Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20091207

Docket: CMAC-536

Citation: 2009 CMAC 7

CORAM: **BLANCHARD C.J.**
LÉTOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

CORPORAL M.A. WILCOX

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on December 7, 2009.

Judgment delivered from the Bench at Ottawa, Ontario, on December 7, 2009.

REASONS FOR JUDGMENT OF THE COURT BY: THE COURT

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20091207

Docket: CMAC-536

Citation: 2009 CMAC 7

CORAM: **BLANCHARD C.J.**
LETOURNEAU J.A.
TRUDEL J.A.

BETWEEN:

CORPORAL M.A. WILCOX

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Ottawa, Ontario on December 7, 2009)

THE COURT

[1] We are of the view that this appeal against the court martial's order denying the appellant judicial interim release pending appeal ought to be allowed for the following reasons.

[2] Paragraph 248.3(*b*) of the *National Defence Act*, R.S.C. 1985, c. N-5 contains the factors that this Court has to consider in determining the merit of an appeal against a judicial interim release order. It reads:

248.3 On hearing an application to be released from detention or imprisonment, the court martial, the military judge or the judge of the Court Martial Appeal Court, as the case may be, may direct that the person making the application be released as provided for in sections 248.1 and 248.2 if the person establishes

(*a*) in the case of an application under section 248.1,

(i) that the person intends to appeal,

(ii) if the appeal is against sentence only, that it would cause unnecessary hardship if the person were placed or retained in detention or imprisonment,

(iii) that the person will surrender himself into custody when directed to do so, and

(iv) that the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces; or

(*b*) in the case of an application under section 248.2,

(i) that the appeal is not frivolous,

(ii) if the appeal is against sentence only, that it would cause unnecessary hardship if the person were placed or retained in detention or imprisonment,

(iii) that the person will surrender himself into custody when directed to do so, and

(iv) that the person's detention or imprisonment is not necessary in the interest of the public or the Canadian Forces.

248.3 À l'audition de la demande de libération, la cour martiale, le juge militaire ou le juge de la Cour d'appel de la cour martiale, selon le cas, peut ordonner que l'auteur de la demande soit remis en liberté conformément aux articles 248.1 et 248.2 si celui-ci établit :

a) dans le cas de la demande prévue à l'article 248.1 :

(i) qu'il a l'intention d'interjeter appel,

(ii) lorsqu'il s'agit d'un appel de la sentence, qu'il subirait un préjudice inutile s'il était détenu ou emprisonné ou s'il était maintenu dans cet état,

(iii) qu'il se livrera lui-même quand l'ordre lui en sera donné,

(iv) que sa détention ou son emprisonnement ne s'impose pas dans l'intérêt public ou celui des Forces canadiennes;

(*b*) dans le cas de la demande prévue à l'article 248.2 :

(i) que l'appel n'est pas frivole,

(ii) lorsqu'il s'agit d'un appel de la sentence, qu'il subirait un préjudice inutile s'il était détenu ou emprisonné ou s'il était maintenu dans cet état,

(iii) qu'il se livrera lui-même quand l'ordre lui en sera donné,

(iv) que sa détention ou son emprisonnement ne s'impose pas dans l'intérêt public ou celui des Forces canadiennes.

[3] Under subparagraph 248.3(*a*)(i) the court martial judge did not have the authority to consider the grounds of appeal on the judicial interim release application. However this Court holds that authority by virtue of subparagraph 248.3(*b*)(i), which requires the Court to ensure that the appeal is not frivolous, and expressly pursuant to subsection 248.9(3).

[4] The respondent concedes that the grounds of appeal are not frivolous. We are satisfied that there appears to be a number of serious grounds of appeal going to the proper constitution of the court martial which heard the case and striking at the fairness of both the trial and the conviction.

[5] The court martial judge was of the view that the detention of the appellant was necessary pending appeal in the interest of the public and of the Canadian Forces. Though he came to that conclusion, the judge provided no reasons other than saying:

> The applicant has not discharged the burden of establishing that his imprisonment pending the proposed appeal is not necessary in the interest of the public or the Canadian Forces.

[6] In our respectful view, he failed to weigh the seriousness of the offence against the particular circumtances of the accused: see *R. v. Ingebritgtson* 5 C.M.A.R. 27 at page 29. The accused was a first offender with a clean conduct sheet in the armed forces. He was well regarded by his commanding officer and within his unit before his dismissal from the Forces. He continued to serve within his unit while awaiting his sentence. He was at liberty pending his trial. He never failed

to appear when requested to do so, even after conviction. He has the support of his parents. At the time he received his sentence, he was pursuing his education in order to reintegrate into civilian life.

[7] On the issue of the interest of the Canadian Forces, the judge wrote:

> I begin with the observation that the offences for which the offender was found guilty and sentenced are very serious. As a general rule, the more serious the offences then the greater the public interest, and the interest of the Canadian Forces, in seeing that a proper sentence of imprisonment is served immediately upon being imposed. This is especially the case where both parties agreed that a fit disposition on sentence involved some form of incarceration of more than a minimal period.
>
> In my view, the nature of the offences here, involving as they do the criminal carelessness in the use of an infantry weapon resulting in the death of a soldier, heightens the disciplinary interest of the Canadian Forces in the immediate service of the sentence.

[8] In our view, the judge misconstrued the interest of the Canadian Forces and the purpose of the interim release provisions by putting the emphasis on the need that the sentence of imprisonment be served immediately upon being imposed, thereby undermining an accused's right to judicial interim release pending appeal.

[9] As Chief Justice McEachern of the British Columbia Court of Appeal said in *R. v. Nguyen* (1997), 10 C.R. (5th) 325, cited in *R. v. Galloway* 2004 SKCA at paragraph 13:

> Considering bail applications with the public in mind can mean different things in different contexts. In some cases, it may require concern for further offences. In other cases, it may refer more particularly to public respect for the administration of justice. It is clear, however, that the denial of bail is not a means of punishment. Bail is distinct from the sentence imposed for the offence and it is

> necessary to recognize its different purpose which, in the context of this case, is largely to ensured that convicted persons will not serve sentences for convictions not properly entered against them.

[10] In addition, we are of the view that the element of the interest of the Canadian Forces is mitigated by the fact that the appellant has been dismissed from the Forces. This is particularly so in the context of an application for judicial release pending appeal.

[11] For these reasons, the appeal will be allowed and the decision of the court martial judge denying the appellant judicial release pending appeal will be set aside. An order will follow that the appellant be released from imprisonment pending appeal under the conditions set out in the order.

"Edmond P. Blanchard"
C.J.

"Gilles Létourneau"
J.A.

"Johanne Trudel"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-536
STYLE OF CAUSE:	CORPORAL M.A. WILCOX v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 7, 2009
REASONS FOR JUDGMENT OF THE COURT BY:	THE COURT
DELIVERED FROM THE BENCH BY:	THE COURT

APPEARANCES:

Lieutenant-Colonel Sweet	FOR THE APPELLANT
Lieutenant-Colonel J.A.M. Léveillée	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Defence Counsel Services	FOR THE APPELLANT
Canadian Military Prosecution Service	FOR THE RESPONDENT