Date: 19980623
Docket: CMAC-414

CORAM: **HUGESSEN J.A.**
VAILLANCOURT J.A.
LÉTOURNEAU J.A.

BETWEEN:

SYLVAIN GAUTHIER

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

Hearing held at Québec, Quebec on Thursday, June 4, 1998

Judgment delivered at Ottawa, Ontario on Tuesday, June 23, 1998

REASONS FOR JUDGMENT BY: **LÉTOURNEAU J.A.**
CONCURRED IN BY: **HUGESSEN J.A.**
VAILLANCOURT J.A.

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

[1] This is an appeal in respect of the legality of the finding and sentence pronounced by a Standing Court Martial against Corporal Gauthier on June 23 and 24, 1997, respectively, and an application by Corporal Gauthier for leave to appeal in respect of the severity of the sentence which was imposed on him. These proceedings have been brought under section 230 of the *National Defence Act* (N.D.A.), R.S.C., 1985, c. N-5. By order of the Chief Justice of the Court Martial

Appeal Court of Canada dated November 26, 1997, it was decided that the application for leave to appeal in respect of the sentence would be heard and decided at the time the appeal was heard.

Facts and proceedings giving rise to this appeal

[2] The appellant was a member of the regular force of the Canadian Armed Forces, of the rank of corporal, when the acts with which he was charged occurred. At the time, he was stationed in the Republic of Bosnia-Herzegovina and was part of the National Support Element of the Canadian Contingent of the IFOR (CCIFOR).

[3] Six charges were laid against the appellant on two separate charge sheets. Five of these charges appeared on the first charge sheet, namely:

(1) uttering threats to cause serious bodily harm, contrary to subsection 264.1(1) of the *Criminal Code*;

(2)engaging in conduct to the prejudice of good order and discipline, contrary to section 129 of the N.D.A.;

(3) being absent from his place of duty without leave, contrary to section 90 of the N.D.A.;

(4) engaging in conduct to the prejudice of good order and discipline, contrary to section 129 of the N.D.A., by consuming alcoholic beverages contrary to the policy of the commanding officer of the CCIFOR National Support Unit; and

(5) driving a vehicle of the Canadian Forces while his ability to drive was impaired by alcohol, contrary to paragraph 111(1)(*b*) of the N.D.A.

[4] On the first charge sheet, the second charge was intended to be an alternative to the first charge. On the second charge sheet, there was only one charge against the appellant—once again,

engaging in conduct to the prejudice of good order and discipline by being found in possession of alcoholic beverages contrary to CCIFOR standing operating procedure 201.

[5] At the conclusion of a trial by a Standing Court Martial held at Canadian Forces Base Valcartier, the appellant was found guilty on the first and third charges (uttering threats and being absent without leave) on the first charge sheet. He was acquitted of the fourth and fifth charges, while proceedings with respect to the second charge were stayed. He was also acquitted of the only charge on the second charge sheet. On the basis of the finding of guilty on the first and third charges, he was sentenced to 30 days detention, which resulted in his reduction to the rank of private.

Analysis of the decision of the Standing Court Martial

1. Legality of the decision on the charge of uttering threats of serious bodily harm contrary to subsection 264.1(1) of the *Criminal Code*

[6] In this Court, the appellant argued that he was not given the benefit of the presumption of innocence and of reasonable doubt with respect to his conviction on the charge of uttering threats of serious bodily harm. He also submitted that the finding was unreasonable.

[7] The appellant's submission is without merit, as the main witnesses—the victim and the chaplain—gave credible testimony regarding the incident. The few discrepancies which the

examinations and cross-examinations brought out, far from diminishing the credibility of these witnesses, actually enhanced the plausibility of their testimony and established its sincerity.

[8] Furthermore, with respect to his threatening remarks to the victim, the appellant took great pains to point out certain discrepancies, which he characterized as contradictions, between the testimony of the police investigators, the victim and the chaplain, to whom the appellant had subsequently repeated his remarks.

[9] In fact, they are not contradictions, but rather a difference of perception among the witnesses as to the gravity or severity of the bodily harm which the appellant was threatening to cause his victim, ranging from a serious and severe beating to death threats, with broken legs or teeth somewhere in between. However, the evidence showed without question that the appellant uttered threats of serious bodily harm, and established the essential elements of the offence beyond a reasonable doubt—those elements being the infliction of physical or psychological injury that interferes in a substantial way with the integrity, health or well-being of a victim[1] and the appellant's intent to intimidate his victim or, at the very least, to instill in her fear and intimidation of the infliction of such harm.[2] The evidence shows that the victim's fear was such that she did not want or dare to make a complaint against the appellant and that only in the course of an

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[1] *R. v. McCraw*, [1991] 3 S.C.R. 72.

[2] *R. v. Clemente*, [1994] 2 S.C.R. 758.

investigation initiated by the military police did she resign herself to relating the facts which, until then, fear had prevented her from expressing openly and officially.

2. Legality of the decision on the charge of absence from his place of duty without leave

[10] With respect to the offence of absence from his place of duty without leave, the appellant argues that the prosecution did not prove all the essential elements of the offence and that, on the evidence, a reasonable doubt remained.

[11] Alternatively, the appellant submits that should this Court decide that the Standing Court Martial properly instructed itself in fact and law as to the interpretation of section 90 of the N.D.A., that provision is unconstitutional and of no force or effect since it offends section 7 of the *Canadian Charter of Rights and Freedoms* in that it does not require the prosecution to prove the accused's guilty intent, even though a violation of this provision can lead to the imposition of a punishment of imprisonment.

[12] I shall therefore consider the question of the precise nature of the offence at the same time as the question of its constitutional validity, as its validity depends on the definition of the appellant's alleged offence.

[13] In *R. v. Forster*, [1992] 1 S.C.R. 339, at page 348, the Supreme Court of Canada did not have to decide whether the offence of absence without leave under section 90 of the N.D.A. was a *mens rea* offence or a strict liability offence since the accused in that case had the mental state required to commit the offence. However, the Court suggested that it was arguable that the offence was not a *mens rea* offence. Given that section 90 provides for the possibility of imprisonment for up to two years, it is clear that it cannot be an absolute liability offence (*R. v. Rube*, [1992] 3 S.C.R. 159).

[14] After analysing the terms of the offence, the importance of discipline in the Armed Forces and the purpose of creating this kind of offence in the military discipline context, I have come to the conclusion that it is a strict liability offence, made up of the following elements:

(a) the accused had a duty to be in a given place at a specific time;

(b) the accused failed to be there;

(c) the accused did not have authority for failing to be there; and

(d) with respect to the mental element associated with the material elements, the accused was aware of the duty which was imposed on him or her.

[15] In the case of this kind of offence, the onus is on the prosecutor to establish beyond a reasonable doubt that the accused was under a duty to be at a place, was aware of the duty and was absent from the place without having been given any authority or leave to do so.

[16] Once these elements are proved by the prosecutor, it falls to the accused to provide a reasonable excuse or justification for failing to be in the required place at the required time, or to establish that he or she exercised reasonable diligence in attempting to fulfil the duty.

[17] In this case, I am satisfied that the Judge of the Standing Court Martial did not err in holding that the prosecution had proved each of the material elements of the offence beyond a reasonable doubt, and that the accused was aware of the duty to be at his place of work. Since the appellant offered no reasonable excuse or justification or evidence of reasonable diligence, the Judge of the Standing Court Martial had no choice but to find him guilty on this charge.

[18] In view of my finding with respect to the nature of the offence of absence without leave, the appellant's alternative submission going to its constitutional invalidity is without merit.

3.Application by the appellant for a remedy for infringement of his constitutional rights

[19] At trial, the appellant alleged that his constitutional rights under the *Canadian Charter of Rights and Freedoms* had been infringed, and sought unsuccessfully, as a remedy under subsection 24(1), to have the Judge of the Court Martial reduce the sentence he was about to receive.

[20] More specifically, the appellant alleges that the military police arrested and detained him arbitrarily, contrary to sections 7 and 9, did not adequately inform him of the reasons for the arrest,

contrary to paragraph 10(*a*), and detained him under conditions which violated section 12 because the conditions amounted to nothing less than cruel and unusual treatment. He submits that the Judge of the Court Martial erred in law with respect to the interpretation of these rights and with respect to the application of appropriate remedial measures in the circumstances.

[21] In my opinion, only one of the appellant's claims is worth analysing: the one relating to arbitrary arrest and detention. The evidence established that the appellant was adequately informed of the nature of the offence with which he was charged and had immediately retained and had the benefit of counsel. The conditions of the preventive detention did not amount to cruel and unusual treatment although, as I shall explain *infra*, regard should be had to them in the assessment of the hardship the appellant allegedly suffered.

[22] Section 156 of the N.D.A. allows for the arrest or detention without a warrant of a person who is subject to the Code of Service Discipline who has committed or is believed to have committed a service offence:

> **156.** Such officers and non-commissioned members as are appointed under regulations for the purposes of this section may
>
> > (a) detain or arrest without a warrant any person who is subject to the Code of Service Discipline, regardless of the rank or status of that person, who has committed, is found committing, is believed on reasonable grounds to have committed a service offence or who is charged with having committed a service offence;
> >
> > (b) exercise such other powers for carrying out the Code of Service Discipline as are prescribed in regulations made by the Governor in Council.

[23] The N.D.A. thus confers a very broad power of arrest and detention without warrant on a military police officer who, under section 22.02 of the *Queen's Regulations and Orders for the Canadian Forces*, is a soldier appointed for the purposes of section 156.

[24] However, in the realm of arrest and detention, because of the particularly prejudicial nature of these powers to an individual's rights and freedoms, it is not enough that the power exist. The exercise of the power must also be justified in the circumstances.

[25] For example, while section 495 of the *Criminal Code* gives a police officer the power to arrest a person for criminal offences, subsection (2) of that section prohibits the police officer from doing so if he or she believes on reasonable grounds that the public interest may be satisfied without arresting the person and has no reasonable grounds to believe that the person will fail to attend court. The concept of public interest in this context refers, among other things, to the need to establish the identity of the person and to prevent the repetition or continuation of the offence or the commission of another offence.

[26] With the advent of the Charter and the constitutionalization of the protection against arbitrary arrest and detention, the requirements governing the exercise of the power of arrest which are found in the Criminal Code and which, surprisingly, are not found in the N.D.A., except in section 158 where they apply only as criteria for release from custody, have become minimum requirements for the valid exercise of the power of arrest.

[27] In this case, there was nothing to justify the arrest and subsequent detention of 13 days, of which 10 were at close arrest. The threats in question were uttered spontaneously following an isolated incident and the arrest was not made until three days later, when there was no evidence or indication that the offence would continue or be repeated or that the threats would be carried out. Nor could the arrest and detention have been justified as being necessary in order to identify the appellant. Pursuant to section 158, the appellant should have been released immediately since the prescribed requirements for freeing the accused had been met.

[28] Furthermore, there was no adequate detention facility in which to hold the appellant, so he wound up being held under unusually and unnecessarily difficult conditions. While the unusually and unnecessarily difficult conditions of detention were not cruel and unusual treatment, they added to the severity of the hardship suffered by the appellant following an arrest and detention which in themselves were unnecessary and unjustified in the circumstances.

[29] The Judge of the Standing Court Martial should have accepted the appellant's submission with respect to the arbitrary nature of his arrest and detention, and considered the need to grant an appropriate and just remedy in the circumstances. In this case, excluding the evidence is not an option which is open to us because no incriminating evidence was obtained as a result of the arrest and detention. The appellant was correct not to ask for a stay of proceedings because that would not be an appropriate remedy in the case at bar. I am of the opinion that it is, however, an appropriate case in which to revise the sentence and, as section 240 of the N.D.A. allows us to do, substitute for the sentence imposed a sentence that is warranted in law.

[30] In view of the severity of the hardship which was suffered by the appellant, as a result of the 13 days of preventive detention served during the Christmas holidays and the conditions of detention which prevailed, I consider that the sentence which would normally have been imposed should be substantially reduced and that a fine equal to two months basic pay should be substituted for the 30 days detention which was ordered by the Court Martial.

[31] For these reasons, I am of the opinion that the appeal in respect of the legality of the finding of guilty should be dismissed, and that the appeal in respect of the legality of the sentence should be allowed in order to substitute a fine equal to two months basic pay for 30 days detention. Having regard to my finding as to the legality of the sentence, I would dismiss the application for leave to appeal in respect of its severity.

Gilles Létourneau
J.A.

I concur.
James K. Hugessen

I concur.
Jacques Vaillancourt
JJ.A.

Certified true translation
Peter Douglas

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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