Date: 19980918

Docket: CMAC-415

CORAM: LÉTOURNEAU J.A.
ROUSSEAU-HOULE J.A.
BIRON J.A.

BETWEEN:

YVES LAUZON, Private (Canadian Battalion) 5 RALC

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

Heard at Québec City, Friday, August 21, 1998

Judgment delivered at Ottawa, Ontario, Friday, September 18, 1998

REASONS FOR JUDGMENT BY THE COURT

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REASONS FOR JUDGMENT

BY THE COURT

[1] At the end of a trial by Standing Court Martial, the accused, who is a member of the regular force, was found guilty on the following four charges:

1st count: sexual assault, section 130 of the *National Defence Act* (NDA), contrary to section 271 of the *Criminal Code*;

2nd count: disgraceful conduct, section 93 of the NDA, namely having ejaculated on a military coworker;

3rd count: drunkenness, section 97 of the NDA;

4th count: indecent act, section 130 of the NDA, contrary to paragraph 173(1)(*a*) of the *Criminal Code*, namely having exposed his penis in a public place in the presence of one or more persons.

[2] The acts which he is alleged to have committed took place in Haiti during the peacekeeping mission in which he participated as a member of the Canadian Battalion (5 RALC) of the Canadian Contingent in Haiti. The victim was a coworker who was a member of the reserve force.

[3] The appeal now before us concerns the legality of the verdict of guilt on these four counts and, in support of his appeal, the appellant submits two arguments related to the verdict itself and another by which he is challenging the constitutional validity of the Court which tried the case and made the finding of guilt.

[4] Concerning the verdict, he criticizes the Trial Judge for ignoring relevant and important evidence as well as failing to apply the appropriate rules as to reasonable doubt when faced with contradictory accounts. In our view, these two criticisms are without merit.

[5] On the count of sexual assault, the victim stated at trial that while she was stretched out on her bed, the appellant approached her, sat down next to the bed and, while talking to her, touched her breasts, thighs and hair and then her breasts again despite her refusal and protests. According to her testimony, the appellant later masturbated in front of her and when he ejaculated, he held back her shoulder with his hand so that the semen fell on her face. In his extra-judicial statements to the military police which were admitted as evidence, the appellant, who did not testify at the trial, denied fondling the complainant. Furthermore, he claimed that the complainant consented to his masturbating in front of her as long as he did not ejaculate on her.

[6] The appellant complains that the Trial Judge did not give sufficient weight to the testimony of two other soldiers, which was that the victim did not seem to be in distress and that there was a good-humoured atmosphere in the tent in which the events, including the sexual

assault, took place. According to the appellant, the atmosphere of camaraderie inside the tent is consistent with his claim that there was no sexual assault. The appellant also argues that the Trial Judge did not analyse the evidence as a whole and relied solely on the testimony of the victim and that of another female soldier who was present when the assault took place. He claims that he was not given the benefit of reasonable doubt to which he was entitled.

[7] It is clear from the decision of the judge that he considered the evidence as a whole, including the extra-judicial statements made by the accused and the little exculpatory evidence they contained, while keeping in mind that this self-serving exculpatory evidence was not given under oath. In fact, these statements were on the whole very incriminating. He admitted that he had consumed alcohol, that he was under the influence of the alcohol and that this was what prompted him to masturbate in front of the complainant. He admitted that he ejaculated and that drops of semen hit the complainant. These extra-judicial admissions by the accused made the testimony given under oath by the victim, who did not know the accused before the assault, very plausible and persuasive. In any event, it was the responsibility of the Trial Judge to assess the credibility of the witnesses and we cannot say that his conclusions about the appellant's guilt are not based on the evidence as a whole and are unreasonable or are due to any error in his understanding of the applicable principles in the case at bar.

[8] The inference drawn by the appellant from the atmosphere in the tent where the events took place and from the fact that the victim did not cry out is not sound. A victim is not required to offer some minimal word or gesture of objection and the lack of resistance is not equated with consent (*R. v. M (M.L.)*, [1994] 2 S.C.R. 3). In the case at bar, the Trial Judge was satisfied that the victim indicated to the accused that she objected both to him touching her and to him masturbating in her presence. Once again, the evidence before him was entirely sufficient and credible for him to be satisfied beyond a reasonable doubt that the victim did not consent.

[9] More persuasive, however, is the appellant's argument that the Standing Court Martial is not an independent tribunal within the meaning of section 11(*d*) of the *Canadian Charter of Rights and Freedoms* (Charter). Essentially, although the expressions he uses on occasion differ from those we are using to organize his arguments, the appellant submits that the Standing Court Martial is not an independent tribunal because of its organizational structure, the lack of a guarantee of the financial security of its members and the process of appointment, reappointment and removal of its members provided in section 177 of the NDA and articles 4.09, 101.16, 113.54 and 204.22 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). We believe he is right.

[10] A number of principles applicable to the instant case on the subject of judicial independence, which is protected by section 11(*d*), emerge from the following cases: *Valente v. The Queen*, [1985] 2 S.C.R. 673; *Beauregard v. Canada*, [1986] 2 S.C.R. 56; *R. v. Lippé*, [1991] 2 S.C.R. 114; *R. v. Généreux*, [1992] 1 S.C.R. 259; *2747-3174 Québec Inc. v. Quebec (Régie de permis d'alcool)*, [1996] 3 S.C.R. 919 and *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3. It is worthwhile to review them briefly.

[11] First, judicial independence is a concept which is distinct from but closely related to impartiality. Impartiality refers first and foremost to an absence of prejudice or bias, actual or perceived, on the part of a judge in a particular case, but like independence it includes an institutional aspect. If the system is structured in such a way as to create a reasonable apprehension of bias at the institutional level, the requirement of impartiality is not met. Independence is based on the existence of a set of objective conditions or guarantees which ensure judges have the complete freedom to try the cases before them. It is more concerned with

the status of the Court in relation to the other branches of government and bodies which can exercise pressure on the judiciary through power conferred on them by the state.

[12] Second, there are two dimensions to judicial independence: the individual independence of a judge and the institutional or collective independence of the Court to which the judge belongs.

[13] Third, institutional independence must not be confused with administrative independence. The latter refers to the ability of the Court to make administrative decisions which bear directly and immediately on the exercise of the judicial function. On the other hand, institutional independence derives from the role of the courts as constitutional organs and protectors of the Constitution and of the fundamental values enshrined therein. It plays a role in the separation of powers and protects against abuses on the part of the Executive as well as, in a federal system, against interference by the legislative power. It also protects against interference by the parties to a case and by the public in general. In the Canadian system of military justice, it refers to the ability of the institution of military justice to make decisions free from any political pressure as well as the public's perception of that institution and of its ability to act free from such pressure.

[14] Fourth, the three core characteristics of judicial independence are security of tenure, financial security and administrative independence.

[15] Fifth, the core characteristics of judicial independence can have both an individual dimension and an institutional or collective dimension.

[16] Sixth, financial security is one of these characteristics which has both an individual dimension and an institutional dimension.

[17] Seventh, judicial independence serves important societal goals such as the maintenance of public confidence in the impartiality of the judiciary and the rule of law.

[18] Eighth, whether or not a court enjoys judicial independence is measured according to the perception of a reasonable and informed person. In other words, the Court must ask itself what such a person - viewing the matter realistically and practically - would conclude.

[19] Lastly, criminal prosecutions brought before a Court Martial attract the protection offered by section 11(*d*) of the Charter to any accused person. We hasten to add that in exercising this jurisdiction, Courts Martial apply the Charter rights and guarantees and use the powers granted under section 24 of that Charter. In other words, they play an important role in the application of the principles of the Constitution and the protection of the values included therein.

[20] On the basis of these principles, let us now review the situation as it relates to the Standing Court Martial which heard the instant case.

[21] At the organisational and structural level, paragraph 4.09(1) of the QR&O states that the officers who perform judicial duties are posted to military trial judge positions within the Office of the Judge Advocate General:

> **4.09(1)** Every officer who performs any of the following judicial duties shall be posted to a military trial judge position established within the Office of the Judge Advocate General:
>
> (*a*) judge advocate of a General Court Martial or a Disciplinary Court Martial;
>
> (*b*) president of a Standing Court Martial;
>
> (*c*) presiding judge of a Special General Court Martial.

[22] The Judge Advocate General who has command of the Office of legal officers where military trial judges are located is the senior legal advisor to the Minister of National Defence (Minister). In effect, he or she is responsible to the executive branch of government, represented in this case by the Minister, for all legal matters pertaining to the Canadian Forces (see article 4.08 of the QR&O). That person and the legal officers of his or her Office argue cases regularly on behalf of the Executive before the military trial judges who themselves are also part of his or her Office.

[23] Furthermore, the defects in this organizational structure are magnified by the procedure for appointing, reappointing and removing the members who preside over the Standing Courts Martial.

[24] One surprising fact is that the members of the Court are appointed by the Minister himself or herself pursuant to section 177 of the NDA to hear military discipline cases coming from the Mininster's own department and argued by his or her legal staff.

[25] Pursuant to paragraphs 4.09(3) and (5) of the QR&O, the postings of members to military trial judge positions are for a fixed term of 2 to 4 years and these postings are renewable:

> **4.09(3)** The fixed term under paragraph (2) shall normally be four years and shall not be less than two years.
>
> **4.09(5)** An officer is eligible to be posted again to a position referred to in paragraph (1) on the expiration of any first or subsequent fixed term
>
> *a*) in the case of the Chief Military Trial Judge upon the recommendation of the Judge Advocate General, and
>
> *b*) in any other case, on the recommendation of the Chief Military Trial Judge.

[26] As this Court of Appeal decided in *R. v. Edwards*, [1995] A.C.A.C. no. 10, the posting of members to military trial judge positions for a fixed term, even if this term is not for life, guarantees institutional independence. The same is true for the process by which judges are now assigned to hear cases by the Chief Military Trial Judge and no longer by the convening authority who also appointed the prosecutor (*R. v. Edwards*, *supra*). However, these were the only questions before the Court. In the case at bar, the appellant is challenging not the term of the appointments to military trial judge positions as in *Edwards*, but the fact that these appointments are renewable. In other words, the appellant submits that the possibility of reappointment interferes with the principle of the security of tenure of military trial judges.

[27] In our view, the fact that the posting of an officer to a military trial judge position is renewable does not necessarily lead to the conclusion that institutional independence is lacking if the reposting process is accompanied by substantial and sufficient guarantees to ensure that the Court and the military trial judge in question are free from pressure on the part of the Executive that could influence the outcome of future decisions. Unfortunately in the case at bar, the reposting is done simply at the ministerial level by the Minister himself or herself, who can decide not to renew the term of a military trial judge who has taken positions which are unpopular with the Department or more generally with the Executive. While the recommendation to renew the term of a military trial judge comes from the Chief Military Trial Judge, the Chief Military Trial Judge's own posting is also done by the Minister. And that is not all. This reposting is done on the recommendation of the Judge Advocate General who, with his or her staff, regularly argues cases for the Minister before the military trial judges and the Chief Military Trial Judge. Furthermore, while the military trial judge may only be removed for cause, a refusal to repost is entirely within the discretion of the Minister, without any protective standard or guideline which, for all practical purposes, is equivalent to removal from the performance of duties without cause. With respect to the appointment and re-appointment of the Presidents of the Standing Court Martial itself, article 113.54 of the QR&O, and more precisely

paragraphs 3 and 4, is to the same effect as article 4.09 and consequently suffers the same shortcomings. As the Presidents decide on military discipline cases where the interests of the Minister are directly in issue, the lack of standards for reappointment does not offer sufficient objective guarantees of independence.

[28] Finally, the Minister also controls the process of removing military trial judges and the Chief Military Trial Judge as well as revoking the appointment of the President of a Standing Court Martial under paragraphs 4.09(6) and 101.16(10) of the QR&O:

> **4.09(6)** The posting of an officer to a position referred to in paragraph (1) may only be terminated prior to the expiration of its fixed term upon
>
> (*a*) the written request of the officer,
>
> (*b*) the officer's acceptance of a promotion,
>
> *(c*) commencement of retirement leave prior to a release under Item 4 (Voluntary) or Item 5(*a*) (Service completed, Retirement Age) of the table to article 15.01 (Release of Officers and Non-commissioned Members), or
>
> (*d*) direction by the Minister, under paragraph (10) of article 101.16 (Conduct of Inquiry), that the officer be removed from the performance of judicial duties.

> **101.16(10)** The Minister may, upon the recommendation of the Inquiry Committee, direct that an officer to whom this section applies be removed from the performance of judicial duties and revoke
>
> (*a*) the designation of the officer as a Special General Court Martial under article 113.05 (*Designation As Special General Court Martial*), and
>
> *b*) the appointment of the officer as President of a Standing Court Martial under article 113.54 (*Appointment - Standing Courts Martial*).

[29] Furthermore, the Minister exercises this power on the recommendation of an Inquiry Committee. The holding of an inquiry, during which the military trial judge in question has a full opportunity to be heard, may at first glance constitute a sufficient restriction on the power of termination for the purposes of section 11(*d*). However in the case at bar, not only is the

majority of the Inquiry Committee, which consists of three members, composed of members of the Executive, but its Chairman is the Judge Advocate General who, in addition to appearing before the Standing Court Martial, is the principal advisor to the Executive in relation to the cases argued before that Court:

> **101.14(2)** Where an inquiry is in respect of an officer of the Regular Force, the Inquiry Committee shall consist of the Judge Advocate General, the Colonel Commandant of the Legal Branch of the Canadian Forces and the Chief Military Trial Judge.
>
> **101.14(4)** The Chairman of the Inquiry Committee shall be the Judge Advocate General.

An informed person can reasonably conclude that the office of military trial judge is not free from discretionary or arbitrary intervention by the Executive or by the authority responsible for appointments.

[30] This process for removing military trial judges is in sharp contrast to the process for removing federally appointed judges where the power to order the holding of an inquiry or investigation lies with the Canadian Judicial Council which, pursuant to its by-laws, must exercise that power in full Council. The Council alone, the composition of which is not dominated by the Executive, may recommend to the Minister of Justice that a judge be removed from office, and the power to remove a judge lies with the Governor in Council, except if an address of the Senate or House of Commons or a joint address of both houses is required (*Judges Act*, R.S.C. c. J-1, ss. 63, 65 and 69; *Canadian Judicial Council By-Laws*).

[31] Similarly, the Quebec *Courts of Justice Act* (R.S.Q., c. T-16) provides substantial guarantees of independence concerning inquiries and removal for provincially appointed judges. The inquiry is conducted by the Conseil de la magistrature (sections 263 *et seq.*) which is independent of the Executive and it is the Conseil which submits the report of its inquiry to the Minister of Justice (section 277), who may file a motion with the Court of Appeal to remove a

judge (section 279). The Government may remove a judge only upon a report to this effect by the Court of Appeal (section 95). (See also the Ontario *Courts of Justice Act* (R.S.O. 1990, c. C-43) where the removal of a provincial judge is made by order of the Lieutenant Governor on the address of the Legislative Assembly. The investigation of the conduct of a judge is conducted by a subcommittee of the Judicial Council composed of a provincial judge and a person who is neither a judge nor a lawyer (sections 51.3, 51.4 and 51.8)). As professors Brun and Tremblay state in *Droit constitutionnel*, 3e éd., Les Éditions Yvon Blais Inc., Cowansville, 1997, page 791, [TRANSLATION] "when all is said and done, it is accordingly the judiciary itself which decides on the criteria and the standards of good conduct" as well as, need we add, compliance with these standards. Furthermore, the Executive cannot appoint the majority of the members of a Judicial Council (*R. v. Temela*, (1992) 71 C.C.C. (3d) 276 (N.W.T.C.A.).

[32] In short, if one wanted to apply the existing principles for Courts martial to the judges of the civil jurisdictions, the judges of the Court of Quebec, for example, would have to be appointed by the Minister of Justice, the positions of these judges would have to be assigned to and located within the litigation section of the department, to hear the department's cases, argued by counsel for the department, on behalf of the Minister of Justice and the Executive, over and above the fact that the appointments of these judges would have to be for short terms only and that the power to re-appoint them would lie with the Minister of Justice, and that his or her Deputy Minister would have an influential role at certain crucial stages of the process. This is a completely unacceptable situation in the civil context. The acknowledged need for military discipline and for special courts to enforce it is not sufficient to justify such a significant and fundamental infringement of the principle of the separation of powers, especially because military personnel who face charges based on the *Criminal Code* have the right to essentially the

same guarantees offered by criminal and constitutional law as ordinary citizens (except the right to a trial by jury, section 11(*f*) of the Charter).

[33] The organizational and institutional relationship among the Minister, the Judge Advocate General and the members of his or her Office who represent the Executive, and the military trial judges who hear the Department's cases does not, in our view, afford sufficient guarantees of institutional impartiality and independence. A reasonable person who became aware of the prevailing state of the law and the embarrassingly close relationship which exists between the Executive and the judiciary could only conclude, or at least would be justified in perceiving and believing, that the Presidents of the Standing Courts Martial are not free from pressure by the Executive at the institutional level. In other words, such a person could reasonably conclude that the military trial judges act through the Executive, with the Executive and for the Executive.

[34] In addition to this information, which already tells us much of significance, there is, more specifically, the question of the financial security of the persons thus appointed. Pursuant to article 204.22 of the QR&O, the pay of a legal officer performing judicial duties is equal to the maximum of the annual range prescribed for a legal officer of the same rank:

> **204.22(1)** This article applies to a legal officer who holds a military trial judge position in accordance with article 4.09 (*Performance of Judicial Duties at Court Martial*).
>
> **204.22(2)** The basic pay of a legal officer to whom this article applies shall be at an annual rate, payable on a monthly basis, that is equal to the maximum of the annual range prescribed in the table to article 204.218 (*Pay - Officers - Legal*) for a legal officer of the same rank.

Under article 26.10 of the QR&O, legal officers cannot receive merit pay and performance evaluations when posted to a military trial judge position.

[35] The salary structure of military trial judges does not offer the financial security that has been required at the institutional level since the decision in the *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island*, *supra*. To reduce the salaries of military trial judges, all the government has to do is to reduce the salary ranges of the legal officers. Military trial judges have no independent, effective and objective mechanism for depoliticizing the process by which their compensation is determined and avoiding the possibility of political interference through economic manipulation.

[36] At page 99 of the *Reference*, *supra*, Lamer C.J. stated that "if judges' salaries were set by the same process as the salaries of public sector employees, there might well be reason to be concerned about judicial independence". In our view, this is precisely what article 204.22 of the QR&O does. Furthermore, the mechanism selected for determining salaries equates military trial judges with the legal officers who argue cases before them. It is therefore almost inevitable that relations between the Executive and the judiciary will become confused, if we remember that military trial judges, like legal officers, also belong to the Office of the Judge Advocate General who argues cases before them. Once again, an informed observer would be justified in believing that military trial judges who preside over Standing Courts Martial have no institutional independence in terms of financial security in their dealings with the Executive.

[37] For these reasons, the appeal should be allowed in part and section 177 of the NDA concerning the process of appointing the members of the Standing Court Martial, as well as

articles 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 QR&O concerning the process of reappointing and removing military trial judges and the determination of their salaries, declared to be invalid and of no force and effect. In his memorandum, the appellant did not specifically refer to articles 101.14, 101.16 and 204.22, but it is clear that his grounds for appeal, and the resulting decision, raise the issue of the constitutionality of these articles and they must accordingly be included in the declaration of invalidity.

[38] That said, what impact does this conclusion have on the verdict of guilt made by the Standing Court Martial in the case at bar? As the whole Court is affected by this constitutional defect and there are no independent court and judges at this level to replace the Court and ensure military discipline, we believe, as the Supreme Court stated in the second *Reference*, [1998] 1 S.C.R. 3, that the doctrine of necessity must apply. Absent a real and substantial injustice specific to the instant case, the effect of applying this doctrine is to validate the convictions entered by the President of the Standing Court Martial. In the case at bar, not only did the evidence not reveal any such injustice, but the appellant admitted that on the issue of impartiality, he had no objection to the President of the Court. The appeal of the convictions will accordingly be dismissed. It is clear from the relief sought by the appellant that this is the only valid solution possible in the circumstances. He is asking us to order that a new trial be held, but any such trial would have to be held by another Standing Court Martial which would also be tainted by the same constitutional defect at the institutional level, thereby giving rise to another challenge which would be identical to the one at issue in the present case.

[39] Lastly, given that draft amendments to the organizational structure of the Courts Martial are presently before Parliament and that it is advisable to allow the Government reasonable time to take the appropriate remedial action, we order that the declaration of invalidity of section 177

of the NDA and articles 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 QR&O be suspended for one year from the date of this decision.

"Gilles Létourneau"
J.A.

"Thérèse Rousseau-Houle"
J.A.

"André Biron"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:

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STYLE OF CAUSE:

Yves Lauzon, Private v. Her Majesty the Queen

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MOTIFS DU JUGEMENT DE LA COUR PAR LA COUR ;

Létourneau, Rousseau-Houle et Biron JJ.A.

DATED:

September 18, 1998

APPEARANCES:

Mr. Jean Asselin

for the Appellant

Major M.H. Coulombe

for the Respondent

COUR D'APPEL DE LA COUR MARTIALAE DU CANADA

NOMS DES AVOCATS ET PROCUREURS INSCRITS AU DOSSIER

NO. DU DOSSIER DE LA COUR :

CMAC-415

INTITULÉ DE LA CAUSE :

Yves Lauzon, Soldat c. Sa Majesté la Reine

LIEU D'AUDITION :

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DATE DE L'AUDITION :

Le 21 août 1998

MOTIFS DU JUGEMENT DE LA COUR PAR LA COUR ;

Létourneau, Rousseau-Houle et Biron jj.c.a.

EN DATE DU ;

18 septembre 1998

COMPARUTIONS :

Me Jean Asselin

pour la partie appelante

Major M.H. Coulombe

pour la partie intimée

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