Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20211012

Docket: CMAC-616

Citation: 2021 CMAC 6

[ENGLISH TRANSLATION]

Present: BELL C.J.

BETWEEN:

SERGEANT ALEXANDRE THIBAULT

Applicant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Quebec, Quebec, on September 20, 2021.

Order delivered at Ottawa, Ontario, on October 12, 2021.

REASONS FOR ORDER BY: CHIEF JUSTICE BELL

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CHIEF JUSTICE BELL

I. Introduction

[1] By way of Notice of Motion filed on the 3rd day of August, 2021 Sergeant A.J.R. Thibault (applicant) requests this Court allow a new issue to be raised on appeal and that fresh evidence be admitted. The parties appeared in person in Quebec City, Quebec on September 20,

2021 for purposes of presenting their oral arguments. For the following reasons, I allow the motion to raise a new issue on appeal. However, I dismiss the motion to admit fresh evidence.

II. New Issue on Appeal

[2] In his Notice of Appeal filed on the 29th day of March 2021, the applicant raises the following issues arising from his conviction for sexual assault contrary to s. 271 of the *Criminal Code*, R.S.C., 1985, c. C-46, and in violation of s. 130 of the *National Defence Act*, R.S.C., 1985, c. N-5 (NDA):

> [TRADUCTION]
>
> 1. The military judge erred in law by using an inappropriate legal test in assessing the accused's and other witnesses'credibility;
>
> 2. The military judge erred in law by using inappropriate stereotypes in assessing the behaviours of the accused and the plaintiff;
>
> 3. The military judge failed to assess the evidence as a whole;
>
> 4. The military judge came to an unreasonable verdict in light of the facts before her;
>
> 5. Any other ground that is open to me and that this Court may hear.

[3] In the Notice of Appeal, the applicant does not challenge the constitutionality of s. 165.21 of the NDA, which requires that military judges be members of the Canadian Armed Forces. However, Rule 7(3)(a) of the *Court Martial Appeal Court Rules*, SOR/86/959 (Rules) permits a new issue to be raised on appeal if the appellant sets it out in his or her appeal submission. In this case, the applicant has done just that and the respondent has, in its submission on the appeal, set out its response to that question. I also note that the issue was raised at trial before the military

judge. Finally, although the respondent objected to the motion to raise a new issue on appeal in its written submission on the within motion, she abandoned that position on the hearing before me.

[4] In the circumstances, given that the issue was raised at trial, is addressed in both the applicant's and the respondent's submissions on appeal and given the respondent's consent, I allow the applicant to raise the issue of the constitutionality of s. 165.21 of the NDA on the hearing of the within appeal.

III. Motion for leave to admit fresh evidence on appeal

[5] The applicant seeks to admit affidavit evidence from the Vice Chief of Defence Staff, Lieutenant-General Michael Rouleau sworn to on the 13th day of July, 2021; Commander of the Royal Canadian Navy, Vice Admiral C.A. Baines sworn to on the 9th day of July, 2021; Commander, Canadian Joint Operations Command, Lieutenant-General C.J. Coates sworn to on the 13th day of July, 2021; Commander, Royal Canadian Air Force, Lieutenant General A.D. Meinzinger sworn to on the 15th day of July, 2021; and, Commander, Special Operations Forces, Major-General Peter Dawe, sworn to on the 26th day of July, 2021.

[6] In each affidavit, the affiant deposes to his opinion that civilian judges with a sufficient degree of military experience could adequately "meet the needs" of the Canadian Armed Forces. Although they do not specifically use the following words, I presume for my purposes, they intend to say that civilian judges could preside over "general courts martial" and could sit in the "same judicial role as military judges sitting alone".

[7] I note that none of the affiants deposes to the degree of military experience that would be "sufficient". I also note that none is a lawyer or constitutional expert. I also note that none purports to have the experience or qualifications to offer an opinion regarding s. 91(7) of the *Constitution Act, 1867*, 30 & 31 Victoria, c. 3 (U.K.) and s. 11(f) of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 (Charter), regarding the exception to jury trials for "military tribunals".

[8] I do not consider any of the evidence to be new evidence as contemplated by the Supreme Court in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at p. 775, 106 D.L.R. (3d) 212. In *Palmer*, the Court sets out the following 4-part test to determine whether evidence is truly fresh evidence:

> (1) The evidence should generally not be admitted if, by due diligence, it could have been adduced at trial provided that this general principle will not be applied as strictly in a criminal case as in civil cases […]
>
> (2) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial.
>
> (3) The evidence must be credible in the sense that it is reasonably capable of belief, and
>
> (4) It must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

[9] I have no doubt that the third branch of the *Palmer* test is met. Each of the well-respected members of the Canadian Armed Forces who signed the affidavits, provides evidence that is reasonably capable of belief. However, I am not satisfied that the other three (3) prongs of the *Palmer* test are met.

[10] The first requirement of the *Palmer* test is that the evidence should not be admitted if, by due diligence, it could have been produced at trial. There exists an abundance of evidence and commentary dealing with the utility of engaging civilian judges in the military justice system. This issue was exhaustively considered in the Court Martial Comprehensive Review, Interim Report dated July 21, 2017. It is available on-line (https://www.canada.ca/en/department-national-defence/corporate/reports-publications/military-law/court-martial-comprehensive-review/interim-report-july-2017.html). At page 97 of that report, one finds opinions from several high-ranking soldiers. In addition, from pages 236 to 239, one reads about the possibility of a Permanent Military Court composed of civilian judges. Academic publications written by high-ranking members of the Canadian Armed Forces have also addressed the issue: see, e.g., Col. Stephen Strickey, "Anglo-American Military Justice System and the Wave of Civilianisation: Will Discipline Survive?" (2013) 2:4 Cambridge J Int'l & Comp L 763; Col. Michael Gibson, "International Human Rights Law and the Administration of Justice through Military Tribunals: Preserving Utility while Precluding Impunity" (2008) 4:1 J Int'l L & Int'l Rel 1. In addition, the United Kingdom has implemented a civilian component to their military justice system. The legislation implementing their current system is found in the *Armed Forces Act* (UK), 2006 c. 52.

[11] The opinions expressed by the five (5) affiants contain nothing new and nothing that could not have been obtained by the exercise of due diligence before the trial.

[12] The second criteria of the *Palmer* test requires that the proposed evidence bear upon a decisive or potentially decisive issue in the trial. The proposed evidence does not meet this test. The affiants assert that civilian judges, with a "sufficient" degree of military service could serve

as military judges. The affiants do not assert that the military judge who heard the trial at first instance was not qualified, either by lack of experience and training or by failure to meet constitutional norms, from sitting as a military judge. If the military judge who heard this matter was qualified to sit, the proposed evidence is not decisive of anything related to the trial.

[13] The fourth part of the *Palmer* test is not met. The evidence of the affiants is expected to have affected the result. The evidence could not have affected the result for a number of reasons. It offers no opinion regarding the constitutional status of military judges who are members of the Canadian Armed Forces. It offers nothing new to the commentary and opinions already available. It offers no opinion about the sufficiency of military service required of the proposed civilian judges. Importantly, it offers no opinion about what might constitute a "military tribunal" for purposes of the Charter, s. 11(f) in the event civilian judges are involved in the military justice system at the trial level.

IV. Conclusion

[14] The applicant is allowed to raise a new issue on appeal pursuant to Rule 7(3)(a): to wit, the constitutionality of s. 165.21 of the NDA. The applicant is not permitted to adduce the proposed fresh evidence, as it does not meet the *Palmer* criteria for admissibility.

[15] For all of the above reasons:

IT IS ORDERED THAT:

1. The motion to raise a new issue on appeal: to wit, the constitutionality of s. 165.21 of the NDA, is allowed; and,

2. The motion to adduce fresh evidence on appeal is dismissed.

"B. Richard Bell"
Chief Justice

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-616
STYLE OF CAUSE:	SERGEANT ALEXANDRE THIBAULT v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	QUEBEC, QUEBEC
DATE OF HEARING:	SEPTEMBER 20, 2021
REASONS FOR ORDER BY:	CHIEF JUSTICE BELL
DATED:	OCTOBER 12, 2021

APPEARANCES:

Commander Mark Letourneau	FOR THE APPLICANT
Major Patrice Germain	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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Canadian Military Prosecution Services Ottawa (Ontario)	FOR THE RESPONDENT