Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20240327

Docket: CMAC-637

Citation: 2024 CMAC 3

CORAM: **ACTING CHIEF JUSTICE BENNETT**
STRATAS J.A.
STRICKLAND J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MAJOR (RET'D) J. ELLISON

Respondent

Heard at Ottawa, Ontario, on March 27, 2024.
Judgment delivered from the Bench at Ottawa, Ontario, on March 27, 2024.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT

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THE COURT

[1] On April 17, 2023, the respondent, Major Jason Ellison, was acquitted of four fraud-related charges under sections 130 and 117(f) of the *National Defence Act*, RSC 1985, c N-5 ("NDA"), namely drawing a document without authority under section 374 of the *Criminal Code*, RSC 1985, c C-46 ("Criminal Code"); fraud under section 380 of the *Criminal Code*; fraud by a public officer under section 122 of the *Criminal Code* and an act of a fraudulent

nature under section 117(f) of the *NDA*. The Minister of National Defence, whom I will refer to as "the Crown", appeals that decision.

[2] The circumstances of the four charges are the same on all counts. Major Ellison was a medical doctor, wing surgeon and detachment commander at Canadian Forces Health Services in North Bay, Ontario. The Crown alleges that between May 1, 2015 and July 31, 2018, with intent to defraud or by deceit, falsehood, or other fraudulent means, Major Ellison wrote prescriptions for medications in the name of Sgt. Krysti Fawcett and Ms. Gabriel Wright for the benefit of his wife.

[3] At the close of the Crown's case, Major Ellison presented a no *prima facie* case motion with regard to the four charges on the basis that the prosecution had failed to introduce any evidence concerning at least one of the essential elements on each charge.

[4] The Crown was required to prove the essential elements of fraud, namely dishonesty and deprivation, in relation to each count. The military judge found that the Crown had not discharged its burden of proving all the essential elements of all four charges, more specifically deprivation, and therefore concluded that there was no *prima facie* case.

[5] The Crown appeals the acquittals of all of the charges on the ground that the military judge erred in her application of the no *prima facie* case test.

[6] The Crown asserts that Blue Cross and the Government of Canada have suffered or were at risk of suffering a deprivation as a result of Major Ellison's dishonest conduct. Major Ellison contends that the Crown failed to prove that there was a deprivation or risk of deprivation as a result of writing prescriptions on behalf of Sgt. Fawcett or Ms. Wright.

[7] Major Ellison admits that there is evidence of his dishonest behaviour. Therefore, given the way the counts have been framed, the entire appeal focuses on whether the military judge erred in applying the no *prima facie* case test to the issue of deprivation.

[8] The test for no *prima facie* case (also known as a directed verdict) is set out in *Queens Regulations &Orders* article 112.05(13) Note (B). It requires that the evidence, whether believed or not and without assessing credibility or weighing the evidence, prove each of the essential elements such that the accused could reasonably be found guilty, if no other evidence were adduced (*R v Charemski*, [1998] 1 SCR 679 at para 22, 1998 CanLII 819 (SCC); *R v Barros*, 2011 SCC 51 at para 48; *R v Arcuri*, 2001 SCC 54 at para 22). It is often stated in terms of whether there is "some" evidence to support each essential element of the offence.

[9] The test for no *prima facie* case remains the same whether the evidence is direct or circumstantial, but the application differs (*Arcuri* at para 22). Where proof of an essential element depends on circumstantial evidence it requires a <u>limited</u> weighing of evidence, by the judge, to see if the inference proposed by the Crown can reasonably be supported by the

evidence (*Arcuri* at para 23; *Charemski* at paras 22–23). Whereas there is no weighing of the direct evidence in this type of inquiry (*Arcuri* at para 22).

[10] The test for fraud is dishonest deprivation. Here, the dishonest act is admitted. It is not necessary for there to be actual deprivation, but only a risk of deprivation. The *mens rea* of the offence is the subjective knowledge of the prohibited act and that the act could result in the deprivation of others, or the knowledge that the victim's pecuniary interest is jeopardized *(R v Théroux*, [1993] 2 SCR 5 at 5–10, 1993 CanLII 134 (SCC), majority reasons of McLachlin J.).

> …The prohibited act is deceit, falsehood, or some other dishonest act. The prohibited consequence is depriving another of what is or should be his, which may, as we have seen, consist in merely placing another's property at risk. The *mens rea* would then consist in the subjective awareness that one was undertaking a prohibited act (the deceit, falsehood or other dishonest act) which could cause deprivation in the sense of depriving another of property or putting that property at risk. If this is shown, the crime is complete…

[11] In our view, the military judge made significant errors in the application of the no *prima facie* case test. She misconstrued the test in *Théroux* with respect to deprivation. On several occasions, she concluded that there was no deprivation on the basis that Major Ellison did not financially profit from writing the illicit prescriptions; found as a fact that Mrs. Ellison was eligible for medication reimbursement, and thus there could be no deprivation; and that since Sgt. Fawcett was entitled to be reimbursed for her drugs, there was no deprivation. The test in *Théroux*, as stated above, does not require actual deprivation.

[12] The military judge erred by examining the evidence and concluding that because Sgt. Fawcett and Mrs. Ellison would be entitled to claim for medical expenses, there was no deprivation. She erred in drawing those inferences as that finding went beyond what is permissible in terms of examining whether there is "some evidence". In addition, there was no evidence that Sgt. Fawcett could lawfully claim reimbursement for drugs she was trafficking to Mrs. Ellison or that Mrs. Ellison would be able to lawfully obtain the prescriptions.

[13] The count in relation to s. 122 of the *Criminal Code* is not a breach of trust, but fraud in connection with the duties of Major Ellison's office. Similarly, count 117(f) of the *NDA* is also an allegation of fraud. The military judge similarly erred with respect to her conclusion regarding deprivation with respect to those counts.

[14] The military judge did not limit herself to examining whether there was "some evidence" to support the element of whether there was a risk of deprivation. Evidence of the risk of deprivation existed because Sgt. Fawcett was entitled to claim for reimbursement of her pharmaceuticals from Blue Cross, which was reimbursed by the Government of Canada. That was a risk that Major Ellison was aware of, given his position in the military and as a doctor.

[15] That evidence comprises "some evidence" of risk of deprivation. Major Ellison does not have to profit personally nor does there have to be an actual deprivation.

[16] In our view, the military judge erred in law when she concluded that there was no evidence of deprivation.

[17] We are also of the view that there was evidence that a trier of fact could find that Major Ellison had subjective knowledge of potential deprivation or a risk of deprivation. Major Ellison knew that as a Sergeant, Sgt. Fawcett could seek reimbursement from insurance. At times, he knew that many more prescriptions were being filled than Sgt. Fawcett required.

[18] In oral argument, counsel for Major Ellison emphasized that Mrs. Ellison might have gotten a prescription from her own doctor and she would have been entitled to look to her insurance to pay. However, the fact that things might have been done legally takes nothing away from the fact that, in the transactions that actually took place, there is some evidence upon which a trier of fact could find that the *actus reus* and *mens rea* for conviction is present on the four counts.

[19] Accordingly, the appeal is allowed, the acquittals are set aside, and a retrial is ordered.

"Elizabeth A. Bennett"
Acting Chief Justice

"David Stratas"
J.A.

"Cecily Y. Strickland"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-637
STYLE OF CAUSE:	HIS MAJESTY THE KING v. MAJOR (RET'D) J. ELLISON
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 27, 2024
REASONS FOR JUDGMENT OF THE COURT BY:	ACTING CHIEF JUSTICE BENNETT STRATAS J.A. STRICKLAND J.A.
DELIVERED FROM THE BENCH BY:	THE COURT
DATED:	MARCH 27, 2024

APPEARANCES:

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