Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20111012

Docket: CMAC-538

Citation: 2011 CMAC 4

CORAM: **MCFADYEN J.A.**
VEIT J.A.
BENNETT J.A.

BETWEEN:

CORPORAL TIM LEBLANC

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Edmonton, Alberta, on June 3, 2011.

Judgment delivered at Ottawa, Ontario, on October 12, 2011.

REASONS FOR JUDGMENT BY: BENNETT J.A.

CONCURRED IN BY: MCFADYEN J.A.
VEIT J.A.

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REASONS FOR JUDGMENT

BENNETT J.A.

[1] The appellant was convicted by a General Court Martial of sexual assault on January 8, 2010 and sentenced to imprisonment for a period for 20 months. He appeals from his conviction and sentence.

[2] In my respectful view, the military judge committed a reversible error with respect to his refusal to admit evidence of a prior statement attributed to the complainant regarding her sexuality. During the progress of the case, this evidence became highly relevant. A request by the defence to revisit the earlier ruling excluding the evidence should have been permitted and the evidence should have been admitted. In my respectful opinion this error can only be rectified by a new trial.

BACKGROUND

[3] The appellant and the complainant lived for a short time in the same barracks building in Edmonton, Alberta. They had known each other casually for a few weeks prior to the incident in question. The complainant was a lesbian, a fact known to the appellant.

[4] On April 15, 2008, the date of the incident, the complainant invited the appellant to go with her to drive her friend home. According to the appellant, while they were driving home after dropping off the friend, the complainant mentioned that she had slept with a man before and that it had been a long time since she had done that. This is the statement which was the subject of an application pursuant to s. 276 of the *Criminal Code.*

[5] Later that evening, the appellant went to the complainant's room while some of her friends were there. He remained behind when her friends left. At this point, the complainant's evidence diverges from that of the appellant.

a) The appellant's evidence

[6] The appellant testified that the complainant told her friends not to worry about him, as he would probably pass out in her room that night. He took this as an invitation to sleep over. He testified that as a result of the earlier conversation in the car, he believed that she was "not exclusively into women".

[7] The appellant testified that once they were alone, he and the complainant lay on her small cot with their bodies touching. He said that they kissed and touched each

other for some time. At one point, the complainant whispered “I don’t know why I’m doing this. I’m gay”. The complainant took her clothes off, and they continued kissing, and touching each other’s genitals. The appellant said that neither of them said anything, except at one point the complainant told him not to perform oral sex on her. The appellant said that she was very well-lubricated when they began having sex, although he had some difficultly penetrating her. He said that he had sex with her for some time, but stopped before having an orgasm as he didn’t have a condom.

b) The complainant’s evidence

[8] The complainant testified that after her friends left, she told the appellant that she had to go to bed because she had to work in the morning. She said the appellant asked if he could stay with her because he was too drunk. She agreed. She said that he knew she was gay, so she didn’t think it would be a problem. They got in her bed. She testified that after she turned out the light to go to sleep, the appellant began trying to remove her pants. She said that she kept telling him that “it wasn’t going to work, to stop, and that it wasn’t going to happen because I was gay”. She said that he pushed her onto the bed and removed his and her pants. She testified that he tried to touch her vagina, but that she took his hand away, and that he tried to put his head towards her vagina, but she stopped him. Finally, he tried to put his penis inside of her. She said that it “didn’t work” but he kept trying. She was not sure, but believed that he was ultimately successful in penetrating her. Her evidence was that she was “very scared” and “froze” while she “waited for him to finish”. She testified that after he left her room she took a shower as she was “soaked” between her legs.

ISSUES

The appellant submits that the military judge erred in the following ways:

1. By ruling that a s. 276 *voir dire* was necessary to determine the admissibility of the complainant’s statement to the appellant that she had previous sexual experiences with males and by finding that the complainant’s statement was inadmissible;

2. By failing to instruct the panel that it was impermissible to infer the complainant was more credible or less likely to consent to sexual activity with the appellant because she was gay;

3. By admitting unnecessary or irrelevant expert evidence and/or by failing to instruct the panel to disregard the prosecutor's overstatement of the extent or value of the expert evidence; and

4. By allowing the prosecution to cross-examine the appellant on why he did not make certain relevant statements to the police, thereby violating the appellant's right to remain silent, and by failing to instruct the panel to ignore that cross-examination.

5. There is an application to adduce fresh expert evidence to rebut the expert evidence tendered by the Crown.

6. The appellant also argues that his 20-month sentence was "demonstrably unfit". He submits that the military judge erred in imposing a sentence based on a range of sentences in similar civilian cases, as incarceration in the Canadian Forces Service Prison and Detention Barracks is significantly harsher than incarceration in a civilian institution.

ANALYSIS

Admissibility of the prior statement by the complainant regarding sexual orientation

[9] During the cross-examination of the complainant, defence counsel attempted to question her about the conversation she had with the appellant on the date of the incident in which she told him that she had sex with men in the past. She did not answer. When counsel continued to question her, the prosecutor objected and a *voir dire* pursuant to s. 276 of the *Criminal Code*, R.S.C. 1985, c. C-46, was held.

[10] The appellant testified on the *voir dire* and stated his conversation he said he had with the complainant, noted above. In a statement the complainant gave to the National Investigation Service (NIS), she said she had sexual relations with men when she was 16 years old and 20 years old.

[11] Defence counsel argued that he was not seeking to admit the statement for its truth, but simply for the fact that it was made to the appellant, arguing that it went to the

appellant's honest but mistaken belief in consent. He took the position that s. 276 was not engaged by the complainant's statement and that a *voir dire* was unnecessary.

[12] Defence counsel argued that even assuming s. 276 was engaged, the statement should be admitted because of its importance to the appellant's defence of honest but mistaken belief:

> DEFENCE COUNSEL: …Now, in honest but mistaken belief cases, we've got to analyse the evidence of the accused person under a microscope and we have to look, because he can't be wilfully blind to the "no". I mean, if there is a "no", it's game over. And if it would've been apparent to anybody that the circumstances were a "no", then again, it's game over. So in order for this defence to succeed an accused person has to be able to point to a series of objectively reasonable factors that flush out and give some substance to his belief. …I think it's fair to say that every indicia of consent that Corporal LeBlanc points to, to flush out and make reasonable his honest but mistaken belief is going to be very, very carefully reviewed. And a significant factor on the other side of the equation is going to be her statement, "I don't have sex with men."
>
> Now, whether she does or not, that she tells Corporal LeBlanc that she does makes it reasonable for him to test the waters. It takes away the suggestion that it was implicitly unreasonable for him to pursue a sexual relationship or to believe that she was consenting. It leaves open the panels' deliberations to turn on, let's look at the facts: Did she consent? Did she not consent? And it takes away the problem of saying, Well, of course she wouldn't consent, she's a lesbian. She doesn't have sex with men. And, of course, if he can't even say in his evidence, I relied on her statement, she told me she has sex with men, …then an important part of his overall defence is taken away from him. [Emphasis added.]

[13] The prosecutor took the position that the statement fell squarely within s. 276, and should not be admitted:

> PROSECUTOR: …obviously, the goal here is to say that if she previously had sex with men …it is more likely that she consented to this specific sexual activity with the accused. …And that goes squarely under paragraph (a), which says:
>
> > …is more likely to have consented to the sexual activity that forms the subject-matter (*sic*) of the charge;…
>
> So that's clearly a section 276. Because it cannot be different than that, that's the only conclusion the prosecution can draw from this. She had sex with me before and that substantiated my reasonable belief in consent.

[14] The prosecutor went on to state:

> PROSECUTOR: …The law doesn't change because of the sexual orientation of the complainant. That's the same law. If the complainant was not gay… do you think my friend could try to put in evidence the fact that Corporal LeBlanc and her being hetero -- if she's hetero and [she] says to Corporal LeBlanc in the car, Oh, I already -- yes, I had sex with men before when I was sixteen. This could not be admissible in evidence at all, not at all. So this -- the fact that she's gay doesn't change the law. Doesn't change the law with regard to the relevance of this conversation in the car. The prosecution -- and I will say it again, I will not say that the complainant was less likely to have consented to the sexual activity because she was gay. I will stay as far away from that as possible to this because it's simply not true. Human beings are too difficult to draw those kind[s] of general inference[s]. I'm not going to go there. She said in her testimony that this is how she expressed her lack of consent to convince him to stop. That's the nature of the evidence here. [Emphasis added.]

[15] The military judge declined to admit the statement. He held:

> MILITARY JUDGE: ...I find that admitting that evidence … would fall into the category of, as found in 276(1), in that, by reason of the sexual activity the complainant is more likely to have consented to the sexual activity that forms the subject matter of the charge or is less worthy of belief. I do not find that it has the probative value -- I do not find that it has probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice. I do not find that it is a relevant issue in this trial. I do not find that it touches on an issue of, at this time, credibility of the complainant.

[16] As the case unfolded, the complainant repeatedly testified that when the appellant attempted intercourse with her she told the appellant "no fucking way, I'm gay. It's not going to work, I'm gay".

[17] Later in the trial, the prosecutor began cross-examining the appellant with respect to his knowledge of the complainant's sexual orientation. The evidence elicited was that the appellant knew that the complainant had a girlfriend. It became clear that the prosecutor was seeking to establish that the appellant was "wilfully blind" to the complainant's lack of consent. Defence counsel objected, and suggested that it would be unfair for the judge to permit the prosecution to continue this line of questioning given that the defence was precluded from cross-examining the complainant in a similar fashion as a result of the s. 276 ruling. He sought a reconsideration of his application pursuant to s. 276 of the *Code*.

> DEFENCE COUNSEL: I think your Honour may have to reconsider the earlier ruling on the 276, because the court will recall on the 276, the defence theory was it does go to state of mind and the prosecution theory is that it was

> too distant temporally from the act itself. But the prosecution theory had nothing to do with, he knew the sexual orientation, so she was less likely to consent. It was simply that she didn't consent.
>
> Now the prosecution after she's been cross-examined and dismissed after the 276 has been ruled upon, he's changing its theory. And now it's willful blindness. And …the willful blindness can only relate that you knew she was gay and you went ahead anyway. And it's not appropriate to change horses in midstream like this. I think we're again very close to a mistrial at this point. Because if the prosecution is now going to argue after arguing to the contrary earlier and after getting rulings on the 276, that his position is willful blindness, then Corporal LeBlanc can't defend himself without referring to the specific of that conversation and it wasn't put to the complainant as it would have been in the course of her normal cross-examination. So this willful blindness issue is a different strategy, it's different from what we started the trial with and it undermines the soundness of the rulings because the court might well have done something very different in terms of the 276 if the prosecution theory had been, he can't believe consent because he knew she was gay and he knew she was gay and wouldn't consent [to] sex with a man. [Emphasis added.]

[18] The prosecutor responded that while the complainant's past sexual history was not admissible, "the accused's knowledge or state of mind as to the sexual orientation of the complainant was relevant and admissible".

[19] The defence responded that the prosecution was trying to "have it both ways":

> DEFENCE COUNSEL: …It can't be both relevant and irrelevant. He can't use it to take away an explanation of the defence that would otherwise be available at the same time he's using it as an attack. …Corporal LeBlanc can't defend himself now because his response to he knew she was gay was, "Well, no, I didn't know she was gay. She told me she had sex [with] men sometimes." So he can't even answer the question. And by alluding to the sexual orientation, it's problematic and we're at a stage where the prosecution has now indicated that it intends to challenge the honest but mistaken belief on the basis of willful blindness.

[20] After receiving a few questions from the military judge with respect to the purpose of questioning the appellant on his knowledge of the complainant's sexual orientation, the prosecutor agreed to abandon the line of inquiry. However the inference remained open to the panel that the appellant knew the complainant was gay yet persisted with sexual relations, knowing she would not consent to sexual acts with a man.

[21] The *voir dire* pursuant to s. 276 on the issue of the admissibility of the prior statement attributed to the complainant regarding sexual relations with men in the past was not re-opened.

[22] At this point, defence counsel urged the military judge to consider a mid-trial instruction on sexual orientation:

> DEFENCE COUNSEL: I think the panel needs to be told, having heard this, having heard this line of questioning and having heard that last question, I think they need to be instructed that …her sexual orientation can't be used to make it more or less likely that she consented or didn't consent.

[23] The military judge declined to make a mid-trial instruction. He held that the issue could be addressed, if necessary, as "part of the final instructions" to the panel. However, when the issue was raised by defence counsel during the pre-charge conference at the end of the trial, the military judge again declined instruct the panel on non-permissible inferences based on the complainant's evidence regarding her sexual orientation.

[24] The admissibility of prior sexual conduct of a complainant is governed by s. 276 of the *Criminal Code*:

> 276. (1) In proceedings in respect of an offence under section 151, 152, 153, 153.1, 155 or 159, subsection 160(2) or (3) or section 170, 171, 172, 173, 271, 272 or 273, evidence that the complainant has engaged in sexual activity, whether with the accused or with any other person, is not admissible to support an inference that, by reason of the sexual nature of that activity, the complainant
>
> (*a*) is more likely to have consented to the sexual activity that forms the subject-matter of the charge; or
>
> (*b*) is less worthy of belief.
>
> (2) In proceedings in respect of an offence referred to in subsection (1), no evidence shall be adduced by or on behalf of the accused that the complainant has engaged in sexual activity other than the sexual activity that forms the subject-matter of the charge, whether with the accused or with any other person, unless the judge, provincial court judge or justice determines, in accordance with the procedures set out in sections 276.1 and 276.2, that the evidence
>
> (*a*) is of specific instances of sexual activity;
>
> (*b*) is relevant to an issue at trial; and
>
> (*c*) has significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice.

> (3) In determining whether evidence is admissible under subsection (2), the judge, provincial court judge or justice shall take into account
>
> (*a*) the interests of justice, including the right of the accused to make a full answer and defence;
>
> (*b*) society's interest in encouraging the reporting of sexual assault 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, provincial court judge or justice considers relevant.

[25] The evidence of the complainant's sexual orientation was not relevant to any issue in the case at the outset of the trial, nor was the fact the statement was made to the appellant initially relevant to any issue in the trial. As the trial unfolded, several events occurred which required, at minimum, a re-consideration of the ruling pursuant to s. 276. First, the complainant testified repeatedly that when the appellant attempted intercourse, she told him there was "no fucking way", she was gay and that it wouldn't work, because she was gay.

[26] Later the Crown cross-examined the appellant regarding his knowledge that the complainant was gay. He submitted that the evidence was relevant to the appellant's state of mind regarding the issue of mistaken belief in consent. The inference sought to be drawn was that the complainant would not consent because she was gay, and since the appellant knew she was gay, he could not be mistaken in his belief that she would consent.

[27] Section 276 prevents an inference that the complainant was more likely to consent to have sexual relations with the appellant because she had prior relations with men. However, that was not the issue here. The issue was whether the appellant knew

she had prior relations with men, a fact which would potentially be relevant to his argument that he had a mistaken belief that the complainant consented.

[28] Mistaken belief in consent was the fundamental issue in the case. I make no comment on the viability of the defence as this question was not raised on appeal. The jury was left with the evidence that the complainant was gay, and the appellant knew she was gay, yet persisted (on her evidence) in forcing sexual relations with her. The appellant was not permitted to give or lead evidence that she had told him (and the NIS officers), that she had specific relations with men in the past. Whether this would have, at the end of the day, assisted the appellant it is impossible to say. The point is that the combined effect of the complainant's evidence and the cross-examination by the Crown resulted in the previous statement having significant relevance to the issue before the Court.

[29] Section 276 was not designed to prevent an accused from having a fair trial, but to prevent a complainant's evidence to be unfairly infected by the "myths" that a woman who engaged in sexual activity was more likely to consent or more likely to be untruthful. See *R. v. Darrach*, [2000] 2 S.C.R. 443 at para. 45.

[30] Though dealing with a previous version of s. 276, the comments of McLachlin J. (as she then was) in *R. v. Seaboyer*, [1991] 2 S.C.R. 577 at 620-21, cited with approval by L'Heureux-Dubé J. in *R. v. Crosby*, [1995] 2 S.C.R. 912 at para. 11, which discuss the importance of balancing the various interests at trial, are apposite:

> Accepting that the rejection of relevant evidence may sometimes be justified for policy reasons, the fact remains that [the former] s. 276 may operate to exclude evidence where the very policy which imbues the section -- finding the truth and arriving at the correct verdict -- suggests the evidence should be received. Given the primacy in our system of justice of the principle that the innocent should not be convicted, the right to present one's case should not be curtailed in the absence of an assurance that the curtailment is clearly justified by even stronger contrary considerations. What is required is a law which protects the fundamental right to a fair trial while avoiding the illegitimate inferences from other sexual conduct that the complainant is more likely to have consented to the act or less likely to be telling the truth.

[31] The Crown tendered evidence from which a potentially false inference of fact could be drawn against the accused. This made the evidence of prior sexual conduct of the complainant highly relevant. See, for example, *R. v. Morden* (1991), 69 C.C.C. (3d) 123 (B.C.C.A.).

[32] It will be for the military judge to determine, based on the evidence tendered in the new trial, whether the evidence should be admitted after a thorough weighing of the factors enunciated in s. 276(3). This is a provision which often requires a ruling prior to evidence being called, and as such, it is always open to be revisited if the evidence changes or a party's position changes from the initial *voir dire*. This was a case which required a revisiting of the ruling as a result of the manner the evidence came before the panel.

[33] Given my conclusions with respect to the first ground of appeal, I do not find it necessary to address the remaining grounds of appeal.

[34] The appellant submitted that this Court should enter an acquittal rather than a new trial if error was found on this ground. In my view, this was an error with respect to an evidentiary ruling which, had the evidence been admitted, may or may not have affected the result. Therefore, it would not be appropriate for this Court to enter an acquittal.

[35] I would allow the appeal and order a new trial.

"E. Bennett J.A."
BENNETT J.A.

"Elizabeth McFadyen"
MCFADYEN J.A.

"Joanne B. Veit"
VEIT J.A.

COURT MARTIAL APPEAL COURT OF CANADA

SOLICITORS OF RECORD

DOCKET:	CMAC-538
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PLACE OF HEARING:	Edmonton, Alberta
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CONCURRED IN BY:	MCFADYEN J.A. VEIT J.A.
DATED:	October 12, 2011

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