Date: 20011016

Docket: CMAC-438

Neutral Citation: 2001 CMAC 2

CORAM: **LÉTOURNEAU**
MEYER
GOODWIN, JJ.A.

BETWEEN:

MASTER CORPORAL RÉAL LAROCQUE

Appellant

AND:

HER MAJESTY THE QUEEN

Respondent

Hearing held in Ottawa, Ontario, August 20, 2001

Judgment pronounced in Ottawa, Ontario, October 16, 2001

REASONS FOR JUDGMENT BY: **LÉTOURNEAU J.A.**

CONCURRING REASONS BY: **MEYER J.A.**

CONCURRING REASONS BY: **GOODWIN J.A.**

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REASONS FOR JUDGMENT

LÉTOURNEAU J.A.

Facts and proceedings

[1] The appellant, a military policeman, was arrested without a warrant on October 15, 1998 for criminal harassment contrary to sections 130 of the *National Defence Act*, R.S.C., c. N-5 (the Act) and 264(1) of the *Criminal Code* (the Code), interrogated for three hours without counsel and then held. He was released the following day at about 4:30 p.m., subject to some caution and observation measures, and it was not until November 9, 1999 that he was initially charged with a criminal harassment offence and,

again in relation to the criminal harassment, with two counts of disobeying the order of a superior and one count of using a Canadian Forces vehicle for unauthorized purposes. Since these were charges that do not fall within the jurisdiction of a commanding officer, a recommendation was made to proceed by court martial. The criminal harassment charges were not filed with the court martial until February 15, 2000. He was also charged on September 15, 2000 with failing to appear before a military tribunal and being absent without leave. He was also suspected of breaking into the workplace of the harassment victim and stealing $25 to $30 worth of alcoholic beverages and cigarettes. However, no evidence could be discovered linking the appellant to the latter offence and consequently no charge was laid in relation to it.

[2] The appellant's trial was initially scheduled for May 9, 2000 and, as a result of his failure to appear, it was adjourned to September 19, 2000. At the hearing, appellant's counsel presented a motion to stay the proceedings based on section 7 and paragraph 11(*b*) of the *Canadian Charter of Rights and Freedoms* (the Charter), alleging that his right to be tried within a reasonable time had been breached and that his right to liberty and security of the person had been infringed in violation of the principles of fundamental justice. This motion by appellant's counsel was based primarily on the pre-charge delay which, added to the post-charge delay, was said to constitute a violation of the appellant's constitutional rights. This motion was dismissed by the military judge presiding at the court martial. The trial was held on all counts other than the one of absence without leave, to which the appellant pleaded guilty. The appellant was convicted on all remaining counts and sentenced to 54 days of detention, the execution of which was

stayed. Hence the appeal to this Court against the lawfulness of the verdict on the ground that there should have been a stay of proceedings on the four counts related to criminal harassment.

Analysis of the decision from the standpoint of paragraph 11(b) of the Charter

[3] I am satisfied that the military judge, in his analysis of the right to be tried within a reasonable time in paragraph 11(*b*) of the Charter, correctly applied the principles governing pre- and post-charge delays.

[4] I am also satisfied that these principles are the ones identified by the judgment in *R. v. Finn*, [1997] 1 S.C.R. 10, which are found in this extract from Mr. Justice Marshall, speaking on behalf of the Newfoundland Court of Appeal (*R. v. Finn* (1996), 106 C.C.C. (3d) 43, at pages 60, 61 and 62), which the Supreme Court of Canada endorsed:

> Crown counsel claims that the trial judge did so err in using the period prior to the laying of the charge as the determining factor. The Crown is maintaining, in view of the judgment's finding of absence of any prejudice to Ms Finn, that the judge committed this error in combining pre- and post-charge delay periods and using the resultant total time span as a basis for the constitutional infringement of s. 11(*b*) and as a consequential justification for the stay of these proceedings. On a proper view of applicable legal principles, for the reasons which follow, this position of the Crown must be sustained.
>
> The starting-point in referencing the relevant law is the clear direction given by the Supreme Court of Canada that the length of delay in the context of s. 11(*b*) of the Charter is to be reckoned from the date of the charge to the completion of the trial. Sopinka J. states this explicitly in *R. v. Morin* (1992), 71 C.C.C. (3d) 1 at pp. 14-15, [1992] 1 S.C.R. 771, 12 C.R. (4th) 1. McIntyre J. had earlier made the same statement in *R. v. Kalanj* (1989), 48 C.C.C. (3d) 459 at p. 469, [1989] 1 S.C.R. 1594, 70 C.R. (3d) 260. Still earlier, La Forest J. wrote in the same vein in *R. v. Rahey* (1987), 33 C.C.C. (3d) 289 at p. 321, 39

D.L.R. (4th) 481, [1987] 1 S.C.R. 588. These directions are based upon the court's interpretation of the opening sentence of s. 11 signifying that the rights and immunities therein enumerated are designed to protect "(a)ny person charged with an offence...". As has been mentioned, the trial judge acknowledged that this was the approach the law required to be adopted at the inception of his judgment.

However, he also recognized a qualification to this otherwise absolute statement of the relevant time-frame. In special circumstances the law allows pre-charge delay to have a bearing upon assessment of the reasonable timeliness of a trial. As indicated, the trial judge purported to be following authority in giving weight to the pre-charge delay in his assessment of the constitutional timeliness in this case. That authority was a statement which he quoted from Morin that was made by Sopinka J. where the latter asserts at p. 14 that the period preceding the laying of the charge:

> ...may in certain circumstances have an influence on the overall determination as to whether post-charge delay is unreasonable but of itself it is not counted in determining the length of the delay.

In view of the judge's use of pre-charge delay in this case, it is necessary to inquire whether the "certain circumstances' justifying its consideration exist here. Identification of the type of circumstances the statement envisages is aided by reference to Sopinka J.'s subsequent commentary in Morin detailing the individual rights which s. 11(b) seeks to protect. In ensuing remarks at p. 12 of his judgment in that case, Sopinka J. identifies them as the rights to security of the person; to liberty; and, to a fair trial. He then elaborates as follows:

> The right to security of the person is protected in s. 11(b) by seeking to minimize the anxiety, concern and stigma of exposure to criminal proceedings. The right to liberty is protected by seeking to minimize exposure to the restrictions on liberty which result from pre-trial incarceration and restrictive bail conditions. The right to a fair trial is protected by attempting to ensure that proceedings take place while evidence is available and fresh.

From this breakdown of the component elements of the protection which this Charter provision is designed to assure, it can readily be seen that any deprivation of the first two categories can only arise from circumstances occurring in the post-charge time period. This is because the state does not put the individual's security and liberty in jeopardy in the context of these rights until he or she has been charged and exposed to

> criminal proceedings. Thus the anxiety, concern and stigma and the restrictions on liberty mentioned in the foregoing passage can only be relevant to the post-charge period. Hence, pre-charge delay can have no relevance in testing whether these two individual rights have been impaired. Thus, the statement in the earlier passage signifying that pre-charge delay is "not counted in determining the length of delay" must be considered as asserting that that period is neither directly nor indirectly to have any import in assessing whether the individual's right to security of the person, or his or her right to liberty, have been infringed.
>
> The third identified element rests on a different footing, however. It cannot be said that the right to a fair trial, in contrast with the other individual rights comprehended by s. 11(b), is incapable of being prejudicially influenced by events occurring during the pre-charge period. Where that delay adversely impinges, for example, upon an accused's right to make full answer and defence, the time span prior to the charge would have an obvious impact on the fairness of the trial. The concern that an accused's right to full answer and defence be unimpaired can be said to go to the very crux of the purpose of guaranteeing trial within a reasonable time under s. 11(*b*). Indeed, it is reasonable to hold that no Charter of fundamental rights would be complete without the basic assurance of the opportunity of full answer and defence on being charged with a criminal offence. The protection against impairment of that right indubitably must be construed as lying at the very kernel of any constitutional guarantee to be tried within a reasonable time.

[5] As this extract indicates, the accused's anxiety, concern and stigma and the restrictions on his liberty are factors that are relevant only in the post-charge period. In other words, the right to security of the person and the right to liberty are affected, for the purpose of determining whether they have been breached, only by the period subsequent to the indictment. In the present case, this period was six months and the military judge rightly held that this delay was not unreasonable. Moreover, the appellant did not appear at his trial, which had been set down for May 9, 2000, because, he said, he thought the

proceedings were moving too quickly for him and he had not had sufficient time in which to prepare although he had been represented by a lawyer since February 11, 2000: see the transcript at pages 68, 79, 81 and 82.

[6] The appellant cited the prejudice he alleges he suffered as a consequence of the pre-charge delay. On the one hand he submits that the military judge erred when he found he had not suffered any harm additional to that resulting from the investigation and indictments. On the other hand he argues that the military judge erred in limiting the analysis of the pre-charge delay to those cases in which such delay has a negative effect on the possibility of presenting a full answer and defence or where some abuse of process results. He bases the latter position on the decision of this Court in *R. v. Perrier*, CMAC-434, dated November 24, 2000, and on paragraph 11(*b*) and section 7 of the Charter.

[7] In so far as paragraph 11(*b*) is concerned, it seems clear from the Finn decision that in some circumstances the pre-charge delay is a factor that must be taken into account, but that this delay must impair the fairness of the trial or the right to full answer and defence. In the case at bar, there is no evidence that the appellant's rights in this regard were affected or compromised. Moreover, the appellant's counsel conceded this at the hearing before us.

[8] In relation to paragraph 11(*b*), I do not think this Court's decision in the Perrier case derogates from the principles in Finn or expands the applicable scope of that

paragraph. Madam Justice Desjardins, at page 15 of that decision, acknowledges that paragraph 11(*b*) has a more specific scope than section 7, which is more general, and that the two sections may play distinct roles depending on the case. The debate in this case had more to do with a breach of section 7, the right to liberty and security of the person, and the fact that any impairment of this right must be consistent with the principles of fundamental justice. The motion by the accused Perrier was a motion based on section 7 of the Charter and it was only subsidiarily and by way of illustration that the military judge, in that case, referred to paragraph 11(*b*): see the decision of this Court at pages 20-22. This leads me to consider whether the military judge erred in finding, as he did, that the appellant did not suffer any prejudice within the meaning of paragraph 11(*b*). I should also examine whether there was a possible violation of section 7 which would penalize a prosecution "conducted in such a manner as to connote unfairness or vexatiousness of such a degree that it contravenes fundamental notions of justice and thus undermines the integrity of the judicial process": *R. v. O'Connor*, [1995] 4 S.C.R. 411, at page 463. I hasten to add that, contrary to what the military judge held (Appeal Book, vol. 1, page 183), it is not necessary that the provision or the prosecution's action be intended to prejudice the accused. The emphasis must be placed primarily not on the prosecutor's intention but rather on the effect that his impugned actions had on the accused and his rights: *ibidem*, at pages 464-65.

<u>Absence of harm within the meaning of paragraph 11(*b*) and breach of section 7</u>

[9] The military judge held that the facts in Perrier relied on by the appellant are of a completely different nature: see the decision of the military judge, Appeal Book, vol. I, at

pages 183-84. It is true that there were a number of differentiating factors that might justify distinguishing this judgment in some respects and it is unnecessary to go over them again. But there were also some facts which, as in Perrier, tended to point to a breach of section 7. In my opinion, the judge failed to consider these facts or to give them the weight they deserve. With respect, they do indicate a breach of section 7 of the Charter. Furthermore, the judge misdirected himself on the meaning and scope of that section.

[10] Section 7 of the Charter is breached when the right to liberty and security of the person has been infringed and this infringement occurred in violation of the principles of fundamental justice. The analysis is a three-step one: determining whether there was a deprivation of this right, identifying and defining the principles of fundamental justice at issue and determining whether the deprivation has occurred in accordance with these principles: *R. v. White*, [1999] 2 S.C.R. 417, at page 438.

[11] As mentioned earlier, the appellant was arrested for criminal harassment on October 15, 1998 by a military policeman, following the meeting the policeman had had the same day with the victim of the harassment, and he was released the following day. On that particular day the appellant's right to liberty was impaired without any charges being filed against him. It was only 13 or 16 months later that these charges of harassment were in fact laid against the appellant, depending on whether the reference date is November 9, 1999 or February 15, 2000. I am prepared for the purposes of this case to accept the November 9, 1999 date in view of the definition of a charge contained

in section 107.015 of chapter 107 of the *Queen's Regulations and Orders for the Canadian Forces*. Meanwhile, the appellant lost, as a consequence of his arrest, his status and powers as a police officer, since his accreditation was suspended the day after his arrest. It is not hard to image the insecurity that can result from the arrest, loss of status and the assignment to reduced duties that resulted, and the uncertainty as to an indictment that was slow in coming. Furthermore, from October 28, 1998 to October 29, 1999, the appellant was subject to caution and observation measures and some restrictions on his freedom were imposed. All of these conditions had to do with a prohibition on contacting the victim, approaching her home or her place of work and doing anything that might be considered an act of intimidation or harassment. The caution and observation measures are extremely serious administrative measures that appear permanently on a soldier's record, influencing his promotion, his re-enlistment and the award of performance bonuses, and rule out the possibility of any transfer to a new unit until the observation period has expired: see articles 12 and 13 of the Canadian Forces Administrative Order. In short, they have an appreciable effect on a soldier's career. In the circumstances, I have no hesitation in concluding that there was an infringement of the right to liberty and security of the person within the meaning of section 7.

[12] Concerning the second stage of the analysis, the provisions of Part XVI of the Code pertaining to the appearance of an accused in court and his release constitute a good source for identifying or determining the principles of fundamental justice applicable to the case at bar.

[13] Section 495 establishes the principle that a police officer may arrest someone in the circumstances described therein, but he must not do so if he has reasonable grounds to believe that the public interest may be satisfied without arresting the person and if he has no reasonable grounds to believe that the person will fail to appear in court. This principle, which still does not appear in section 156 of the Act, was incorporated and recognized in the military criminal law by this Court in *Gauthier v. R.*, CMAC-414, August 23, 1998; see also *Claude-Rolland M. du Lude v. R.*, F.C.A., A-907-97, September 7, 2000.

[14] Under sections 497 and 498 of the Code, the arrested person shall be released as soon as possible by the person who arrested him or by the person in charge of the post, unless the public interest or the need to ensure his appearance in court justifies his detention. The release is accompanied by an appearance notice, a promise to appear or a recognizance to that effect. The police officer or officer in charge may also opt for a summons as a means of guaranteeing the appearance of an accused person.

[15] But more important still, section 505 of the Code requires that when a person has been released, an information relating to the offence alleged to have been committed by that person shall be laid before a justice as soon as practicable thereafter and in any event before the time stated in these appearance documents. Surprisingly, the Act is completely silent on this matter.

[16] Similarly, if the arrested person is not released, he shall be taken before a justice without unreasonable delay to respond to his charge and be dealt with according to law: see section 503 of the Code. In the military, section 158.1 of the Act requires that a report of custody shall, as soon as practicable, and in any case within twenty-four hours after the arrest, be delivered to the custody review officer. Under section 158.5, if no charge is laid within 72 hours of the arrest, the custody review officer shall determine why a charge has not been laid and reconsider whether it remains necessary to retain the person in custody. Finally, section 159 requires that a person who is not released by a custody review officer shall be taken before a military judge for a release hearing. Sections 159.1 to 159.6 deal with the powers of the military judge at that hearing. It is implicit in the terms of these sections and the powers of the review officer and the military judge that some charges shall by that time have been filed against the person who is arrested and held; if not, that person shall be released from custody.

[17] All in all, the provisions of both the Code and the Act, notwithstanding the deficiencies and shortcomings in the latter, identify the following principle of fundamental justice: a person who is arrested without a warrant because the authorities have reasonable grounds to believe he has committed an offence, whether that person is detained or released, shall be charged as soon as materially possible and without unreasonable delay unless, in the exercise of their discretion, the authorities decide not to prosecute. As Chief Justice Lamer, dissenting, states in *R. v. Kalanj*, [1989] 1 S.C.R. 1594, at page 1617, on the meaning of the words “person charged”:

> By arresting without a warrant, [the police] have, as a matter of law, undertaken to charge him within hours. ... If

> the law is respected, the difference of time as regards the charge is one of hours. ... If the police officers are acting according to our laws, they do not arrest, with or without a warrant, until the conclusion of a concludent investigation, if indeed an investigation be necessary. Arrests, summons, notices, are not investigatory instruments, but vehicles to court. If an officer is not going to court because he does not have enough to go to court, his arrest is premature, indeed unlawful.

This principle of fundamental justice is fully meaningful when, as in the case at bar, the prosecution already has, at the time of the arrest, the evidence that would justify the arrest, the charge and the prosecution. I will come back to this evidence later. In *Perrier*, *supra*, at page 22, the Court adopts as a more general principle of fundamental justice the principle of speedy justice which means that a prosecutor must proceed within a reasonable time.

[18] In this case, as we mentioned earlier, the appellant was not charged until 13 months after his arrest, taking the option most favourable to the prosecution. In reality, the harassment charges the appellant had to answer to and argue before a court martial were not actually filed in that court until February 15, 2000, 16 months after the arrest. They included some slight changes from those of November 9, 1999. The police officer who conducted the arrest on October 15, 1998 confirmed during his testimony that he had reasonable grounds to believe that the appellant was guilty of criminal harassment and that is the reason he arrested him: see Appeal Book, vol. I, at pages 26 and 42. Why, then, did he wait 13 months to indict him? The explanation given is a two-fold one, and in my opinion does not justify this delay, which I consider unreasonable and an infringement of the principles of fundamental justice.

[19] In the first place, the prosecution alleges that the investigation was not concluded. Yet, by the investigator's own admission, the prosecution had sufficient evidence to arrest the appellant for harassment. In our system of criminal law, contrary, for example, to the French criminal law system, the arrest does not constitute the commencement of the police investigation but rather the outcome of that investigation. It means that the prosecution is reasonably satisfied that an offence was committed, that its perpetrator is identified, that it has sufficient evidence of these facts and that it is necessary to proceed with his arrest. The prosecution is therefore able at that point to lay a charge and must do so with diligence if it decides to use the power of arrest, even if it necessarily means conducting some additional investigation while the proceedings are going ahead.

[20] The respondent's counsel argued that the arrest was necessary in the circumstances to guarantee the protection and safety of the harassment victim. Perhaps. But if such was the case, why then was the charge not laid forthwith precisely in order to obtain as quickly as possible, for the victim's benefit, a judgment against the accused and to take the measures that were necessary?

[21] Furthermore, admitting, as in the Kalanj case, supra, that the prosecution may postpone the charging for a reasonable time in order to review ample proof, the evidence on the record in this case discloses that all of the witnesses in relation to the offence of criminal harassment were met with and their statements taken in the week following the appellant's arrest, with the exception of one individual who was interviewed on

November 25, 1998 about the appellant's character and added nothing material or significant. Moreover, from November 25, 1998 to March 31, 1999, a four-month period, no police investigative activity occurred: see the Appeal Book, vol. I, at pages 29 to 32. And the military police officer in charge of the investigation conceded in his testimony that the criminal harassment investigation was for all intents and purposes completed as of October 21, 1998: *ibidem*, at pages 42 and 44. This initial explanation does not persuade me that the harassment charge could not be laid at the worst within two or three weeks following the appellant's arrest. It was not a complex charge and the evidence was essentially based on the complainant's statement.

[22] Secondly, the prosecution also cites as a justification for the lengthy pre-charge period the fact that it had to send the Royal Canadian Mounted Police (RCMP) some cards of fingerprints taken on the premises of the break-in, and await the results. It argues that it was appropriate, even necessary, to obtain this evidence in order to strengthen the evidence of harassment. But as early as October 30, 1998, 15 days after the arrest, the military police knew that the prints were of very poor quality, that the results of this fingerprint card were negative in the sense that they could not be identified and linked to the appellant, and that they were at best suitable for "latent research", i.e. periodic checks. It was in that capacity that they were conveyed to the RCMP on October 30, 1998, and the latter was to retain them for such checks until November, 2000: *ibidem*, at pages 38 to 41.

[23] Furthermore, as early as March 29, 1999, the RCMP informed the military police officer responsible for the investigation that generally speaking they were not to rely on the fingerprint evidence. The officer acknowledged in his testimony that at that date, to use his expression, “it was over” in so far as this evidence was concerned: ibidem, at pages 46 and 47.

[

24] In the circumstances, it is unreasonable and improper, in my opinion, to have postponed to November 9, 1999 the filing of the criminal harassment charges against the appellant. In the end, the harassment charges were laid without the theft fingerprints evidence. Furthermore, it is clear from the oral testimony that the evidence gathered as of October 25, 1998 was considered by the military judge a sufficient basis for reaching a guilty verdict on all the counts pertaining to criminal harassment.

[25] In my opinion, the prosecution delayed unduly, unfairly and in violation of the principles of fundamental justice in filing the charges related to criminal harassment following the arrest of the appellant and, in doing so, infringed the appellant’s section 7 Charter rights. No explanation or valid justification has been provided for the pre-charge delay of which the appellant was the victim.

[26] In view of the conclusion I have reached under section 7, it is unnecessary to determine whether the appellant has been wronged under paragraph 11(*b*) as a result of the pre-charge delay alone or in conjunction with the post-charge delay. I will limit myself to the additional comment that the prosecution’s unwarranted delay in proceeding

also had the effect of deferring the appellant's rights under paragraph 11(*b*). In the last analysis, the appellant's trial was scheduled for the first time for May 9, 2000, on a charge without complexity, and could not commence until 19 months after an arrest that the prosecution justified by the need to act quickly.

The appropriate remedy in the circumstances

[27] The appellant is asking that the conviction rendered against him be quashed and that a stay of proceedings be ordered on the criminal harassment counts. It should be added that under subsection 238(2) of the Act, this Court's dismissal of a conviction results in the vacating of the whole of the sentence. The requested remedy is based on section 24 of the Charter.

[28] A stay of proceedings is a drastic and final remedy since it puts an end to society's right and desire to have violations of the law deterred and punished in the collective interest. That is why it must be resorted to sparingly and only in the clearest cases: *R. v. O'Connor*, [1995] 4 S.C.R. 411, at pages 460-61 and 465; *R. v. Morin*, [1992] 1 S.C.R. 771; *R. v. Power*, [1994] 1 S.C.R. 601, at pages 615-16.

[29] As is often the case with any other accused person, the appellant was affected in his personal, professional and family life by the charges brought against him. The unjustified delay in filing the charges no doubt served to aggravate this effect. However, as the military judge rightly held, it did not affect the fairness of the trial and the

appellant's right to a full answer and defence. Nor do I think that it can be said that it has, in some irremediable way, "caused prejudice to the integrity of the judicial system" or that the continuation of the prosecution caused irreparable prejudice to the integrity of the judicial system: *R. v. O'Connor*, [1995] 4 S.C.R. 411, at pages 466 and 468. In the circumstances, I do not think the stay of proceedings demanded by the appellant is the just and appropriate remedy, especially if, as I am obliged to do so, I take into account the public interest, the interest of the victim and the gravity of the charges laid against the appellant, which is amplified by the fact that the offender is a police officer and that the reprehensible acts were committed while he was on duty: *ibidem*, at page 467. Instead, I think a reduction in sentence would achieve the objective sought by subsection 24(1) for the violation of the appellant's constitutional rights.

[30] The court martial judge, in determining the nature and duration of the custodial sentence imposed on the appellant, and in electing to stay its execution, took into account (to use his expression) "[Translation] the exceptionally long period that has elapsed since the perpetration of the offences". He did in fact reduce the sentence that he would normally have imposed. That was an appropriate remedial measure of relief in the circumstances. In applying the appropriate and just remedy required under subsection 24(1) of the Charter, I am unable to say that the sentence is so unreasonable as to cause prejudice to the integrity of the judicial system and to require modification.

Conclusion

[31] For these reasons, I would dismiss the appeal.

(s) Gilles Létourneau
J.A.

Certified true translation

Suzanne M. Gauthier, LL.L., Trad. a.

MEYER J.A. (Concurring reasons)

[32] Although I am not in full agreement with Mr. Justice Létourneau's reasoning, I am of the same opinion as him in regard to his conclusion that the appeal should be dismissed.

[33] I have some doubts as to the existence of an infringement of the accused's right under section 7 of the Charter, and hence the need to grant any remedy.

[34] The facts in this case are very different from those in Perrier, where, for example, a lengthy suspension without pay occurred before the indictment without any attempt at justification.

[35] Accordingly, I agree with Mr. Justice Goodwin when he concludes that we are not bound by *Perrier*.

[36] However, I accept Mr. Justice Létourneau's reasoning in the sense that even if *Perrier* applied, and I were to conclude, as he does, that the accused's Charter rights had been breached, I would also agree with him that a stay of proceedings would be a much too draconian sanction in this case, and that the appropriate punishment would instead be the reduced sentence imposed by the military judge.

[37] It is clear to me that the section 24 Charter remedy, the stay of proceedings, would in the circumstances of this case bring the administration of justice into disrepute.

[38] For these reasons, I would dismiss the appeal.

(s) P. Meyer
J.A.

Certified true translation

Suzanne M. Gauthier, LL.L., Trad. a.

GOODWIN J.A. (Concurring reasons)

[39] I conclude that the appeal should be dismissed.

[40] In my opinion, the military judge made a valid assessment of the facts and correctly instructed himself on the questions of law, concluding as follows:

> [Translation] Having examined the evidence as a whole, I find that the accused did not actually suffer prejudice within the meaning of section 11(*b*) of the Charter. I also find that there was no abuse of proceedings within the meaning of section 7, that his rights to a fair trial and full answer and defence were not breached. The defence motion is therefore dismissed. (Transcript, p. 185).

Consequently, this Court of Appeal cannot intervene and substitute its assessment of the facts and draw a conclusion different from that of the military judge.

[41] However, with respect for the opinion of my colleague, Mr. Justice Létourneau, I am unable to subscribe to the assessment of the facts that would find an infringement of the appellant's right under section 7 of the Charter, which provides:

> 7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[42] In my opinion, the military judge made a valid assessment of the facts in finding there was no infringement of Master Corporal Larocque's right. He correctly instructed himself in the law.

[43] Master Corporal Larocque was arrested on October 15, 1998 and released the next day.

[44] It is common ground that the charges were in fact laid on November 9, 1999. The only delay to be considered is therefore some 13 months.

[45] During this period, the investigation continued and the various stages of verification took place. An attempt was made to explain the delay by the wait for the RCMP report on the fingerprints found at the site of the theft and other regulatory requirements such as that of obtaining the opinion of legal counsel and the convening of a Court martial.

[46] There is, however, valid cause for surprise at this 13-month period during which the matter does not appear to have progressed for about six months (from April 27, 1999 to November 1, 1999).

[47] My remarks are not intended to validate such a delay. Justice must be speedier, as the new section 162 of the Act, in force since September 1, 1999, reminds us:

> 162. Charges under the Code of Service Discipline shall be dealt with as expeditiously as the circumstances permit.

[48] To be able to characterize the pre-charge delay to November 9 as unreasonable and improper, I think it would be necessary to find that the appellant had suffered some harmful repercussions.

[49] Without trivializing the anguish and anxiety that affects anyone who is under investigation or charged, more is needed in the circumstances. In my opinion it would be necessary to discover some significant impact affecting Master Corporal Larocque.

[50] This impact should be sufficiently significant to adversely affect the fairness of the trial or amount to an abuse of process. Let us keep in mind that the appellant acknowledges that the delay did not adversely affect the fairness of the trial.

[51] It seems to me it is hard to consider that the caution and observation measures imposed on Master Corporal Larocque were of such significant degree as to constitute an infringement of his section 7 right.

[52] Let us recall that Master Corporal Larocque was born September 12, 1959. He has been a military policeman for more than 23 years. In that capacity, he enjoyed special knowledge about his rights, but also about his duties, including respect for persons and laws. His freedom to move about has been only slightly affected by the prohibition on contact and the obligation to keep 500 feet away from the victim's place of work and residence.

[53] It should be recalled that as early as 1995 (transcript, p. 446) he was using a service vehicle to spy on her, driving in front of her residence. On July 4, 1997, he had

been given a formal notice of recommendation of a caution and observation in this regard (exhibit 14).

[54] How can the appellant claim his "life, liberty and security of the person" have been breached because his credentials as a military policeman were withdrawn, when at the same time he remains at work, he performs some duties and assumes some responsibilities compatible with his rank? Furthermore, he continues to be paid.

[55] This case is clearly distinguishable from that of Master Warrant Officer Perrier, in which this Court held, on November 24, 2000, there had been an infringement of his Charter right:

> [Translation]
> - Very briefly
>
> Warrant Officer Perrier confessed to the theft of $40,000 – The military judge in this trial had taken 24 months from the end of the investigation, thereby adding six months after the charge. This delay, with the other measures such as the relieving of his duties, the cessation of his pay, the commencement of clearance from the Forces, etc.... Furthermore, no evidence had been provided to explain this lengthy delay.

<u>The sentence:</u>

[56] The appellant requested a remedy based on section 24 of the Charter, i.e. a stay of proceedings. Such a conclusion would amount, in my opinion, to bringing the administration of justice into disrepute.

[57] I have noted the comments of the military judge and I subscribe to the principles expressed by Mr. Justice Létourneau. I think the military judge based his sentence on the generally applicable sentencing principles and did not consider it a remedy to a breach of the appellant's right. The sentence is not unreasonable.

[58] Let us recall that the sentence of 54 days' detention (but suspended) is expressed as a package and covers five convictions on different counts and a guilty plea on another count.

[59] I would make two observations in this regard:

(a) the expression of a package penalty would create some analytical difficulties in an appeal as to sentence or if there were an acquittal on one or more counts. It is preferable to distinguish the sentences.

(b) the suspension of the sentence would be a valid disposition if pronounced by the military judge, but this right, it seems to me, does not inhere in the Court Martial Appeal Court. This question merits some clarification.

(s) Ross Goodwin
J.A.

Certified true translation

Suzanne M. Gauthier, LL.L., Trad. a.

COURT MARTIAL APPEAL COURT OF CANADA
NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET NO:	CMAC-438
STYLE:	Master Corporal Réal Larocque v. Her Majesty the Queen
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	August 20, 2001
REASONS FOR JUDGMENT:	Létourneau J.A.
CONCURRING REASONS:	Meyer Goodwin JJ.A.
PRONOUNCED:	October 16, 2001

APPEARANCES:

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