Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20220509

Docket: CMAC-618

Citation: 2022 CMAC 5

CORAM: **CHIEF JUSTICE BELL**
HENEGHAN J.A.
SCANLAN J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

CORPORAL P.J.M. EULER

Respondent

Heard at Fredericton, New Brunswick, and by videoconference hosted by the Registry,

on February 9, 2022.

Judgment delivered at Ottawa, Ontario, on May 9, 2022.

REASONS FOR JUDGMENT BY: BELL, C.J.
CONCURRED IN BY: HENEGHAN, J.A.
SCANLAN, J.A.

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REASONS FOR JUDGMENT

BELL, C.J.

I. Overview

[1] On April 29, 2021 a military judge, sitting at a standing court martial, acquitted Corporal (Cpl.) P.J.M. Euler of charges that he had behaved in a disgraceful manner contrary to s. 93 of the *National Defence Act*, R.S.C. 1985, c. N-5 (NDA) and that he had "ill-treated a person who

by reason of rank was subordinate to him", contrary to s. 95 of the NDA. The Crown appeals from the acquittals.

[2] Both accusations arose from incidents which purportedly occurred in Halifax, Nova Scotia, between April 1, 2019 and August 1, 2019, when the accused and the complainant were both working at the Juno galley. The complainant was training to be a cook and held the rank of private. The respondent, at all relevant times, held the rank of Corporal and was one of the complainant's supervisors.

[3] For the reasons set out below, I would dismiss the appeal.

II. Military Judge's decision

[4] In recounting the relevant facts, the military judge describes how Cpl. Euler and the complainant first met at CFB Shearwater. The Respondent was eventually transferred to Juno Galley; being joined shortly thereafter by the complainant. During the first two days of her work at Juno Galley, in April 2019, the complainant says Cpl. Euler greeted her with a hug. Those incidents were uneventful and do not form the basis of either charge filed against Cpl. Euler. The alleged incidents from which the charges arose are summarized by the military judge at paragraphs 13 - 18 of her reasons:

> [13] The first incident happened in the kitchen. The accused asked her if she needed a hug and, without waiting for an answer, he grabbed her. The front of his body was touching hers, and he was using "hard pressure" when hugging her, to keep her upper body firmly pressed against his; she describes his hips being "glued" to hers. At the same time, Corporal Euler was rubbing her neck, her back, and then the top of her buttocks with both hands. When prompted by the prosecutor to provide additional details on

the area of the buttocks she was referring to, she explained that she meant halfway down the buttocks. The accused also moved his hands to the side of her upper body just below the armpits, close to her breast area. She describes feeling uncomfortable with the accused's conduct. She testifies that the accused said words to the effect of "You like it". At this moment, she told him, "Please stop" and managed to wiggle her way out of his embrace by pushing him away. This occurrence lasted around ten seconds.

[14] She described a second incident that occurred one to two months later in the back room, close to the changing room in Juno Tower. The accused grabbed her to hug her and applied hard pressure to press her body onto his while rubbing the middle part of the buttocks area and the side of her breasts with both hands. She testified that once again, she asked the accused to stop; however, he released the pressure exerted only as she wiggled her way out. This similar incident also lasted about ten seconds. The accused did not say anything this time. His conduct left the complainant feeling uncomfortable and frustrated because it had happened a second time.

[15] She described another physical contact that occurred between the two incidents, while she was working "on the line". She testifies that while passing behind her, the accused hit her buttocks with a clipboard. She believed it was not an accidental touch because of the pressure that was applied. The accused did not say anything because he kept walking past her. She also felt uncomfortable with this contact.

[16] She testified that following the two incidents involving hugging, the accused told her that he had plans to go to a hotel on the weekend and invited her to join him, saying that it would make her feel happy. She assumed that he was not making a joke.

[17] She described yet another incident when she went to see the accused in his capacity as i/c, to inform him that she was feeling unwell. At this moment, with his right hand, he reached to grab her hip or buttocks. She tried to move aside. The accused then said, "I can make you feel better." She asked him to stop. She did not physically push him. This incident was not followed by other similar conduct for about one month.

[18] The day before she reported the allegations regarding the accused's conduct, she described a last incident where the accused rubbed her neck and back while he was having what she described as a "seducing face". This incident happened in the presence of,

> and was witnessed by, Private Hardiman while they were in the baking section of Juno Galley (bake shop).

[5] The military judge properly instructed herself on the law regarding proof beyond a reasonable doubt, including the jurisprudence set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, 63 C.C.C. (3d) 397. She also properly instructed herself that corroboration is not required. (see, e.g., s. 274 of the *Criminal Code*, R.S.C. 1985, c. C-46 [*Criminal Code*]; *R. v. Vetrovec*, [1982] 1 S.C.R. 811, 67 C.C.C. (2d) 1; *R. v. A.G.*, 2000 SCC 17, [2000] 1 S.C.R. 439).

[6] Against that backdrop the military judge considered the complainant's evidence and found it to be credible. She also concluded that four of the five defence witnesses were credible. She concluded Cpl. Euler's evidence, which essentially constituted a denial of the allegations, was "difficult to accept" or "not accept[ed]" (at paras.78, 81).

[7] After concluding that Cpl. Euler's evidence did not leave her with any reasonable doubt, the military judge then moved on to the third prong of the *W.(D.)* analysis. She properly framed the question as set out below, and, instructed herself that just because a witness fails to see an event does not mean it did not occur. At paragraph 82 she states:

> [82] Now I must ask myself, looking at the evidence as a whole, whether I am left with a reasonable doubt as to the accused's guilt. As alluded to earlier, offences of a sexual nature generally happen when no one else is around but the accused and the victim. They are infractions of opportunity, seized by the perpetrator who has a chance to engage into sexual misconduct when alone with the victim. This is why most of the evidence for these cases are mainly tried upon the credibility of witnesses. A statement that a witness did not see anything does not mean that nothing happened; it simply means that the person did not witness the incident.

[8] Despite finding the complainant credible, the military judge then makes observations in which she expresses concern about the reliability of that evidence. For this judge, a favourable conclusion regarding credibility did not lead inevitably to a favourable conclusion regarding reliability.

[9] A brief summary of uncontested facts provides context. The galley is a huge kitchen where meals are prepared for hundreds of people. It is a dangerous place. There is boiling hot water, there are burners, sharp knives and other dangerous implements throughout. The galley is a busy, highly productive and highly demanding workplace. There are 10-12 people working in the galley at any given time. For a significant period of the time during which the allegations against Cpl. Euler were said to have occurred, a junior member of the Canadian Armed Forces was job-shadowing the complainant. Importantly, the military judge noted that the complainant had testified that one type of improper conduct, hugging, took place on a daily basis. It is that testimony of hugging on a daily basis that initially appeared to trouble the military judge as she considered the "whole of the evidence". The military judge reasoned as follows at paragraphs 84 - 87:

> [84] It is not contested that Juno Galley is a very busy workplace with at least ten to twelve people working during the same shift. All staff members have to be vigilant of their surroundings at all time; everybody has to be on the lookout for hazardous circumstances in order to prevent accidents and injuries. In addition, the complainant was tasked with the constant supervision of a subordinate who was, as the Court understands it, shadowing the complainant at Juno Galley. Other than evidence that Juno Galley was an open space generally unobstructed view of the room [sic], the Court was not provided with the details regarding assigned shifts, expected time and location of arrival for staff. There was no evidence provided of galleys schedules pertaining to hours when it was occupied and when it was vacant. Except for the brief mention in the evidence of Mr. Giffin that the

expected time of arrival for the complainant for a specific reporting day was between 1000 and 1030 hours, no evidence was adduced by the prosecution regarding the time that personnel normally arrives, the complainant's and the accused's typical arrival at work, the shift the accused and the complainant were assigned, its duration and whether the eight-hour shift alluded to by Master Corporal Nickerson was for all staff or just the complainant and the accused. There was also no evidence regarding the schedule of the galley with timing for breaks for the staff and the names of the other staff that the accused and the complainant normally would work with. All of these facts were critical to the evidence of the prosecution, but were not adduced at trial.

[85] Although these details may not usually be important for cases of sexual misconduct, since these offences typically happen when no one else is around, they were essential to the prosecution's case in this instance. In effect, the Court is left to speculate as to whether the accused ever had a daily opportunity, over an extended period time [sic], to be alone with the complainant and hug her in a high traffic, open space, closely monitored workplace that is typically crowded, busy and hazardous at a time where a subordinate was shadowing the complainant. The complainant testified that she was trying to avoid the accused, but no evidence was adduced that she effectively changed her schedule or habits as a result. The timing of the incidents is also quite blurry, particularly with the clipboard incident, where no evidence on context was provided, other than it happened on the line, a concept not explained at the trial. Without this evidence, I am left with a reasonable doubt as to the commission of any of the offences as charged.

[86] While I do believe that the accused probably engaged in some sexual improprieties with the complainant, the prosecution failed to prove beyond a reasonable doubt that the accused committed the offences because of the presence of critical gaps in its evidence.

Conclusion

[87] Relying on the evidence admitted in Court, I do find the complainant's testimony to be generally credible. The Court did not accept that she fabricated her evidence. However, although the Court believes that the accused probably, at a given time, conducted himself inappropriately in engaging in some form of sexual improprieties toward the complainant, the evidence I have accepted leaves me with a reasonable doubt as to the accused's guilt. The gaps in the prosecution's evidence as to the

> circumstances in which the daily hugs would have occurred, in such a busy workplace, were critical and leaves the Court with a reasonable doubt as to Corporal Euler's guilt on both charges.
>
> [Emphasis added.]

III. Ground of Appeal

[10] The Crown raises one ground of appeal. It states the issue very succinctly: Did the military judge commit an error of law by requiring corroboration of the complainant's testimony?

IV. Analysis

[11] It is trite law that the Crown may only appeal on a question of law: see, *R. v. Graveline* 2006 SCC 16, [2006] 1 S.C.R. 609, at para. 13; NDA, s. 228, s. 230.1. It is also trite law that not just any error of law will be sufficient to justify allowing an appeal from acquittal. The error of law must reasonably have had a bearing on the acquittal: *Graveline*, at para. 14; *R. v. Sutton*, 2000 SCC 50, [2000] 2 S.C.R. 595, at para. 2; *R. v. Morin*, [1988] 2 S.C.R. 345 at p. 374, 44 C.C.C. (3d) 193; *Vézeau v. The Queen* (1976), [1977] 2 S.C.R. 277, 28 C.C.C. (2d) 81.

[12] Crown counsel, in their written and oral submissions, repeated on numerous occasions that the military judge erred in law by requiring corroboration. However, in my view, the issue in is not as simple as that framed by the Crown. While no one would dispute that a judge may convict on the uncorroborated testimony of the complainant, the jurisprudence is also clear that a judge may acquit an accused based upon a lack of evidence (see, e.g., *R. v. K.(V.)*, 1991 Carswell BC 418, 68 C.C.C. (3d) 18; *R. v. W.(A.)*, 2008 NLCA 52, W.C.B. (2d) 443, at paras. 14-17; *R. v.*

Picot, 2011 NBCA 70, 295 C.C.C. (3d) 125 (Richard J.A. dissenting), appeal allowed for the reasons of Richard J.A., 2012 SCC 54, [2012] 3 S.C.R. 74).

[13] I would also point out that evidence can be credible without being sufficiently reliable to meet the standard of proof beyond a reasonable doubt: *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at p. 526, 97 C.C.C. (3d) 193. The Supreme Court has observed that the term "credibility" is often used in a broader sense which includes reliability: *R. v. G.F.*, 2021 SCC 20, 459 DLR (4th) 375, at para. 82. However, that will not be the case where the trial judge's language demonstrates implicitly or explicitly that credibility is, in the circumstances of the case, distinct from the accuracy or reliability of the evidence.

[14] For example, in the present case, the military judge found the complainant to be credible (that is, not trying to mislead the Court) about being hugged on a daily basis. However, the military judge, despite finding the complainant credible, said she had unanswered questions about the hugging. The basis of that unreliability is explained by the military judge at paragraph 85:

> […] the Court is left to speculate as to whether the accused ever had a daily opportunity, over an extended period of time, to be alone with the complainant and hug her in a high traffic, open space, closely monitored workplace that is typically crowded, busy and hazardous at a time where a subordinate was shadowing the complainant.

[15] Similarly, the complainant's bald assertion that she tried to avoid Cpl. Euler may be credible, that is "worthy of belief", but became unreliable in the absence of context, which, for the military judge, included evidence of the physical surroundings and shift schedules. The

military judge's concerns regarding this evidence are reflected in the following excerpt found at paragraph 85:

> The complainant testified that she was trying to avoid the accused, but no evidence was adduced that she effectively changed her schedule or habits as a result. The timing of the incidents is also quite blurry, particularly with the clipboard incident, where no evidence on context was provided, other than it happened on the line, a concept not explained at trial.
>
> [Emphasis added.]

[16] Finally, I would note that the military judge also had concerns about the failure to produce readily available evidence regarding shift schedules, the lay-out of the kitchen and arrival and departure times of the complainant and Cpl. Euler. Such evidence would have permitted the military judge to be satisfied about the reliability of the complainant's testimony regarding opportunity, timing and frequency of the alleged events.

[17] Whether or not a trial judge erroneously required corroboration was also the central issue in *R. v. Picot*, 2012 SCC 54, [2012] 3 S.C.R. 74. In *Picot*, similar to the present case, the trial judge did not believe the accused, but had concerns which caused him to harbour doubts. As a result, he wanted "more" before he could find the accused guilty. The observations of Richard J.A. in dissent in the Court of Appeal (2011 NBCA 70, 2011 CarswellNB 806), and upheld in the Supreme Court, are equally applicable to the within appeal:

> […] The judge found the accused was probably guilty, but, as explained earlier, he found aspects of the complainant's testimony troubling, which made him want more before the presumption of innocence might give way to conviction on the standard of proof applicable to criminal cases. This is not an error. It is rather a classic example of the criminal justice system at work. Judges do not convict people based on probability, and, when aspects of a

> witness' testimony are troubling, there is nothing wrong for a judge to scrutinize it with care and determine, where appropriate, that, without more, the doubt he harbours has not been dispelled. With respect, this is exactly what happened in this case.
>
> (at para. 24)

[18] I do not consider a trial judge errs when he or she expects evidence, particularly evidence of bald assertions, to be placed in context. It is trite law that absence of proof beyond a reasonable doubt can arise from evidence not called or weaknesses in the evidence (*R. v. J.M.H.*, 2011 SCC 45, [2011] 3 S.C.R. 197 at para. 39). That, with respect, is what occurred in this case. The military judge's approach was consistent with that recently approved by the Court in *R. v. Gerrard,* 2022 SCC 13.

V. Conclusion

[19] The military judge appropriately applied the third prong of the *W.(D.)* test. Furthermore, she appropriately applied the standard of proof beyond a reasonable doubt by assessing the evidence globally rather than in a piecemeal fashion: *J.M.H.*, *supra*.

"B. Richard Bell"
Chief Justice

"I agree.
Heneghan, J.A."

"I agree.
Scanlan, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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