Date: 19981209

Docket: CMAC-410

CORAM: **LÉTOURNEAU J.A.**
BIRON J.A.
DURAND J.A.

BETWEEN:

CAPT. RICHARD BOIVIN,

Appellant,

AND

HER MAJESTY THE QUEEN,

Respondent.

Hearing held at Québec, Quebec on Friday, October 16, 1998

Judgment delivered at Ottawa, Ontario, Wednesday, December 9, 1998.

REASONS FOR JUDGMENT BY: BIRON J.A.

CONCURRED IN BY: LETOURNEAU J.A.
DURAND J.A.

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REASONS FOR JUDGMENT

BIRON J.A.

[1] The appellant, a member of the Regular Force, was found guilty by a standing court martial on the following charges:

> [TRANSLATION]
> COUNT 1 An offence punishable under s. 130 of the *National Defence Act*, namely accepting a benefit from a person who has dealings with the government contrary to s. 121(1)(*c*) of the Criminal Code of Canada.
>
> COUNT 5 An offence punishable under s. 130 of the *National Defence Act*, namely the false certification of documentation contrary to s. 80(*d*) of the *Financial Administration Act*.
>
> COUNT 6 An offence punishable under s. 130 of the *National Defence Act*, namely fraud, contrary to s. 380 of the *Criminal Code of Canada*.
>
> COUNT 7 An offence punishable under s. 130 of the *National Defence Act*, namely accepting a benefit from a person having dealings with the government, contrary to s.

121(1)(*c*) of the *Criminal Code of Canada*.

COUNT 9	An act to the prejudice of good order and discipline, contrary to s. 129 of the *National Defence Act*.
COUNT 12	An offence punishable under s. 130 of the *National Defence Act*, namely accepting a benefit from a person having dealings with the government, contrary to s. 121(1)(*c*) of the *Criminal Code of Canada*.
COUNT 14	An offence punishable under s. 130 of the *National Defence Act*, namely "FORGERY", contrary to s. 367 of the *Criminal Code of Canada*.
COUNT 15	An offence punishable under s. 130 of the *National Defence Act*, namely the uttering of a forged document, contrary to s. 368 of the *Criminal Code of Canada*.

[2] After hearing submissions of the parties the presiding judge of the Court sentenced him to 15 months' imprisonment, dismissal from Her Majesty's Service and demotion to the rank of sub-lieutenant.

[3] As his first ground of appeal the appellant alleged that standing courts martial were unconstitutional and submitted the same arguments as those made by counsel for the appellant in *Lauzon v. Her Majesty The Queen*, CACM-415.

[4] On September 18, 1998, this Court's decision was rendered in Lauzon, finding such courts unconstitutional but staying for one year the finding that ss. 177 of the *National Defence Act* 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 *Queen's Regulations and Orders for the Canadian Forces* were invalid. The Court, relying on the judgment of the Supreme Court of Canada in *Reference re Provincial Court Judges*, [1998] 1

S.C.R. 3, further applied the doctrine of necessity to affirm the convictions in absence of any evidence of real and substantial injustice specific to the case. In the instant case there is also no evidence of such hardship, and as in *Lauzon* the appellant admitted that the judge assigned to his trial was impartial.

[5] As the appellant relies on the same arguments of unconstitutionality as in *Lauzon*, and in view of the *stare decisis* rule adopted for the security and predictability of the rule of law and the proper functioning of the courts, I conclude that standing courts martial are unconstitutional, and as in *Lauzon* I propose to stay until September 18, 1999 the finding that the provisions of the *National Defence Act* and the *Queen's Regulations and Orders for the Canadian Forces* governing standing courts martial are invalid.

[6] The appellant further appealed from the various guilty verdicts rendered against him and the sentence imposed on him. As to these guilty verdicts, he relied on three arguments which he made as follows:

> [TRANSLATION]
> Did the trial judge err in law:
>
> 1. in his application of the rules of law regarding the standard of evidence, and by not taking all the evidence into account when rendering his guilty verdict on the various counts?
>
> 2. by dismissing the appellant's motion to stay the proceedings, in light of recent judgments of the Supreme Court of Canada?
>
> 3. by admitting in evidence the appellant's out-of-court statement made to military police in breach of his constitutional rights?

Background to case

[7] As of June 1993, and at all times relevant to the facts of the case at bar, the appellant was a contract officer at the Valcartier military base ("the Base"). In performing this function it was he who certified the invoices the contractors submitted to him in order to obtain payment. Among these contractors whose invoices had to be certified was Pierre Gamache, doing business under the name "Service Techno-Pro". He was the instigator of the charges laid against the appellant.

[8] The eight counts on which the appellant was found guilty had to do with four allegations:

> [TRANSLATION]
>
> (a) On a trip to Europe accompanied by Gamache, from October 15 to 23, 1993, a trip authorized by the military authorities, the appellant allegedly allowed Gamache to pay his personal expenses;
> (b) The appellant demanded and was paid $3,000 by Gamache;
> (c) The appellant had Gamache give him a computer;
> (d) The appellant bought Christmas cards in December 993 without going through the Base supply section.

[9] According to Gamache's allegations, the appellant allowed Gamache to recoup this money by inflating the invoices for work done or services rendered by Service Techno-Pro in a corresponding amount.

[10] I feel it is best to look first at the third ground of appeal.

Did the trial judge err by admitting in evidence the accused's out-of-court statement, a statement made to two military police officers on August 23, 1994?

[11] The four-and-a-half-hour statement was recorded on video and filed as Nos. VD-7 to VD-10 inclusive.

[12] To begin with, the appellant argued that, in breach of the right guaranteed by s. 10(*a*) of the *Canadian Charter of Rights and Freedoms*, he was not sufficiently well informed of the reasons which led the police officers to question him. Secondly, he submitted that his right guaranteed by s. 10 of the Charter, namely the right to retain and instruct counsel without delay and to be informed of that right, was infringed by the failure of the police officers to inform him of the existence of free legal aid services in the province of Quebec and of the existence of a free custodial service of the Barreau du Québec 24 hours a day.

[13] The appellant had not been arrested at the time of the interview and had also not been detained, since the police officers told him several times he could leave at any time if he wished to do so. However, even assuming he had been detained, this argument appears to me to be without factual basis, as amply demonstrated by the video in the record. The police officers disclosed the nature of the suspicions regarding him, but did not give him all the details. I still feel that he was sufficiently well informed of the reasons for the examination.

[14] The same conclusion applies as to the information regarding the legal aid service and the custodial service. The appellant did not make use of these because, as he said several times, he felt he did need not a lawyer at that time.

[15] This argument therefore appears to be groundless. We must therefore turn to consider the appellant's first argument.

Did the trial judge err in his application of the rules of law regarding the standard of the evidence and by not taking all the evidence into account?

[16] The judgment covers 30 pages. After making a brief summary of the charges, the judge goes no further than page 2 before stating that the primary point at issue is the credibility of the witnesses heard. The judge then explains the questions which a judge must ask himself in assessing testimony, and states that he has applied the rules set forth by the Supreme Court of Canada in *R. v. W.(D)*, [1991] 1 S.C.R. 742. Having stated these rules at the outset, the judge then says that he does not believe the testimony of the accused and rejects it as untrue.

[17] The judge then proceeds to give the basis for his conclusion: he alleges lapses of memory by the appellant and refers to what he considers to be contradictions. He states that the appellant's attitude changed completely between the examination-in-chief and the cross-examination, that he became hesitant, reticent and evasive. He completes his review by saying that as a whole the appellant's testimony did not seem to him to be reasonable, coherent and compatible with the uncontradicted facts.

[18] These are the conclusions disputed by the appellant. It therefore seems useful to recall and to apply the rules stated by the Supreme Court in *Harper v. The Queen*, [1982] 1 S.C.R. 2; *R. v. Burke*, [1996] 1 S.C.R. 474; and *R. v. W.(R)*, [1992] 2 S.C.R. 122.

[19] At p. 14 of *Harper*, Estey J. said for the Court:

> An appellate tribunal has neither the duty nor the right to reassess evidence at trial for the purpose of determining guilt or innocence. The duty of the appellate tribunal does, however, include a review of the record below in order to determine whether the trial court has properly directed itself to all the evidence bearing on the relevant issues. Where the record, including the reasons for judgment, discloses a lack of appreciation of relevant evidence and more particularly the complete disregard of such evidence, then it falls upon the reviewing tribunal to intercede.

[20] In *Burke*, *supra*, Sopinka J. rendering judgment for the court, wrote at 479, 480 and 481:

> Under s. 681(1)(*a*)(i) of the *Criminal Code*, a court of appeal may allow an appeal against conviction where the court is of the view that the verdict reached below was unreasonable in that it cannot be supported on the evidence. Section 81(1)(*a*)(i) of the *Criminal Code* provides as follows:
>
> 686. (1) On the hearing of an appeal against a conviction or against a verdict that the appellant is unfit to stand trial or not criminally responsible on account of mental disorder, the court of appeal
>
> (a) may allow the appeal where it is of the opinion that
>
> (i) the verdict should be set aside on the ground that it is unreasonable or cannot be supported by the evidence . . .
>
> . . . . .
>
> In undertaking a review under s. 686(1)(a)(i) of the Criminal Code, the appellate court must carefully consider all of the evidence that was before the trier of fact.
>
> . . . . .
>
> As a result, it is only where the Court has considered all of the evidence before the trier of fact and determine that a conviction cannot be reasonably supported by that evidence that the court can invoke s. 686(1)(a)(i) and overturn the trial court's verdict.

> According to this Court in R. v. W.(R.), [1992] 2 S.C.R. 122, special concerns arise in cases such as this where the alleged "unreasonableness" of the trial court's decision rests upon the trial judge's assessment of credibility. In these cases, the court of appeal must bear in mind the advantageous position of a trial judge in assessing the credibility of the witnesses and the accused.
>
> . . . . .
>
> Despite the "special position" of the trial judge in assessing credibility, however, the court of appeal retains the power, pursuant to s. 686(1)(a)(i), to reverse the trial court's verdict where the assessment of credibility made at trial is not supported by the evidence.
>
> . . . . .
>
> Thus, although the appellate court must be conscious of the advantages enjoyed by the trier of fact, reversal for unreasonableness remains available under s. 686(1)(a)(i) of the Criminal Code, where the "unreasonableness" of the verdict rests on a question of credibility.

[21] I intend to apply these rules to my review of the legality of the guilty verdict, which under s. 228 of the *National Defence Act* relates either to questions of fact alone or to questions of mixed law and fact. Determining the reasonableness or unreasonableness of a verdict and the application of this legal concept raise a question of law (*R. v. Yebes*, [1987] 2 S.C.R. 168, at 181 to 183).

[22] In the case at bar the appellant testified and his out-of-court statement of August 23, 1984 was admitted as evidence. Both in his out-of-court statement and in his testimony the appellant categorically denied the crimes with which he was charged. He was contradicted by Pierre Gamache. Without Gamache's testimony, none of the charges could stand.

[23] The tests in *R. v. W.(D.)*, *supra*, must therefore be applied. The rules were stated by Cory J. as follows:

> First, if you believe the evidence of the accused, obviously you must acquit.

> Second, if you do not believe the testimony of the accused but you are left in reasonable doubt by it, you must acquit.
>
> Third, if you are not left in doubt by the evidence of the accused, you must ask yourself whether, on the basis of the evidence which you do accept, you are convinced beyond a reasonable doubt by that evidence of the guilt of the accused. (at 758)

[24] The appellant argued that, although the judge correctly stated the tests for assessing the persuasiveness of the evidence where there was contradictory testimony, he applied those tests incorrectly.

[25] With respect, I feel he is right. The judge did say that he did not believe the accused and that he had no reasonable doubt, but he failed to consider the accused's deposition in the context of the evidence as a whole and to ask himself whether his testimony could reasonably have been true. After rejecting the testimony of the appellant, he sought to determine whether the essential aspects of the charges against the appellant had been proven. In this process, he asked himself no questions as to the evidentiary value of Gamache's testimony, on which the evidence for the prosecution essentially rested, except to say in the final paragraph of his thirty-page judgment, after finding the appellant guilty:

> [TRANSLATION]
>
> I would add that I also checked the content of Military Rule 83 regarding the testimony of an accomplice before arriving at my conclusions on the accused's guilt on each of the counts.

[26] Gamache is a wholly tainted witness, who in his testimony in court stated that he had been defrauding the Department of National Defence since 1985 or 1986 by inflating the invoices in the section to which the appellant had just been assigned. This prosecution witness has never been prosecuted for the admitted fraudulent acts. Further, as I will explain below, Gmache was

contradicted on a key point by the oral and documentary evidence submitted by the prosecution. I should add immediately that Gamache's testimony in cross-examination was far from being candid. I noted more than 10 passages between pp. 648 and 805 of the transcript where Gamache testified with impatience and insolence in his cross-examination, without being reprimanded. Finally, as I will explain below, there is a degree of improbability in Gamache's allegations.

[27] First, I direct my attention to the contradiction. Gamache's claim was that on the trip to Europe with the appellant he paid all the appellant's expenses and recouped himself by inflating the invoices, with the appellant's knowledge. He stated twice in his testimony that before leaving he changed $1,000 to $1,500 into French francs at the St-Albert-le-Grand Caisse Populaire. Francine Godbout, routine and administrative services officer in the Caisse, and a witness for the prosecution, stated that he only changed $500 into French francs. I regard this as a major contradiction in view of the fact that Gamache sought by this means to establish that he had paid the appellant's expenses, expenses which he said were significant. The prosecution conceded that this was a contradiction for which it had no explanation.

[28] The lack of plausibility is quite striking, yet the judge said not a word about it, and, I say it with respect, this leads me to believe that he did not take all the evidence into account. The lack of plausibility results from the fact that it was the appellant himself who was the instigator of the administrative inquiry into contract administration held at the Base from October 1993 to August 1994, and covering all suppliers, including Gamache and his company Service Techno-Pro.

[29] Let us recall the circumstances. The appellant arrived at the Base in May 1993 and began performing the duties of a contracts officer from the middle of the following June. After some time he came to the conclusion that the contract administration and payment procedure contained serious anomalies. He immediately discussed this with his superiors on several occasions, but the procedure does not appear to have been altered.

[30] In fall 1993 he was authorized to go to Lahr and Paris with Gamache, the contractor responsible for maintaining the kitchens. As the Lahr Base in Germany was to close, the ovens had to be inspected to determine whether they should be brought back to the Base and installed there. They were to visit an exhibit of kitchen equipment in Paris. The trip, which lasted from October 15 to 23, 1993, was authorized by the military authorities provided, and this is to say the least astonishing, that it did not cost the Department anything.

[31] The air tickets, hotel and car used in Europe were paid for by Entreprise Julien. Gamache stated that he paid all the appellant's expenses in Europe, and the latter said he paid his share.

[32] In August 1993, and thus even before the trip to Europe had taken place, an official of the Department at the Ottawa office did a routine accounting audit at the Base. On that occasion the appellant met with her and at once told her of what he thought were problems of improper contract administration and suspicions of fraud which he had about the engineering construction sec-

tion. On her return to Ottawa she at once told her superiors of the appellant's statements. Lt. Col. Serge Tremblay of the Review Section was accordingly assigned to meet with the appellant. His first meeting with the appellant was held at Québec in late October, followed by another three-day meeting in Ottawa in December and another at the same place in January 1994.

[33] Lt. Col. Tremblay went to the Base in February 1994 to continue his on-the-spot investigation. At all these meetings, when he was regarded as assisting in the investigation, the appellant told him of everything he thought could be improper procedures requiring review.

[34] In February 1994 the appellant introduced Gamache to Tremblay as an information source. Tremblay and his group spent several consecutive weeks at the Base doing audits and meeting with members of staff. Throughout all these meetings Gamache never implicated the appellant until May 6, 1994, when he made the charges in question. It was then that Tremblay turned the case over to the military police for the rest of the inquiry.

[35] The implausibility of Gamache's allegations results from the following facts:

(a) the appellant was alleged to be fraudulent although he alerted the authorities to complain of the situation and ask for an investigation;

(b) the appellant was alleged to be fraudulent though he introduced his accomplice to the investigator in order to help him in his research;

(c) when the investigators had been on the spot for several weeks and were in contact with Gamache, the appellant in April 1994 asked Gamache to give him a computer, and received it;

(d) in the same circumstances, early in May 1994 he allegedly asked Gamache to give him three $1,000 bills, and received them.

[36] The implausibility is made even greater by the following facts. The appellant filed a receipt for the price of the computer, which he said he bought from a Gamache supplier through the latter's business because he could thus obtain a better price. Further, according to the Caisse employee Gamache did not withdraw three $1,000 notes from the Caisse in May but in March. Gamache stated that he gave the appellant the $3,000 on the same day, so that the three notes were withdrawn from the Caisse and given to the appellant even before the latter had asked for them.

[37] To these factors, I should add that it was not the appellant who checked the performance of the work in detail, but inspectors. I think it is quite natural for him to have relied on them. Moreover, as we were told at the hearing through counsel for the prosecution, it was he, the attorney, who authorized the payment of Gamache's disputed invoices on orders from the Department, well after the charges were made against the appellant, and they were paid [TRANSLATION] "for services rendered". That included the payment for the unfortunate Christmas cards, which in count 9 of the charge the appellant was alleged to have bought for the engineering construction section without going through the Base supply section. According to the evidence, these Christmas cards were not ordered by the appellant but actually by Maj. Harnois.

[38] Finally, the judge did not comment on the testimony of Maj. Daniel Godbout who was head of the engineering construction section and who was the subject of any embezzlement allegations. When asked to describe the work of the appellant, when he was under his command, he said:

> [TRANSLATION]
>
> Capt. Boivin, in the year when he was a contract officer, was a very keen officer who did many audits. He ensured that . . . to the best of his ability the rules were properly carried out in his unit. . . . He was an officer who had a lot of energy, who gave himself to his work . . .

He also passed over in silence the testimony of the contract inspector, Eric Vézina, who confirmed that the appellant, shortly after he took up his duties, asked him to keep a special watch on Gamache and his company Service Techno-Pro, specifically on the performance of work and the invoicing submitted by Gamache.

[39] In view of the clearly unsatisfactory nature of Gamache's testimony, its implausibility and contradictions; and in view of the fact that the judge did not take all the evidence into account and did not properly apply the tests in *R. v. W.(D.)*, *supra*, I feel after a careful reading of the evidence that the guilty verdict is unreasonable. In keeping with the law as it stands regarding analysis of the unreasonableness of the guilty verdict, therefore, I would quash the guilty verdict.

[40] In the circumstances, I do not think it is necessary or useful to consider the second argument made by the appellant.

[41] At the start of the hearing of the appeal the appellant, anticipating a favorable verdict, submitted an application to be reimbursed the fees and disbursements made pursuant to Rule 21 of the *Rules of the Court Martial Appeal Court of Canada*. The relevant portion of this rule reads as follows:

> **Rule 21**. (1) Subject to Rule 22, where the appellant is represented by counsel of his own choice and succeeds in whole or in part on his appeal, the Court may direct that all or any of the fees and disbursements, including reasonable travel and subsistence costs, of such counsel, as taxed by a Taxing Officer in accordance with the Tariff of the Federal Court Rules shall be paid.

[42] Counsel for the prosecution argued that the application should not be granted unless the Court is persuaded that, in view of all the circumstances of the case, the appellant's conviction should never have been imposed by the trial court. I am not certain that this is the proper test, but I do not think the point has to be decided in view of the conclusion at which I have arrived regarding the unreasonableness of the guilty verdict. I therefore propose that the appellant be reimbursed for his court costs and that the fees of his counsel be reimbursed on submission of supporting documentation, at the rate of $100 an hour, for attendance in court for the trial proceeding and for the hearing of the appeal.

[43] At the end of this analysis, I feel I should note before concluding that the hearsay exclusion rule was improperly applied several times at trial. For example, I note the following passage at pp. 633 and 634 of the transcript of the examination-in-chief of the prosecution witness Pierre Gamache:

> [TRANSLATION]
> Q. Did you meet him alone at any time, Lt. Col. Tremblay?

A. Yes, they brought me to Ottawa by plane to talk about the case with Yves Girardeau. Serge Tremblay, just before we ended our talk, asked me one final question.

Q. How did you answer his question, without repeating what he said to you? What was your answer to his question?
A. Well, I did not want to answer on the spot. We both left and we went to talk outside and he said [TRANSLATION] "I think I understand this situation".
Q. No, I am asking you not to repeat the words, Mister Gamache.
A. Well, what did I say? I said [TRANSLATION] "Yes".
Q. [TRANSLATION] "Yes", what? Did you give other information regarding Capt. Boivin?
A. Yes, he said . . . Can I say the question he asked me?
Q. The rule is, Mr. Gamache, that you cannot report the words of someone else. You can say what you said in reply to the question you were asked, but not the person's words.
A. Well, I said [TRANSLATION] "Yes" in reply.

[44] Clearly, the effect of this improper method of conducting the hearing was to deprive the Court of evidence it needed to decide the questions before it. It must not be permitted. I would note that in such a case, relating the question should be allowed when its purpose is not to prove the truth of the facts it may contain but simply to clarify the reply and explain the following events and the witness' subsequent conduct. In view of the conclusion at which I have arrived, I will say no more on this point.

Conclusion

[45] For these reasons I would allow the appeal, with costs to be taxed in accordance with these reasons, and find that ss. 177 of the *National Defence Act* 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 *Queen's Regulations and Orders*

for the Canadian Forces are constitutionally invalid and inoperative. However, the application of this conclusion shall be stayed until September 18, 1999.

[46] I would also quash the guilty verdicts against the appellant and order that a verdict of not guilty be entered on each of the counts in the appeal.

André Biron

J.A.

I concur.

Gilles Létourneau J.A.

I concur.

R. Durand J.A.

Certified true translation

"Bernard Olivier"

Bernard Olivier

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

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CONCURRED IN BY:	Létourneau J.A. Durand J.A.
DATED:	December 9, 1998

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