Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20141030

Docket: CMAC-568

Citation: 2014 CMAC 10

CORAM: **DAWSON J.A.**
TRUDEL J.A.
RENNIE J.A.

BETWEEN:

MASTER CORPORAL D.D. ROYES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

Heard at Ottawa, Ontario, on October 24, 2014.

Judgment delivered at Ottawa, Ontario, on October 30, 2014.

REASONS FOR JUDGMENT BY: TRUDEL J.A.

CONCURRED IN BY: DAWSON J.A.
RENNIE J.A.

Court Martial Appeal Court of Canada

Cour d'appel de la cour martiale du Canada

Date: 20141030

Docket: CMAC-568

Citation: 2014 CMAC 10

CORAM: **DAWSON J.A.**
TRUDEL J.A.
RENNIE J.A.

BETWEEN:

MASTER CORPORAL D.D. ROYES

Appellant

and

HER MAJESTY THE QUEEN

Respondent

REASONS FOR JUDGMENT

TRUDEL J.A.

[1] The accused, Master Corporal D.D. Royes (the appellant), was tried and convicted of sexual assault by a Standing Court Martial (2013 CM 4033). He was sentenced to a term of imprisonment of 36 months (2013 CM 4034). His application for release pending appeal was allowed under specific conditions. He is now appealing the legality of the guilty verdict as well as the Military Judge's decision to dismiss his motion for an order striking down paragraph

130(1)(*a*) of the *National Defence Act*, R.S.C. 1985, c. N-5 (the NDA) on the basis that it violates section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11. The Military Judge's decision on the constitutional question is indexed as 2013 CM 4032.

[2] At paragraph 20 of his memorandum of fact and law, the appellant advances four grounds of appeal:

a. First, he argues that the Judge erred in assessing the credibility and reliability of witnesses. He submits that the Judge committed an error of law in treating a witness' credibility as dispositive of proof for the elements covered by that witness' testimony.

b. Second, the appellant submits that the Judge wrongly shifted the onus of proof by requiring the appellant to demonstrate that the complainant had consented, rather than keeping the onus on the Crown to prove lack of consent beyond a reasonable doubt.

c. Third, the appellant argues that the Judge misapprehended the evidence in finding that the complainant was unconscious at the time of the sexual acts. He contends that the evidence did not support this finding, nor could it prove a lack of consent beyond a reasonable doubt.

d. Fourth, the appellant submits that paragraph 130(1)(*a*) of the NDA is unconstitutional. He argues that our Court's recent decision in *Moriarity v. Canada*, 2014 CMAC 1, 455 N.R. 59, leave to appeal to S.C.C. granted, 35755 (July 24, 2014), which limited the scope of the provision to offences with a military nexus, was incorrect and should be overruled.

[3] At the hearing of this appeal, our Court was informed that the appellant had not served a Notice of Constitutional Question pursuant to rule 11.1 of the *Court Martial Appeal Court Rules*, S.O.R./86-959 (the Rules). As this is a condition precedent to our Court's jurisdiction over the constitutional matter and in view of the importance of the question to the appellant who has been sentenced to 36 months of imprisonment, the appeal was adjourned on this issue to January 23, 2015 to allow the appellant to comply with the Rules.

[4] It was, however, understood that the adjournment would not prevent our Court from deciding the other issues in this appeal. These reasons concern the appellant's first three grounds of appeal. Although the appellant changed the order of his submissions at the hearing, the substance remained the same. I shall therefore examine each ground of appeal in the order presented in the appellant's memorandum of fact and law, starting with the Military Judge's treatment of the concepts of reliability and credibility. Before turning to this issue, a few words about the standard of review are apposite.

[5] The parties did not make submissions on the applicable standard of review. The appellant seeks to overturn his guilty verdict. The standard for assessing the reasonableness of a verdict and the relationship between the verdict and the judge's factual findings were described by the Supreme Court of Canada in *R. v. R.P.*, 2012 SCC 22, [2012] 1 S.C.R. 746 at paragraph 9:

> To decide whether a verdict is unreasonable, an appellate court must ... determine whether the verdict is one that a properly instructed jury or a judge could reasonably have rendered. The appellate court may also find a verdict unreasonable if the trial judge has drawn an inference or made a finding of fact essential to the verdict that (1) is plainly contradicted by the evidence relied on by the trial judge in support of that inference or finding, or (2) is shown to be incompatible with evidence that has not otherwise been contradicted or rejected by the trial judge [references omitted].

[6] The above excerpt shows clearly that, absent an overriding and palpable error, the Military Judge's findings of fact should not be lightly interfered with. This particularly applies to the appellant's third ground of appeal. As for the first two grounds—whether the Military Judge applied the proper legal tests—these are questions of law and reviewable on a standard of correctness.

I. First ground of appeal: the legal test for assessing credibility

[7] I note, as do the parties, that the Military Judge committed an error of law when stating at paragraph 13 of his reasons that:

> The court is not required to accept the testimony of any witness, except to the extent that it has impressed the court as credible. However, a court will accept evidence as trustworthy unless there is a reason rather to disbelieve it.

[8] Indeed, a finding of credibility is not dispositive of the acceptance of a witness' testimony (see *Clark v. The Queen*, 2012 CMAC 3, 438 N.R. 366 at paragraph 47). This being said, the Military Judge's reasons must be read as a whole. Before allowing the appeal on this ground, our Court must be satisfied that the error had a material impact on the Military Judge's assessment of the complainant's testimony (*R. v. Rhyason*, 2007 SCC 39, [2007] 3 S.C.R. 108 at paragraph 14; *R. v. Boucher*, 2005 SCC 72, [2005] 3 S.C.R. 499 at paragraph 43). The appellant argues that evidence of this legal error's impact can be found at paragraph 134 of the Military Judge's reasons where he wrote:

> Although [the complainant] is not a completely reliable witness because of her period of blackout, she is deemed a credible witness.

[9] The appellant submits that once the Military Judge deemed the complainant credible, he accepted her testimony as proof of lack of consent beyond a reasonable doubt. For the appellant, not only did this second statement represent a legal error in itself, but it affected how the Military Judge allocated the burden of proof, an issue that will be discussed under the second ground of appeal.

[10] Returning to the Military Judge's alleged error from *Clark*, I am of the view that the appellant has failed to show that the Military Judge applied the misstated test. To the contrary, a fair reading of the Military Judge's reasons, including paragraph 134 partially cited above, shows that he was alive to the issue and aware of the distinction between credibility and reliability (see Military Judge's reasons at paragraph 81). His use of the word "deemed", though unfortunate, did not influence his analysis of the testimony of the complainant or other witnesses. Moreover, he did not rely solely on the complainant's testimony to conclude that she had not consented (*ibidem* at paragraph 133). This ground of appeal must fail.

II. Second ground of appeal: the burden of proof

[11] The appellant identifies four passages in the Military Judge's reasons which allegedly demonstrate how the Military Judge improperly allocated the burden of proof (appellant's memorandum of fact and law at paragraphs 41-47). Once again, the appellant cannot parse the Military Judge's reasons. The Military Judge continually referred to the standard of proof beyond a reasonable doubt and explained that the onus remained on the Crown throughout, as evidenced by his reasons at paragraphs 2-3, 7, 17, 19, 24, 100, 135-136, and 142-143. The Military Judge made it clear at paragraph 2 of his reasons that it was "up to the prosecution to prove its case on each element of the offence beyond a reasonable doubt." The appellant essentially criticizes the Military Judge for the manner in which he framed the issues. In my view, these passages are not evidence of shifting the burden of proof. Instead, the Judge was merely restating the elements of the offence in a straightforward way.

[12] Given my conclusion that the Military Judge did not improperly shift the burden of proof, the appellant's arguments regarding the evidence, including the "expert's exculpatory evidence [that] could raise a reasonable doubt" (appellant's memorandum of fact and law at paragraph 44), will be examined under the third ground of appeal.

III. Third ground of appeal: misapprehension of the evidence

[13] The appellant is asking this Court to re-assess the evidence in a more favourable light and to draw a different conclusion on the issue of consent. I find that the Military Judge's findings are supported by the evidence and not unreasonable.

[14] First, the appellant takes issue with the manner in which the Military Judge treated the expert evidence and argues that the evidence presented at trial was sufficient to raise a reasonable doubt that the complainant had consented. The appellant argues that the Military Judge erred "by failing to recognize that the complainant's evidence was equally consistent with a valid but unwise and later regretted drunken consent" (appellant's memorandum of fact and law at paragraph 46).

[15] At paragraphs 128-129 of his reasons, the Military Judge found the expert's evidence "of little use" in resolving the issue of consent. He correctly stated that the case was "not one that can be determined primarily by the use of expert evidence but is one that is decided on the facts accepted by the court." The testimony of an expert is assessed like that of any other witness and the Military Judge was entitled to accord the expert's opinion little weight given that it was not

based on a sound factual foundation (see *R. v. S.A.B.*, 2003 SCC 60, [2003] 2 S.C.R. 678 at paragraph 63; *Shawinigan Engineering Co. v. Naud*, [1929] S.C.R. 341 at page 343).

[16] Second, the appellant argues that the Military Judge committed a palpable and overriding error in finding that the complainant was unconscious at the time of the sexual activities and thus unable to give her consent.

[17] The appellant is essentially arguing that the Military Judge erred in determining that the *actus reus* of the offence was made out, because the evidence does not support either a finding of unconsciousness or a finding of lack of consent. The gist of the appellant's submissions is that there was neither direct nor circumstantial evidence showing that the complainant was unconscious during the sexual activities. Relying on his expert's testimony, the appellant argues that the complainant could have consented but not remember doing so due to an alcohol-induced "blackout" or "memory loss", these mental states not being equivalent to unconsciousness.

[18] In my view, this appeal should not turn on whether the Crown proved "unconsciousness". Throughout the Military Judge's reasons, consciousness was discussed in the context of deciding if the complainant had the capacity to consent. At the hearing of the appeal, counsel for the appellant conceded that capacity to consent was the crux of the appeal. The Supreme Court in *R. v. J.A.*, 2011 SCC 28, [2011] 2 S.C.R. 440 summarized capacity to consent as requiring "the conscious consent of an operating mind" (at paragraph 36), adding that this definition requires "the complainant to provide actual active consent throughout every phase of the sexual activity" (at paragraph 66). Thus to succeed on this issue, I must be persuaded that the evidence on record

did not allow the Military Judge to believe that the complainant was "unable to consent to sexual intercourse and to the sexual touching" (Military Judge's reasons at paragraph 133).

[19] I have not been persuaded by the appellant that the Military Judge committed a palpable and overriding error when he concluded as he did. The issue here is not whether the complainant's testimony can support an alternative conclusion. Rather, the appellant must show that the evidence, as a whole, is incompatible with the Military Judge's finding. There was ample evidence on record showing that the complainant did not consent. On multiple occasions, the complainant stated very clearly that she "did not agree to have sex" with the appellant and "woke up to" the sexual activities (see transcript of the complainant's cross-examination, appeal book, volume 1, page 111, line 10; page 110, line 20; page 112, line 23; page 115, line 12; page 116, line 30; page 117, line 1).

[20] As a result, this ground of appeal must fail.

IV. The reasonableness of the verdict

[21] While the appellant does not present the reasonableness of the verdict as a separate ground of appeal, it can be considered the overarching issue: Is the guilty verdict one that a properly instructed jury or judge could reasonably have rendered? I answer this question in the affirmative.

[22] There was evidence from which the Military Judge could infer that the complainant did not have the capacity to consent. Furthermore, she testified that she did not subjectively consent. The Military Judge accepted her testimony. This establishes the *actus reus* of the offence.

[23] As for the *mens rea* component, it was reasonable for the Military Judge to conclude that the appellant knew that the complainant did not consent or that she could not consent to the sexual acts. Given that the Military Judge rejected the appellant's account of the events, the only remaining issue was whether the appellant could prove an honest but mistaken belief in consent.

[24] In view of the limitations on this defence set in out in section 273.2 of the *Criminal Code*, R.S.C. 1985, c. C-46 and the evidence accepted by the Military Judge, it was reasonable on his part to find that the appellant was either reckless or did not take reasonable steps in the circumstances known to him to determine whether the complainant was consenting.

[25] Consequently, I propose to dismiss all grounds of appeal raised by the appellant other than that dealing with the constitutionality of paragraph 130(1)(*a*) of the *National Defence Act*. That question and the final outcome of this appeal will be reserved.

"Johanne Trudel"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Donald J. Rennie J.A."

COURT MARTIAL APPEAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	CMAC-568
STYLE OF CAUSE:	MASTER CORPORAL D.D. ROYES v. HER MAJESTY THE QUEEN
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 24, 2014
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	DAWSON J.A. RENNIE J.A.
DATED:	OCTOBER 30, 2014

APPEARANCES:

Mark Létourneau J.B. Cloutier	FOR THE APPELLANT MASTER CORPORAL D.D. ROYES
Anne Litowski	FOR THE RESPONDENT HER MAJESTY THE QUEEN

SOLICITORS OF RECORD:

Defence Counsel Services Gatineau, Quebec	FOR THE APPELLANT MASTER CORPORAL D.D. ROYES
Canadian Military Prosecution Service Ottawa, Ontario	FOR THE RESPONDENT HER MAJESTY THE QUEEN