Date: 20091127

Docket: CMAC-520

Citation: 2009 CMAC 6

CORAM: **LAYDEN-STEVENSON J.A.**
SNIDER J.A.
MOSLEY J.A.

BETWEEN:

CORPORAL T.J. MILLS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on November 27, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on November 27, 2009.

REASONS FOR JUDGMENT BY: THE COURT

Date: 20091127

Docket: CMAC-520

Citation: 2009 CMAC 6

CORAM: **LAYDEN-STEVENSON J.A.**
SNIDER J.A.
MOSLEY J.A.

BETWEEN:

CORPORAL T.J. MILLS

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT BY THE COURT
(Delivered from the Bench at Ottawa, Ontario, on November 27, 2009)

[1] Following a trial before a Standing Court Martial, the appellant was convicted of assault with a weapon contrary to section 130 of the *National Defence Act*, R.S. 1985, c. N-5 (NDA) and section 267 of the *Criminal Code*, R.S., 1985, c. C-46 (the Code).

[2] At the outset of the trial, pursuant to subsections 11(*b*) and 24(1) of the *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.)*, 1982, c. 11 (the *Charter*), the appellant moved for a stay of proceedings. The Military

Judge dismissed the motion. The appellant appeals that decision. He abandoned his application for leave to appeal the sentence. We are all of the view that the appeal must be dismissed.

[3] Subsection 11(*b*) of the *Charter* provides that any person charged with an offence has the right to be tried within a reasonable time. Subsection 24(1) authorizes anyone whose *Charter* rights have been infringed to apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. The appellant also relies upon section 162 of the NDA which mandates that charges laid under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

[4] The charges against the appellant arose as a result of an incident in Kandahar, Afghanistan on December 24, 2005. While intoxicated and engaged in horseplay with a fellow soldier, the appellant hurt his elbow. The appellant eventually became annoyed and aggressive. The situation escalated, the appellant retrieved his C8 rifle, stood 3 to 5 feet from the other soldier and cocked the weapon. Fearing for his life, the soldier grabbed the appellant by the throat, kneed him in the ribs, cleared the weapon, removed the bullet and secured the area. For reasons not material to this appeal, the Canadian Forces National Investigative Service (CFNIS) did not lay charges until January 30, 2007. The trial began on September 22 and concluded on September 25, 2008, almost 20 months after the charges were laid. At no point did the appellant waive his right to a trial within a reasonable time.

[5] A significant period of delay arose in this case because of the inadvertent misplacement of the appellant's referral package. The error was not discovered for nine months. Another period of delay ensued after the decision in the case of *R. v. Trépanier*, CMAC 3 (*Trépanier*) was released. In *Trépanier*, this Court declared section 165.14 and subsection 165.19(1) of the NDA unconstitutional. Between April 24, 2008 (the date of the judgment) and July 18, 2008 (the date upon which Bill C-60 came into force), the Court Martial Administrator stopped convening courts martial and the Chief Military Judge ceased holding coordinating teleconferences to set trial dates.

[6] In considering the appellant's motion for a stay of proceedings, the Military Judge examined and analysed the factors in *R. v. Morin*, [1992] 1 S.C.R. 771 (the *Morin* factors). In *R. v. LeGresley*, 2008 CMAC 2 (*LeGresley*), this Court approved the adoption of the *Morin* factors in the context of military justice.

[7] The crux of the Military judge's decision addressed the reasons for the delay and the issue of prejudice to the appellant. The Military judge concluded "that the delay attributable to the Crown in excess of what should be considered as reasonable in this specific case is approximately 12 months." The three-month fall out from *Trépanier* was regarded as neutral since it could not be attributed to either the appellant or the Crown. In addressing the degree of prejudice, one month of inaction on the part of the appellant was considered to be a relevant factor.

[8] The appellant argues that the Military judge erred in regarding the *Trépanier* period as neutral. He submits that with a correct determination of 15 months, prejudice can be inferred. The

appellant also takes issue with the attribution to him of one month of "inaction". Further, he claims the Military judge applied the wrong test to determine whether the delay was unreasonable.

[9] In our view, the issue of prejudice is determinative. In *Morin*, the Supreme Court indicated that section 11(*b*) of the *Charter* operates "to expedite trials and minimize prejudice and not to avoid trials on the merits." Further, the court is to consider action or inaction by the accused which is inconsistent with a desire for a timely trial (paragraph 62).

[10] In this case, whether the delay comprised 12 or 15 months, it was not prolonged to the point where prejudice can be inferred, particularly in the face of the explicit evidence to the contrary. The appellant was never incarcerated and he sustained neither loss of liberty nor threat to the security of his person beyond the ordinary stress and anxiety associated with facing serious charges. He continued to serve and progress in his career. Indeed, he was promoted to Master Corporal. The delay did not prejudice his right to a fair trial in any way. The prohibition against possessing a firearm did not apply to his career (subsection 147.1(3) of the NDA).

[11] The Military judge noted the seriousness of the offence and the significant prejudice to society that would ensue if a stay were granted. As the Supreme Court stated in *Morin*, as the seriousness of the offence increases, so too does the societal demand and interest to make sure that the accused be brought to trial (paragraph 30).

[12] Regarding the appellant's submission that the Military judge applied the wrong test with respect to the granting of a stay, the short answer is the one posed by the respondent. Since there was no infringement of the appellant's section 11(*b*) *Charter* right, the issue of remedy does not arise. In any event, the reference to the *O'Connor* test (*R. v. O'Connor*, [1995] 4 S.C.R. 411), while inappropriate, was not material to the reasoning which consisted of an overall balancing of the *Morin* factors.

[13] The appeal will be dismissed.

"Carolyn Layden-Stevenson"
J.A.

"Judith A. Snider"
J. A.

"Richard G. Mosley"
J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-520
STYLE OF CAUSE:	CORPORAL T.J. MILLS v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	November 27, 2009
REASONS FOR JUDGMENT BY THE COURT:	LAYDEN-STEVENSON J.A. SNIDER J.A. MOSLEY J.A.
DELIVERED FROM THE BENCH BY:	LAYDEN-STEVENSON J.A.
DATED:	November 27, 2009

APPEARANCES:

Lieutenant Navy Patrice Desbiens	FOR THE APPELLANT
Captain Eric Carrier Lieutenant Colonel Marylène Trudel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Defence Counsel Services Montréal, Québec	FOR THE APPELLANT
Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENT