Date: 19990215

Docket: CMAC-417

Coram: **ROULEAU J.A.**
ROUSSEAU-HOULE J.A.
DESROCHES J.A.

Between:

YVES BERGERON,

Appellant,

And:

HER MAJESTY THE QUEEN,

Respondent.

HEARING HELD AT QUÉBEC, Quebec, Friday, November 27, 1998.

JUDGMENT RENDERED at Ottawa, Ontario, Monday, February 15, 1999.

REASONS FOR JUDGMENT BY THE COURT

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REASONS FOR JUDGMENT

BY THE COURT

[1] At the conclusion of a hearing held before the Standing Court Martial the accused, who is a member of the Regular Forces, was convicted on the following three charges:

> [TRANSLATION]
>
> > Count 1: aggravated assault, s. 130 of the *National Defence Act* (NDA), contrary to s. 268(2) of the *Criminal Code*;
> >
> > Count 2: threats to cause serious bodily harm to Cpl. J.M.P. Provencher, s. 120 of the *National Defence Act* (NDA), contrary to s. 264.1(1) of the *Criminal Code*;
> >
> > Count 3: threats to cause serious bodily harm to Cpl. S. Girard, s. 130 of the *National Defence Act* (NDA), contrary to s. 264.1(1)(a) of the *Criminal Code*.

[2] The alleged acts were committed in Haiti during a peace mission in which the appellant participated as a member of the 3rd Battalion of the Royal 22d Regiment.

[3] He is appealing to this Court against the legality of the guilty verdict on the three counts and nine-month term of imprisonment imposed on him. His grounds of appeal were as follows:

> [TRANSLATION]
>
> (A) The Standing Court Martial, as established in accordance with s. 177 of the *National Defence Act* (hereinafter referred to as "the NDA") and s. 113.51 of the Queen's Regulations and Orders for the Canadian Forces (hereinafter referred to as "the QR&O"), is not an independent tribunal within the meaning of s. 11(d) of the *Canadian Charter of Rights and Freedoms* (hereinafter referred to as "the Charter") and is not justified by s. 1 of the Charter;
>
> (B) the President of the Standing Court Martial made an error in lowering the prosecution's burden of proof:
>
> > (a) he completely ignored and passed over the relevant evidence submitted by the defence, which had a bearing on the outcome of the trial;
> >
> > (b) he neglected to give the appellant the benefit of a reasonable doubt regarding the credibility of his testimony;
> >
> > (c) the President of the Standing Court Martial made an error in usurping the functions of counsel for the prosecution, destroying the balance of the trial and the right to a fair and equitable trial.

[4] The appellant charged that the trial judge had ignored relevant and important evidence, failed to give him the benefit of a reasonable doubt on his testimony and destroyed the fairness of the trial by asking certain questions, thereby usurping the functions of counsel for the prosecution. In our view, there is no merit in these three allegations.

[5] The evidence was that on the night of August 29, 1997 Cpl. Provencher was sleeping in his tent. He was attacked by someone who fractured his left arm with a metal bar. He cried out in pain, sat up in bed and saw two people running away, one of whom he thought was the appellant Master Cpl. Bergeron. He tried to run after this person outside the tent, but lost sight of him. Some time later he saw him go into the division 3 tent and sit down in the television room. He went up to him, noted that he was out of breath and asked him to come outside as he wanted to talk to him. The appellant told him at that time: [TRANSLATION] "I hit you and you know I could have done much worse than that. Give me names because it might be worse for you the next time".

[6] It appeared that the appellant was referring at the time to events in connection with negligence allegedly committed by him in handling his weapon on July 4, 1997, in the presidential palace, for which he was liable to charges pursuant to s. 129 of the *National Defence Act*.

[7] Witnesses deposed to certain facts. On the night in question Cpl. Girard was also in the television room with the appellant and Cpls. Gilbert and Côté. He saw the appellant go to his room and come out a short time later with a metal bar about two feet long, which was in fact a section of the camp bed. He heard a shriek from the tent where Cpl. Provencher was living and the sound of people running outside. He then saw the appellant come in by the back of the division 3 tent and come and sit down in the television room. He stated that the appellant was out of breath and that Cpl. Provencher had asked to speak to him, and that they both went outside. When their conversation was over, the appellant came into the room and at that time he said:

[TRANSLATION] "If something is said this evening, it will be you, Girard, and you, Côté, who will say it". He then added for Girard's benefit: [TRANSLATION] "If you don't want the same thing to happen to you, you better not say anything".

[8] Corporal Côté also stated that the appellant went to his room, that he came out shortly afterwards and that he then saw Cpl. Provencher running after him outside the tent. A few minutes later, the appellant came into the division 3 tent by the rear entrance. Corporal Provencher asked to talk to him and they both had a conversation outside.

[9] The appellant denied that he was responsible for the aggravated assaults and threats. He insisted that the lighting was poor in the camp area and in the division 3 tent, and emphasized that only Cpl. Girard claimed to have seen him with a metal bar in his hands. The latter was the only person, apart from Cpl. Provencher, to say that he had been threatened. He submitted that the prosecution had not established the identity of the attacker beyond all reasonable doubt. The evidence also left some doubt as to the actual existence of the threats. Finally, he said that the questions the judge asked Cpl. Girard about how the latter perceived the threats had deprived him of a fair and equitable trial.

[10] Contrary to what was argued by the appellant, the evidence of identification provided by the prosecution witnesses established beyond all reasonable doubt that the appellant was the perpetrator of the aggravated assaults of which he was convicted. The appellant was the only witness heard for the defence and it appeared from reading the judgment that the judge did not believe his version of the facts. This version was contradicted on certain essential points such as

the lighting of the area, the layout of the camp and the sequence of events by all the prosecution witnesses and by clearly established evidence.

[11] Although the judge did not reproduce in its entirety the approach suggested in *R. v. W. (D.)*, [1991] 1 S.C.R. 742, and *Potvin v. The Queen*, [1994] R.J.Q. 64 (Q.C.A.), he applied the rules set out in those judgments since it was because, taking the evidence as a whole, the accused's testimony raised no reasonable doubt as to his guilt, that he found the latter guilty on the three counts.

[12] It is well settled that where a judgment is based on the assessment of the witnesses' credibility the trial judge has the last word and an appellate court should only intervene if the judgment is not based on the evidence or discloses a patent and overriding error. We consider that the trial judge clearly based his ruling on his assessment of the credibility of the testimony given before him and that the judgment contains no error on the evidence submitted.

[13] It is worth setting out the questions put to Cpl. Girard by the judge at the end of the latter's testimony:

> [TRANSLATION]
>
> BY THE COURT:
>
> Q. Corporal Girard, the threats you say Master Cpl. Bergeron made to you - did you take them seriously or not? A. Yes, I took them seriously.
>
> Q. You stated that the words were - I will try and refer to my notes - to the effect that "If you don't want the same thing to happen to you, you better not say anything", or something of the sort. A. Yes.

> Q. But "the same thing" – what did that mean to you: the same thing as what? Was that discussed? A. No.
>
> Q. The same thing as who - the same thing as what? A. The same thing. It was not discussed, but Provencher - in any case, when I heard someone cry out and after that when I saw Provencher come into our tent, I knew Provencher had just been hit with the aluminium bar.
>
> Q. But you did not see him . . . A. No.
>
> Q. . . . Provencher receive a blow? A. No.
>
> Q. But Master Cpl. Bergeron never said what "the same thing" was? He never said what had happened to whom? A. No.

[14] Following these questions the judge answered the defence objection as follows:

> [TRANSLATION]
>
> The prosecution asked the witness questions about the threats in question. You yourself asked the witness questions about the threats and the answers were ambiguous, and the Court has the right to put questions to clarify.
>
> I will tell you why I found the answers ambiguous: it was because in my notes here I have an answer to a question which you asked him.
>
> [TRANSLATION] "I do not think I was afraid of Master Corporal Bergeron" . . . "I do not think I was afraid Bergeron would hit me or harm me". I have that. A little further on in my notes, I also have "but I slept badly". Then I have a question mark in my margin alongside, which indicates to me that it was not clear how the witness perceived the threats allegedly made. That was the reason why I asked questions to clarify this point in particular.
>
> On the second point, the witness said the words I mentioned earlier, repeated the words Master Cpl. Bergeron allegedly said: "If you don't want the same thing to happen to you". None of the counsel explored the question of what "the same thing" was. The clarification question which I put was, what was it? The witness said "No, in fact the meaning of that was not discussed". He never

> said what "the same thing" was. That answered my questions. If you are not satisfied, you can appeal.
>
> I have no other questions to put to the witness. Are there any questions, Maj. Cloutier, which you would like to ask as a result of the questions I have put?

[15] The threats made to Cpl. Girard had to be assessed by the Court. Were they a form of intimidation designed to produce a feeling of fear in Cpl. Girard? In the circumstances, could the latter reasonably fear for his safety? (See *McGraw v. The Queen*, [1993] 3 S.C.R. 72.)

[16] Since Cpl. Girard was examined and cross-examined on the alleged threats, the judge's questions did not deal with disputed matters that had not been covered. They were asked in order to clarify points already in evidence. Further, the effect of the questions was not to deprive the defence of the right of putting questions to the witness. The judge in fact invited counsel for the defence to ask questions after his own. There is no basis for a conclusion that the questions asked were designed to favour the prosecution's case at the expense of the defence or that they prevented the appellant from exercising his right to a full and complete defence.

[17] Accordingly, as regards the arguments concerning the prosecution's burden of proof, we feel that the appeal at bar should be dismissed and the convictions imposed by the Standing Court Martial affirmed.

[18] The appellant then made the same constitutional argument as that pleaded in *Lauzon v. The Queen*, CMAC-415 (a judgment rendered on September 18, 1998), namely that the Standing Court Martial is not an independent tribunal within the meaning of s. 11(d) of the *Canadian*

Charter of Rights and Freedoms ("the Charter"). This argument is based on the organizational structure within which the Standing Court Martial is established, the lack of a guarantee of the financial security of its members and the process of appointment, reappointment and removal of its members. In *Lauzon*, the Court accepted the argument made by the appellant and held that s. 177 of the *National Defence Act* (NDA), concerning the process of appointing the members of the Standing Court Martial, as well as ss. 4.09(1), 4.09(5), 4.09(6), 101.14(2), 101.14(4), 101.16(10), 113.54(4) and 204.22 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) concerning the process of reappointing and removing military trial judges and the determination of their salaries were invalid and of no force or effect. We concur in the view stated in that judgment.

[19] The respondent made two arguments to persuade the Court not to apply the reasoning in *Lauzon* in the case at bar: first, changes in the organizational structure of the Office of the Chief Military Trial Judge, and second, *Edwards v. Her Majesty The Queen,* [1995] A.C. A.C. No. 10 (judgment rendered on October 16, 1995).

[20] The respondent noted that since *Lauzon* had been heard, but before the appellant's trial, the Ministerial order regarding organization signed by the Minister of National Defence on September 27, 1997 had reorganized the Office of the Chief Military Trial Judge as a separate unit of the Canadian Forces pursuant to s. 17(1) of the NDA. In the respondent's submission, therefore, the institutional and organizational links between the Minister, the Judge Advocate General and the military trial judges had been significantly altered: the latter were assigned as

members of the Office of the Chief Military Trial Judge, a separate unit which was not part of the Office of the Judge Advocate General.

[21] We recognize the scope of this change, but we are not persuaded that by itself it responds to the concerns expressed by the Court in *Lauzon* regarding the process of reappointing and removing military trial judges and the determination of their salaries, which as the respondent admitted have not changed since that judgment was rendered.

[22] For this reason, we are not persuaded that we should disregard the reasoning in *Lauzon* on account of the Ministerial organization order of September 27, 1997.

[23] The respondent further argued that the Court should apply the judgment rendered by Strayer C.J. in *Edwards*. If we understand her argument correctly, *Lauzon* is inconsistent with *Edwards*, in which the Chief Justice dismissed a constitutional argument dealing with a disciplinary court martial. It is important to note that in Edwards the point before the Court was whether, because of the regulations governing its composition, a disciplinary court martial was an independent tribunal. According to the argument made in that case, the Judge Advocate was not independent and the members of the disciplinary court martial, because of the method chosen for their appointment, were not sufficiently independent of the convening authority. The respondent relied in particular on the following passage from that judgment, at 5:

> [TRANSLATION]
>
> The appellant contends that the Judge Advocate appointed and holding office pursuant to this regime does not have sufficient

> security of tenure to meet the requirements of an independent tribunal prescribed by paragraph 11(d) of the Charter. In particular it is argued that an appointment of from two to four years can be seen as leaving the Judge Advocate susceptible to external pressures on the assumption that he or she will be concerned, particularly as the end of such term approaches, to gain favour with military authorities either to achieve a new appointment as Military Trial Judge or a preferred new appointment elsewhere in the military.

[24] Although the Chief Justice admitted that the appellant's argument concerned not only the appointment of the Judge Advocate, but also his reappointment, he limited his judgment to the appointment process and only considered s. 4.09 of the QR&O in the context of *R. v. Généreux*, [1992] 1 S.C.R. 259. He concluded, at 11:

> In the present case the respondent relies on such statements as authority for the validity of the existing provisions for security of tenure of judge advocates. The appellant contends that such statements on the part of the Supreme Court were merely obiter dicta as the provisions of the amended section 4.09 were not in issue in *Généreux*. While the statement quoted above may, strictly speaking, be *obiter dicta* I believe we should not depart from it. The Court was there dealing with essentially the same issue, the nature of the constitutional requirement of security of tenure when applied to the position of judge advocate. The Court stated that a judge advocate or military judge should not "during a certain period of time, depend on the discretion of the executive". Section 4.09 provides a period of time of two to four years during which a military judge may serve without being dependent on the discretion of the executive. I think we must take the comment of the Chief Justice that section 4.09 appeared "to correct the primary deficiencies of the judge advocate's security of tenure" as a considered view of what the Court would regard as a "certain period of time". Certainly it is consistent with the ratio of the *Généreux* decision, both that of the majority and that of the concurring minority.
>
> I therefore conclude that the Judge Advocate in this case, having enjoyed the security of tenure prescribed by section 4.09, had such

> security of tenure as in the context of a court martial complies with paragraph 11(d) of the Charter.

[25] Further, in Lauzon the Court made the following distinction with *Edwards*, at paragraphs 25 and 26:

> [25] Pursuant to paragraphs 4.09(3) and (5) of the QR&O, the postings of members to military trial judge positions are for a fixed term of two to four years and these postings are renewable:
>
> > 4.09(3) The fixed term under paragraph (2) shall normally be four years and shall not be less than two years.
> >
> > 4.09(5) An officer is eligible to be posted again to a position referred to in paragraph (1) on the expiration of any first or subsequent fixed term
> >
> > > (a) in the case of the Chief Military Trial Judge upon the recommendation of the Judge Advocate General, and
> > >
> > > (b) in any other case, on the recommendation of the Chief Military Trial Judge.
>
> [26] As this Court of Appeal decided in *R. v. Edwards*, [1995] A.C. A.C. No. 10, the posting of members to military trial judge positions for a fixed term, even if this term is not for life, guarantees institutional independence. The same is true for the process by which judges are now assigned to hear cases by the Chief Military Trial Judge and no longer by the convening authority who also appointed the prosecutor (*R. v. Edwards*, *supra*). However, these were the only questions before the Court. In the case at bar, the appellant is challenging not the term of the appointments to military trial judge positions as in *Edwards*, but the fact that these appointments are renewable. In other words, the appellant submits that the possibility of reappointment interferes with the principle of the security of tenure of military trial judges.

[26] It should also be noted that in *Lauzon* the Court limited its finding of invalidity to s. 177 of the NDA, which provides for the establishment of Standing Court Martials whose president is "appointed by or under the authority of the Minister", and the sections of the QR&O which deal expressly with the reappointment and removal of military trial judges and with determining their salaries.

[27] For these reasons, we dismiss the respondent's argument that the judgment in *Lauzon* is inconsistent with *Edwards*. For the reasons stated in *Lauzon*, which need not be reproduced here, we feel that the appeal should be allowed in part and that s. 177 of the NDA, concerning the process of appointing the members of a Standing Court Martial, as well as ss. 4.09(1), 4.09(5), 4.09(6), 101.14(2), 101.14(4), 101.16(10), 113.54(4) and 204.22 of the QR&O concerning the process of reappointing and removing military trial judges and the determination of their salaries, should be declared to be invalid and of no force or effect.

[28] Finally, since this Court cannot disregard the reasoning in *Lauzon*, it was asked to direct that there be a new trial in a provincial court. As the charges laid against the appellant fall under not only the *Criminal Code* but also certain sections of the *National Defence Act*, the Court is not persuaded that a provincial court has the necessary jurisdiction to deal with the matter.

[29] Having found that no real or substantial injustice existed as a reason for overturning the convictions imposed by the President of the Standing Court Martial, the appeal against the convictions will be dismissed. However, as the Court is affected by the same constitutional problem as in *Lauzon*, in view of the draft amendments to the organizational structure of courts

martial which are currently before Parliament and the advisability of giving the government a reasonable time in which to make the appropriate adjustments, the Court makes an order suspending until September 18, 1999 the finding that ss. 177 of the NDA and 4.09(1), 4.09(5), 4.09(6), 101.14(2), 101.14(4), 101.16(10), 113.54(4) and 204.22 of the QR&O are invalid.

Paul Rouleau
Thérèse Rousseau-Houle
Armand DesRoches

J.A.

J.A.

J.A.

Certified true translation

Bernard Olivier, LL. B.

COURT MARTIAL APPEAL COURT OF CANADA
NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	CMAC-417
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