Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20201117

Docket: CMAC-604

Citation: 2020 CMAC 5

[ENGLISH TRANSLATION]

CORAM: **CHIEF JUSTICE BELL**
LEBLANC J.A.
CHARBONNEAU J.A.

BETWEEN:

CAPTAIN J. RENAUD

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Quebec City, Quebec, on October 16, 2020.

Judgment delivered at Ottawa, Ontario, on November 17, 2020.

REASONS FOR JUDGMENT BY: BELL C.J.

CONCURRED IN BY: LEBLANC J.A.
CHARBONNEAU J.A.

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REASONS FOR JUDGMENT

BELL C.J.

[1] On November 14, 2019, a military judge returned a finding of guilty in respect of Captain Joel Renaud (Captain Renaud) following a 10-day trial in which the Standing Court Martial heard 18 witnesses (*R. v. Renaud*, 2019 C.M. 4021) [*Renaud*]. Charged with five offences, Captain Renaud, at the end of the trial, was found guilty of two (2) charges, that is, counts 4 and 5, both of which were laid under section 129 of the *National Defence Act*, R.S.C. 1985, c. N-5 for conduct to the prejudice of good order and discipline.

[2] During the period in which the facts that are the subject of those two charges occurred, Captain Renaud held the position of provost marshal for the Canadian mission in Romania named Operation REASSURANCE. The position is essentially equivalent to that of a chief of police. The mission lasted from August 2017 to January 2018, but Captain Renaud was only there in September and October 2017.

[3] With respect to the fourth count, the military judge found that the prosecution had proven beyond a reasonable doubt that, during a meeting of about 10 people, Captain Renaud had simulated a sexual act in the presence of another captain, who was at that meeting, and that the action had been directed at her. The military judge also found that Captain Renaud, in doing so, was guilty of conduct to the prejudice of good order and discipline.

[4] The incident that led to the fifth charge occurred during an official dinner to mark the departure of a civilian who had recently completed his work with the mission. Two women who were members of the Canadian mission and who held a lower rank than that of Captain Renaud

(five ranks in one case, six in the other) had been invited to that dinner to highlight their contribution at work and their exceptional performance. They considered themselves to be—and undoubtedly were—privileged to have the opportunity to attend that dinner. During the walk prior to the dinner, and during the dinner, Captain Renaud made comments and observations about some of the physical attributes of women who were walking down the street. According to the testimony, Captain Renaud allegedly said, among other things, several times, “look at the girl’s tits” or “look at her ass”.

[5] After having determined that Captain Renaud had used these words, the military judge found that, in the circumstances, Captain Renaud’s conduct was to the prejudice of good order and discipline (*Renaud* at para. 165):

> [TRANSLATION]
>
> [165] I understand from Captain Renaud’s testimony that he favours egalitarian relationships between officers and non-commissioned members, regardless of rank. He may firmly believe in that philosophy but I have no doubt that he, as a military police officer, knew or should reasonably have known that that point of view was not shared by the CAF’s leadership. . . . By his unprofessional conduct at the dinner on August 19, 2017, that is, his humiliating and demeaning comments toward women, he lost the respect of two junior non-commissioned members. His conduct was to the prejudice of good order and discipline.

[6] Captain Renaud argues that these two findings are unreasonable. With regard to the finding on the fourth count, he argues that the military judge did not correctly apply the rules established in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, [1991] S.C.J. No. 26 [*W.(D.)*]. He submits that the military judge simply chose the version of the facts that he preferred instead of addressing the crucial issue, that is, whether the evidence, considered as a whole, convinced him beyond a

reasonable doubt of his guilt. With regard to the fifth count, Captain Renaud argues, among other things, that the military judge erred in finding that his conduct, which was described as [TRANSLATION] "unprofessional", was equivalent to a level of conduct that results in, or tends to result in, prejudice to the good order and discipline of the Canadian Armed Forces as defined in *R. v. Golzari*, 2017 CMAC 3, at para. 77 [*Golzari*].

[7] I disagree with Captain Renaud's claims for the brief reasons that follow.

[8] With respect to the fourth count, the issue was purely a question of fact. The complainant provided her detailed version of the incident, and Captain Renaud provided a blanket denial. The military judge correctly instructed himself with respect to what the burden of proof beyond a reasonable doubt means and with respect to the application of that burden of proof in matters where the assessment of credibility is the central issue: (*Renaud* at paras. 11 and 12):

> [TRANSLATION]
>
> [11] The most important thing to remember about credibility is that it is not a competition between the prosecution witnesses and the accused. Indeed, in a criminal trial, the accused is presumed innocent, not only before and at the commencement of the trial, but also throughout it. It is not because I was impressed by the prosecution evidence at the commencement of the trial that the burden of proof was then transferred to Captain Renaud. That burden always rested with the prosecution. I cannot presume guilt before the close of the evidence and arguments. Before I can find an accused guilty, I must be convinced, beyond a reasonable doubt, of the existence of all the essential elements of the offences with which he is charged. The standard of proof beyond a reasonable doubt is inextricably linked to the presumption of innocence, a fundamental principle governing all criminal trials. That standard applies to the assessment of credibility. Therefore, if I were to find that two witnesses with contradictory statements are equally credible and I do not know whom to believe, it would mean that the prosecution was not able to displace the presumption of

> innocence that belongs to the accused and I would have to find the accused not guilty.
>
> [12] Therefore, I must not return a finding by deciding whether I believe the defence evidence or the prosecution evidence. When contradictory testimony is given, the approach to take is set out in *R. v. W.(D.)*, [1991] 1 S.C.R. 742, where the Supreme Court of Canada explained, at page 757, the credibility assessment method that triers of fact must follow to respect the fundamental obligation imposed on the prosecution to prove offences beyond a reasonable doubt. If I believe the accused's testimony in light of all of the evidence, I must acquit the accused; if I do not believe the accused's testimony, but it raises a reasonable doubt in me, I must also acquit the accused. Lastly, even if the accused's testimony does not raise any doubt in me, I must ask myself whether, considering the evidence that I accept, I am convinced of the accused's guilt beyond a reasonable doubt.

[9] In his extensive reasons, the military judge found that the complainant was credible and that her testimony was reliable. He also explained his findings concerning Captain Renaud's credibility (*Renaud* at paras. 21 to 23):

> [TRANSLATION]
>
> [21] With regard to Captain Renaud's credibility, I am of the opinion that his memory of the events is generally good. He clearly waited a long time for the opportunity to testify in his defence and provided full answers to counsel's questions. However, he failed to hide his animosity toward counsel for the prosecution. That animosity was probably related to his deep conviction that he did nothing to justify his indictment before the Court Martial. On at least two occasions, he unnecessarily disclosed details of the sex life of the prosecution witnesses, be it out of revenge or to try to deter the prosecutor, who was asking difficult questions in cross-examination. That mean-spirited tendency makes me doubt his sincerity and his commitment to tell the truth. . . .
>
> [22] To be clear, even though I expressed doubts about Captain Renaud's judgment regarding the personal relationships that he developed during his deployment, that concern has nothing to do with my findings on his credibility. Captain Renaud testified to the effect that all military members are equal regardless of rank. The evidence shows what seems to be a practice on his part of

> engaging in discussions, discussions that often he initiated, with female military members, some of whom are of a considerably lower rank, about details that are of a personal nature. In cross-examination, I objected to a suggestion from the prosecution to the effect that Captain Renaud was [TRANSLATION] "in pursuit" during his deployment. I still believe that it was inadmissible propensity evidence in relation to the specific facts alleged against Captain Renaud. What I cannot ignore, however, is Captain Renaud's use of that type of information in his testimony as well as his far-fetched theories on the reason for his actions. For this reason, I will remain skeptical of those explanations, while accepting that he may very well have told the truth about some of the other relevant aspects of the evidence, especially when he is supported by other credible testimony.
>
> [23] That being said, Captain Renaud's lack of credibility may very well not be determinative if the prosecution's evidence does not have the credibility required to leave me without a reasonable doubt about the facts. . . .

[10] In assessing the testimony pertaining to the fourth count, the military judge, contrary to the appellant's claims, did not simply compare the complainant's testimony and that of Captain Renaud and choose the one that he preferred. He also did not find Captain Renaud guilty simply because he believed that the complainant was honest. He considered the actions of the complainant in her testimony to describe Captain Renaud's act, the size of the room where the incident took place, the presence of other people in the room, the fact that a witness favourable to the defence did not attend all similar meetings, the fact that no one, including the complainant, knew the exact date of the incident and the fact that, according to the complainant, the other people who attended the meeting were looking at their notes when the act alleged against Captain Renaud was committed.

[11] The appellant notes that the military judge engaged in speculation about the possible reasons why no other military member who was in the room had been called to testify about the

incident. I agree with the appellant on that point, but I am satisfied that that does not compromise the military judge's entire analysis or his application of the principles set out in *W.(D.)*. The military judge's comments to that effect are regrettable but have no impact, in my opinion, on the disposition of the appeal. It is important to remember that the reasons of a judgment must be considered as a whole (*W.(D.)*, at para. 24).

[12] With regard to the fifth count, it is important to consider, as the military judge did, the fact that at the time of the events, Captain Renaud held a much higher rank (five and six ranks respectively) than that of the two complainants. As provost marshal (chief of police), Captain Renaud was responsible for their safety. It is to him, or to the people under his charge, that they would have had to turn if they, or their colleagues, felt physically threatened or had been sexually harassed during the mission. Captain Renaud represented not only the officer corps, but also the military police. In my opinion, the military judge correctly applied the principles set out in *Golzari* and *R. v. Bannister*, 2019 CMAC 2. His assessment of the evidence and his analysis of Captain Renaud's conduct are consistent with the case law.

[13] As stated in *R. v. Biniaris*, 2000 SCC 15, [2000] 1 S.C.R. 381, the trier of fact has considerable latitude in his or her assessment of the evidence. In my opinion, in this case, the findings are not unreasonable and the military judge did not commit any error of law that would justify the intervention of this Court. For these reasons, I would dismiss the appeal.

"B. Richard Bell"
Chief Justice

“I agree.
René LeBlanc J.A.”

“I agree.
L.A. Charbonneau J.A.”

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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CONCURRED IN BY:	LEBLANC J.A. CHARBONNEAU J.A.
DATED:	NOVEMBER 17, 2020

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