Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20110203

Docket: CMAC-540

Citation: 2011 CMAC 1

CORAM: **LÉTOURNEAU J.A.**
NOËL J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CAPTAIN WINTERS, S.

Respondent

Hearing held at Montréal, Quebec, on January 28, 2011.

Judgment delivered at Ottawa, Ontario, on February 3, 2011.

REASONS FOR JUDGMENT: LÉTOURNEAU J.A.

CONCURRED IN BY: NOËL J.A.
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REASONS FOR JUDGMENT

LÉTOURNEAU, J.

Issues

[1] The Directorate of Military Prosecutions is appealing from a decision of the President of the General Courts Martial (judge) in which he acquitted the accused on May 4, 2010.

[2] The appellant argues that the judge erred in law when he refused:

a) to accept the accused's guilty plea after initially accepting and recording the plea;

b) to allow the prosecution to have the details of the charge amended to include the words [TRANSLATION] "instruction entitled"; and

c) the request for an adjournment of the proceedings to allow for the prosecution to call its witnesses.

[3] The particular circumstances of this case are important. I will therefore have to deal with them at some length, in fact, more than I would have liked to.

The facts and circumstances in this case

[4] The respondent was charged under section 129 of the *National Defence Act*, R.S.C. 1985, c. N-5 (Act) with having committed an act to the prejudice of good order and discipline. The details of the charge, amended at the opening of the trial, essentially indicated that the respondent, on or about August 18, 2008, at the Land Force Quebec Area Headquarters/Joint Task Force (East), in Montréal, contravened the Land Force Quebec Area (LFQA) Information Systems Security Orders by connecting an unauthorized peripheral to the Defence Intranet Network.

[5] On the morning of the trial, the respondent, who was represented by his counsel, indicated his intention to plead guilty. The judge made sure that the respondent had discussed the guilty plea with his counsel, and this was confirmed to him by the respondent: see appeal book, at page 9.

[6] The judge then proceeded to explain to the respondent that the decision of whether or not to accept a guilty plea was up to him. In accordance with the legal provisions requiring him to do so, particularly article 112.25 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&Os), the judge fulsomely explained to him the nature of the offence with which he was charged, the maximum sentence that could be imposed on him and the fact that he would be called upon to accept the accuracy of the details set out in the charge sheet: *ibidem*, at page 10.

[7] He read him the first subsection of section 129 of the Act and then went on to carefully explain the essential elements of the offence that the prosecution would normally have to prove beyond a reasonable doubt: *ibidem*, at pages 10 to 12. He explained the presumption in subsection 129(2) of the Act on which the prosecution was relying and whose effect is to turn any contravention of a regulation, order or instruction into an act to the prejudice of good order and discipline: *ibidem*, at pages 12 and 13.

[8] Subsections 1 to 4 of section 129 read as follows:

Conduct to the Prejudice of Good Order and Discipline	*Conduite préjudiciable au bon ordre et à la discipline*
129. (1) Any act, conduct, disorder or neglect to the prejudice of good order	**129.** (1) Tout acte, comportement ou négligence préjudiciable au bon ordre

and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.	et à la discipline constitue une infraction passible au maximum, sur déclaration de culpabilité, de destitution ignominieuse du service de Sa Majesté.
(2) An act or omission constituting an offence under section 72 or a contravention by any person of (*a*) any of the provisions of this Act, (*b*) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or (*c*) any general, garrison, unit, station, standing, local or other orders, is an act, conduct, disorder or neglect to the prejudice of good order and discipline.	(2) Est préjudiciable au bon ordre et à la discipline tout acte ou omission constituant une des infractions prévues à l'article 72, ou le fait de contrevenir à : *a*) une disposition de la présente loi; *b*) des règlements, ordres ou directives publiés pour la gouverne générale de tout ou partie des Forces canadiennes; *c*) des ordres généraux, de garnison, d'unité, de station, permanents, locaux ou autres.
(3) An attempt to commit any of the offences prescribed in sections 73 to 128 is an act, conduct, disorder or neglect to the prejudice of good order and discipline.	(3) Est également préjudiciable au bon ordre et à la discipline la tentative de commettre l'une des infractions prévues aux articles 73 à 128.
(4) Nothing in subsection (2) or (3) affects the generality of subsection (1).	(4) Les paragraphes (2) et (3) n'ont pas pour effet de porter atteinte à l'application du paragraphe (1).

[9] The judge drew the attention of the respondent and his counsel to the fact that the prosecution was alleging a contravention of a regulation, that the term regulation has a precise meaning and that the prosecution was bound by the details it had chosen: *ibidem*, at pages 13 to 16.

[10] Finally, he informed the respondent about the blameworthy state of mind required by the offence with which he was charged. He informed him that it was normally up to the prosecution to provide proof of this state of mind at the time of the commission of the offence.

[11] In answer to the question posed to him by the judge, the respondent indicated that he understood the offence to which he wanted to plead guilty and requested a short adjournment of 20 minutes to discuss the matter with his counsel: *ibidem*, at page 18.

[12] Upon resumption of the proceedings, the judge further explained the procedural effect of a plea of guilty as compared to a plea of not guilty: *ibidem*, at pages 19 to 22. After stating that he had clearly understood the judge's explanations with regard to the elements of the offence that must be proved, the applicable sentence and the effect of a plea of guilty, the respondent, in answer to the judge's question, indicated that he still wanted to maintain his guilty plea for the offence with which he was charged in the charge sheet: *ibidem*, at page 22.

[13] The judge therefore accepted and recorded the respondent's plea of guilty: *ibidem*, at page 23. The prosecution then proceeded to note the respondent's service, the Reserve pay system, the personal record resumes of soldiers, the fact that the respondent had no conduct sheet, as well as reading the summary of the circumstances in which the offence was committed, all of which was considered for the purpose of determining the type of sentence sought: *ibidem*, at pages 23 to 26.

[14] At the judge's request, the respondent rose and admitted the truth of the facts contained in the summary of the circumstances, which was filed as Exhibit P-6.

[15] It was at this moment that the judge intervened to state that the contravention alleged was not of a regulation but of an instruction. He then stated that in his view it was not in the interests of justice under the circumstances to accept a plea of guilty and set it aside before adjourning for a few minutes.

[16] When proceedings resumed, counsel for the prosecution sought to claim the benefit of section 138 of the Act and request a special finding of guilty. Such a finding is possible where there is a difference between the facts alleged and the facts proved and where the latter, the facts proved, are sufficient to establish the commission of the offence charged.

[17] The judge immediately intervened to put a stop to this application under section 138 of the Act on the ground that the authority conferred by it can only be exercised at the end of a trial: *ibidem*, at pages 28 and 29. Section 138 reads as follows:

138. Where a service tribunal concludes that (*a*) the facts proved in respect of an offence being tried by it differ materially from the facts alleged in the statement of particulars but are sufficient to establish the commission of the offence charged, and (*b*) the difference between the facts proved and the facts alleged in the	**138.** Le tribunal militaire peut prononcer, au lieu de l'acquittement, un verdict annoté de culpabilité lorsqu'il conclut que : *a*) d'une part, les faits prouvés relativement à l'infraction jugée, tout en différant substantiellement des faits allégués dans l'exposé du cas, suffisent à en établir la perpétration; *b*) d'autre part, cette différence n'a pas

statement of particulars has not prejudiced the accused person in his defence, the tribunal may, instead of making a finding of not guilty, make a special finding of guilty and, in doing so, shall state the differences between the facts proved and the facts alleged in the statement of particulars.	porté préjudice à l'accusé dans sa défense. Le cas échéant, le tribunal expose la différence en question.

Given that the appellant did not insist on this ground of appeal at the hearing, I will not deal with it. The judge also denied an application to amend the charge, which would have entailed adding the words [TRANSLATION] "Instruction entitled:" right before *LFQA Information Systems Security Orders*.

[18] Faced with the unexpected setting aside of the guilty plea and the recording of a plea of not guilty by the judge, the prosecution requested an adjournment of the hearing in order to call its witnesses. The request was denied, the judge indicating that he failed to see [TRANSLATION] "how, in the circumstances of this case, an adjournment will allow you to call your witnesses, who at any rate should have been here this morning, regardless of the fact that this is a plea of guilty or that those witnesses are available on short notice": *ibidem*, at pages 30 and 31.

[19] Following a short adjournment to allow for a discussion between counsel for both parties, the prosecution applied for a withdrawal of the charge, which the judge denied: *ibidem*, at page 33. The appellant abandoned the ground of appeal it had filed following this denial.

[20] Having been unable to replace the term “regulation” with “instruction” in the details of the charge sheet following the judge’s refusal to allow the amendment, the prosecution found itself unable to establish through its witnesses that there had been a contravention of a regulation since it was an instruction. It therefore had to declare that it had no further evidence to submit, which led to the dismissal of the charge and the respondent’s acquittal: *ibidem*, at pages 34 and 35.

Analysis of judge’s decision and parties’ submissions

[21] For the reasons that follow, I am of the view that the appeal should be allowed. At the root of the cascading decisions which led to the respondent’s acquittal is a misunderstanding as to the essence and scope of subsection 129(2), with regard to the authority to amend a detail of the charge and with regard to the effect of a plea of guilty. I will therefore begin with an analysis of section 129 of the Act.

The offence in subsection 129(1) and essence of subsection 129(2) of the Act

[22] In the case at bar, the charge was laid under section 129 which, it should be noted, sanctions acts prejudicial to good order and discipline. The offence is created by subsection 129(1).

[23] Contrary to the assertion by author J.B. Cloutier, on which the respondent relies, section 129 does not create two distinct offences; it creates one single offence: see article by Major Cloutier, "The Use of Section 129 of the *National Defence Act* in Canada's Military Justice System," (2004) 35 *R.D.U.S.*, at pages 56, 59, 60 and 61, in which the author erroneously sees two distinct offences in subsections 129(1) and (2), the offence at subsection 129(2) being specific in nature.

[24] When a charge is laid under section 129, other than the blameworthy state of mind of the accused, the prosecution must establish beyond a reasonable doubt the existence of an act or omission whose consequence is prejudicial to good order and discipline. Proof of prejudice may be clear, direct, but the existence of prejudice and its causal relationship can also be inferred from matters proven in evidence: see *Bradt v. R.*, 2010 CMAC 2, at paragraphs 39 to 42.

[25] In certain cases, proof of prejudice or of the causal relationship may be difficult to establish. Parliament may wish to create a presumption to mitigate this difficulty or even obviate it. Or, as in the case of paragraph 129(2)(*b*) of the Act, to ensure compliance with the regulations, orders or instructions published for the governance of the Canadian Forces and, by the very fact, simplify the proof of prejudice resulting from a breach of those provisions.

[26] Thus, subsection 129(2), and consequently paragraph (2)(*b*), presume, from the act, the existence of a prejudice to good order and discipline as well as the existence of a causal relationship between the act and the prejudice. When the conditions of subsection (2) and, more particularly, paragraph (2)(*b*) in this case, are met, the prosecution is relieved of having to prove this essential

element of the offence. But the offence referred to here is the one under subsection 129(1). There is no other.

[27] Thus, the fact that the conditions in subsection 129(2) with regard to proof have not been met does not mean that there was no offence under subsection (1), that the prosecution cannot prove the offence or that the accused cannot plead guilty to the offence. In other words, the prosecution's loss of the benefit of any presumption with regard to proof of prejudice does not put an end to the prosecution and to the possibility of the accused pleading guilty.

[28] It was within this legal framework that the judge set aside the respondent's plea of guilty. The judge's decision to refuse the respondent's plea was, in my view, vitiated by errors in principle and law.

The refusal to accept the respondent's plea of guilty

[29] Accepting or refusing a guilty plea is discretionary: *R. v. Lachance*, [2002] C.M.A.J. No. 7. This discretion must be exercised judicially, i.e. it must be exercised according to the law and in a manner that is neither abusive, arbitrary, or discriminatory. The exercise of discretion will be in accordance with the law if the judge has not made an error in principle or failed to consider a relevant factor and has taken care not to consider irrelevant factors: *R. v. St-Onge*, [2010] C.M.A.J. No. 7, at paragraph 88; *R. v. Dixon*, 2005 CMAC 2. In this case, I believe that the judge committed two errors in law.

a) Amendment of a detail of the charge

[30] First, he should have allowed the application to amend by the prosecution. The essence of the offence with which the respondent was charged is that it is an act that is prejudicial to good order and discipline, namely, having connected an unauthorized peripheral to the Defence Intranet Network. The statement that this act contravened a regulation was a detail. Substituting this detail with another stating that it was an instruction in no way altered the essence of the offence. There was no substitution of one offence for another. The amendment was all the more justified given that, on the one hand, paragraph 129(2)(*b*) contemplates disobeying both an instruction and a regulation for the purposes of the presumption, and on the other, the respondent knew about the instruction and acknowledged that his act contravened it. He would therefore not have been prejudiced by an amendment.

[31] The summary of the circumstances surrounding the commission of the alleged offence, which was read to the judge and whose contents were accepted by the respondent, reads as follows:

> [TRANSLATION]
>
> The instruction entitled: "LFQA Information Systems Security Orders" forbids connecting unauthorized peripherals, such as personal hard drives, to the DIN. Captain Winters was aware of the instruction and, on December 1, 2004, signed a document attesting to this fact. He was fully aware of the instruction when he connected his personal hard drive to the network.
>
> [Emphasis added.]

See appeal book, at page 26.

[32] In criminal law, it is possible to "amend a count in an indictment at any stage in the proceedings provided it is a particular of the offence" provided that there is no substitution of the offence: *R. v. Daoust*, [2004] 1 S.C.R. 217, at page 229, citing *Morozuk v. The Queen*, [1986] 1 S.C.R. 31 and *Elliot v. The Queen*, [1978] 2 S.C.R. 393, at page 427. And the decision of whether or not to amend a count in an indictment is a decision on a question of law: see subsection 601(6) of the *Criminal Code*.

[33] The situation is no different in military criminal law. Moreover, the requested amendment could be justified under section 188 of the Act, which reads as follows:

Amendment of Charges	*Modification des accusations*
188. (1) Where it appears to a court martial that there is a technical defect in a charge that does not affect the substance of the charge, the court martial, if of the opinion that the conduct of the accused person's defence will not be prejudiced by an amendment of the charge, shall make the order for the amendment of the charge that it considers necessary to meet the circumstances of the case.	**188.** (1) Lorsqu'elle constate l'existence d'un vice de forme qui ne touche pas au fond de l'accusation, la cour martiale doit, si elle juge que la défense de l'accusé ne sera pas compromise par cette décision, ordonner que soit modifiée l'accusation et rendre l'ordonnance qu'elle estime nécessaire en l'occurrence.
(2) Where a charge is amended by a court martial, the court martial shall, if the accused person so requests, adjourn its proceedings for any period that it considers necessary to enable the accused person to meet the charge so amended.	(2) En cas de modification de l'accusation, la cour martiale doit, si l'accusé en fait la demande, ajourner les procédures le temps qu'elle juge nécessaire pour permettre à celui-ci de répondre à l'accusation dans sa nouvelle forme.

This amendment in no way affected the substance of the charge and in now way compromised any future defence of the respondent, who, represented by counsel, simply wanted to plead guilty and was determined to do so. In fact, section 188 creates the obligation to amend the charge when the few conditions for its application are met.

b) Validity of the respondent's guilty plea without amendment of the charge

[34] Moreover, regardless of any amendment of a detail in the charge sheet as well as the presumption to the benefit of the prosecution, the respondent could still have pleaded guilty to the offence under subsection 129(1). [TRANSLATION] "A plea of guilty constitutes an admission of proof of all of the material and legal elements of the defence. This admission liberates the prosecution from having to prove the commission of the offence and signifies that the respondent has no grounds of defence against the charge": see G. Létourneau and P. Robert, *Code de procédure pénale du Québec annoté*, 8e édition, 2009, pages 361-362, Wilson et Lafleur, Montréal, citing *Adgey v. R.*, [1975] 2 S.C.R. 426; *Lefebvre v. R.*, [1989] R.J.Q. 1780 (Q.C.A.).

[35] In the case at bar, the respondent acknowledged by his guilty plea that he had intentionally connected an unauthorized peripheral to the Defence Intranet Network and that this act was prejudicial to good order and discipline under section 129 of the Act. His plea was voluntary and, above all, informed, given that he recorded the same plea after all of the information the judge had provided him about the charge and after he had benefitted from an adjournment of twenty (20)

minutes to discuss it with his counsel. That was all that was needed for him to be found guilty and he ought to have been.

[36] Moreover, subsection 129(4) of the Act clearly states that nothing in subsections (2) and (3) limits the scope of subsection 129(1). It is clear that a deficient allegation with respect to the presumption in subsection 129(2) in no way affects the scope of the application of subsection (1) or the offence created by it.

Refusal to adjourn the proceedings

[37] In view of the conclusion I have reached with respect to the issue of amending the charge, it is not necessary to rule on the refusal to allow an adjournment. However, I will state the following for the benefit of the courts martial and the parties appearing before them.

[38] In principle, there is nothing objectionable about the fact that the prosecution did not call its witnesses when the accused, duly represented by counsel, informed the prosecution that he would enter a guilty plea and would limit his submissions to the sentencing submissions. The savings in resources for the administration of military justice (administrative, financial and legal resources) resulting from a guilty plea is a factor that is often taken into consideration when determining a sentence: *R. v. Thompson*, 2009 CMAC 8, at paragraph 15; *R. v. Taylor*, 2008 CMAC 1, at paragraph 6; *R. v. Lachance*, 2002 CMAC 7, at paragraph 19; *R. v. Dominie*, 2002 CMAC 8, at paragraph 6; *R. v. Nicholson*, 2008 ABCA 256, at paragraphs 12 and 13; *R. v. L.P.*, [1998] C.M.A.J.

No. 8, at paragraph 22; *R. v. Labrie*, 2008 CM 1013, at paragraph 9; *R. v. Cayer*, 2007 CM 1006, at paragraph 5; *R. v. Cimon*, 2005 CM 4, at paragraph 9; and *R. v. Sinclair*, 2009 CM 1004.

[39] These savings, which also save time for the witnesses, as well as the mitigating factor of the sentence, are lost if the prosecution must still call witnesses and have them appear in court in order to be able to deal with any eventuality and be constantly prepared to proceed. In the rare cases where it may be necessary to adjourn the hearing of the case, it is less burdensome to do this than to systematically and uselessly have witnesses present at all times.

Appropriate remedy under the circumstances

[40] Were it not for the errors discussed above, the judge would have accepted the respondent's guilty plea and entered a finding of guilty instead of the finding of not guilty that he made. Paragraph 239.1(1)(*b*) of the Act allows our Court to enter a finding of guilty with respect to the offence for which the respondent should have been found guilty. This is what I propose to do.

[41] But under the circumstances, it is preferable in my view, as is authorized under subparagraph 239.1(1)(*b*)(ii), to remit the matter to the court martial and direct it to impose a sentence that is warranted in law.

[42] I understand that the prosecution wanted to appeal the matter to clarify the interpretation of section 129 and the judge's power to amend a detail in the charge sheet. Through no fault of his

own the respondent is, in a way, suffering the consequences. But the fact that, right from the start, he was willing to acknowledge the inappropriate and prejudicial nature of his act and that he pleaded guilty should be taken into consideration when determining the sentence.

Conclusion

[43] I would allow the appeal, set aside the decision of the Court Martial and, pursuant to subparagraph 239(1)(*b*)(ii) of the Act, I would reinstate and re-record the plea of guilty that was accepted and recorded by the judge at the hearing on May 4, 2010. I would remit the matter to the court martial in order that it may hear the parties' sentencing submissions and impose the sentence that is warranted in law in the circumstances.

"Gilles Létourneau"
J.A.

"I agree
Marc Noël J.A."

"I agree
Johanne Trudel J.A."

Certified true translation

Sebastian Desbarats, Translator

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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DATED:	February 3, 2011

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