Date: 20020514

Docket: CMAC-451

Neutral citation: 2002 CMAC 7

CORAM: **LÉTOURNEAU J.A.**
NADON J.A.
DURAND J.A.

BETWEEN:

CORPORAL MICHEL LACHANCE

Appellant,

and

HER MAJESTY THE QUEEN

Respondent

Hearing held in Ottawa, Ontario, April 25, 2002.

Judgment rendered in Ottawa, Ontario, May 14, 2002.)

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRING: NADON J.A.
DURAND J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] Can an accused who pleaded guilty following the dismissal of his motion for a stay of proceedings based on his constitutional right to be tried within a reasonable time appeal the decision dismissing his motion? That is the question, seemingly innocuous but in fact problematic, that comes before us through this appeal.

Facts and Proceedings

[2] The appellant, a soldier with the rank of corporal, charged with being disrespectful to a superior, complains that he had to wait thirteen (13) months to be tried on two simple charges necessitating only a short preparation time for both the prosecution and the defence. It is common ground that the normal period for trying such charges is four months. The appellant criticizes the military judge for not allowing his preliminary motion to stay the proceedings based on paragraph 11(*b*) of the *Canadian Charter of Rights and Freedoms* (the Charter) and for failing to put an end to those proceedings.

[3] Once his motion was dismissed by the military judge, the appellant entered a plea of guilty on the first count and the prosecution stated it had no evidence to offer on the second count, which was then dismissed. He was sentenced to a fine of $200.

[4] The proceedings against the appellant were begun by a record of disciplinary proceedings that was delivered to him on July 25, 2000. However, it was not until January 31, 2001 that the charges were formally filed with the court martial in accordance with the option selected by the appellant for his trial. The parties agree, however, that the point of departure in calculating the period for the purposes of paragraph 11(*b*) is July 25, 2000.

[5] The appeal is only on the dismissal of the motion for a stay of proceedings. In a letter dated April 3, 2002, the Court asked the parties to reply in writing, and subsequently orally at the hearing, to the following questions:

(a) In view of the right of appeal under section 230 of the National Defence Act, does the Court have jurisdiction to hear an appeal on the sole issue of the dismissal of a motion to stay the proceedings?

(b) In so far as the appeal that is before this Court is an appeal or may be perceived as an appeal of the finding of guilty, may the Court hear such an appeal when the finding of guilty is the result of an unequivocal guilty plea recorded voluntarily, freely, with the assistance of counsel and in full knowledge of the effect and consequences of such a plea?

(c) Should not the person who is appealing ask the Court and obtain from it leave to withdraw his plea before he can proceed with his appeal on its merits?

This leads me to examine the nature of the right of appeal under the N*ational Defence Act*, R.S.C. 1985, c. N-5 (the Act) and the appeal actually exercised by the appellant.

The right of appeal under the Act and the appeal by the appellant

[6] Paragraph 230(*b*) of the Act gives an accused a right to appeal "the legality of any finding of guilty". But it is still necessary that the appeal be filed against this verdict. In the present case, the notice of appeal is addressed to "the legality of one or more verdicts" but without specifying which ones (appeal book, page V). The grounds of appeal contained in the notice of appeal are addressed only to the decision of the military judge dismissing the motion to stay the proceedings. And in paragraph 6 of his memorandum, the appellant writes: "[Translation] This is

an appeal only of the military judge's decision to dismiss the appellant's motion." But that decision is not a finding within the meaning of section 230 of the Act, and it is not a finding alone that can be appealed.

[7] However, on an appeal specifically filed against a finding of guilty, a decision refusing to order a stay of proceedings may also be reviewed and set aside if the pre-trial delay is unreasonable, if it so prejudiced the accused that the trial should have been prohibited and, accordingly, it resulted in a conviction that is unlawful because it is contrary to the Charter.

[8] One of the difficulties in this appeal lies in the fact that, apart from the lack of precision in the notice of appeal, the appellant's memorandum does not attack the legality of the finding of guilty pronounced against him other than in its conclusion where, in seeking a stay of the proceedings, he asks purely incidentally that this verdict be dismissed and that a stay of the proceedings be ordered.

[9] I am inclined, from reading the notice of appeal combined with the conclusions of the appellant's memorandum, to give a liberal interpretation to the notice of appeal and to infer that it is an appeal of the finding of guilty as a way of bringing it within the requirements of the Act. But even if this is done, the appellant's difficulties do not end there.

Does the appellant's guilty plea compromise his right of appeal?

[10] In fact, the appellant was convicted after he himself, represented by counsel, had freely, voluntarily, unequivocally and in full knowledge, pleaded guilty to the charge against him. An

accused's plea of guilty with these characteristics is an admission of proof of all the material and legal ingredients of the offence (*Adgey v. R.*, [1975] 2 S.C.R. 426; *Lefebvre v. R.*, R.J.Q. 1780 (Que. C.A.)). It constitutes a waiver of trial and of his right to a trial. Under the *Military Rules of Evidence*, SOR/90-306, subsection 38(1), it is conclusive proof of guilt.

[11] Before accepting the appellant's guilty plea, the military judge, as required by subsection 112.25(1) of the *Queen's Regulations and Orders for the Canadian Forces*, explained to him in ample detail the legal and criminal consequences of this plea and satisfied himself that the appellant clearly understood the consequences (see the appeal book at pages 130 to 133). At that time the appellant, in response to the questions by the military judge exercising his discretion as to whether to accept the plea, explicitly acknowledged each of the ingredients of the offence as charged and the accuracy of the facts as alleged and contained in the statement of particulars in support of the charge. Furthermore, the appellant obtained, on the one hand, a dismissal of the second count as a result of his plea of guilty and, on the other hand, benefited from the clemency of the military judge on sentencing, as the judge accepted the argument of the appellant's counsel that the guilty plea was a mitigating factor that he should take into account: see the appeal book at pages 141 and 143. The military judge considered this plea a "[Translation] first step taken in the rehabilitation process". How can the appellant now, on appeal, attack the finding of guilty that resulted from his plea without, at minimum, asking in his proceedings for leave to withdraw this plea or demonstrating why this plea is invalid or should be set aside? A plea of guilty is presumed to be voluntary unless the appellant establishes the contrary. The burden is on him to demonstrate the invalidity of his plea (*R. v. Djekic* (2000), 147 C.C.C. (3d) 572, at page 575

(Ont. C.A.); *R. v. Rajaeefard* (1996), 104 C.C.C. (3d) 225 (Ont. C.A.); *R. v. Rubenstein* (1988), 41 C.C.C. (3d) 91 (Ont. C.A.) withdrawal of plea refused).

[12] In *R. v. Davidson* (1992), 110 N.S.R. (2d) 307, the Nova Scotia Court of Appeal unanimously dismissed the appeal on the ground that the appellant's guilty plea deprived him of his right of appeal. Mr. Justice Jones writes at page 308:

> By notice dated July 2, 1991, the appellant applied for leave to appeal from the judgment of Mr. Justice Goodfellow. There is no reference in the notice to the conviction or that he was appealing from the conviction under s. 675(1) of the Criminal Code. An appeal must be from a conviction. In our opinion the plea of guilty precludes an appeal in this case. There is a division of opinion in the Supreme Court of Canada as to whether s. 11(b) is a jurisdictional issue. See Mills v. The Queen, 26 C.C.C. (3d) 481. Notwithstanding that, it is clear from R. v. Askov et al., 113 N.R. 241 that an accused can waive his rights under s. 11(b) of the Charter. At common law a plea of guilty was simply an admission of the facts stated in the information. See Tremeear's Criminal Code of Canada 5th ed. p. 842. However, we think that is too narrow a view in terms of waiver of a privilege. See Sayers and Hall v. The King, 76 C.C.C. 1 and Hall v. Taylor, [1926] 3 D.L.R. 34. We find support for that view in the American context. The following passage is from 22 C.J.S. paragraph 396:
>
> > "In general, a plea of guilty waives all defenses other than that the indictment or information charges no offense. By pleading guilty accused waives the right to trial and the incidents thereof, and likewise waives the constitutional guaranties with respect to the conduct of criminal prosecutions."

Jones J.A. goes on to cite an extract from Justice Rehnquist in *Tollett v. Henderson*, 411 U.S. 258:

> We thus reaffirm the principle recognized in the Brady trilogy: a guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has

> solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. He may only attack the voluntary and intelligent character of the guilty plea by showing that the advice he received from counsel was not within the standards set forth in *McMann*. Id al 267, 93 S.Ct. at 1608.

[13] In short, the Nova Scotia Court of Appeal concludes that by pleading guilty, the accused had waived his right to a trial, including the right to be tried within a reasonable time guaranteed by the Charter. It dismissed the appeal without assessing it on the merits.

[14] This judgment was followed by the New Brunswick Court of Queen's Bench, Trial Division, sitting in appeal in *R. v. Parish* (1996), N.B.J. No. 232, once the Court was satisfied that the appellant's plea of guilty was valid because it had been made freely, unequivocally and in full knowledge of the nature of the charge and of the effect of a plea of guilty.

[15] Finally, in *R. v. Naderi*, the Ontario Court of Justice (General Division) likewise held that an accused could not raise a paragraph 11(*b*) Charter argument after pleading guilty to the charges since in doing so he had waived his constitutional right to be tried within a reasonable time (see also *R. v. Leaver* (1997), 3 C.R. (5th) 138, in which the Ontario Court of Appeal notes that the accused raised his right to be tried within a reasonable time only after being convicted.) It is to be noted that the waiver of the right to be tried within a reasonable time through a plea of guilty does not necessarily imply a waiver of the right to be sentenced within a reasonable time, which is guaranteed by paragraph 11(b): *R. v. MacDougall* (1997), 6 C.R. (5th) 228 (N.S.C.A.).

[16] These cases are in line with the case law on the effect of a guilty plea and the conditions in which such a plea will be held to be valid, particularly when the accused is represented by counsel (*Adgey v. R.*, supra; *Lefebvre v. R.*, supra; *Thibodeau v. R.*, [1955] S.C.R. 646; *Brosseau v. R.*, [1969] S.C.R. 181; *R. v. Laperrière,* [1996] 2 S.C.R. 284; *R. v. Bamsey,* [1960] S.C.R. 294; *R. v. Patenaude* (1978), 44 C.C.C. (2d) 376 (Que. C.A.); *R. v. Newman* (1993), 20 C.R. (4th) 370 (Ont. C.A.); *Lamoureux v. R*. (1984), 40 C.R. (3d) 369 (Que. C.A.)). The entry of a guilty plea that is free, voluntary and informed of the consequences it entails for the course of the proceeding implies a waiver of the right to be tried within a reasonable time under paragraph 11(*b*) of the Charter (*Korponay v. Attorney General of Canada*, [1982] 1 R.C.S. 41, at page 49; *R. v. Askov*, [1990] 2 S.C.R. 1199, at page 1228).

[17] I confess that this conclusion, logical as it is in terms of principles, may nevertheless seem counterproductive in practical terms since it forces an accused who unsuccessfully attempts at trial to enforce his constitutional right to be tried within a reasonable time to plead not guilty and undergo a trial in regard to which he has a nullifying objection, for the sole purpose of preserving on appeal his right to the protection of paragraph 11(*b*) of the Charter.

[18] In terms of the administration of justice, it forces the prosecution to summon witnesses and proceed with their testimony. As the Ontario Court of Appeal commented in *R. v. Fegan* (1993), 80 C.C.C. (3d) 356, at page 361, "it is wasteful of court time and resources to conduct an entire trial on the issue of guilt simply to preserve the right to appeal an evidentiary ruling." In that case the Court held that there is no conditional plea of guilty under the Criminal Code and that it is up to Parliament to allow one if it considers this appropriate. "If we were to accept that

an accused could enter some form of conditional plea", writes Mr. Justice Finlayson at page 363, "it would be a significant erosion of the integrity of a plea of guilty. A plea of guilty is intended to signal the termination of the trial as it relates to conviction. It is considered by the sentencing judge as an expression of remorse. By expressing finality to the conviction process, it invites leniency in the sentencing portion of the trial. A conditional plea does none of these things." It is true that an accused may, while artificially maintaining his plea of not guilty, appreciably shorten the proceedings by making incriminating admissions of fact that leave the trial judge no alternative but to convict the accused: see paragraph 37(*b*) of the *Military Rules of Evidence, supra*. He may also, after a key prosecution witness has testified, admit that if all the other witnesses were heard they would corroborate this initial testimony, thereby making a finding of guilty inevitable and reducing the trial time to the minimum. But again, the situation is clearly completely artificial, since the proceeding under paragraph 11(*b*) is not a hearing on the guilt or innocence of the accused but rather a hearing on his right not to be tried, which he can appeal only by way of a finding of guilty.

[19] Having said that, I do not exclude the possibility that an accused may, once his motion for a stay of proceedings has been dismissed by the trial judge, in the interest of saving time and judicial resources, plead guilty after first taking pains to indicate clearly that he intends to appeal the denial of his constitutional right and that his plea of guilty, if accepted by the appeal court, cannot constitute a waiver of the paragraph 11(b) right. Paragraph 37(*a*) of the *Military Rules of Evidence, supra*, unlike the *Criminal Code*, allows an accused to confess his guilt "subject to variations and exceptions" and authorizes the military judge to accept such a plea:

Judicial Confession Explained	Explication de l'aveu judiciaire
37. When, at his trial, the accused chooses to make a complete or partial admission of incriminating facts in respect of an offence for which he is being tried, he may make a judicial confession	37. Lorsque, dans le cours de son procès, l'accusé choisit de faire une admission complète ou partielle de faits incriminants à l'égard d'une infraction pour laquelle il subit un procès, il peut faire des aveux judiciaires
(*a*) by pleading guilty, including pleading guilty subject to variations and exceptions, when this plea is accepted by the court under QR&O 112.25;	*a*) en s'avouant coupable, y compris le fait d'avouer coupable sous réserve de variations et d'exceptions, lorsque ce plaidoyer est accepté par la cour aux termes de l'article 112.25 des ORFC;

It will then be up to the military judge in such circumstances to determine the mitigating effect on the sentence of this kind of guilty plea. In other words, I do not rule out the possibility that in resorting to paragraph 37(*a*), the presumption of waiver that is normally the result of a plea of guilty may be rebutted. However, in the case before us, there is nothing in the transcript of the proceedings that can bar the operation of the presumption of waiver.

[20] In support of his contention that his plea of guilty cannot deprive him of his right of appeal, the appellant refers us to the following extract from Lord Morris of Borth-y-Gest in *D.P.P. v. Shannon*, [1975] A.C. 717, at page 747 (Eng. H.L.):

> Furthermore, it may often happen that a ruling by a judge on a question of law is followed by a plea of guilty which is made on the basis of such ruling: the accused will thereafter be entitled to appeal against his conviction on the ground that there was a wrong decision on the question of law.

With respect, even assuming that the appellant's objection raises a pure question of law, I do not believe that this observation of Lord Morris of Borth-y-Gest is applicable to the circumstances of the present case. It is true, as His Lordship says, and as the U.S. cases recognize, that a plea of

guilty following the rejection of a preliminary objection does not always and necessarily bar an appeal against conviction. In some cases it is necessary to examine the nature of the preliminary objection that was made and, at minimum, to satisfy oneself that the plea of guilty was generated by the error at the source of the dismissal of the preliminary objection. That is the necessary reading of the words "followed by a plea of guilty which is made on the basis of such ruling" used by Lord Morris.

[21] In other circumstances, as is evident from the American cases cited previously, it is necessary to examine the nature of the preliminary objection that is made and the impact that the guilty plea recorded following the dismissal of the objection has on the question that was the subject matter of that objection. For example, an accused who unsuccessfully objects to the charge against him and who pleads guilty once his objection is dismissed by the trial judge does not lose his right of appeal if his objection consists of arguing that the facts alleged against him, even if admitted, do not constitute a legally recognized offence. The admission of the facts by way of a guilty plea cannot give rise to an offence that does not legally exist. In such cases this admission of the facts clearly does not constitute a waiver of the nature and content of the objection.

[22] In the case of an application based on paragraph 11(*b*) of the Charter, as in the present appeal, the very essence of the preliminary objection is to seek the recognition of the right to be tried within a reasonable time. But the unconditional plea of guilty is, as I said earlier, precisely a waiver of that right. Furthermore, it is impossible, particularly in the circumstances in which the plea of guilty was entered here, to conclude that this plea results from the dismissal of the

preliminary objection in the sense of the *Shannon* case or, as in *R. v. Fegan* (1993), 80 C.C.C. (3d) (Ont. C.A.), where the accused pleaded guilty after his preliminary objection in law as to the admissibility of incriminating and conclusive evidence of his guilt was dismissed and the evidence admitted.

Examination of the merits of the appeal

[23] In short, the circumstances in which the appellant's plea of guilty was made are such that this plea and the finding of guilty pertaining to it cannot be set aside. This conclusion would be sufficient to dismiss the appeal without the need to rule on its merits. But since the appeal was heard on the merits and this is the fourth appeal within a short period concerning the slowness of the proceedings in the military courts due to pre-charge or post-charge delay, I think it may be useful to briefly express an opinion on the actual merit of the appeal: (*The Queen v. Langlois*, CMAC-443, 2001 CMAC 3, November 14, 2001; *The Queen v. Perrier*, CMAC-434, November 24, 2000; *Larocque v. The Queen*, CMAC-438, October 16, 2001). Furthermore, since the appellant was represented at the time of the trial below by a new counsel, it is not inconceivable that the latter was unaware of the effect of a plea of guilty and thought his right to appeal the decision under paragraph 11(*b*) of the Charter would not be compromised by entering such a plea: see the mistaken perception of the appellant's counsel in *R. v. Fegan*, supra at page 359 (Ont. C.A.), where the lawyer thought he could appeal notwithstanding his client's guilty plea and the Crown admitted that the appellant's counsel had acted on the basis of this misunderstanding.

[24] Although the administration of the prosecution in the case at hand could have been conducted in a more efficient manner, I am satisfied that the military judge's finding of fact, that the appellant did not suffer any actual harm as a result of the post-charge delay of thirteen (13) months, is not unreasonable in view of the evidence he had before him: see the appeal book at page 127.

[25] I am also of the opinion that the military judge did not err in applying in this case the principles laid down by the Supreme Court of Canada in *R. v. Morin*, [1992] 1 S.C.R. 771.

[26] The appellant, as was his right, opted for a trial by a court martial, but his election in itself involved some inherent institutional delays longer than those that are common in trials by way of summary procedure. In this regard the military courts are not unlike the courts of ordinary law in which, for example, the choice of trial by jury generally entails some procedural delays longer than those that characterize a trial in a provincial court without a jury and without a preliminary inquiry.

[27] In this case, once the charge was formally filed in the court martial, the delays proved to be slightly longer than normal as a result of a conjunctural unavailability of judges that the military judge rightly characterized as special, exceptional and temporary. In fact, three new military judges were appointed in January 2001, all three for all intents and purposes coming from the military prosecutions division, the effect of which was to limit for some time their availability to sit in cases formerly under their supervision. I note as well that had it not been for the lack of availability of the appellant's counsel when the hearing of the charge laid on January

31, 2001 was set down for April 3, 2001, the delays would have been shortened by about five months. In saying that, I do not mean to criticize the accused or his counsel for his lack of availability. But in assessing the reasonableness or unreasonableness of the delay, this is a factor which must be taken into account and which, in terms of the institutional delay, cannot be attributed to the prosecution. I would add that the appellant took no steps to request a speedy trial and at no time manifested any such desire either personally or through his counsel: *R. v. C.*(R.) (2001), 158 C.C.C. (3d) 119, at page 127 (Nfld. C.A.).

[28] For these reasons, I would dismiss the appeal.

(s) “G. Létourneau”
J.A.

"I agree
M. Nadon J.A."

"I agree
R. Durand J.A."

Certified true translation

Suzanne M. Gauthier, C.Tr. LL.L,

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-451
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DATED:	May 14, 2002

APPEARANCES:

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