Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20221116

Docket: CMAC-622

Citation: 2022 CMAC 9

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

BETWEEN:

SAILOR THIRD CLASS J.G. STEWART

Appellant

and

HIS MAJESTY THE KING

Respondent

Heard at Ottawa, Ontario, on October 6, 2022.

Judgment delivered at Ottawa, Ontario, on November 16, 2022.

REASONS FOR JUDGMENT BY: THE COURT

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REASONS FOR JUDGMENT

THE COURT

I. Introduction

[1] The Complainant R, L, and the Appellant were all members of the Canadian Armed Forces. They were friends and socialized together from time to time. On 9 August 2018, R and L went to the quarters the Appellant shared with his roommate, for a barbecue. R testified that at one point she went into the kitchen, at which time, the Appellant kissed her and grabbed her buttocks, without her consent. The Appellant testified that the Complainant had followed him into the kitchen and hugged him from behind. He testified that he responded by kissing her on the neck in a playful manner.

[2] Later in the evening, R and L accompanied the Appellant to his bedroom. R and L sat at the end of the bed, while the Appellant sat on the desk chair at the foot of his bed. All three watched videos on the computer on the desk. L left the bedroom on two occasions for short intervals, which he estimated at 1-2 minutes the first time, and 5-10 minutes the second time. At some point, both the Complainant and the Appellant were lying on his bed, watching videos. When L returned to the bedroom for the last time and opened the door, he saw the Complainant and the Appellant facing each other, standing up by the foot of the bed. The Complainant had the button on her shorts undone. L felt as though he had walked into something compromising. He did not know what to make of the situation and described it as “uncomfortable”. The Complainant testified that during the second interval when L was absent from the room, the Appellant forced sexual intercourse upon her. The Appellant testified that R was a willing and

active participant in consensual sexual relations. This factual outline is drawn from the Military Judge's reasons in *R. v. Stewart*, 2021 CM 5013.

[3] At the time of the incident, R and the Appellant were 18 and 22 years old respectively. Each had consumed significant amounts of alcohol. The trial judge ultimately concluded that the Complainant had the capacity to consent to sexual relations. The Complainant testified "I felt like my consent was invalid, sir, because I was incredibly intoxicated and I was definitely in an emotional state even prior to drinking" and "What I meant when I said that was if you're in a, for lack of a better term, in, like, just a really messed up head space, whether it be emotional, whether it be because you are intoxicated, then there shouldn't be any consent there." She stated that if she was emotionally vulnerable, that made her consent invalid.

[4] The central issue at court martial was consent. The Military Judge had to assess the credibility of the witnesses.

[5] The Appellant was convicted on two counts of sexual assault, contrary to s. 271 of the *Criminal Code*, R.S.C. 1985, c. C-46 ("*Criminal Code*") and laid pursuant to s. 130 of the *National Defence Act*, R.S.C. 1985, c. N-5 ("*NDA*"). The first conviction pertained to the kitchen incident and the other to the sexual contact in the bedroom.

II. Grounds of Appeal and Brief Summary

[6] The Appellant raises two grounds of appeal. One of them relates to an application pursuant to s. 278.93(4) for a determination of whether evidence of prior sexual conduct of the

Complainant would be admissible under s. 276(2). The Military Judge concluded the proposed evidence was not capable of being admissible and refused to hold a Stage Two hearing under s. 278.94. The Appellant contends the Military Judge erred in refusing to hold a Stage Two hearing. For the reasons set out below, we agree. Because a new trial is necessary, we need not address the other ground of appeal.

III. The s. 276 Application at Court Martial

[7] The Appellant brought his application after R's examination in chief. He relied on a statement L had made to military police indicating that L had had sexual intercourse with R two days prior to the alleged sexual assault. Pursuant to s. 278.93, he sought an evidentiary hearing to determine if that evidence was admissible. Section 276 applies to evidence of extrinsic sexual activity whether that evidence is proposed to be adduced from the Complainant or another person.

[8] The Appellant submits that the Military Judge erred by dismissing his s. 276 application without allowing an evidentiary hearing about the admissibility of the evidence under s. 278.94. The Appellant argued that the evidence was relevant to the issue of whether the Complainant had a motive to falsely state that the physical contact between R and the Appellant was non-consensual. The Appellant also argued that the evidence was relevant to the assessment of L's credibility.

[9] The Military Judge held that the evidence was irrelevant, and that the Appellant relied on one or both stereotypical inferences forbidden by statute. The Military Judge opined:

> There is no relevant or credible evidence offered in the affidavit in support of the application that would support the theory that the complainant and the witness had a motive to lie. Further, there is no evidence that the witness and the complainant were in fact, engaged in a romantic, sexual or committed relationship at the time. Consequently, the evidence of the one-time sexual activity between the complainant and the witness, does not assist this Court in finding the truth and coming to a fair verdict. This evidence is irrelevant, thus inadmissible.

[10] The Military Judge went on to conclude the following:

> …[A]lthough evidence of a motive to lie is generally relevant evidence to the assessment of credibility, the Court finds that the evidence sought to be admitted is not capable of being admissible under subsection [sic] 276(2) The contention that the complainant and the witness have a motive to fabricate, is not supported by the evidence presented in the affidavit. It has no air of reality since it is not supported by a factual foundation. The evidence the applicant seeks to adduce is prohibited under section 276 of the *Criminal Code;* it is irrelevant to the charged offences before the court [*sic*].
>
> I find that this evidence would tend to support that, because the complainant had a sexual activity with a third party two days before the alleged incident, the Court is asked to infer that she is less worthy of belief. Consequently, after a facial consideration of the application and supported affidavit, I find the evidence of prior sexual activity between the complainant and [L] is not capable of being admitted under section [*sic*] 276 of the *Criminal Code*.

[11] Having held that the proposed evidence was incapable of admission, the trial judge refused to hold a *voir dire* to determine the admissibility of the evidence of prior sexual activity. She indicated that the Appellant could question R about the nature of her relationship with L, without asking about the alleged sexual activity.

[12] During R's cross-examination, the Appellant renewed his application for an admissibility hearing regarding this evidence. By then there was evidence before the Military Judge that R had

been staying in L's home for about a week before the events in issue. When asked if she knew that L had strong feelings for her, she responded "I knew he thought he had feelings for me or he may have." She said they were very close, "but on a friendship level. Not on an intimate level." R volunteered that her relationship with L was purely platonic. This is in contrast to the proposed evidence of L who said he had had intercourse with R just two days before the disputed events.

[13] The prosecution opposed the renewed s. 276 application and argued that there had been no change in the evidence that would support such an application. The Military Judge agreed with the prosecution.

IV. Arguments on Appeal

A. *The Appellant*

[14] The Appellant submits that the Military Judge erred by refusing to embark on an evidentiary hearing to determine whether the evidence of the Complainant's other sexual activity was admissible. The evidence was tendered to support the argument that the Complainant may have had a motive to falsely claim that her sexual contact with the Appellant was not consensual. The credibility and reliability of R's and L's evidence was squarely at issue and the proposed evidence was important to the Appellant's ability to raise a reasonable doubt about the prosecution's evidence.

[15] The Appellant argues that a decision to refuse to grant a hearing under s. 278.94 of the *Criminal Code* is a question of law alone, reviewable for correctness and that no deference is owed to the Military Judge's decision.

B. *The Respondent*

[16] The Respondent submits that trial judges are expressly tasked with exercising their discretion as evidentiary gatekeepers to exclude potentially highly prejudicial evidence. The Crown submits that the Military Judge's decision should be afforded great deference. It submits that the Appellant had a fair trial and suffered no prejudice from the ruling.

[17] In the event that this Court finds error on the part of the Military Judge, the Crown asks that the Court apply the curative proviso on the contention that the evidence in question was of marginal utility and would not have impacted the outcome of the Military Judge's credibility analysis over any of the witnesses.

V. Analysis

A. *The Statutory Framework*

[18] Section 276 of the *Criminal Code* creates exclusionary rules that were enacted to eliminate the misuse of evidence of a Complainant's prior sexual activity for irrelevant or misleading purposes, while also ensuring that an accused's right to a fair trial is not compromised: *R. v. Darrach*, 2000 SCC 46 at paras. 19, 25; see also *R. v. J.J.*, 2022 SCC 28, at para. 5.

[19] There are two stages to the process for assessing admissibility. At Stage One, the accused must make an application in writing that sets out detailed particulars of the evidence proposed and explains the relevance of that evidence. The application must be given to the prosecutor and the clerk of the court.

[20] Before a judge grants a Stage Two hearing, s. 278.93(4) stipulates that the trial judge must be satisfied that the procedural requirements have been met and that the evidence is capable of being admissible under s. 276(2) [Emphasis added].

[21] The conditions of admissibility are outlined at s. 276(2). These conditions include a prohibition against evidence offered to support the twin myths, that by reason of other sexual activity the Complainant is more likely to have consented to the sexual activity forming the subject matter of the charges or that he or she is less worthy of belief.

[22] In order to be "capable of being admissible" the proposed evidence must be relevant to an issue at trial and it must, as outlined at s. 276(2)(d), have "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."

[23] Subsection 276(3) directs that in determining whether evidence is admissible the judge must consider the following factors:

(a) the interests of justice, including the right of the accused to make full answer and defence;

(b) society's interest in encouraging the reporting of sexual offences;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case;

(d) the need to remove from the fact-finding process any discriminatory belief or bias;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury;

(f) the potential prejudice to the complainant's personal dignity and right of privacy;

(g) the right of the complainant and of every individual to personal security and to the full protection and benefit of the law: and

(h) any other factor that the judge considers relevant.

[24] It is common ground that the Military Judge did not balance the probative value of the evidence against the danger of prejudice to the proper administration of justice. She excluded the evidence because she thought it was irrelevant and engaged the prohibited twin stereotypes.

B. *Standard of review*

[25] Discretionary decisions weighing probative value and prejudice are most often reviewed with deference to the first instance decision maker. Examples include: decisions as to the admissibility of an accused's criminal record (*R. v. Corbett*, [1988] 1 S.C.R. 670, at p. 697, *per* Dickson C.J.C.); the admissibility of similar act evidence (*R. v. Handy*, [2002] S.C.R. 908, at para. 153); and evidence of extrinsic sexual activity (*R. v. M.T.*, 2012 ONCA 511, 289 C.C.C. (3d) 115, at para. 54). In contrast, decisions as to relevance are reviewed on the standard of correctness. On this point, we extract the following principles from the Supreme Court of Canada's recent decision in *R. v. Schneider*, 2022 SCC 34 at para. 39:

1) To determine relevance, a judge must ask whether the evidence tends to increase or decrease the probability of a fact at issue. Beyond this, there is no "legal test" for relevance.
2) Judges, acting in their gatekeeping role, are to evaluate relevance as a matter of logic and human experience. When doing so, they should take care not to usurp the role of the finder of fact, although this evaluation will necessitate some weighing of the evidence, which is typically reserved for the jury.
3) The evidence does not need to firmly establish the truth or falsity of a fact in issue, although the evidence may be too speculative or equivocal to be relevant. The threshold for relevance is low and judges can admit evidence that has modest probative value.
4) A judge's consideration of relevance does not involve considerations of sufficiency of probative value and admissibility must not be confused with weight. Concepts like ultimate reliability, believability, and probative weight have no place when deciding relevance.
5) Whether evidence is relevant is a question of law, reviewable on the standard of correctness.

[26] Even if relevance is not initially apparent, the dynamic nature of a trial may provide further context that establishes the relevance of proposed evidence. Guiding principles on this point, most recently reaffirmed at para. 40 of *Schneider*, were noted by Charron J. in *R. v. Blackman*, 2008 SCC 37, [2008] 2 S.C.R. 298, at para. 30 and we summarize them as follows:

1) Relevance can only be fully assessed in the context of the other evidence at trial.

2) However, as a threshold for admissibility, the assessment of relevance is an ongoing and dynamic process that cannot wait for the conclusion of the trial for resolution.

3) Depending on the stage of the trial, the "context" within which an item of evidence is assessed for relevance may well be embryonic. Often, for pragmatic reasons, relevance must be determined on the basis of the submissions of counsel. The reality that establishing threshold relevance cannot be an exacting standard is well captured in the following statement of Cory J. in *R. v. Arp,* [1998] 3 S.C.R. 339 at para. 38:

> […]To be logically relevant, an item of evidence does not have to firmly establish, on any standard, the truth or falsity of a fact in issue. The evidence must simply tend to "increase or diminish the probability of the existence of a fact in issue". [Emphasis deleted.]

C. *Was the Proposed Evidence Relevant?*

[27] In our view the proposed evidence was relevant. While the affidavit initially filed with the application provided a thin basis to admit the evidence, by the time that the Appellant renewed his application, the evidence adduced to that point provided a context that set the groundwork for an argument that the Complainant may have had a motive to falsely say that she had not consented. The nature and intensity of the relationship between the Complainant and L was important to assessing both of their reactions to the events in issue. The Complainant knew that L had feelings for her. As a matter of logic and human experience, she could have wanted to avoid hurting L's feelings by admitting that she had had consensual sexual relations with the Appellant two days after sexual relations with L. She might have been embarrassed about L entering the room in the immediate aftermath of sexual relations with the Appellant. Those findings might or might not be ultimately made, but they provide a logical path for a finding of relevance that does not engage the twin myths.

[28] L was physically present with the Complainant and absent for short times during which the alleged sexual assaults occurred. He came into the room in the immediate aftermath. L said he was shocked when he came into the room. The Complainant described the events to him and he encouraged her to go to the police. If a trier accepted the Complainant's evidence that her relationship with L was purely platonic, L's statement that he had had sexual relations with the Complainant two days prior might raise questions about his own credibility. L was clearly supportive of the Complainant and hostile towards the Appellant. He had relevant evidence to give at trial.

[29] L and the Complainant had a very close relationship. The difficulty in segregating aspects of their relationship into sexual and non-sexual matters became evident when the Complainant volunteered, in a manner non-responsive to a particular question, that their relationship was platonic, as defence counsel attempted to explore the contours of the relationship to the extent permitted by the trial judge.

[30] This case is not unlike *R. v. JC*, 2021 ONCA 131, 401 C.C.C. (3d) 433. There the accused argued that the Complainant may have been motivated to falsely claim that her sexual contact with the accused was not consensual in order to protect her relationship with her boyfriend. The Crown argued that the motive theory was based on a stereotype that women with boyfriends are motivated to fabricate allegations of sexual assault. The court held that the trial judge was wrong to conclude that there was no evidence to support the existence of a motive to mislead when there was evidence that the complainant had difficulties in her relationship with

her boyfriend, that the boyfriend was upset when he learned of the sexual activity with the accused, and that he encouraged the complainant to go to police.

[31] Here the proposed evidence would be unlikely to infect the fact-finding process with bias or discriminatory beliefs. It would not arouse sentiments of prejudice, sympathy or hostility on the part of the trier. Given the very limited nature of the evidence, and the Complainant's denial that there had been an intimate aspect to her relationship with L, it may not amount to a substantial intrusion on the Complainant's interest in privacy and personal dignity to ask whether intimate activity had occurred. A publication ban prevents dissemination of information that could identify the Complainant. The evidence may assist the trier of fact in evaluating the credibility of the witnesses.

[32] In *R. v. Seaboyer*, [1991] 2 S.C.R. 577, at p. 635, the Supreme Court of Canada expressly contemplated that evidence of other sexual conduct tending to prove bias or motive to fabricate, on the part of the Complainant, may be admissible where the probative value is not outweighed by the danger of unfair prejudice resulting from the evidence. And, as observed in *R. v. Ecker*, (1995) 37 C.R. (4th) 51, 96 C.C.C. (3d) 161 at paras. 60-62 (albeit as regards an earlier iteration of the s. 276 regime), courts should be cautious about ruling against admissibility of evidence at Stage One. Unless the evidence is clearly inadmissible the judge should proceed to the evidentiary hearing.

[33] Here the inferences sought by the Appellant did not engage the prohibited twin myths. Instead, the record showed an evidentiary basis for finding that the proposed evidence met the threshold for relevance sufficient to proceed to a Stage Two admissibility hearing.

[34] In engaging in the balancing mandated by s. 276, a court must not lose sight of the presumption of innocence and the right of an accused to make full answer and defence. While sexual assaults can have serious harmful effects upon victims, wrongful convictions can also be devastating and can ruin an accused's life.

D. *Should This Court Apply the Curative Proviso?*

[35] As restated in *R. v. Samaniego*, 2022 SCC 9 at para. 65, the curative proviso set out in s. 686(1)(b)(iii) of the *Criminal Code* can be applied to uphold convictions despite an error by the trial judge in two situations:

a) Where the error is so harmless or trivial that it could not have had any impact on the verdict; or
b) Where the evidence is so overwhelming that the trier of fact would inevitably have convicted.

[36] Similarly, s. 241 of the *NDA* provides that this court may dismiss an appeal where there has been no substantial miscarriage of justice.

[37] Here the error was not so harmless that it could not have had any impact on the verdict. Where proof beyond a reasonable doubt turns on findings of credibility, factual findings that

seem unimportant in isolation can swing the ultimate conclusion in one direction or another. Here the disputed evidence was capable of being admitted upon application of the statutory criteria.

[38] If admitted, it is possible that it, together with other evidence favouring the Appellant, could have raised a reasonable doubt and the disposition at court martial might have been different.

[39] This was not a case where the evidence was overwhelming, such that a trier of fact would inevitably have convicted the Appellant. The Appellant's roommate, who was not affected by alcohol at the relevant time, testified that he found the Appellant and the Complainant in the kitchen, with the Complainant hugging the Appellant from behind. This evidence supported the Appellant's evidence that the encounter was consensual and contradicted the Complainant's evidence. There were problems with the Complainant's evidence, to which the Military Judge adverted.

VI. Conclusion

[40] The Military Judge's error in concluding that the proposed evidence was irrelevant, and that the Appellant proposed to rely on statutorily prohibited inferences requires a new trial.

[41] The Appellant raises other grounds of appeal. Since a new trial will be required, and the record may not necessarily be the same in the new trial, prudence dictates that we not opine on the lost evidence issue.

[42] The appeal is allowed and the matter is remitted to court martial for a new trial before a different judge.

"B. Richard Bell"
Chief Justice

"J. Edward Scanlan"
J.A.

"Gladys I. Pardu"
J.A.

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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