COURT MARTIAL

Citation: *R. v. Betts*, 2017 CM 3021

Date: 20170522
Docket: 201709

General Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Able Seaman B.W. Betts, accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR THE DECISION ON AN APPLICATION FOR MISTRIAL

(Orally)

[1] Able Seaman Betts has presented on 20 May 2017 this application asking this General Court Martial to declare a mistrial.

[2] Essentially, Able Seaman Betts is claiming that the inadmissible evidence heard by panel members on 19 May 2017 through the examination-in-chief of Commander Hooper, the first witness called by the prosecution in this trial, is so prejudicial to the fairness of this court, that the only remedy available consists in declaring a mistrial.

[3] A mistrial is an aborted trial resulting from an order of the trial judge, which may be started afresh before a different judge. A mistrial may be declared when the judge that is seized with a matter is satisfied that for any reason, there is a reasonable apprehension that either party will not have a fair trial if the current trial continues, but a fair trial would be possible if the trial was to begin afresh before another judge.

[4] Many sources can provide grounds for a mistrial, but whatever the source, the basis for it always comes back to bias. Something done or not done, said or not said, before or during the

proceedings, in or out of court, gave rise to a reasonable apprehension that the judge of fact, the judge of law, or both, is now biased against one of the parties or a witness.

[5] The right to a fair trial before an unbiased judge is protected at common law and by section 7 and paragraph 11(d) of the *Canadian Charter of Rights and Freedoms*, which extend to a court martial in the context of the military justice system. As very recently mentioned by the Chief Judge of the Court Martial Appeal Court in the decision of *R. v. Déry et al.*, 2017 CMAC 2, at paragraph 5:

> It is essential that this parallel military justice system be seen as fair, just, Charter compliant, and operating effectively, both at home and abroad.

[6] Able Seaman Betts is charged with two service offences punishable under section 129 of the *National Defence Act* for conduct to the prejudice of good order and discipline. He allegedly committed these offences at two different occasions at or near Canadian Forces Base (CFB) Esquimalt, British Columbia, on or about 3 and 5 November 2015, by saying each time some words in the presence of other members.

[7] The trial started on 15 May 2017. Some preliminary matters were heard by the Court during the first four days. On 19 May 2017, the members of the panel were sworn in and the court started to hear evidence.

[8] The first witness called by the prosecution was Commander Hooper. His testimony established that he was the Commanding Officer (CO) of the Canadian Forces Fleet School Esquimalt, the accused unit at the time of both alleged incidents. Being the CO of Able Seaman Betts, he referred the charges currently before the Court, meaning that he decided to proceed with them further to the accused electing to be tried by a court martial.

[9] He also said that he provided a briefing on 3 November 2015 on Operation HONOUR to which Able Seaman Betts allegedly attended. The topic of the presentation was about inappropriate sexual behaviour in the Canadian Armed Forces (CAF).

[10] The facts in support of this application arose at the end of his examination-in-chief when Commander Hooper was asked about his opinion on some issues.

[11] When specifically asked by the prosecutor, he provided the Court with his opinion on the following matters:

(a) The comments, as alleged in the particulars of both charges before the Court, qualifying them as being unacceptable and falling under the unacceptable behaviour or comments, as he illustrated it during the briefing he gave on Operation HONOUR.

(b) The fact that a person attending his briefing on Operation HONOUR would have been in a position to understand the concept of what was unacceptable, as a matter of comments, compared to those alleged in the particulars of both charges;

(c) The nature of those comments in the context of Operation HONOUR.

(d) How it impacted on his opinion when considering that the course instructor's wife is a Canadian Forces member, as referred in the particulars of both charges.

(e) If comments in both charges were different or of the same in nature; and

(f) Why, as a CO, it is important to stop such comment in a workplace environment.

[12] The prosecution asked a final question on a different topic and declared being done with its examination-in-chief. The Court then adjourned the case on its own, and, when it came back, raised a concern, in the absence of panel members and the witness, about the issue of admissibility of the opinion provided by the witness as a lay witness.

[13] The Court adjourned the case to the following day in order to provide parties an opportunity to analyze the situation and let it know about their respective intent. When the Court reassembled, defence counsel objected to this evidence and asked the Court to rule on its admissibility.

[14] After having held a hearing on this specific issue, the Court ruled that this evidence was inadmissible because it was not made in accordance with section 64 of the *Military Rules of Evidence*. More specifically, the Court was of the opinion that the questions and answers about the opinion of the witness were inadmissible because they were not based on facts he observed or experienced.

[15] As a result of this decision, then Able Seaman Betts made the present application asking the Court to declare a mistrial.

[16] The law on whether to declare a mistrial is well settled. A court martial authority to make such a declaration comes from its inherent power to control its own process (see *R. v. Dueck*, 2011 SKCA 45 at paragraph 24). It is a power to be exercised only in the clearest of cases (see *R. v. Lawson*, 1991 CanLII 194 (BC CA)) and it involves a balancing of the interests of the accused and those of public justice (see *R. v. D.(T.C.)* (1987), 38 C.C.C. (3d) 434 (Ont. C.A.), at page 445).

[17] The issue to be decided is whether the accused's right to a fair trial has been compromised to such extent that it cannot be preserved by remedial measures (see *R. v. Khan*, 2001 SCC 86, at paragraph 80). Usually, in circumstances such as the one before this Court, the remedial measure is a protective instruction to members of the panel.

[18] In *Khan*, LeBel J. set out an approach often recommended and used by courts. Essentially, he suggested some factors to consider when a trial judge is making such determination:

(a) Is the question in law or in fact central to the case against the accused?

(b) What is the relative gravity of the irregularity?

(c) May a well-instructed jury have the capacity to overcome irregularities?

[19] The inadmissible evidence was in support of proving an essential element of the offence on both charges, which is the prejudice to good order and discipline. By providing that the conduct alleged was covered by the briefing he gave on inappropriate sexual behaviour and by saying how such conduct could impact on the work environment, Commander Hooper's evidence was clearly adduced by the prosecution to achieve that purpose.

[20] However, even if this inadmissible evidence is related to an essential element of the offence, despite the fact being it is an important element to be determined by the members of the panel, it still one among others of great significance that they will have to deal with. In addition, I would say that the influence of the inadmissible evidence in resolution of this important issue is moderate in the circumstances.

[21] The relative gravity of this irregularity is average at this stage of the trial. Reality is that we are at the very beginning of the prosecution's evidence, and chances that other evidence adduced may reduce the impact of it are high enough to come to that conclusion. The fact that this evidence was provided by the CO of the accused at the time of the alleged offence and that he referred the charges may be of some concern. However, members of the panel would not be very surprised that the witness delivered such opinion, because if he had provided a different one, it would probably mean that he would not have proceeded with the charges. So, such opinion would not appear to them as very surprising and would not be binding on them in that way.

[22] Generally, members of a panel for a General Court Martial are educated people with a number of years of experience within the military, considering that those who are members of a panel cannot be below a specific rank as an officer or non-commissioned member. Through leadership experiences, they have had opportunities to exercise their common sense and their ability to follow instructions must be recognized. I am of the opinion that a corrective measure such as mid-trial instructions repeated at the end of this trial could remedy to the irregularity.

[23] I would say that the effect of this irregularity at this early stage of the trial, combined with the ability of members of the panel to follow the corrective measure ensure fairness of the trial and the appearance of fairness up to this point.

[24] I would like to add that the attitude of defence counsel for not objecting to the admissibility of the opinion of the witness is not determinative for this issue. Counsel may have reasons or not for doing so and there is nothing that the Court may infer from that situation.

THEN FOR ALL THESE REASONS, THE COURT:

[25] **DECLARES** that the issuance of mid-trial instructions could remedy the irregularity;

[26] **DISMISSES** the application made by Able Seaman Betts to declare a mistrial.

Counsel:

The Director of Military Prosecutions as represented by Major D.G.J. Martin

Lieutenant-Colonel D. Berntsen and Major A.H. Bolik, Defence Counsel Services, Counsel for Able Seaman B.W. Betts