COURT MARTIAL

Citation: *R. v. Riley*, 2024 CM 5009

Date: 20240424
Docket: 202241

Preliminary Proceedings

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Petty Officer 1st Class S.M. Riley, Applicant

- and –

His Majesty the King, Respondent

Before: Captain(N) C.J. Deschênes, C.M.J.

DECISION ON AN APPLICATION FROM DEFENCE FOR A STAY OF PROCEEDINGS

(Orally)

I. Introduction

[1] The applicant, Petty Officer 1st Class (PO1) Riley, is facing charges of theft, forgery, breach of trust and negligent performance of military duty in relation to allegations of stealing non-public funds using forged cheques and mishandling the non-public funds account of Her Majesty's Canadian Ship *Regina*, between December 2015 and September 2019 while in Victoria, British Columbia. Following the alleged commission of the offences, the deterioration of the applicant's mental health caused him to consult and since 30 October 2019, he has been treated by a register psychologist, Dr Anthony. In March 2021, the applicant was placed on medical employment limitation for being "unfit [to] work in any military environment" until his medical release from the Canadian Armed Forces, in relation to experiencing post-traumatic stress disorder (PTSD) symptoms. Following the preferral signed on 12 October 2022, the trial proceedings were postponed due to the applicant's situation,

at his request. Counsel for the applicant now seeks an order to stay the charges, contending that PO1 Riley would not be able to fully or properly engage or participate in the proceedings, which would result in his trial being unfair contrary to paragraph 11(d) of the *Charter*. In particular, PO1 Riley would not be able to properly understand evidence being presented, provide feedback to his counsel on a timely basis, understand advice to counsel or properly synthesize all information before him so as to give proper instructions to counsel, including whether he would testify for his own defence, and whether he would be able to testify effectively. Both counsel for the applicant and for the prosecution specified that there is no issue with the applicant's fitness to stand trial. Considering the application before me, I must decide if the applicant has established, on a balance of probabilities, that his right to a fair trial will be prejudiced by being required to stand trial because his mental health prevents him from adequately defend himself as a result of not being able to understand the nature or object of the proceedings and the possible consequences of the proceedings, or adequately communicate with his counsel, or testify when necessary or, the trial process itself would seriously imperil his health.

II. Background

[2] In considering the application, a brief review of the record, and of the undisputed evidence in support of the application, is required. A teleconference with the acting-chief military judge was held at the request of counsel for a change of trial dates, trial that was initially scheduled to commence on 5 June 2023. The General Court Martial (GCM) was then convened for 11 September 2023. On 7 September 2023, counsel for the applicant submitted a notice of application seeking to postpone the trial proceedings arguing that, as his trial date drew closer, the applicant became more stressed; his anxiety continually worsened, and he realized that he may not be able to engage or fully participate in his trial by court martial. In support of his argument, he provided a letter from the applicant's treating registered psychologist, Dr Anthony, dated 16 August 2023. Dr Anthony's letter indicates that PO1 Riley, "being required to attend an on-base function would likely exacerbate his PTSD". Dr Anthony requested accommodations be provided for the applicant's service-related condition. Another letter was produced by counsel, dated 6 September 2023, where Dr Anthony clarified that there was a likelihood that the applicant would experience an emotional breakdown in a courtroom setting on a military base and recommended treatment to develop coping skills to manage the "anxiety related to attending a military court martial". Based on these contentions and on the fact that continued therapy for the next six to nine months would likely stabilize his condition and should allow him to properly engage and participate in his own defence, and based on the prosecution not opposing the application I, as the military judge assigned to preside the GCM, granted the request and ordered that the trial be postponed to 6 May 2024 in order for counsel for the applicant to obtain clarity on the applicant's mental health condition, and to determine whether or not his fitness to stand trial was an issue. The order also included a schedule that counsel had agreed to, in particular that counsel for the applicant was to provide an update on the mental health situation of the applicant no later than 15 December 2023, which would confirm PO1 Riley's attendance or participation to therapy or other related

treatment. A hearing was also scheduled to be held, as required, on 18 March 2024, for any applications to be heard regarding whether there was an issue with the fitness of PO1 Riley to stand trial in May 2024. Counsel for the applicant specified that on 6 May 2024, the GCM of PO1 Riley would proceed, or alternatively, a fitness application would be heard. He would also consider subsidiarily whether any accommodations should be sought to mitigate the risk that the applicant's symptoms would manifest themselves during the trial.

[3] In December 2023, counsel for the applicant provided a letter from Dr Anthony dated 15 December 2023 confirming that PO1 Riley was attending therapy. The letter indicated that the applicant was "making slow but steady progress on stabilizing the anxiety that had developed" in relation to his mental health condition. Later on, another letter dated 1 February 2024 from Dr Anthony was provided by counsel for the applicant. Dr Anthony reiterated that there was slow but steady progress and explained that the applicant is irritable and easily angered, that he expressed resentment towards military command and complained that he was unfairly charged. Dr Anthony also stated that he expected the applicant would be able to attend trial in May, but that he would do so in "a diminished capacity" and that he is likely to become argumentative or he may shut down and withdraw. Dr Anthony also clarified that the applicant's response to the stress associated with the trial was difficult to predict. He finally recommended accommodation be imposed to mitigate any risk associated with triggering PTSD symptoms, specifically that the trial not be on base, and that the applicant not be in uniform. The last letter provided by the applicant is dated 11 March 2024. In that correspondence, Dr Anthony confirmed his opinion regarding the impact the military trial proceedings may have on the applicant, and that he is unable to provide a prognosis for his mental health during his attendance at his trial in May 2024, but repeated that "regarding PO1 Riley being an effective participant in his trial, it would be helpful if the trial was scheduled off base, and that trial participants and spectators do not wear military attire". He explained that military uniforms and proximity to Canadian Forces Base Esquimalt are "major triggers" that could cause the applicant into fight or flight, and he "may become agitated and angry, or emotionally shut down".

[4] The applicant served his notice of application on 15 March 2024. Another notice, seeking subsidiarily to postpone the trial proceedings, was submitted by the applicant early April 2024. A hearing was held for both applications on 13 April 2024. Dr Anthony was called as a witness and was qualified as an expert following a *voir dire*. Dr Anthony testified that he is a cognitive behavioural clinician advising on developing coping skills and managing stress. The letters he wrote between August 2023 and March 2024 as referred to above, were admitted on consent. Dr Anthony generally confirmed his opinion as conveyed in his letters. He also testified that, at the date of the hearing for these two applications, PO1 Riley had participated in seventy-six individual cognitive behavioural therapy sessions with him for a duration of one hour to one hour fifteen minutes each.

III. Whether the applicant has established, on a balance of probabilities, that his right to a fair trial will be prejudiced by being required to stand trial because his

mental health prevents him from adequately defending himself as a result of not being able to understand the nature or object of the proceedings and the possible consequences of the proceedings, or adequately communicate with his counsel, or testify when necessary or, the trial process itself would seriously imperil his health.

Positions of parties

[5] The applicant contended that the test for a breach of paragraph 11(d) of the *Charter* in the circumstances is not whether the applicant can communicate with counsel, rather it is whether the applicant can communicate adequately with his counsel, that he understands what counsel explains so that he can provide proper instructions. Counsel for the applicant is worried that his client would shut down or say: "that is it, I am done", which would result in not receiving proper instructions from him, particularly as decision to present evidence, including the applicant's testimony, is often decided at the last minute. This would cause his trial to be unfair. Counsel further contended that a stay is the only remedy because the anxiety that the applicant would experience from his trial being postponed again and having proceedings hang over his head, would have greater negative consequences on his mental health and recovery. While it is true that, should the Court find that paragraph 11(d) of the *Charter* is in breach, it can impose accommodations, these accommodations would not address the subject of the proceedings which are military in nature. Indeed, the trial is directly related to the applicant's service, therefore no accommodations exist that would fully eliminate elements that trigger onset of symptoms because the evidence would pertain to the military context of the allegations.

[6] The respondent disagreed, arguing that the application for a stay is premature and speculative. The testimony of Dr Anthony does not support the contention that the applicant is unable to participate to the trial proceedings. Even stress conditions, at their highest, do not meet the test for a stay. Imposing accommodations measures would address any of the issues raised by counsel for the applicant.

Applicable law

[7] First, the concept of "unfit to stand trial" is defined at *Queen's Regulations and Orders for the Canadian Forces* article 1.02**.** It means:

> "unable on account of mental disorder to conduct a defence at any stage of a trial by court martial before a finding is made or to instruct counsel to do so, and in particular, unable on account of mental disorder to
>
> *(a)* understand the nature or object of the proceedings,
>
> *(b)* understand the possible consequences of the proceedings, or
>
> *(c)* communicate with counsel".

[8] Accused persons are presumed to be fit to stand trial. The burden to establish unfitness is on a balance of probabilities, section 198 of the *National Defence Act*. A specific regime applies to an applicant person who is deemed to be unfit for trial.

[9] Fitness to stand trial, however, is a separate issue from whether a stay should be imposed for reasons arising from an applicant's mental and physical condition, *R. v. Magomadova*, 2015 ABCA 26, at paragraph 4. The test as stated at paragraph 24 of *Magomadova* is whether the applicant has established, on a balance of probabilities, that his right to a fair trial would be prejudiced by being required to stand trial when:

> a. [his] mental or physical health prevents [him] from adequately defending [himself] as a result of not being able to (i) understand the nature or object of the proceedings and the possible consequences of the proceedings, or (ii) adequately communicate with [his] counsel, or (iii) testify when necessary, or
>
> b. the trial process itself would seriously imperil [his] health.

Analysis

[10] Based on the record, the evidence I have heard as well as both parties' submissions, which aligned on this point, I am satisfied that are no reasonable grounds to believe that the applicant is unfit to stand trial.

[11] Turning to the allegations in support of the application, I find that the applicant has not met his burden to prove, on a balance of probabilities, that his right to a fair trial will be prejudiced by being required to stand trial. The evidence I have accepted demonstrates that his mental health does not prevent him from adequately defending himself. Although it was not contested that when in a stressful situation, the applicant may experience symptoms related to a PTSD diagnosis, in particular symptoms of anxiety, irritability, anger and that he may shut down, nothing in the evidence allows me to conclude that these symptoms, if experienced, would prevent PO1 Riley from understanding the nature or object of the proceedings and the possible consequences of the proceedings, or adequately communicate with his counsel, or testify when necessary. The evidence of Dr Anthony, who was very clear and consistent in his answers, confirmed that PO1 Riley would be able to participate in his trial. Dr Anthony did express concerns that the applicant may be in a diminished capacity, which he means that the applicant may "shut down", in other words, he may refuse to engage further. However, he testified that onsets of these symptoms are difficult to predict. I infer from this statement that the applicant's response to the stress of the trial proceedings may not arise at all. PO1 Riely may experience no symptom, one of them, or some of them, and they may manifest themselves in various degrees. Although it would be unfortunate if PO1 Riley was to experience any of these symptoms in court, the evidence does not support that these symptoms would amount to preventing the applicant from engaging in his trial proceeding. Dr Anthony did testify that he observed the applicant expressing anger toward his chain of command who he feels is against him; his observation is supporting evidence that PO1 Riley understands the nature of

the disciplinary proceedings against him. Dr Anthony also confirmed that even when experiencing symptoms, PO1 Riley is able to understand and to respond.

[12] Further, the expert stated that, should any of the PTSD symptoms appear, a short break would most likely ease PO1 Riley's symptoms, and assist him in composing himself for the continuation of the trial. He also confirmed that proper measures put in place, such as having the trial off base and ordering court participants to wear civilian attire, would greatly assist in eliminating or at least mitigating any risk of symptoms occurrence. I find therefore that PO1 Riley can engage in the proceedings, particularly if measures to accommodate his situation would mitigate or prevent onset of symptoms.

[13] Little was said about the impact of the trial on the applicant's mental health. The expert confirmed that the applicant has not expressed suicidal ideation, and that accommodations would address the concerns. The trial may slow down PO1 Riley's progress, but no evidence supports that the trial process itself would seriously endanger his health. It is logical to conclude that most accused persons would be on heighten stress level as their trial approaches. While the proceedings may adversely affect PO1 Riley's progress, the evidence does not allow me to conclude that the trial process itself would seriously imperil his health.

[14] Any finding of a *Charter* breach would have still required a consideration of whether a stay of proceedings is an appropriate remedy under subsection 24(1) of the *Charter*. Having found that PO1 Riley's right to a fair trial was not breached, the appropriateness of a stay need not be considered.

[15] There certainly will be some inconveniences to the applicant to stand trial when he is still attending therapy and working on developing coping skills in relation to his mental health condition. Nevertheless, courts have imposed accommodation measures following the dismissal of similar application. In *R. v. King (J.K.)*, 1995 CanLII 10502 (NL SC), 130 Nfld & PEIR 74 (SC), the trial judge ruled that the applicant's anxiety and depression would not result in an unacceptable risk to his health should he proceed to trial but recommended a change of venue for the trial.

[16] Imposing accommodation measures for court participants suffering from onset of PTSD symptoms has also been done at courts martial; it is not a novel exercise of court martial powers. See for example, the case of the GCM for Master Corporal Goulding in 2023 where, as part of her trial management power, Sukstorf M.J. limited sitting hours to three or four-hour timeframe to accommodate the mental health condition of the applicant; and for a witness, the case of *R. v. Sutherland* 2022, CM 5022, when, after denying an application seeking to allow a witness suffering from PTSD to testify remotely, I ordered that any military symbols, such as flags, be removed from the courtroom, and military court participants were to appear in civilian attire for the day of the testimony.

IV. Conclusion

[17] I conclude that the evidence before me is insufficient to conclude that PO1 Riley's trial will be unfair because of his mental health condition. Indeed, although Dr Anthony's evidence demonstrated that the applicant's PTSD symptoms, such as anxiety and irritability, could be exacerbated or triggered by the trial proceedings, he could not confirm that the applicant would indeed suffer from these symptoms during the trial. There certainly will be some inconveniences to the applicant as a result of these trial proceedings while he is participating in therapy and working on developing coping skills. For that reason, accommodation measures, such as the removal of all visual military components, frequent breaks, shorter sitting days, or a person accompanying the applicant during the trial, would greatly reduce the risk of onset of symptoms. Instructions could be provided to the panel to explain the applicant's situation and the imposition of accommodation measures. This aspect will be discussed with counsel at the appropriate time.

[18] Finally, counsel for the applicant may later address, as required, the issue of fitness or of a possible *Charter* breach, should the applicant's mental health condition unexpectedly deteriorate.

FOR THESE REASONS, THE COURT:

[19] **DISMISSES** the application.

Counsel:

Lieutenant(N) B. Wentzell, Defence Counsel Services, Counsel for Petty Officer 1st Class S.M. Riley, Applicant

The Director of Military Prosecutions as represented by Major D.G. Moffat, Counsel for the Respondent.