
CANADA / JUDGMENT

R. v. Forster

[1992] 1 SCR 339

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Supreme Court of Canada

DECIDED

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R. v. Forster

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[1992] 1 SCR 339

Case number

21624

Judges

Lamer, Antonio; La Forest, Gérard V.; L'Heureux-Dubé, Claire; Sopinka, John; Gonthier, Charles
Doherty; Cory, Peter deCarteret; McLachlin, Beverley; Stevenson, William; Iacobucci, Frank

On appeal from

Canada

Subjects

Armed Forces

Constitutional law

Notes

SCC Case Information: 21624

Decision Content

R. v. Forster, [1992] 1 S.C.R. 339

Karen Ruth Forster Appellant

v.

Her Majesty The Queen Respondent

Indexed as: R. v. Forster

File No.: 21624.

1991: June 5; 1992: February 13.

Present: Lamer C.J. and La Forest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Stevenson and Iacobucci JJ.

on appeal from the court martial appeal court of canada

Constitutional law -- Charter of Rights -- Independent and impartial tribunal -- General Court Martial -- Member of Canadian Armed Forces charged with being absent without leave and tried by General Court Martial -- Whether structure of General Court Martial infringes s. 11 (d) of Canadian Charter of Rights and Freedoms -- If so, whether infringement justifiable under s. 1 of Charter -- National Defence Act, R.S.C., 1985, c. N-5, ss. 166 to 170 .

Armed Forces -- Service offences -- Absence without leave -- Mens rea -- Officer not reporting to new posting and charged with being absent without leave -- Officer honestly believing that she had resigned from Armed Forces -- Honest mistake about legal consequences of her actions not a defence to charge -- National Defence Act, R.S.C., 1985, c. N-5, ss. 90 , 150 .

The accused, a commissioned officer in the Canadian Armed Forces, was relieved of her duties as Base Comptroller in Edmonton and received an "attached posting" in Ottawa. She did not report to her new posting and was arrested by the military police. She was later charged with being absent without leave contrary to s. 90 of the National Defence Act . At her trial before a General Court Martial, the accused testified that she did not attend at her new posting because, having submitted a letter of resignation, she honestly believed that she had resigned from the Armed Forces. The accused was convicted and her conviction was affirmed by the Court Martial Appeal Court. The main issue in this appeal is whether a General Court Martial is an independent and impartial tribunal for the purposes of s. 11 (d) of the Canadian Charter of Rights and Freedoms . The appeal also raises the question of whether the judge advocate erred in law in advising the General Court Martial of the requisite mens rea for the service offence of being absent without leave.

Held (L'Heureux-Dubé J. dissenting): The appeal should be allowed and a new trial ordered.

(1) Section 11 (d)

Per Lamer C.J. and Sopinka, Gonthier, Cory and Iacobucci JJ.: For the reasons given in *Généreux*, the structure and constitution of the General Court Martial, as it existed at the time of the accused's trial, did not meet the requirements of s. 11 (d) of the Charter . The infringement of the accused's s. 11 (d) right could not be justified under s. 1 of the Charter .

Per La Forest, McLachlin and Stevenson JJ.: For the reasons given in *Généreux*, and subject to the reservations expressed there, the Chief Justice's disposition of the s. 11 (d) issue is agreed with.

Per L'Heureux-Dubé J. (dissenting): For the reasons given in *Généreux*, the structure of the General Court Martial did not infringe the accused's right to be tried by an independent and impartial tribunal guaranteed by s. 11 (d) of the Charter .

(2) Mens Rea

Even assuming that absence without leave is a mens rea offence, the accused was shown to have the requisite mental state. She deliberately refrained from reporting to her new posting because of her failure to understand that she was under a continuing legal obligation to report for duty notwithstanding her purported resignation by letter from the Armed Forces. She was mistaken not about the factual context or the quality of her actions, but rather about their legal consequences. This is not a circumstance amounting to a defence. In the context of this appeal, it is not appropriate to determine whether an officially induced error as to the state of the law might constitute a defence.

Cases Cited

By Lamer C.J.

Followed: *R. v. Généreux*, [1992] 1 S.C.R. 000; referred to: *Molis v. The Queen*, [1980] 2 S.C.R. 356; *R. v. Docherty*, [1989] 2 S.C.R. 941.

By Stevenson J.

Followed: *R. v. Généreux*, [1992] 1 S.C.R. 000.

By L'Heureux-Dubé J. (dissenting)

R. v. Généreux, [1992] 1 S.C.R. 000.

Statutes and Regulations Cited

Canadian Charter of Rights and Freedoms, ss. 1 , 11 (d).

Canadian Forces Administrative Orders.

National Defence Act, R.S.C. 1970, c. N-4, ss. 23(1), 80, 128.

National Defence Act, R.S.C., 1985, c. N-5, ss. 23(1) , 90 , 150 , 166 , 167 , 168 , 169 , 170 [am. c. 31 (1st Supp.), s. 54].

Queen's Regulations and Orders for the Canadian Forces (1968 Revision).

APPEAL from a judgment of the Court Martial Appeal Court of Canada (1989), 5 C.M.A.R. 6, dismissing the accused's appeal from her conviction on a charge of being absent without leave contrary to s. 90 of the National Defence Act . Appeal allowed and a new trial ordered, L'Heureux-Dubé J. dissenting.

Alexander D. Pringle and Alison Stewart, for the appellant.

Jean-Marc Aubry, Q.C., Richard Morneau, Bernard Laprade, Lt.-Col. K. S. Carter and Maj. M. H. Coulombe, for the respondent.

The judgment of Lamer C.J., Sopinka, Gonthier, Cory and Iacobucci JJ. was delivered by

//Lamer C.J.//

Lamer C.J.--

The Facts

The appellant, Ms. Forster, has been a commissioned officer in the Canadian Armed Forces since 1975. In June 1987, she and her husband were transferred to the C.A.F. Base in Edmonton, where the appellant assumed the position of Base Comptroller. Prior to her difficulties with a particular superior officer at Edmonton, she had an excellent service record. Her difficulties evidently began during this new posting.

On January 29, 1988, Colonel Buckham (the Edmonton Base Commander) relieved the appellant of her duties as Base Comptroller, apparently due to his concerns regarding her management methods. Colonel Buckham testified that the appellant was advised to remain at home until called to a specific duty. On February 9, Colonel Buckham sent a message to National Defence Headquarters, with a copy to Air Command, indicating the appellant was relieved of her duties as Base Comptroller. This same day, he also denied a redress of grievance that the appellant had submitted.

On February 15, 1988, the appellant was informed she had received an "attached posting" to the Directorate of Pay Services, Ottawa, her duties commencing February 19. This was subsequently changed to 8:00 a.m., March 15. The appellant did not report to her new posting on March 15, but remained at her home in Edmonton where she was arrested by military police on March 16. At the General Court Martial that followed, she gave the following explanation.

In early February 1988, the appellant had engaged civilian legal counsel, because after researching the Canadian Forces Administrative Orders, the Queen's Regulations and Orders for the Canadian Forces ("Q.R. & O.") and the National Defence Act, R.S.C., 1985, c. N-5 (formerly R.S.C. 1970, c. N-4), she could not find any regulation or authority for Colonel Buckham to do what he had done. On February 18, her counsel wrote a letter to Colonel Buckham, which stated:

Maj. Forster has no alternative but to treat these circumstances as a constructive dismissal of her employment from the Armed Forces.

On February 23, 1988, the appellant attended a meeting with Colonel Buckham, at which they discussed this letter. The appellant's request that her lawyer be present at this meeting was denied.

According to the appellant, she was told that she could not simply resign from the Armed Forces and that if she did not report for duty in Ottawa she could face charges under the National Defence Act . She was also advised to bring certain sections of the Act to the attention of her lawyer. However, the appellant further testified that at this meeting "[t]he invitation was extended to me by the Base Commander [Colonel Buckham] that I could, if I so wished, tender my release voluntarily at that point.... Eventually I did tender my resignation, my lawyer sent a letter." With respect to this meeting, Colonel Buckham testified:

In order to prevent what appeared to be a collision course with the Code of Service Discipline, I convened the meeting on the 23rd of February to lay out very clearly and explicitly, with a witness present so that there was no misunderstanding, just how serious a situation she was putting herself in. Indeed, with Major Gouin's assistance, we even brought to her attention the particular sections of the National Defence Act that applied to her and that would apply....

On March 10, 1988, the appellant's lawyer sent a second letter, this time to the Commander of Air Command, indicating that the appellant "hereby resigns her position from the Armed Forces effective Monday, March 14, 1988".

The appellant testified that she did not attend at her posting in Ottawa because she had resigned. She felt this was her right, particularly because Colonel Buckham had told her at the meeting on February 23, 1988, that she could tender her release voluntarily. She testified that she did not intend to commit any offence, and that she believed that her resignation absolved her of the requirement of attending the posting in Ottawa.

On May 2, 1988, the appellant was convicted by a General Court Martial at Canadian Forces Base Edmonton on a charge of being absent without leave (s. 90 of the National Defence Act (formerly s. 80)). The judge advocate rejected her objections to the constitution and structure of the General Court Martial based on s. 11 (d) of the Canadian Charter of Rights and Freedoms . The appellant's appeal to the Court Martial Appeal Court of Canada was unanimously dismissed: (1989), 5 C.M.A.R.

Issues

On March 1, 1990, Ms. Forster's application for leave to appeal to this Court was granted, [1990] 1 S.C.R. vii. By Order dated September 17, 1990, the following constitutional questions were stated by Cory J.:

1. Does the trial of an accused by General Court Martial constituted pursuant to ss. 166 -170 of the National Defence Act, R.S.C., 1985, c. N-5 , as amended, and the Queen's Regulations and Orders infringe or deny the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by s. 11 (d) of the Canadian Charter of Rights and Freedoms ?

2.If the answer to question 1 is yes, is the trial of an accused by General Court Martial constituted pursuant to ss. 166 -170 of the National Defence Act, R.S.C., 1985, c. N-5 , as amended, and the Queen's Regulations and Orders justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982 ?

The appellant was also granted leave to appeal on the question of whether the judge advocate erred in law in advising the General Court Martial of the requisite mens rea for the service offence of being absent without leave.

Relevant Statutory Provisions

National Defence Act, R.S.C., 1985, c. N-5

23. (1) The enrolment of a person binds the person to serve in the Canadian Forces until the person is, in accordance with regulations, lawfully released.
90. (1) Every person who absents himself without leave is guilty of an offence and on conviction is liable to imprisonment for less than two years or to less punishment.
- (2) A person absents himself without leave who
- (a) without authority leaves his place of duty;
- (b) without authority is absent from his place of duty; or
- (c) having been authorized to be absent from his place of duty, fails to return to his place of duty at the expiration of the period for which the absence of that person was authorized.
150. The fact that a person is ignorant of the provisions of this Act, or of any regulations or of any order or instruction duly notified under this Act, is no excuse for any offence committed by the person.

Analysis

This appeal was heard at the same time as the appeal in *R. v. Généreux*, [1992] 1 S.C.R. 000. The s. 11 (d) Charter issue raised by the appellant Forster is the same as that raised by the appellant Généreux, and falls to be decided on the same principles. This Court concluded in *Généreux* that the structure and constitution of the General Court Martial, as it existed at the time of the appellants' trials, did not comply with the requirements of s. 11 (d) of the Charter . It follows that the appellant Forster's appeal must also be allowed and a new trial ordered. This in itself is sufficient to dispose of this appeal.

It is not therefore necessary to deal with the mens rea issue raised by the appellant. However, since this matter will be sent back for a new trial I consider it appropriate to deal with this question as well. The appellant did not contend before us that her purported resignation from the Canadian Forces was legally effective. What she claims is that she honestly believed that she had resigned from the Forces, and that because of this she did not possess the requisite mens rea for the offence under s. 90 of the National Defence Act of being absent without leave. In my opinion,

this submission can be dealt with very briefly. Even if we take the appellant's assertions about her beliefs at face value, she did not labour under any mistake about what she in fact did: she deliberately refrained from reporting to her new posting in Ottawa. Instead, she was mistaken about the legal consequences of her actions, because of her failure to understand that she was under a continuing legal obligation to report for duty notwithstanding her purported resignation by letter from the Forces. Thus, while she may not have intended to commit any offence under military law, this lack of intention flowed from her mistake as to the continuing legal obligation to report for duty which that regime imposed upon her until properly released from service in accordance with the Q.R. & O.

It is a principle of our criminal law that an honest but mistaken belief in respect of the legal consequences of one's deliberate actions does not furnish a defence to a criminal charge, even when the mistake cannot be attributed to the negligence of the accused: *Molis v. The Queen*, [1980] 2 S.C.R. 356. This Court recently reaffirmed in *R. v. Docherty*, [1989] 2 S.C.R. 941, at p. 960, the principle that knowledge that one's actions are contrary to the law is not a component of the *mens rea* for an offence, and consequently does not operate as a defence.

I do not rule out the possibility that, in an appropriate case, an officially induced error as to the state of the law might constitute a defence. However, I do not consider that it would be appropriate to rule on this question in the context of this appeal. At trial, defence counsel did raise the possibility of a defence based on an officially induced error of law. However, the precise theory advanced by the defence was somewhat unclear, and, in any case, the judge advocate concluded that there was no evidence to support such a defence, even if it existed. Defence counsel expressed complete satisfaction with the judge advocate's re-charge, in which he repeated that there was no evidence to support a defence based on officially induced error. Consequently, the triers of fact received no instructions with respect to a possible defence of officially induced error of law, and made no finding as to whether it was supported by the evidence.

Before this Court, the appellant in her statement of facts says that she relied upon certain remarks made to her by Colonel Buckham at the meeting of February, 1988 which led her to believe she could resign from the Forces as she did. However, in argument the theory of officially induced error was not pressed and it is unclear whether, or to what extent, it was relied upon. Rather than attempt to unravel the somewhat confusing record, the availability of a defence of officially induced error of law, and whether such a defence arises on the facts of this case, should be left to be ruled upon, if raised, at a new trial.

In view of the above, it is not necessary to decide whether the offence of absence without leave is a *mens rea* offence or an offence of strict liability, for which the required mental state could simply be negligence. At trial, the appellant took the position, with which the judge advocate agreed, that absence without leave is a *mens rea* offence, not an offence of strict liability. Before this Court, she argues that the judge advocate's charge may not have made this sufficiently clear. I am not convinced that the appellant is entitled to raise this issue at all, considering that her counsel at trial stated that he was "totally satisfied" with the re-charge given by the judge advocate

in response to defence counsel's objections to the part of the charge dealing with mens rea. Moreover, it is arguable that the offence of absence without leave is not a mens rea offence.

However, it is not necessary for me to decide this issue, because even assuming that absence without leave is a mens rea offence, the appellant was shown to have the requisite mental state. She was mistaken not about the factual context or the quality of her actions, but rather about their legal consequences. Without considering the possibility of a defence based on officially induced error of law, this is not a circumstance amounting to a defence.

Disposition

For the reasons stated above, the appellant's appeal is allowed and a new trial is ordered.

I would answer the constitutional questions as follows:

1.Does the trial of an accused by General Court Martial constituted pursuant to ss. 166 -170 of the National Defence Act, R.S.C., 1985, c. N-5 , as amended, and the Queen's Regulations and Orders infringe or deny the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by s. 11 (d) of the Canadian Charter of Rights and Freedoms ?

Answer: Yes.

2.If the answer to question 1 is yes, is the trial of an accused by General Court Martial constituted pursuant to ss. 166 -170 of the National Defence Act, R.S.C., 1985, c. N-5 , as amended, and the Queen's Regulations and Orders justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982 ?

Answer: No.

The reasons of La Forest, McLachlin, and Stevenson JJ. were delivered by

//Stevenson J.//

Stevenson J.-- For the reasons I gave in R. v. G  n  reux, [1992] 1 S.C.R. 000, I agree with the Chief Justice's disposition of this appeal in so far as it is based on the s. 11 (d) Charter issue, although I maintain the same reservations I expressed there on this issue. I also agree with the Chief Justice's disposition of the mens rea issue. I would accordingly dispose of the appeal in the manner proposed by the Chief Justice.

The following are the reasons delivered by

//L'Heureux-Dub   J.//

L'Heureux-Dub   J. (dissenting) -- I have had the opportunity of reading the reasons of the Chief Justice. For the reasons I expressed in R. v. G  n  reux, [1992] 1 S.C.R. 000, a case heard at the same time as the case at bar, I am of the view that the right of the appellant to be tried by an independent and impartial tribunal as guaranteed by s. 11 (d) of the Canadian Charter of Rights and Freedoms was not denied by the structure of the General Court Martial.

In so far as the issue of the requisite mens rea for the offence of being absent without leave is concerned, I agree with the views expressed by the Chief Justice.

Consequently, I would dismiss the appeal and answer the constitutional questions as follows:

1.Does the trial of an accused by General Court Martial constituted pursuant to ss. 166 -170 of the National Defence Act, R.S.C., 1985, c. N-5 , as amended, and the Queen's Regulations and Orders infringe or deny the accused's right to a fair and public hearing by an independent and impartial tribunal guaranteed by s. 11 (d) of the Canadian Charter of Rights and Freedoms ?

Answer: No.

2.If the answer to question 1 is yes, is the trial of an accused by General Court Martial constituted pursuant to ss. 166 -170 of the National Defence Act, R.S.C., 1985, c. N-5 , as amended, and the Queen's Regulations and Orders justified by s. 1 of the Canadian Charter of Rights and Freedoms and therefore not inconsistent with the Constitution Act, 1982 ?

I need not answer this question.

Appeal allowed and new trial ordered, L'Heureux-Dubé J. dissenting.

Solicitor for the appellant: Alexander D. Pringle, Edmonton.

Solicitors for the respondent: Jean-Marc Aubry, Richard Morneau and Bernard Laprade, Ottawa.

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