Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20100412

Docket: CMAC-528

Citation: 2010 CMAC 3

CORAM: **LÉTOURNEAU J.A.**
MOSLEY J.A.
DE MONTIGNY J.A.

BETWEEN:

EX-ORDINARY SEAMAN ELLIS, C.A.E.

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on March 26, 2010.

Judgment delivered at Ottawa, Ontario, on April 12, 2010.

REASONS FOR JUDGMENT BY: LÉTOURNEAU J.A.

CONCURRED IN BY: MOSLEY J.A.
DE MONTIGNY J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Issues on appeal

[1] The appellant appeals the legality and, with leave, the fitness of his nine (9) months' imprisonment sentence for convictions on two charges of trafficking cocaine and two charges of conduct to the prejudice of good order and discipline for using cocaine.

[2] The first two charges were laid pursuant to section 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 (Act) and section 5 of the *Controlled Drugs and Substances Act*, S.C. 1996, ch. 19. The other two charges were laid pursuant to section 129 of the Act.

[3] The challenge to the legality of the sentence consists of a constitutional challenge to section 139 of the Act, based on sections 7 and 12 and paragraph 11(*d*) of the *Canadian Charter of Rights and Freedoms* (Charter). Section 139 of the Act sets out the military justice scale of punishments for service offences which, through section 130 of the Act, include *Criminal Code* and drug offences.

[4] The allegation is that the system in place violates the right to life, liberty and security of the person (section 7) as well as the presumption of innocence (paragraph 11(*d*)). It also subjects an accused to cruel and unusual treatment or punishment (section 12). At the hearing, counsel for the appellant did not press arguments on paragraph 11(*d*).

[5] I reproduce sections 130 and 139 of the Act and the relevant Charter provisions:

Service trial of civil offences	Procès militaire pour infractions civiles
130. (1) An act or omission	**130.** (1) Constitue une infraction à la présente section tout acte ou omission :
(*a*) that takes place in Canada and is punishable under Part VII, the Criminal Code or any other Act of Parliament, or	*a*) survenu au Canada et punissable sous le régime de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale;
(*b*) that takes place outside Canada and would, if it had taken place in Canada, be punishable under Part VII, the Criminal Code or any other Act of Parliament,	*b*) survenu à l'étranger mais qui serait punissable, au Canada, sous le régime de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale.

is an offence under this Division and every person convicted thereof is liable to suffer punishment as provided in subsection (2).

Quiconque en est déclaré coupable encourt la peine prévue au paragraphe (2).

Punishment

Peine

(2) Subject to subsection (3), where a service tribunal convicts a person under subsection (1), the service tribunal shall,

(2) Sous réserve du paragraphe (3), la peine infligée à quiconque est déclaré coupable aux termes du paragraphe (1) est :

(*a*) if the conviction was in respect of an offence
(i) committed in Canada under Part VII, the Criminal Code or any other Act of Parliament and for which a minimum punishment is prescribed, or
(ii) committed outside Canada under section 235 of the Criminal Code,
impose a punishment in accordance with the enactment prescribing the minimum punishment for the offence; or

a) la peine minimale prescrite par la disposition législative correspondante, dans le cas d'une infraction :
(i) commise au Canada en violation de la partie VII de la présente loi, du Code criminel ou de toute autre loi fédérale et pour laquelle une peine minimale est prescrite,
(ii) commise à l'étranger et prévue à l'article 235 du Code criminel;

(*b*) in any other case,
(i) impose the punishment prescribed for the offence by Part VII, the Criminal Code or that other Act, or
(ii) impose dismissal with disgrace from Her Majesty's service or less punishment.

b) dans tout autre cas :
(i) soit la peine prévue pour l'infraction par la partie VII de la présente loi, le Code criminel ou toute autre loi pertinente,
(ii) soit, comme peine maximale, la destitution ignominieuse du service de Sa Majesté.

Code of Service Discipline applies

Application du code de discipline militaire

(3) All provisions of the Code of Service Discipline in respect of a punishment of imprisonment for life, for two years or more or for less than two years, and a fine, apply in respect of punishments imposed under paragraph (2)(*a*) or subparagraph (2)(*b*)(i).

(3) Toutes les dispositions du code de discipline militaire visant l'emprisonnement à perpétuité, l'emprisonnement de deux ans ou plus, l'emprisonnement de moins de deux ans et l'amende s'appliquent à l'égard des peines infligées aux termes de l'alinéa (2)*a*) ou du sous-alinéa (2)*b*)(i).

Saving provision

Disposition restrictive

(4) Nothing in this section is in derogation of the authority conferred by other sections of the Code of Service Discipline to charge, deal with and try a person alleged to have committed any offence set out in sections

(4) Le présent article n'a pas pour effet de porter atteinte aux pouvoirs conférés par d'autres articles du code de discipline militaire en matière de poursuite et de jugement des infractions prévues aux

73 to 129 and to impose the punishment for that offence described in the section prescribing that offence.

articles 73 à 129.

…

[…]

Scale of punishments

139. (1) The following punishments may be imposed in respect of service offences and each of those punishments is a punishment less than every punishment preceding it:
(*a*) imprisonment for life;
(*b*) imprisonment for two years or more;
(*c*) dismissal with disgrace from Her Majesty's service;
(*d*) imprisonment for less than two years;
(*e*) dismissal from Her Majesty's service;
(*f*) detention;
(*g*) reduction in rank;
(*h*) forfeiture of seniority;
(*i*) severe reprimand;
(*j*) reprimand;
(*k*) fine; and
(*l*) minor punishments.

Échelle des peines

139. (1) Les infractions d'ordre militaire sont passibles des peines suivantes, énumérées dans l'ordre décroissant de gravité :
a) emprisonnement à perpétuité;
b) emprisonnement de deux ans ou plus;
c) destitution ignominieuse du service de Sa Majesté;
d) emprisonnement de moins de deux ans;
e) destitution du service de Sa Majesté;
f) détention;
g) rétrogradation;
h) perte de l'ancienneté;
i) blâme;
j) réprimande;
k) amende;
l) peines mineures.

Definition of "less punishment"

(2) Where a punishment for an offence is specified by the Code of Service Discipline and it is further provided in the alternative that on conviction the offender is liable to less punishment, the expression "less punishment" means any one or more of the punishments lower in the scale of punishments than the specified punishment.

Interprétation

(2) Lorsque le code de discipline militaire prévoit que l'auteur d'une infraction, sur déclaration de culpabilité, encourt comme peine maximale une peine donnée, l'autorité compétente peut lui imposer, au lieu de celle-ci, toute autre peine qui la suit dans l'échelle des peines.

Life, liberty and security of person

7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

Vie, liberté et sécurité

7. Chacun a droit à la vie, à la liberté et à la sécurité de sa personne; il ne peut être porté atteinte à ce droit qu'en conformité avec les principes de justice fondamentale.

…

[…]

Proceedings in criminal and penal matters	Affaires criminelles et pénales
11. Any person charged with an offence has the right	**11.** Tout inculpé a le droit :
…	[…]
(*d*) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;	*d*) d'être présumé innocent tant qu'il n'est pas déclaré coupable, conformément à la loi, par un tribunal indépendant et impartial à l'issue d'un procès public et équitable;
…	[…]
Treatment or punishment	Cruauté
12. Everyone has the right not to be subjected to any cruel and unusual treatment or punishment.	**12.** Chacun a droit à la protection contre tous traitements ou peines cruels et inusités.

[6] As a remedy, the appellant seeks a declaration of invalidity of section 139 of the Act and, consequently, a termination of the proceedings and an Order granting either a permanent stay of the proceedings or, in the alternative, a conditional stay until such time as the sentencing regime is amended by Parliament.

[7] With respect to the fitness of the sentence, the appellant alleges that the sentence imposed violates the principles of proportionality and parity. In his written submissions, counsel for the appellant proposed that a sentence in the range of forty (40) days of imprisonment and a $1,000.00 fine be substituted to the nine (9) months' imprisonment, or such other sentence as this Court would consider just in the circumstances. At the hearing, he requested that the sentence be in the range of six (6) months or less.

Facts and history of the proceedings

[8] As previously mentioned, the appellant faced four charges before a Standing Court Martial at the Canadian Forces Base Esquimalt. Prior to pleading to the charges, he brought a motion to challenge the scale of punishments of the Act. He pleaded not guilty but made admissions of fact pursuant to paragraph 37(*b*) of the *Military Rules of Evidence* in order to protect his right of appeal since his motion had a jurisdictional aspect.

[9] The salient admissions of facts appear at pages 192 to 194 of volume 1 of the Appeal Book. They can be summarized as follows:

a) On June 14, 2007, undercover military police were inserted into junior ranks singles quarters (specifically Nelles Block) at CFB Esquimalt in response to information indicating that cocaine was being sold and purchased by CF members who lived there.

b) On June 19, 2007, an Undercover Operator (UCO) made contact with an OS Lee and asked him to facilitate the purchase of "coke";

c) After several requests by the UCO for assistance from OS Lee, the latter made arrangements with Ex-OS Ellis and Ex-OS Ellis approached the UCO just after 22:00 hrs on June 20, 2007 and made arrangements to sell the UCO cocaine;

d) The UCO gave Ex-OS Ellis $100.00 for two grams of cocaine;

e) At 23:33 hrs on the same evening, Ex-OS Ellis gave the UCO one small clear plastic bag that contained cocaine;

f) On June 22, 2007, the UCO attended Ex-OS Ellis' room at Nelles Block and asked if Ex-OS Ellis could purchase an "eight-ball" of cocaine (3.5 grams): The UCO gave Ex-OS Ellis $180.00;

g) A few minutes after 17:03 hrs, a playing card package with a small baggy containing cocaine was slid under the UCO's door;

h) On June 27, 2007, Ex-OS Ellis was arrested for trafficking in a controlled substance. He admitted in a cautioned statement with police that he had used cocaine as recently as June 20 and 22 and that he was aware of the CF drug policy that prohibits CF members from using illicit drugs.

[10] On the basis of the admissions, the military judge (judge) found the appellant guilty on the four charges. He proceeded to hear the motion and dismissed it. He then sentenced the appellant to nine (9) months' imprisonment.

The decision of the judge on the constitutional challenge to section 139 of the Act

[11] The judge first found that paragraph 11(*d*) of the Charter did not apply to section 139 of the Act because paragraph 11(*d*) deals with the presumption of innocence afforded to an accused until proven guilty while section 139 of the Act merely comes into play after conviction, at the sentencing stage.

[12] As for section 7 of the Charter, the judge expressed the view that imprisonment in a custodial facility as a last resort is not a principle of fundamental justice within that section. He found that it was not a legal principle, but rather a mere principle of sentencing: see Appeal Book, vol. 1 at pages 144 and 145. In the same vein, he ruled that the principle of proportionality in sentencing is not a principle of fundamental justice: *ibid*., at page 143.

[13] In his view, imprisonment as a last resort, the principle of proportionality of sentences, the principles enunciated in paragraph 718.2(*e*) of the *Criminal Code*, conditional sentences and restorative principles are all policy principles of sentencing designed to achieve the purpose of section 718.1, i.e. a sentence which is proportionate to the gravity of the offence and the degree of responsibility of the offender: *ibid.*, at pages 140-144.

[14] I note in passing that the judge referred to article 112.48 of the *Queen's Regulations and Orders* (QROs) which enunciates a principle of proportionality different from the principle found in section 718.1 of the *Criminal Code*. Under the QROs, a sentence has to be commensurate with the

gravity of the offence and the previous character of the offender (emphasis added) while under the *Criminal Code* it has to be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[15] As enunciated in the QROs, the principle puts the emphasis on the past behaviour of the accused rather than his actual involvement in the offence charged. While it is appropriate in sentencing to take into account the criminal record of an accused, the sentence imposed for the offence charged, however, should reflect the degree of responsibility of the offender for the offence for which he is sentenced. Otherwise, an accused is sentenced for his past rather than his actual behaviour.

[16] Consequently, the judge ruled that there was no breach of section 7 of the Charter since there had been no breach of principles of fundamental justice.

[17] With respect to section 12 of the Charter, the judge relied upon the decision of the Supreme Court of Canada in *R. v. Ferguson*, [2008] 1 S.C.R. 96 to conclude that, in order to constitute cruel and unusual punishment, a sentence had to be "grossly disproportionate" and "more than merely excessive".

[18] Looking at the range of punishments provided by section 139 of the Act and, while recognizing that civilian judges possess sentencing options that are not available to military judges,

he was of the view that "the scale of punishments offers military judges many alternatives to imprisonment and detention": *ibid.*, at page 147.

[19] Consequently, section 139 of the Act, in his view, could not be said to be imposing cruel and unusual punishments. Furthermore, the advisability of having for the military and the civilian systems the same sentencing options, the judge said, is a question that "remains within the realm of policy and does not fall within the ambit of fundamental justice": *ibidem*.

Context of the constitutional challenge: the scope of sections 130 and 139 of the Act

[20] In order to understand the appellant's complaint, it is useful to say a word about the scope of sections 130 and 139 of the Act. The Act contains a Code of Service Discipline, but its scope "is not limited to military or disciplinary offences *per se*, such as misconduct in presence of the enemy (s. 73 ff.), treason (s. 76 ff.), misconduct in the course of operations (s. 77), sedition (s. 82), insubordination (s. 85), physical violence on a superior officer (s. 84), disobedience of a lawful command (s. 83), to name just a few": see *Canadian Military Law Annotated*, Thomson/Carswell, Toronto, 2006, page 293.

[21] Section 130 of the Act includes in that Code ordinary criminal law or civilian offences which, by the definition of "service offence" in section 2 and the combined effect of section 130, may become military offences triable by military courts. "Service offence", according to the definition, "means an offence under this Act, the *Criminal Code* or any other Act of Parliament,

committed by a person while subject to the Code of Service Discipline". "Service offence" is translated in French by "infraction d'ordre militaire".

[22] The scope of the Code is also broad with respect to the jurisdictions *rationae loci* and *rationae personae*. The military courts' jurisdiction extends to offences committed outside Canada by members of the regular, the special and the reserve force as well as civilians who accompany a unit or another element of the Canadian Forces that is on service or acting service in any place: see *Canadian Military Law Annotated*, *supra*, at pages 293 and 294, sections 15, 60, 61 and 67 of the Act for the details of their subjection to the Code.

[23] Section 139 enumerates the kind and range of punishments that a military court can impose for a service offence. Under subsection 139(2), the military court may impose one or more of the punishments lower in the scale of punishments than the punishment specified for the offence. The court possesses this power when the provision creating the offence stipulates that the person found guilty is liable, for example, to imprisonment, dismissal with disgrace *or to lesser punishment*. The words "to lesser punishment" appear in every military offence, including *Criminal Code* offences: see for examples section 77 (offences related to operations), section 78 (spying for the enemy), section 83 (insubordination), section 84 (striking an officer) and subparagraphs 130(2)(*b*)(i) and (ii) of the Act.

[24] While the Code of Service Discipline over the years has extended its scope of application to all civilian offences, except murder, manslaughter and the abduction of children when these

offences are committed in Canada (see section 70 of the Act), the range and scale of punishments provided by section 139 of the Act have not followed and benefited from the evolution of the sentencing options now available to civilian courts. For example, as this Court stated in *Trépanier v. Her Majesty the Queen*, 2008 CMAC 3, at paragraph 36:

> [36] An accused convicted by a court martial for *Criminal Code* offences is also deprived of a variety of sentences which would be available to him if he or she were tied before a civilian court. Absolute discharge (section 730 of the *Criminal Code*), conditional discharge (*ibidem*), condition sentences whereby the sentence of imprisonment is served in the community (section 742.1 of the *Criminal Code*), conditional sentence order (section 742.3 of the *Criminal Code*), intermittent sentence (section 732 of the *Criminal Code*) and suspended sentence with probation (section 731 of the *Criminal Code*) are not part of the range of sentences that a court martial can impose pursuant to section 139 of the NDA: see *Dixon v. Her Majesty the Queen, supra*, at paragraphs 21 and 22.

[25] As a result, for similar offences committed in similar circumstances, civilian and military accused may received a different treatment at the sentencing level. Indeed, a civilian who happens to fall under the scope of the Code of Service discipline may receive a treatment different from the one that he would have received if he had been prosecuted before a civilian court for the same offence committed in similar circumstances. In fact, the range and scale of punishments under section 139 of the Act has practically remained the same since its enactment in 1950.

[26] This is the context in which the constitutional challenge to section 139 of the Act is brought. This brings me to the analysis of the appellant's grounds of appeal and to two principles that should govern our approach to the constitutional challenge to the judge's decision on sentencing.

Principles guiding our approach to the constitutional challenge to the judge's decision on sentencing

[27] It is a well established principle that a court "is not bound to answer constitutional questions when it may dispose of the appeal without doing so": *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106, at page 121. In *R. v. Nystrom*, 2005 CMAC 7, at paragraph 7, our Court applied this principle in the following terms:

> [7] I will address first the question of the legality of the verdict, since my determination is such that I do not have to rule on the constitutional questions that are raised: see *Skoke-Graham v. The Queen*, [1985] 1 S.C.R. 106, at page 121; *C.P. Air v. British Columbia*, [1989] 1 S.C.R. 1134, at page 1154; *The Queen (Man.) v. Air Canada*, [1980] 2 S.C.R. 303, at page 320; *Bisaillon v. Keable*, [1983] 2 S.C.R. 60, at page 71; *Allard Contractors v. Coquitlam*, [1993] 4 S.C.R. 371, at page 413; and *Ordon v. Grail Estate*, [1998] 3 S.C.R. 437, at pages 495 and 496. The Court should generally avoid making any unnecessary constitutional pronouncement: *Tremblay v. Daigle*, [1989] 2 S.C.R. 530, at page 571; see also *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at page 51.

[28] It is also a well established principle that "Charter decisions should not and must not be made in a factual vacuum": *Mackay v. Manitoba*, [1989] 2 S.C.R. 357, at pages 361 and 362.

[29] I am of the view that the particular facts in the present instance do not support the constitutional challenge. The appellant does not contest that imprisonment is an appropriate sentence for the offences charged although he would have liked to receive a conditional sentence which would allow him to serve his imprisonment in the community. However, the sentence proposed by counsel for the appellant at trial (who was not counsel appearing on appeal) was, in the scale of punishment, higher than the one actually imposed by the judge. Counsel for the appellant recommended a dismissal with disgrace (a punishment higher than imprisonment for less than

two years), combined with a six (6) months' imprisonment whose execution could be suspended pursuant to section 215 of the Act: see Appeal Book, vol. 1, at page 170.

[30] The appellant's constitutional arguments are not based on the facts of his case. Rather, they question the policy choices made by Parliament. They rest on the conclusion that the civilian system offers better sentencing options than section 139 of the Act. There is no doubt that this is true and that the military justice system would greatly benefit from a wider variety of options: see *The First Independent Review of the provisions and operation of Bill C-25, An Act to amend the National Defence Act and to make consequential amendments to other Acts*, September 3, 2003 by the Right Honourable Antonio Lamer where he concluded that the sentencing provisions under the Act require extensive reform. However, this does not mean that there are no acceptable sentencing alternatives under section 139 of the Act. Nor does it necessarily mean that the scale of punishments therein is so grossly disproportionate for an offender that Canadians would find the punishment abhorrent or intolerable and, therefore, that section 139 is unconstitutional: see *R. v. Morrisey*, [2000] 2 S.C.R. 90, at paragraph 26.

[31] In short, on the facts of this case, the Court would be ill-advised to pass judgment in the abstract on the constitutionality of section 139 and I will refrain from doing so. The appellant's complaints can be addressed through the principles governing the fitness of sentences.

Principles governing the fitness of a sentence

[32] The standard applicable to the review of the severity of a sentence is not disputed. In *R. v. Lui*, 2005 CMAC 3, at paragraph 14, this Court wrote:

> [14] As for the standard of review applicable to appeals against the severity of sentences, this Court restated it in the following terms in the case of *Dixon v. Her Majesty the Queen*, [2005] C.M.A.J. No. 2, CMAC-477, February 8, 2005. At paragraph 18, it wrote, subject to any express provision of the Act:
>
> > This Court in *R. v. St-Jean*, [2000] C.M.A.J. No. 2, and more recently in *R. v. Forsyth*, [2003] C.J.A.J. No. 9, reasserted the principle enunciated by Lamer C.J. in *R. v. M. (C.A.)*, [1996] 1 S.C.R. 500 that a court of appeal should only intervene if the sentence is illegal or demonstrably unfit. At page 565, the learned Chief Justice wrote:
> >
> > > Put simply, absent an error in principle, failure to consider a relevant factor, or an over-emphasis of the appropriate factors, a court of appeal should only intervene to vary a sentence imposed at trial if the sentence is demonstrably unfit.

[33] The judge reviewed the authorities submitted by both parties. He diligently addressed the mitigating and aggravating factors. There is no allegation or evidence that he omitted to consider relevant factors. He concluded from his review of the authorities and the facts and circumstances surrounding the commission of the offences that imprisonment was the appropriate punishment. I can see no error in his approach and conclusion that would justify a reversal of this conclusion.

[34] As for the length of the imprisonment and its resulting severity, I cannot say that, in the circumstances, a sentence of nine (9) months' imprisonment is demonstrably unfit.

Conclusion

[35] For these reasons, I would grant leave to appeal against the severity of the sentence and dismiss the appeal.

"Gilles Létourneau"
J.A.

"I agree
Richard Mosley J.A."

"I agree
Yves de Montigny J.A."

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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