Date: 20030321

Docket: CMAC-462

Citation: 2003 CMAC 4

CORAM: **MEYER J.A.**
MCFADYEN J.A.
HENEGHAN J.A.

BETWEEN:

CAPTAIN ROBERT HUGHES

Appellant

- and -

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT OF THE COURT
(Delivered from the Bench at Toronto, Ontario
on Friday, March 21, 2003.)

MEYER J.A.

The appeal from conviction of two charges of sexual assault is based on the Appellant's argument that the Military Judge erred in admitting the evidence of two friends of the Complainant respecting consistent statements made by the Complainant immediately after the alleged sexual assaults. According to the Appellant, such statements are inadmissible under

Military Rules of Evidence ("MRE") 31 (2) and even if the common law exceptions apply, the statements would still be inadmissible.

With respect, we conclude that the common law exceptions do apply notwithstanding MRE 31, and particularly the exception of admissibility to rebut an allegation of recent fabrication. Such an allegation was implicitedly raised in cross-examination of the Complainant (page 38 of the Appeal Book). When the Respondent introduced the rebuttal evidence, the Military Judge and both counsel seemed to agree on its admissibility on this ground, and referred to its use in relation to the credibility of the Complainant.

While we would usually be concerned about the introduction of such evidence in the absence of a clear indication from the prosecution that recent fabrication was an issue, it is clear in this case that counsel for the Defence and the Military Judge were aware of this issue. In this regard, we refer to the following extract from the closing submissions presented by counsel for the Defence at pages 137-138 of the Appeal Book:

> ... She did not complain until March, Your Honor, and there is a reason for that, in my submission, that on the evidence, she was clearly annoyed and she said she thought that Captain Hughes had been treating her like shit, in her words, at work and there was, despite my friend's assertion, some motivation to at least embellish these accounts. Captain Hughes had terminated the relationship on the 14th of December, he'd gone into her office and said, Look, we're getting mixed signals here, this hadn't worked out, we're not going to have anything other than a professional relationship from this point on.
>
> Now, I want to reiterate something and amplify something my friend said to you about the evidence, the use the court can properly make of the evidence of Miss Morrison and Mrs Little. Now my friend provided you with a copy of *Hughes* case in the British Columbia Court of Appeal and the court may very well have remarked to itself, in the course of the trial, why is the defence counsel not objecting

> to this evidence, because, of course, clearly it is hearsay and it is evidence of a prior consistent statement which would normally not be admissible. My friend has persuaded me on the basis of the *Hughes* case, and a number of others, that it would be admissible and very limited purposes but I do want to clearly outline for the court the use that it should properly make of that evidence and I think a very apt summary of that which actually comes from the *Ay* case but is repeated in *Hughes*, is found at page 8 of the *Hughes* case, Your Honour. ...
>
> ....
>
> So, Your Honour, you cannot take, in my submission, the repetition of these remarks, which the complainant allegedly made to Mrs Little and Ms Morrison, for the truth of their content. The only use the court could properly make of those might be in respect of an assessment of the credibility of the complainant.

From these remarks, it is clear that counsel for the Defence was aware of the issue of recent fabrication, addressed it in his cross-examination of the prosecution witnesses and relied on it in his closing submissions to the Court.

In these circumstances, we are not persuaded that there was any error of law arising from the admission of this evidence from the two friends. There is no basis for intervention and the appeal from conviction is dismissed.

Leave to appeal is granted to Respondent from the severity of the sentence imposed on January 24, 2002. The cross-appeal of Respondent in respect of the sentence is dismissed. In the circumstances of this case, the Court sees no need to intervene with the sentence imposed by the Military Judge on grounds of excessive leniency.

The publication ban imposed at trial remains in effect.

"Perry Meyer"
J.A.

"I agree
Elizabeth McFadyen"

"I agree
E. Heneghan"