Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20240422

Docket: CMAC-633

Citation: 2024 CMAC 2

[ENGLISH TRANSLATION]

CORAM: **LEBLANC J.A.**
CHARBONNEAU D.J.A.
PARDU D.J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MASTER CORPORAL V. BROUSSEAU

Respondent

Heard at Ottawa, Ontario, on November 23, 2023.

Judgment delivered at Ottawa, Ontario, on April 22, 2024.

REASONS FOR JUDGMENT BY: CHARBONNEAU D.J.A.

CONCURRED IN BY: LEBLANC J.A.
PARDU D.J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20240422

Docket: CMAC-633

Citation: 2024 CMAC 2

CORAM: **LEBLANC J.A.**
CHARBONNEAU D.J.A.
PARDU D.J.A.

BETWEEN:

HIS MAJESTY THE KING

Appellant

and

MASTER CORPORAL V. BROUSSEAU

Respondent

Order restricting publication: In accordance with the order issued on November 23, 2023, no person shall publish or broadcast or transmit in any way any information that could identify the person described in these proceedings before the Court Martial Appeal Court of Canada as being the complainant.

REASONS FOR JUDGMENT

CHARBONNEAU D.J.A.

I. Introduction

[1] Corporal Vincent Brousseau (the "Respondent") was charged with sexual assault, an offence set out in section 130 of the *National Defence Act*, RSC 1985, c N-5 (the "NDA") and in section 271 of the *Criminal Code*, RSC 1985, c C-46 (the "Criminal Code"), and was scheduled to stand trial before a military judge sitting with a panel in February 2023.

[2] Shortly before trial, and following a series of events related to preliminary issues that were to be decided by the military judge, the Respondent brought a motion alleging abuse of process. The military judge granted this motion and ended the proceedings before the Court Martial.

[3] The Crown has filed an appeal and is asking this Court to order a new trial before a different military judge.

II. Background

[4] In order to understand the submissions put forward by the parties in this appeal, it is necessary to review the procedural history of this case, in particular the events that preceded the bringing of the motion for abuse of process.

A. *Allegations*

[5] In her statement to the Military Police on March 16, 2021, the complainant asserted that she met the Respondent in 2018. Initially, it was within the context of her work, as she had been

providing him with medical care. They got along well and began to see each other socially. Eventually, they had consensual sexual relations.

[6] The complainant was not sure of the specific date on which they first had sexual relations, nor of the exact number of times that they had had consensual relations prior to the alleged assault, but she stated that there had been fewer than five. She also indicated that the Respondent was no longer her patient when they had begun to grow closer.

[7] The complainant alleges that, on the evening of June 29, 2018, she and the Respondent had gone out with a group of colleagues. She had not consumed any alcohol that night as she was driving. At the end of the evening, she drove everyone back to their respective places of residence, except for the Respondent, whom she brought back to her home.

[8] They went to bed, and the Respondent began to make sexual advances towards her. She stated that she did not want to have sexual relations with him that night. She told him [TRANSLATION] "no", that she was tired and that she wanted to sleep. The Respondent continued making advances, saying [TRANSLATION] "I know you want to". She told him [TRANSLATION] "no" a second time. He persisted. From that moment on, she said nothing and remained still. The Respondent had full sexual intercourse with her.

B. *Procedural history*

[9] On May 5th, 2022, the Respondent was charged with one count of sexual assault.

[10] Before trial, the Respondent brought a motion to determine the admissibility of certain evidence. First, he wanted to introduce into evidence a series of text messages that he had exchanged with the complainant. Second, he sought to adduce into evidence the consensual sexual relations that he had had with her prior to the alleged assault, including the fact that the complainant had been very passive during these relations.

[11] These two motions were heard by the military judge on January 12, 2023.

[12] With respect to the text-message exchanges, the parties agreed that these messages do not constitute “records” within the meaning of section 278.1 of the *Criminal Code*. The military judge therefore determined that they could be used during trial, subject to potential objections as to their relevance.

[13] With respect to the motion concerning the admissibility of the evidence of past sexual relations, made pursuant to the procedure set out in section 278.93 of the *Criminal Code*, the military judge first turned to the issue of whether the conditions set out in subsection 276(2) of the *Criminal Code* were met so as to justify a hearing on the admissibility of this evidence. He concluded that they were met and ordered a hearing. That hearing proceeded on January 19, 2023.

[14] The Respondent stated that he wanted to adduce the evidence of the past relations, including some of their details, for two reasons. The first reason was to contradict the

complainant's assertion that they had begun to be intimate only after he had stopped being her patient.

[15] The second reason concerned the complainant's behaviour during these past relations. The Respondent stated that the complainant had acted passively during their past sexual relations and that she had behaved similarly when they had had relations in the night of June 29 to 30, 2018. His version, contrary to that of the complainant, is that she did not tell him [TRANSLATION] "no", nor did she otherwise verbally express any lack of consent that evening.

[16] The Respondent argued that the complainant's passive behaviour during their past relations was relevant in demonstrating that, in her case, passiveness was not an indication of non-consent.

[17] The prosecution argued that the evidence of the past sexual relations was not admissible because it was not relevant.

[18] Regarding the first reason, the prosecution submitted that the Respondent could establish that the relationship between the Respondent and the complainant became more personal before he ceased being her patient without getting into their sexual relations.

[19] As for the second reason, the prosecution argued that evidence of passive conduct is never evidence of consent. It also argued that, since the complainant stated she had verbally

communicated her non-consent on June 30, 2018, her passive behaviour during past relations was not relevant.

[20] The complainant, through her counsel, asserted that the evidence of the past relations would not be truly helpful in assessing the complainant's credibility about the fact that the Respondent was no longer her patient when they began to have relations. Regarding the evidence of her passiveness during the past relations, counsel for the complainant acknowledged that the balancing of the interests involved was a delicate issue, but emphasized that being passive cannot be used as evidence of consent.

[21] The military judge rendered his decision on January 20, 2023. He declared admissible the evidence regarding the number of times that the Respondent and the complainant had previously had sexual relations, and the dates when those relations occurred, as this evidence could contradict the complainant's assertion that she and the Respondent had started seeing each other only after he had stopped being her patient (Appeal Book, vol. I, at p. 167, line 15 to p. 172, line 9).

[22] As for the evidence of the complainant's passive conduct during these past relations, he also declared it admissible. He considered that this evidence was necessary to making full answer and defence so as to prevent the evidence of the complainant's passive behaviour during the alleged assault from being interpreted as evidence of non-consent (Appeal Book, vol. I, at p. 172, line 10 to p. 174, line 23).

[23] The military judge then shared with counsel his opinion regarding how the evidence of past sexual behaviour could and should be introduced (Appeal Book, vol. 1, at p. 175, line 35 to p. 176, line 2):

> [TRANSLATION]
>
> I invite counsel to read – on this question paragraph 75 of *Goldfinch*, which deals with the possibility of introducing evidence of sexual activity through an agreed statement of facts, and I invite counsel not only to consider this option, but also to take note that it is the option that I consider strongly preferable, keeping in mind that I will not hesitate to impose this solution in the absence of agreement between the parties. Indeed, it is a way to submit the facts into evidence that significantly limits the deleterious effects that adducing these elements will have on the complainant at trial. In addition, it is an approach that is likely to streamline the proceedings.

[24] The military judge scheduled a teleconference for January 25, 2023 in order to discuss the progress made by the parties in developing the agreed statement of facts.

[25] During this teleconference, counsel for the prosecution notified the military judge that they had decided not to communicate with the complainant to ask her questions about the details of the past sexual relations and that the evidence of these relations would not be submitted through an agreed statement of facts.

[26] The military judge expressed his dissatisfaction and surprise with respect to the prosecution's refusal to proceed in accordance with his suggestion. He reiterated the reasons why he considered that it would be preferable for the evidence to be adduced through an agreed statement of facts. In his view, this manner of proceeding would be less intrusive for the complainant's privacy, would limit the negative impact that the proceedings would have on her,

and would make the trial more efficient. He also reiterated his opinion that this way of doing things was consistent with the Supreme Court of Canada's teachings in *R v Goldfinch*, 2019 SCC 38 [*Goldfinch*]. He encouraged the prosecution to reconsider its position. The prosecution indicated that it would revisit the issue (Appeal Book, vol. IV, at pp. 552 to 564).

[27] The military judge scheduled another teleconference for January 30 to obtain an update. He indicated that if the parties could not agree on an agreed statement of facts, he intended to set parameters defining the limits of the evidence that could be introduced concerning the past sexual relations (Appeal Book, vol. IV, at p. 562, line 55 to p. 563, line 13):

> [TRANSLATION]
>
> If the prosecution says no, it persists in its position, well, I will ask [counsel for the defence] to elaborate a little bit on what he considers to be the external limit of his cross-examination needs in connection with what we discussed during the debate and the decision on the second step, that is, what he requires in order to establish these legitimate objectives of full answer and defence of the accused with respect to the fact that there had been past sexual relations at the time that they occurred and with respect to the general and specific circumstances surrounding the complainant's level of activity. And those will become the rules of the game, that will become the playing field, in a sense, the boundaries of the playing field for the cross-examination of the complainant, and for the questions that will be put to [*sic*] if he chooses to testify, both by the defence and by the prosecution on cross-examination.

[28] During the January 30 teleconference, the prosecution informed the military judge that it was maintaining its position and that it did not intend to obtain a statement from the complainant regarding the details of the past sexual relations.

[29] Counsel for the defence confirmed that no progress had been made in arriving at an agreed statement of facts. He notified the military judge that in light of the prosecution's position, he intended to bring as soon as possible a motion under section 7 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [the *Charter*], alleging abuse of process.

[30] The military judge referred to his January 20 decision declaring the past sexual relations admissible. He then raised, for the first time, the possibility of issuing an order compelling the prosecution to communicate with the complainant.

[31] The defence brought its motion under section 7 of the *Charter* that same day. In the motion, it was alleged that the prosecution's refusal to communicate with the complainant was a clear case of abuse of process that undermined the integrity of the judicial process (Appeal Book, vol. IV, at pp. 539 to 546).

[32] The next day, the military judge issued a detailed order requiring the prosecution to communicate with the complainant. The order included, in an appendix, a list of questions to be put to the complainant (Appeal Book, vol. IV, at pp. 548 to 550).

[33] Having received the military judge's order, the prosecution filed an application for judicial review with the Federal Court to challenge its validity.

[34] The hearing of the defence's motion for abuse of process was scheduled for February 2, 2023. At the start of the hearing, the prosecution asked the military judge to stay his order of January 31 and to postpone the trial, which was supposed to begin a few days later, in order to allow the Federal Court to rule on the validity of the order. The military judge denied those requests and proceeded to hear the motion for abuse of process.

[35] At the end of the hearing, the military judge concluded that the prosecution's conduct constituted an abuse of process.

[36] He interpreted the prosecution's position as a refusal to accept his judgment on the admissibility of the past sexual relations (Appeal Book, vol. II, at p. 250, para. 27 to p. 253, para. 35).

[37] Regarding the question of whether this conduct constituted an abuse of process as defined in *R v Babos*, 2014 SCC 16 [*Babos*], the military judge reviewed the issue through the lens of the "residual category". He considered whether holding the trial, despite the conduct of the prosecution, would undermine the integrity of the justice system. He found that it would. In his opinion, the prosecution, in refusing to accept the court's decision, [TRANSLATION] "adopted the attitude of a privileged litigant party for whom court decisions are optional or negotiable". He also concluded that the prosecution's conduct was contrary to the interests of the complainant (Appeal Book, vol. II, at p. 253, para. 36 to p. 257, para. 51).

[38] The military judge then considered whether a remedy other than a complete stay of the proceedings could rectify the harm caused by the prosecution's conduct. He acknowledged that a stay of proceedings would permanently put an end to the matter because this remedy would eliminate any possibility of prosecuting the Respondent within the civilian criminal justice system. Rather, he decided to end the proceedings before the Court Martial (Appeal Book, vol. II, at p. 259, para. 52 to p. 260, p. 62).

III. Grounds of appeal

[39] The prosecution raises two grounds of appeal. It argues that the military judge erred in law in finding that the prosecution's conduct constituted an abuse of process. It also asserts that the military judge erred in law in declaring admissible the evidence of the past sexual relations between the complainant and the Respondent.

IV. Analysis

A. *Abuse of process*

(1) Standard of review

[40] The parties do not entirely agree on the standard of review that applies to a declaration of abuse of process. The Appellant asserts that the case law is divided whereas the Respondent states that the applicable standard of review is palpable and overriding error.

[41] The Supreme Court of Canada stated the following at paragraph 48 of *Babos*:

> The standard of review for a remedy ordered under s. 24(1) of the *Charter* is well established. Appellate intervention is warranted only where a trial judge misdirects him or herself in law, commits a reviewable error of fact, or renders a decision that is "so clearly wrong as to amount to an injustice" (*Bellusci*, at para. 19; *Regan*, at para. 117; *Tobiass*, at para. 87; *R. v. Bjelland*, 2009 SCC 38, [2009] 2 S.C.R. 651, at paras. 15 and 51).

[42] In *R v Regan*, 2002 SCC 12 at paragraph 117 [*Regan*], the same court indicated the following:

> The decision to grant a stay is a discretionary one, which should not be lightly interfered with: "an appellate court will be justified in intervening in a trial judge's exercise of his discretion only if the trial judge misdirects himself or if his decision is so clearly wrong as to amount to an injustice" (*Tobiass*, *supra*, at para. 87; *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375).

[43] The applicable standard of review therefore requires that this Court show deference to the military judge's analysis; disagreeing with his findings is not sufficient to justify our intervention. However, this deference is not without limits.

B. *Analytical framework*

[44] The military judge correctly identified the analytical framework that applies to a motion alleging abuse of process in violation of section 7 of the *Charter*. This analytical framework, which is discussed in *Babos*, was recently reaffirmed by the Supreme Court of Canada in *R v Brunelle*, 2024 SCC 3 [*Brunelle*].

[45] The case law recognizes two types of conduct by the state that may constitute abuse of process: conduct that compromises the fairness of the trial (the main category) and conduct that

does not threaten trial fairness but nonetheless undermines the integrity of the judicial process (the residual category) (*Babos* at para 31; *Brunelle* at para 27).

[46] The test for determining whether a stay of proceedings is justified is the same for both categories of misconduct and has three parts (*Babos* at para 32; *Brunelle* at para 29):

> (1) the state's misconduct is such that prejudice to a fair trial or to the integrity of the judicial process will be manifested, perpetuated or aggravated through the conduct of the trial;
>
> (2) there is no possible remedy other than a stay of proceedings;
>
> (3) if there is any doubt as to the necessity over whether a stay of proceedings should be ordered, the judge must balance the interests in favour of granting the stay of proceedings and the interest that society has in having a final decision on the merits.

C. *Analysis of the military judge*

[47] As mentioned above, the military judge considered the motion from the perspective of the residual category.

[48] When the conduct of the state is examined through this lens, the question is not whether the trial would cause an injustice for the accused, but rather whether this conduct is offensive to the community's sense of decency and fair play to such an extent that the court must dissociate itself from it. In these situations, going forward with the trial would undermine the integrity of the justice system by giving the impression that the justice system condones the state's misconduct (*Babos* at para 35).

[49] The military judge correctly identified these principles, but in my opinion, erred in their application.

[50] First, the military judge erroneously interpreted the prosecution's position as a refusal to comply with his decision on the admissibility of the evidence relating to the past sexual relations between the complainant and the Respondent. Then, he erred as regards the scope of his trial management power.

[51] In his decision, the military judge identified the prosecution's reprehensible conduct as [TRANSLATION] "the refusal to accept a decision of the court and to express its intention not to comply with it" (Appeal Book, vol. II, at p. 254).

[52] This same interpretation is found in the recitals to his January 31 order: in one of the [TRANSLATION] "WHEREAS" recitals of the order, he wrote that the prosecution [TRANSLATION] "does not seem to accept the January 20, 2020 decision" and that it [TRANSLATION] "continues to argue that the past sexual relations are not admissible" (Appeal Book, vol. IV, at pp. 548 to 549).

[53] These statements are incorrect. The prosecution never indicated that it intended to continue to object to all the questions pertaining to the past sexual relations between the complainant and the Respondent. What the prosecution told the military judge is that it had decided not to ask the military police to go ask questions to the complainant about this before

trial for the purpose of introducing the evidence of the past relations through an agreed statement of facts.

[54] Counsel for the prosecution could surely have stated things more clearly, particularly during the first teleconference, and better explained their position in not wanting to put to the complainant, prior to trial, questions concerning her past sexual relations with the Respondent. The wording they used most probably did not assist the military judge in fully understanding the nuances of their position.

[55] The fact remains that, contrary to what the military judge found, the prosecution's position was not a refusal to comply with his decision on the admissibility of the evidence in question. Rather, it was a decision not to follow his suggestion as to how this evidence would be adduced at trial. This error is fundamental and tainted the military judge's assessment of the prosecution's conduct.

[56] The military judge's second error, which greatly contributed to skewing his analysis, was that he erred regarding the scope of his trial management power.

[57] Trial management power is an essential and versatile tool; it must, however, be exercised carefully and does not eliminate the rules of evidence. Parties should generally be allowed to present their cases as they see fit (*R v Samaniego*, 2022 SCC 9, at paras 22-24; *R v Polanco*, 2018 ONCA 444, at paras 22 and 29).

[58] The military judge obviously had the power to declare the evidence of the past sexual relations admissible. It was also open to him to make suggestions regarding how this evidence could be submitted. He was evidently convinced that his proposed manner of proceeding would be the most efficient way of doing things at trial and the least harmful approach for the complainant.

[59] It is true that in *Goldfinch*, the Supreme Court encouraged counsel and judges to consider the possibility of proceeding by way of an agreed statement of facts in order to adduce, at trial, evidence of sexual activity that has been found admissible. It does not follow, however, that it is always appropriate or possible to do so. For example, this is not a viable option in cases where there are contradictory versions of the facts. Additionally, the more nuanced the factual matrix, the more difficult it will be to arrive at an agreed statement of facts. The parties may decide, for various reasons, not to introduce the evidence through an agreed statement of facts. The decision is theirs.

[60] Here, the parties had opposing versions of the events that were the subject matter of the charge: the Respondent's version was that the complainant had been passive and had said nothing, whereas the complainant asserted that she had clearly told him [TRANSLATION] "no". As for the past relations, the topic that the Respondent wanted to introduce—the complainant's passive behaviour during these relations—was unlikely to be part of an agreed statement of facts given its subjective and nuanced nature. Be that as it may, the prosecution was entitled to decide that it was preferable to introduce the evidence through a witness.

[61] Furthermore, I note that the way in which the military judge himself viewed the limits of his trial management power seems to have shifted during the proceedings.

[62] As mentioned previously, on January 20, in rendering his decision on the admissibility of the evidence of past sexual relations, and after referencing *Goldfinch* and the possibility of proceeding by way of an agreed statement of facts, the military judge stated that he not only preferred this option, but also [TRANSLATION] "would not hesitate to impose it".

[63] However, during the January 25 teleconference, he no longer seemed to be considering compelling the parties to proceed by means of an agreed statement of facts. Rather, he stated that he intended to lay down certain guidelines beforehand about the presentation of the evidence. It would have been entirely appropriate for him to set parameters in order to provide a framework for the implementation of his decision on the admissibility of the past sexual relations.

[64] Unfortunately, during the January 30 teleconference, the military judge, once notified of the Respondent's intention to bring a motion for abuse of process, seems to have returned to his original approach by referring to the possibility of issuing an order, without either party having requested it. Ultimately, this order was issued after the motion for a stay of proceedings was brought.

[65] The military judge's errors with respect to the position of the prosecution and the scope of his management power irreparably tainted his analysis of the situation, more particularly his conclusion that to continue the proceedings would undermine the integrity of the justice system.

He misapprehended the facts and erred in exercising his discretionary power. His finding that the prosecution's conduct constituted an abuse of process was so clearly wrong as to amount to an injustice.

[66] Although it is not necessary to do so in order to dispose of this appeal, I am of the opinion that certain comments need to be made about the military judge's analysis concerning the remedy that should be granted.

[67] As already stated, at this stage, the court must determine whether, under the circumstances, there is no possible remedy other than a stay of proceedings. Where there is still uncertainty over this issue, the court must balance the interests in favour of granting the stay of proceedings and the interest that society has in having a final decision on the merits.

[68] The military judge found that it was unnecessary to carry out this balancing of interests because he had opted to end the proceedings before the Court Martial rather than to stay proceedings completely (Appeal Book, vol. II, at p. 258, para. 57):

> [TRANSLATION]
>
> Although the balancing of interests that is conducted at the third step is particularly important when the residual category is raised, the fact remains that balancing is necessary only where there is still uncertainty over whether the stay of proceedings is warranted after the first two steps of the test have been completed. Here, the balancing of interests that is carried out at the third stage of the test set out in *Babos* does not need to be done because it was determined, after completing the analysis in the first two parts of the test, that an alternative solution to the stay of proceedings was justified. In circumstances where the decision no longer involves determining which option—staying the proceedings or holding a trial despite the alleged conduct—would best safeguard the integrity of the justice system, this third step, which requires a

> balancing to be carried out, loses its significance. I would note that there might be situations where there is no alternative to prosecution before the military courts. In such cases, it might no longer be logical to select, as a remedy, to end the proceedings before the Court Martial without costs if, in practice and in light of the facts, this remedy is in all respects equivalent to the stay of proceedings. No evidence to this effect was adduced in this case.

[69] The military judge went on to indicate that even though it was not necessary to complete the third part of the test set out in *Babos*, he had nevertheless taken into account the potential inconveniences that his decision to end the proceedings might cause to the administration of justice (Appeal Book, vol. II, at p. 259, paras. 58 to 61).

[70] In my view, the military judge erred in determining that the existence of the possibility of ending the proceedings before the Court Martial in the military context made balancing the interests an optional step. For the purposes of the military justice system, ending the proceedings before the Court Martial is equivalent to a stay of proceedings. The possibility of proceedings being instituted in the civilian criminal system does not change the fact that ending the proceedings before the military court is an extreme remedy.

[71] Furthermore, insofar as the military judge did carry out a certain balancing of the interests at issue, certain aspects of his assessment are problematic.

[72] In deciding not to order a complete stay of the proceedings, the military judge must necessarily have found that this remedy was not appropriate in the circumstances. He determined that ending the proceedings before the Court Martial would be an appropriate remedy because this option preserved the possibility that proceedings could still be brought against the

Respondent before the civilian criminal courts. However, in the same breath, the military judge acknowledged—and rightly so—the obstacles that might arise and that such proceedings before the civilian courts might never materialize.

[73] If the balancing of the interests at issue, including the interest that society has in having cases tried on the merits, had led the military judge to find that a complete stay of proceedings was not justified, it is difficult to see how he managed to conclude that ending the proceedings before the Court Martial, which could well have the same effect, was an appropriate remedy. The military judge indicated that there was no evidence that ending the proceedings before the Court Martial would have the same effect as a complete stay of proceedings. It is difficult to imagine how the prosecution could have adduced such evidence.

[74] I am also of the opinion that the military judge made a palpable and overriding error in considering the impact that the remedy that he was granting would have on the complainant. He stated the following (Appeal Book, vol. II, at p. 259, para. 60):

> [TRANSLATION]
>
> I am also cognizant of the consequences that ending the proceedings will have on the complainant in this matter. She was necessarily aware of the proceedings, having retained counsel to represent her in anticipation of the January 19, 2023 hearing, and she was certainly preparing to testify at trial as of February 6, 2023. She will probably be disappointed not to have the opportunity to present her complaint to the Court Martial, as she was expecting to do. However, given the conduct of the prosecution, I remain of the view that this is a very low price to pay. Ending the present proceedings before the Court Martial will prevent her from being subjected to trying proceedings that will probably expose parts of her personal life unnecessarily to public curiosity, considering that the military prosecutors have adamantly refused to participate in proceedings that are likely to avoid these inconveniences and to preserve her dignity.

[75] First, in the event of a proceeding initiated in the civilian courts, the risks to the complainant having to testify about parts of her intimate life would have remained entirely the same. These risks are an integral part of proceedings in matters of sexual assault, be it within the military justice system or the civilian criminal justice system. Therefore, the remedy granted by the military judge would not avoid these inconveniences for the complainant.

[76] Moreover, the military judge does not seem to have considered the measures available to mitigate this type of inconvenience, such as the possibility of ordering the exclusion of the public during the complainant's testimony or the possibility that she testify behind a screen or outside the courtroom, as contemplated by sections 486.1 and 486.2 of the *Criminal Code*.

[77] In addition, the military judge's comments show that he greatly underestimated the effect that interrupting the proceedings a few days before the trial would necessarily have on a complainant. At best, the process would have to start over from the very beginning before the civilian courts. At worst, the matter would never be heard on the merits. In these circumstances, it seems to me that to speak of the complainant being [TRANSLATION] "disappointed" and of a [TRANSLATION] "very low price to pay" reflects a lack of understanding of the actual consequences of the decision to end the proceedings before the Court Martial.

[78] A stay of proceedings is the most drastic remedy a court can order and is appropriate only in the clearest of cases (*Babos* at para 30). The remedy that was granted in this case, although technically different, was also an extreme remedy. The balancing carried out by the military

judge was flawed and led to an unreasonable conclusion as to the remedy that could be appropriate.

D. *Decision on the admissibility of the past sexual relations*

[79] The Appellant alleges that the military judge erred in law in declaring admissible the evidence of the past sexual relations between the Respondent and the complainant as well as the evidence of her passive behaviour during these relations. The Appellant claims that this decision, though interlocutory in nature, is inextricably linked to the other ground of appeal and should be reviewed by this Court.

[80] Section 230.1 of the *NDA* provides a list of the types of decisions that may be appealed by the prosecution. During the hearing of the appeal, counsel for the Appellant acknowledged that, in the circumstances of this case, the decision on the admissibility of the past sexual relations is not captured by any of the grounds of appeal listed in this provision.

[81] Moreover, appellate courts generally refrain from ruling on issues that are not necessary to disposing of a matter. Given my conclusion that a new trial must be ordered, it is not necessary to deal with this second ground of appeal. That said, I consider it important to indicate that nothing in these reasons should be construed as endorsing in any way the military judge's reasoning on this issue.

V. Conclusion

[82] For these reasons, I would allow the appeal and order a new trial before a different military judge.

"Louise A. Charbonneau"
D.J.A.

"I agree.
René LeBlanc, J.A."

"I agree.
Gladys I. Pardu, D.J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-633
STYLE OF CAUSE:	HIS MAJESTY THE KING v. MASTER CORPORAL V. BROUSSEAU
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	NOVEMBER 23, 2023
REASONS FOR JUDGMENT BY:	CHARBONNEAU D.J.A.
CONCURRED IN BY:	LEBLANC J.A. PARDU D.J.A.
DATED:	APRIL 22, 2024

APPEARANCES:

Lieutenant-Colonel Karl Lacharité	FOR THE APPELLANT
Lieutenant-Commander Patrice Desbiens	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Canadian Military Prosecution Service Ottawa, Ontario	FOR THE APPELLANT
Defence Counsel Services Gatineau, Quebec	FOR THE RESPONDENT