Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20140307

Docket: CMAC-564

Citation: 2014 CMAC 3

CORAM: **EWASCHUK J.A.**
STRATAS J.A.
RENNIE J.A.

BETWEEN:

PRIVATE ALEXANDRA VEZINA

Appellant

And

HER MAJESTY THE QUEEN

Respondent

Heard at Toronto, Ontario, on March 7, 2014.

Judgment delivered from the Bench at Toronto, Ontario, on March 7, 2014.

REASONS FOR JUDGMENT OF THE COURT BY: STRATAS J.A.

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REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario, on March 7, 2014).

STRATAS J.A.

[1] The appellant appeals from her convictions on June 10, 2013 of service offences punishable under section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 for trafficking in cocaine, contrary to subsection 5(1) of the *Controlled Drugs and Substances Act*, S.C. 1996, c. 19.

[2] Immediately after her conviction, the appellant applied for stay of proceedings on the basis that she was entrapped into committing these offences by the military police. The Military Judge dismissed the application. In her appeal to this Court, the appellant submits that she was entrapped and the proceedings should have been stayed.

[3] In our view, the appeal must be dismissed.

[4] The appellant concedes that the Military Judge correctly identified the applicable principles found in cases such as *R. v. Mack*, [1988] 2 S.C.R. 903 and *R. v. Brown*, [1999] 3 S.C.R. 660, aff'g *R. v. Brown*, [1998] C.M.A.J. No. 6 (QL). Instead, she focuses upon the Military Judge's application of these principles to the facts of this case. The appellant submitted that the entrapment took place when an investigator asked her whether she could buy her some coke. When the investigator asked that question, she was not, in the words of *Mack*, "acting on a reasonable suspicion that [the appellant was] already engaged in criminal activity or pursuant to a *bona fide* inquiry."

[5] The Military Judge found that the investigator was not acting on a *bona fide* inquiry when she posed the question, nor did the military police have reasonable grounds to suspect that the appellant was implicated in trafficking. On the other hand, the Judge found that the investigator's question, "Can you get me some coke?" did not amount to providing the appellant with an opportunity to commit an offence. Rather, it was just an investigative step. The opportunity to commit the offence took place two days later when the exchange of money took place. The Military Judge found that at this point the investigator had reasonable suspicion.

[6] In our view, the Military Judge's characterization of the investigator's question as just an investigative step is supported by the evidence and is consistent with authorities such as *R. v. Imoro*, 2010 SCC 50, [2010] 3 S.C.R. 62. There are no grounds to interfere with the Military Judge's conclusions in this regard.

[7] We would add, in disagreement with the Military Judge, that there were also two alternative bases for rejecting the defence of entrapment in this case.

[8] First, when the investigator asked the appellant whether she could sell her some coke, the military police did have objectively discernable facts supporting a reasonable suspicion that the appellant was implicated in trafficking. Among other things: the appellant lived in an apartment with her girlfriend, Elizabeth Smith; drugs were known to be trafficked at that apartment building; Smith worked at a club where illicit drugs could be obtained; the appellant herself was an illicit drug user; two other individuals at the Base were using drugs; these two individuals at the Base and the appellant had rooms in the same building on the Base, Building A-79. In our view, these facts went beyond just mere suspicion or hunch. They form a constellation of objectively discernable facts that supported a reasonable suspicion that the appellant was the link between the likely source of drugs, Smith, and the illicit drug users in Building A-79.

[9] In this regard, it bears repeating that reasonable suspicion is a lower standard than reasonable and probable grounds. There need only be objectively discernable facts implicating the appellant in the criminal activity. Objectively discernable facts can come from the "totality of the circumstances" and inferences drawn therefrom, including information supplied by others, apparent

circumstances and associations among individuals. See *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at paragraph 43; *R. v. Kang Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Monney*, [1999] 1 S.C.R. 652.

[10] Second, in our view, the investigator's question to the appellant arose during a *bona fide* inquiry within the meaning of *Mack*, *supra* and *R. v. Barnes*, [1991] 1 S.C.R. 449. The military police were inquiring into the scope of illicit drug use in a particular building on the Base, Building A-79. This was not just a speculative concern. The military police already had plenty of evidence, including the arrest of one of the occupants of the building for drug possession. The investigator's question posed to the appellant was in furtherance of that *bona fide* inquiry. It was not "random virtue testing," as the appellant submitted to us.

[11] The appellant also seeks to raise for the first time on appeal the issue whether paragraph 130(1)(*a*) of the *National Defence Act* is overbroad and, thus, contrary to section 7 of the Charter. We are concerned that this constitutional issue is one that should have been raised below and the parties given the opportunity to adduce evidence relevant to it: *Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd.*, 2002 SCC 19, [2002] 1 S.C.R. 678 at paragraphs 32-34. For example, had the constitutional issue been raised below, the prosecution might have introduced evidence relevant to section 1 of the Charter in order to justify any overbreadth under section 7 of the Charter: *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at paragraphs 124-129 and 161-163. As well, some evidence regarding how other jurisdictions have dealt with the issue might have been necessary. Nevertheless, we exercised our discretion in favour of hearing submissions on the constitutional issue.

[12] Turning to the merits of the constitutional issue, we note that in *Moriarity v. The Queen*, 2014 CMAC 1, this Court dismissed an identical challenge. We consider ourselves bound to follow *Moriarity* because the appellant has failed to persuade us that that Court committed manifest error.

[13] The appellant submits that the reading down remedy, granted in *Moriarity*, was not available because it conflicts with Parliamentary intent. We disagree. The remedy accords with Parliamentary intent and the appellant has not discharged her burden of showing manifest error on the part of the Court.

[14] The appellant also submitted that the imposition of a requirement of military nexus in *Moriarity* did not cure the unconstitutional overbreadth, relying upon *R. v. Ionson* (1987), 120 N.R. 82 (C.M.A.C.). In our view, this raises the issue of exactly what constitutes a military nexus sufficient to avoid unconstitutional overbreadth, a matter to be worked out on the facts of future specific cases. Here again, we see no manifest error.

[15] Finally, the appellant submitted that this Court in *Moriarity* overlooked the Supreme Court's decision in *R. v. Ferguson*, 2008 SCC 6, [2008] 1 S.C.R. 96, which decried a case-by-case approach to determining constitutionality. We note, however, that those concerns were expressed concerning the remedy of constitutional exemption, not the remedy of reading down. For that remedy, *Osborne v. Canada (Treasury Board)*, [1991] 2 S.C.R. 69 is the leading authority. On the basis of that authority, we see no manifest error in this Court's exercise of discretion in *Moriarity* to read down paragraph 130(1)(*a*).

[16] Therefore, for the foregoing reasons, we shall dismiss the appeal.

"David Stratas"

J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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