Justice"

"I concur.
Donald J. Rennie, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-613
STYLE OF CAUSE:	CORPORAL M.A. LÉVESQUE v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	QUEBEC, QUEBEC
DATE OF HEARING:	SEPTEMBER 21, 2021
REASONS FOR JUDGMENT:	CHIEF JUSTICE BELL RENNIE J.A. CHARBONNEAU J.A.
DATED:	OCTOBER 14, 2021

APPEARANCES:

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