Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20230609

Docket: CMAC-623

Citation: 2023 CMAC 6

CORAM: **CHIEF JUSTICE BELL**
MCVEIGH J.A.
PAPERNY J.A.

BETWEEN:

SERGEANT V.N.E. TURNER

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Ottawa, Ontario, on January 19, 2023.

Judgment delivered at Ottawa, Ontario, on June 9, 2023.

REASONS FOR JUDGMENT BY: CHIEF JUSTICE BELL

CONCURRED IN BY: MCVEIGH, J.A.
PAPERNY, J.A.

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REASONS FOR JUDGMENT

BELL, C.J.

I. Introduction

[1] The complainant C.H. and the Appellant are both members of the Canadian Armed Forces. The Military Judge concluded that in August or September, 2001 C.H., the Appellant and TJB, a mutual friend of C.H. and the Appellant, attended at the Appellant's room in what were commonly known as the "shacks" at CFB Winnipeg in Winnipeg, Manitoba. This gathering in the Appellant's room occurred after an evening of socializing, which included the consumption of alcohol. TJB, whose evidence was accepted by the Military Judge, testified that before attending at the Appellant's apartment, C.H. and the Appellant demonstrated some mutual interest in one another. TJB was the last to leave the Appellant's apartment, leaving C.H. and the Appellant alone.

[2] C.H. testified that she slept alone in the Appellant's bed, while the Appellant slept on the couch, in the same room. While much of C.H.'s testimony lacked precision and clarity, the Military Judge believed her when she testified that at one point the Appellant crawled under the covers of her bed, forced her legs apart and began performing cunnilingus on her, against her will. The Military Judge found the Appellant guilty of one count of sexual assault, contrary to s. 130 of the *National Defence Act,* R.S.C. 1985, c. N-5 ("*NDA*") as contemplated by s. 271 of the *Criminal Code,* (R.S.C., 1985, c. C-46) ("*Criminal Code*"). The Military Judge sentenced the Appellant to nine months of imprisonment and a reduction in rank from that of Warrant Officer to Sergeant, among others. The Military Judge ordered Sgt. Turner's release pending the outcome of the within appeal.

II. Grounds of Appeal

[3] The Appellant raises four grounds of appeal, which are framed as follows in his written submissions:

A. The Military Judge erred in refusing to grant a meaningful adjournment following late disclosure;

B. The Military Judge erred in refusing to grant an adjournment to defence counsel prior to sentencing;

C. The Military Judge erred in restricting the defence's cross-examination of the complainant on her financial situation; and,

D. The Military Judge was not independent and impartial.

[4] I will consider the factual context as well as the relevant jurisprudence for each ground of appeal, separate from the other grounds. For the reasons set out below, I would dismiss the appeal.

III. Analysis

A. *Did the Military Judge fail to grant a meaningful adjournment following late disclosure?*

[5] The offence is alleged to have occurred in August or September, 2001. The complainant first reported the matter through her chain of command to the Military Police in 2019. A member of the Canadian Forces National Investigation Service laid the charge against the Appellant on July 13, 2020 by filing a Record of Disciplinary Proceedings. The prosecution preferred charges

on November 24, 2020 and on June 10, 2021, a Military Judge was assigned to hear the trial. The matter was scheduled to proceed to trial commencing December 6, 2021. The prosecution provided initial disclosure to the defence on November 25, 2020 – more than one year before trial. That disclosure included three video statements and one written statement from the complainant, C.H., one video statement from the accused (Appellant) and one from a potential witness, TJB. TJB's statement had been taken on November 7, 2019. Initially, the prosecution did not intend to call TJB as a witness. For unknown reasons, that changed on November 30, 2021. On that date the prosecution provided to defence counsel a "will say" statement setting out a summary of TJB's potential evidence. It is agreed by all parties that that "will say" statement appeared to be of little value to the prosecution. In this regard, the Military Judge observed:

> My observation on the nature of Mr. [TJB]'s testimony in 2019 is consistent with the initial decision by the prosecution not to call Mr. [TJB] as a witness. That changed on 30 November 2021 for whatever reason.

[6] Knowing that he would be called to provide evidence, TJB reviewed his earlier statement and made additional enquiries, which all resulted in his memory being "rejigged", according to the Military Judge. This "rejigging" of his memory resulted in TJB requesting a further meeting with investigators, which occurred on December 2, 2021. During and immediately after the meeting of December 2, 2021 investigators informed the prosecution of the new revelations from TJB. Essentially, TJB recalled that the Appellant had spent a night with the complainant in August or September, 2001 and that the Appellant had told him, the following morning that he had performed cunnilingus on her. TJB understood from his conversation with the Appellant that the encounter had been consensual. TJB's proposed testimony significantly changed the case for the prosecution. Prior to December 2, 2021, the prosecution's only witness who placed the

accused (Appellant) with the complainant was the complainant herself. It is this late disclosure, which forms the basis of this ground of appeal.

[7] I would first point out that there is no late disclosure in the sense that there is a potential violation of the *Canadian Charter of Rights and Freedoms,* s. 7, Part I of the *Constitution Act, 1982,* being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. The Crown did not possess any evidence prior to December 2, 2021 that it had not disclosed to the defence. There is no assertion that the prosecution attempted to hide any evidence. Immediately upon the proposed evidence coming to its attention, the prosecution communicated that information to defence counsel.

[8] It is important at this point to make a few observations about the conduct of the case by defense counsel. These observations demonstrate the time available to defence counsel to fully investigate, as they sought fit, and the apparent lack of concern about the potential testimony from TJB. First, defence counsel knew TJB was a potential witness as early as November, 2020. They did not attempt to interview him at that time or anytime immediately thereafter. Second, as early as November 30, 2021 defence counsel knew TJB would be a witness at the trial commencing December 6, 2021. Defence counsel made no attempt to interview him between that date and December 5. Although defence counsel requested a one-month adjournment, the Military Judge only adjourned the beginning of the trial from December 6, 2021 to December 8, 2021. Again, defence counsel made no attempt to interview TJB prior to the adjourned date of December 8, 2021. Finally, TJB did not testify until December 13, 2021. Again, there is no record of any attempt by defense counsel to interview TJB prior to his examination in chief. It is

against those facts, and on that timeline, that defence counsel, on December 6, 2021, brought the motion for a one-month adjournment in order to deal with the “late” disclosure of evidence. The Military Judge granted a half-day adjournment following the argument of the motion on December 7, 2021 and a second half-day adjournment which would follow the direct examination of TJB, prior to TJB’s cross-examination.

[9] Whether an adjournment should be granted, and its duration, is a highly discretionary decision to be made by a presiding judge. See, *Barrette v. The Queen*, [1977] 2 S.C.R. 121 at 121; *R. v. Davis*, 1998 CanLII 18030 (NL CA) 1998 CarswellNfld 12 at para. 13.

[10] The Appellant contends the Military Judge erred in explaining the need for an adjournment. The Military Judge specifically referred to the need for the accused (Appellant) to reconsider his plea in light of the new evidence and prepare for the cross-examination of TJB. The Appellant says numerous other factors needed to be considered, including how to approach the cross-examination of the complainant and adjustments to the theory of the defence, among others. I agree with the Appellant. However, one appeals from judgments. One does not appeal from reasons. See e.g. *Park v. Shepheard*, 2022 BCSC 2270 (CanLII) at para. 17 and *Morrison v. Coulter*, 1991 CanLII 5745 (BCCA), 3 BCAC 24 at para. 12. Here, the reasons demonstrate the Military Judge properly exercised his discretion in concluding that an adjournment was necessary. That decision, of course, is not challenged on this appeal and, in my view, should stand.

[11] I now turn to the length of the adjournment. At trial, defense counsel requested an adjournment of one month. Before this Court, appellate counsel suggested that an adjournment of at least one week would have been in order. The variance between the positions advanced by the defence at trial and on appeal, demonstrates the highly discretionary nature of an adjournment decision. In justifying two half-day adjournments, the Military Judge observed that:

a. Disclosure was provided at the earliest possible moment;

b. The information provided was simple;

c. The case was not overly complex;

d. The time allotted for the trial and the challenges in finding a new date.

[12] In deciding the length of the adjournment, the Military Judge was aware of the relevant circumstances including, the following: defence counsel saw no need to speak to TJB in and after November 2020 after becoming aware he was a potential witness; defence counsel did not make any effort to interview TJB between November 30, 2021 and the date of the motion decision, December 7, 2021; and, that TJB would not be testifying until later in the trial, which afforded the defence an opportunity to question him before his examination. It is trite law that there is no property in a witness. The fact the Military Judge did not mention these factors does not detract from the fact that he exercised his discretion in a lawful manner. See *Alberta (Director, Parentage & Maintenance Act) v. B.C.*, 1993 CanLII 7147 (AB KB), 12 Alta LR (3d) 422 at paras. 9-10.

B. *Did the Military Judge err in failing to grant an adjournment to the Appellant prior to sentencing?*

[13] Prior to sentencing, the prosecution provided to defence counsel a Victim Impact Statement (VIS) in which the complainant stated that the "very same act" occurred when she was sexually assaulted at the age of five. Briefly, she stated that when she was five years' old, while living on a military base with her family, a military member had performed cunnilingus on her.

[14] Relying upon C.H.'s statement in the VIS that the very same act had occurred when she was five, the Appellant sought an adjournment of the sentencing hearing. The purpose of the adjournment was to afford the Appellant sufficient time to gather evidence to re-open the case. Based upon the contents of the VIS, the Appellant was concerned that C.H. was suffering from false memory syndrome and was confusing the events that occurred when she was five with those which were the subject of the charges against the Appellant. In seeking the adjournment, the Appellant provided to the Military Judge, among other things, two affidavits: one from Dr. Peter Collins dated January 24, 2022 and one from Dr. Deborah Davis, dated January 23, 2022.

[15] Dr. Collins admits in his affidavit that he had never assessed C.H. He also deposes to the fact that he "[…] will require more time to arrive at a fulsome determination regarding the reliability of the complainant […]". Taken in its most favourable light toward the Appellant, the affidavit of Dr. Collins merely states that in his professional opinion, the information provided to him "[…] raises concerns that the complainant may be experiencing from a false memory of the alleged incident […]". Dr. Deborah Davis does not depose that she met with C.H. Dr. Davis does not depose that she attended the trial. Dr. Davis summarizes the materials made available to her by Crown Counsel, including a copy of the VIS. Taken in its most favourable light for the Appellant, Dr. Davis opines that the incident from which C.H. suffered "[…] raises the

possibility that she is projecting what happened when she was assaulted when five years old onto WO Turner".

[16] I can do no better than to quote extensively from the reasons of the Military Judge in dismissing the motion for an adjournment, which are found at pages 1468 and 1469 of Volume VIII of the Appeal Book. The Military Judge opined as follows:

> 23. As expressed summarily to the parties when announcing my decision, I will assume, without deciding, that I would have the authority to cancel my findings and re-open the proceedings. The question now becomes whether the facts submitted in support of the application would justify doing so. If not, then the application for an adjournment has no reasonable prospect of succeeding because it would only lead to granting time to obtain information that could not possibly justify a re-opening of the defence's case.
>
> 24. The applicant submits and the prosecution accepts that the test for re-opening of the case is as set by the Supreme Court of Canada in the *Palmer and Palmer v. The Queen* 1979 CanLII 8 (SCC) at page 205 as follows:
>
> > (1) the evidence should generally not be admitted if, by due diligence, it could have been adduced at trial;
> >
> > (2) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the trial;
> >
> > (3) the evidence must be credible in the sense that it is reasonably capable of belief; and
> >
> > (4) it must be such that if believed it could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result
>
> 25. I find that the evidence that the applicant expect could be adduced does not meet that test, essentially for the reasons argued by the prosecution.

26. Indeed, the prosecution has demonstrated that the statement contained in the draft victim impact statement of 18 January 2022 was already known to the parties as the complainant had made statements to the same effect to police on two occasions before, as demonstrated from at page 4 and pages 24 and 25 of the 25 September 2019 statement (Exhibit M4-4) and at pages 34 and 35 of the 2 October 2019 statement (Exhibit M4-5). In fact, as noted in the Court's findings, the complainant alluded to one or several previous traumatic events during her testimony while answering general, unrelated questions from counsel. At one point in the cross-examination, defence counsel even stated that he did not want to hear details about a previous event. Defence counsel also alluded to flashbacks that the complainant claimed to have experienced as an indication of the lack of reliability of her testimony, as evidenced by the discrepancies between her memory and unquestionable facts. These submissions were accepted as the findings are clear as to the reliability concerns stemming from memory triggers.

27. I find that the defence theory at trial was that the complainant was unreliable. The existence of a previous traumatic event was known to counsel who made a conscious decision not to explore it. In these circumstances, the first criteria of the test has not been met. Further, I find that the second criteria is not met either. The affidavits in support of the application do not establish the existence of relevant evidence bearing upon a decisive issue. At best, the affidavits raise the possibility that expert witnesses may come to an opinion on the possibility that the complainant may have experienced false memory of events. This is short of what is required under the second criteria. In the circumstances where the evidence proposed only raises a possibility of evidence, the assessment of the credibility of that evidence is not conclusive. I do accept that the affiants are credible experts, yet their views on the possibility of an opinion are based on what they were given and does not constitute evidence of the fact that the complainant would have experienced false memory.

28. More importantly though, the opinion obtained from Drs Collins and Davis on the possibility of false memory were given without them being informed of the fact that an independent witness had heard WO Turner state the day following the assault that he had awaken the complainant by going down on her, a statement entirely compatible with the testimony of the complainant as to what happened. The findings are clear to the effect that the testimony of that independent witness, Mr Baker, was key in concluding that the acts complained of had occurred. This leads me to conclude, in relation to the important fourth

> criteria, that the evidence could not reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result. The "very same acts" to use the language of the draft victim impact statements were not proven beyond reasonable doubt only by the testimony of the complainant.
>
> 29. I am convinced there is no possibility of a miscarriage of justice having occurred in this case. Any request to re-open the case could possibly be successful. Consequently, there is no need to allow time to defence counsel to pursue this course of action.

[17] I agree with the Military Judge that the defence offered no new evidence as contemplated by the *Palmer* test (*Palmer v. The Queen*, 1979 CanLII 8 (SCC), [1980] 1 S.C.R. 759). There is no jurisprudence which supports the concept of granting an adjournment to an accused in the hopes that he might find new evidence.

[18] I consider untenable, the assertion by the Appellant that he was taken by surprise by the statement contained in the VIS. In C.H.'s first statement to the Military Police on September 25, 2019 she stated in part: "[…] and when I was five years old I was assaulted by a big sort of brother who was an artillery guy from Shilo […]". Further in that same statement she goes on to say that she was assaulted "[…] in the same way that I was all those years ago […]" and further still at page 24 of the September 25, 2019 statement C.H. said "Well, especially it was like the same thing, from when I was a kid, and this happened to me when I was five". Finally, in a statement to Military Police on October 2, 2019, also provide to the accused in November, 2020, C.H. stated in part:

> […] so I had another incident when I was a little kid with a babysitter, on base in Barracks, and that is also documented too, my mom didn't (indiscernible) and I remember being interviewed about that, that that person did to me, and so I think that's why it really stuck out in my head and like scared the shit out of me because I was like, 'Oh, my God, again. I'm going through this

> again'. But, in a very different way, like – it was like exactly the same […]". (Appeal Book Vol IV, page 652)

[19] Prior to trial the accused (Appellant) took no steps to advance an assertion of false memory syndrome. He also took no steps to cross-examine on this prior sexual conduct as contemplated by ss. 276 or 278 of the *Criminal Code*. The request for an adjournment constituted a clear attempt to redo the trial.

[20] I agree with the observations of the Military Judge that, in the circumstances, an independent witness (TJB), a then friend of the accused, not only placed the accused with C.H. but testified that the accused (Appellant) spoke about performing oral sex on C.H. This evidence, in my view, eliminates any concern about an unsafe verdict arising from false memory syndrome.

C. *Did the Military Judge err in restricting the defence's cross-examination of the complainant on her financial situation?*

[21] Near the beginning of C.H.'s cross-examination, defence counsel put questions to her regarding her financial circumstances. Defence counsel's declared intent for asking such questions was to demonstrate a motive for C.H. to lie. One of the theories of the defence was that C.H. made up the story about the alleged sexual assault for financial gain, in order to benefit from a class action for victims of sexual assault, harassment or other sexual misconduct in the Canadian Armed Forces. According to the Appellant, the timing of her disclosure of the sexual assault to Military Police in September, 2019 was suspect because it came shortly after the publication of news about the class action settlement.

[22] The Military Judge immediately entered into a *voir dire* to determine the admissibility of evidence related to C.H.'s finances, and, in particular her involvement, if any, in the class action. Recall that at all relevant times surrounding the filing of the complaint and the trial, C.H. held the rank of Sergeant in the Canadian Armed Forces. Her salary level, if at all relevant, would have been common knowledge to all in the courtroom, including the presiding judge.

[23] In the course of the *voir dire* the Military Judge presumed that C.H. was aware of the class action at the time she filed her complaint with the Military Police. He also presumed she had made a claim. The Military Judge framed the issue as follows:

> Here, the evidence sought to be entered are answers from the complainant tending to show that she would have invented her story to seek and/or obtain financial compensation, including through a claim filed with the Canadian Armed Forces Sexual Misconduct class action settlement claim's administrator on the basis of her versions of the facts.

[24] One must not overlook the subtlety of the manner in which the issue is framed. The Military Judge clearly referred to "financial compensation" in general, which included, but was not limited to, the potential participation in the class action claim. Defence counsel acknowledged his questions would not be limited to C.H.'s potential participation in the class action, but also to her financial situation in general. Defence counsel informed the court his line of questioning could lead to questions about C.H.'s ability to finance her household, which includes herself and her two children. Defence counsel also acknowledged that questions might be asked regarding any support payments C.H. receives from her former spouse. He acknowledged this questioning could lead to further applications for disclosure. Frankly, the potential list of financial considerations is infinitesimal.

[25] The Military Judge was not convinced this would be a proper line of questioning. He stated, in part, that he could not possibly conceive that "submitting a claim […] would constitute a motive to lie". After concluding there was no factual relevance to the proposed line of questioning, the Military Judge then considered the legal relevance from a cost benefit analysis as contemplated in *R. v. Mohan* 1994 CanLII 80 (SCC), [1994] 2 S.C.R. 9 [*Mohan*] at 21 where Justice Sopinka, for the Court, stated:

> This further enquiry may be described as a cost benefit analysis, that is whether its value is worth what it costs. Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability.
>
> [Citations omitted].

[26] After concluding that the proposed evidence was neither logically relevant, nor legally relevant, the Military Judge observed that based upon the affirmation of defence counsel, such evidence would open the door to further useless enquiries. Those enquiries as described by the Military Judge, and as affirmed by defence counsel, could include an application for disclosure of financial records, which would consume significant resources and result in significant trial delays.

[27] Following the *voir dire*, the Military Judge refused to permit any questions about the details of C.H.'s "financial means or situation". In the event that general prohibition were insufficient, the Military Judge then specifically declared that there would be no questions

permitted “on anything related to a claim submitted or not under the Canadian Armed Forces class action lawsuit settlement”.

[28] With one minor exception, I agree with the analysis undertaken by the Military Judge. In concluding that the fact of making a claim under the class action regime was logically irrelevant, the Military Judge referred to the terms of settlement and noted that a claimant need not have filed a criminal complaint. This was the principal basis upon which the Military Judge concluded testimony about the class action would not be logically relevant. However, as contended by defence counsel, there was no evidence that C.H. knew about this provision. Therefore, it follows that that clause should not have been used the Military Judge to negate logical relevance. That said, as already noted, the defence did not limit its application to the class action. Defence counsel clearly intended to cross-examine C.H. on virtually all of her finances, including support payments, if any; the cost of living for a household of one adult and two children.

[29] I agree with the Military Judge’s conclusion with respect to the application of the *Mohan* test regarding legal relevance, including trial efficacy and cost-benefit analysis. I would add that in virtually every criminal offence, including sexual assault, schemes exist for victim compensation. See, for example, Alberta, the *Victims Restitution and Compensation Payment Act* SA 2001, c V-3.5; New Brunswick, the *Compensation for Victims of Crime Regulation - Victims Services Act*, NB Reg 1996-81 under the *Victims Services Act*, RSNB 2016, c.113; and, Nova Scotia, the *Compensation for Victims of Crime Act*. R.S., c. 83, s. 1. In my view, questioning about finances, potential compensation resulting from a civil trial or any compensation scheme would, except in rare circumstances, constitute cross-examination on a collateral issue, which is

inappropriate. See, for example, *R. v. Jason C. Boyd*, 2006 MBQB 128 (CanLII), 203 Man R (2d) 282 at para. 2; *R. v. C.F.*, 2017 ONCA 480 (CanLII), [2017] OJ No 3034 (QL).

[30] In the event the Military Judge erred with respect to his conclusion regarding logical relevance, I am satisfied the error was so harmless or trivial that it could not have had any impact on the verdict. I would apply the *curative proviso* set out in s. 686(1)(b)(iii) of the *Criminal Code* and s. 241 of the *NDA* to uphold the conviction. As with the previous two grounds of appeal, I would reject this ground of appeal.

D. *Was the Military Judge independent and impartial?*

[31] The present appeal raises the same issue that was raised in *R. v. Remington* 2023 CMAC 3 [*Remington*]. For substantially the same reasons set out in *Remington*, I would dismiss this ground of appeal. I remain of the view this Court's decisions in *R. v. Edwards; R. v. Crépeau; R. v. Fontaine; R. v. Iredale* 2021 CMAC 2; *R. v. Proulx; R. v. Cloutier* 2021 CMAC 3; *R. v. Christmas* 2021 CMAC 1; *R. v. Brown* 2022 CMAC 2; *R. v. Thibault* 2022 CMAC 3; and *Remington* constitute sound jurisprudence and reflect the current state of the law.

IV. Conclusion

[32] For the reasons set out above, I would not interfere with the Military Judge's exercise of his discretion as it relates to the two adjournment requests. I would also affirm his decision to limit cross-examination of C.H. regarding her finances. Finally, I am of the view there is no merit to the assertion the Military Judge lacked independence. I would dismiss the appeal. As

there is no appeal from the sentence imposed, the Appellant is required to present himself to Military Police in order to commence serving his sentence.

"B. Richard Bell"
Chief Justice

"I agree.
Glennys L. McVeigh, J.A."

"I agree.
Marina S. Paperny, J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	JUNE 9, 2023

APPEARANCES:

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