



COURT MARTIAL

Citation: *R. v. Dondaneau*, 2023 CM 2008

Date: 20230302

Docket: 202227

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

His Majesty the King, Applicant

- and -

Master Corporal S.L. Dondaneau, Respondent

Before: Commander S.M. Sukstorf, M.J.

DECISION ON VOLUNTARINESS OF STATEMENT BY THE ACCUSED

REASONS FOR DECISION

(Orally)

Introduction

[1] In the present case, Master Corporal Dondaneau was interviewed by a military police officer, Corporal Brisbane-Babin for suspected fraud. In the context of this interview, I have no trouble concluding that Corporal Brisbane-Babin was a person in authority.

[2] No statement made by an accused to a person in authority is admissible as an integral part of the prosecution's evidence nor may it be made available for the purpose of cross-examining the accused unless the prosecution has proven the voluntariness of the statement beyond a reasonable doubt.

Law on voluntariness

[3] The rule for determining voluntariness at courts martial is set out within section 42 of the *Military Rules of Evidence* (MRE). The relevant sections of MRE 42 reads as follows:

42 (1) Subject to subsection (9) and Division IX (Effect of Public Policy and Privilege), a statement by the accused alleged to be an unofficial confession may be introduced in evidence by the prosecutor if he proves that

- (a) there is evidence that the accused did make the statement attributed to him; and
- (b) the statement was voluntary in the sense that it was not made by the accused when or because he was or might have been significantly under the influence of
 - (i) fear of prejudice induced by threats exercised, or
 - (ii) hope of advantage induced by promises held out, in relation to the offence in question, by a person in authority.

(2) The only inducements by way of threats or promises significant for the purpose of excluding a statement of the accused under subsection (1) are those that a reasonable man would think might have a tendency to cause an innocent accused person to make a false confession.

...

(6) Subject to subsection (7), when an unofficial confession is admissible under this section, the whole of it, including any part that is exculpatory, shall be admitted.

(7) When an unofficial confession contains a statement that the accused has committed an offence other than that with which he is charged, the part of the confession relating to that other offence shall not be admitted unless it is relevant to and otherwise admissible in respect of the offence with which he is charged.

[4] As clearly indicated in MRE 42(2), and as found in common law, the primary reason for the confessions rule is to avoid both false confessions and wrongful convictions. Consequently, a trial judge has a duty to examine the entire contents of the statement and ask whether there exists a doubt about its voluntariness.

[5] The substance of section 42 of the *MRE* is similar to the common law rule defined by the Supreme Court of Canada (SCC) in *R. v. Oickle*, [2000] 2 S.C.R. 3. However, in *Oickle*, the SCC also lists several factors that are not currently contained in section 42 of the *MRE*, such as the operating mind requirement and police trickery.

[6] For the purposes of the present *voir dire*, the admissibility of the audiovisual statement made by Master Corporal Dondaneau on 28 April 2021 is considered under section 42 of the *MRE* supplemented by the common law rules of evidence.

[7] *Oickle* holds that for statements made to a person in authority to be admissible, the prosecution must establish beyond a reasonable doubt that the accused was not

unduly influenced by inducements, oppression and that she had an operating mind. In addition, there must not be police trickery that unfairly denies the accused of her right to silence.

[8] If police trickery is assessed as being engaged in obtaining the statement, then the Court must assess whether the trick or tricks were sufficient to shock the conscience of the community. (see paragraphs 65-67 of *Oickle*)

[9] *Oikle* instructs that the voluntariness of a statement is determined almost entirely by context. Because of the complex interplay of circumstances that could vitiate voluntariness, a judge must consider all the circumstances surrounding the statement and ask whether they raise a reasonable doubt as to its voluntariness. Further, a trial judge should be cognizant that there might have been an interaction between the different causal factors that might also raise reasonable doubt.

Facts

[10] Corporal Brisbane-Babin, a military police member and investigator, requested Master Corporal Dondaneau attend the military police unit at Canadian Forces Base (CFB) Esquimalt to answer questions.

[11] On 28 April 2021, at around 1503 hours, Master Corporal Dondaneau was interviewed by Corporal Brisbane-Babin at the military police unit at CFB Esquimalt for approximately one hour.

[12] Early in the interview, Corporal Brisbane-Babin explained the charges Master Corporal Dondaneau was being investigated for and provided her with a printed description of offences of section 117 and 125 of the *National Defence Act (NDA)* and explained to her the jeopardy she faced if she was found guilty of any of the offences.

[13] In this case, defence drew the Court's attention to the fact that during the interview, Corporal Brisbane-Babin advised Master Corporal Dondaneau that she was not being investigated for any *Criminal Code* offences. Notwithstanding this, of the six charges before the Court, one of the alternate charges was laid under section 130 of the *NDA*, that is to say fraud contrary to section 380 of the *Criminal Code*. The particulars of the *Criminal Code* offence allege that "she, between 30 July 2013 and 9 October 2020, at or near Canadian Forces Base Esquimalt, BC, by deceit, falsehood or other fraudulent means did defraud the Government of Canada of funds of a value exceeding \$5,000 by claiming financial benefits and allowances to which she was not entitled." The alternate charge was laid under paragraph 117(f) of the *NDA* and alleges that "she, between 30 July 2013 and 9 October 2020, at or near CFB Esquimalt, British Columbia with intent to defraud, claimed financial benefits and allowances to which she was not entitled." All the remaining charges relate to *NDA* offences. The maximum penalty that Master Corporal Dondaneau would be exposed to if convicted of an offence under paragraph 117(f) of the *NDA* is imprisonment for less than two years or to less punishment. Whereas under section 380 of the *Criminal Code*, for defrauding of a value

exceeding \$5,000, Master Corporal Dondaneau is exposed to a term of imprisonment not exceeding fourteen years.

[14] After explaining the two *NDA* offences, being sections 117 and 125 to which Master Corporal Dondaneau was a suspect, he explained that he wanted to hear her side of the story. He stated:

“CPL BRISBANE-BABIN: Okay, So the reason you are here today is because I want to go over this with you, hear your side of the story, show you what I have, hear what you have to say and hopefully we can clear it up together and see where we can go from there, okay? So before we do that, we need to discuss legal rights and counsel. Now do you understand what your rights are or your Charter of Rights?”

[15] After engaging in some small talk, the interview going to the crux of the issue began as follows:

“CPL BRISBANE-BABIN: So let’s move into some more important questions shall we?

MCPL DONDANEAU: Sure.

CPL BRISBANE-BABIN: Okay. So our investigation today is with regards to PLD.

MCPL DONDANEAU: Okay.

CPL BRISBANE-BABIN: Post Living Differential.

MCPL DONDANEAU: M’mmm.

CPL BRISBANE-BABIN: So I’m going to ask you flat out, did you knowingly claim Post Living Differential allowances using an address other than the one that you are residing at for any period? Did you knowingly fill out military documents, claims, itineraries during your career, knowing that the information was wrong?

MCPL DONDANEAU: No.

CPL BRISBANE-BABIN: Okay. Are you telling me the truth?

MCPL DONDANEAU: Yes.”

[16] As the interview progresses, Corporal Brisbane-Babin asks Master Corporal Dondaneau to provide him with an outline of all the places she lived since joining the CAF.

Analysis

[17] Paragraph 117(f) of the *NDA* deals with any act of a fraudulent nature. The wording of this section is purposefully broad and encompasses virtually all acts of a fraudulent nature contemplated within the *Criminal Code*. Courts martial have found that the elements of the offence of paragraph 117(f) of the *NDA* mirror those set out under a charge of fraud under subsection 380(1) of the *Criminal Code* (see *R. v. Berlasty*, 2019 CM 2020 and *R. v. Downer*, 2016 CM 4005).

[18] During the interview, prior to explaining to Master Corporal Dondaneau her *Charter* rights, the following exchange took place:

“CPL BRISBANE-BABIN: Okay. So right now, so as I said, it’s for *NDA* 117 and *NDA* 125. Those are the two offences at the moment, okay? So, your legal rights. It is my duty to inform you that you have the right to retain and instruct counsel without delay, okay? You have the right to telephone any lawyer you wish. You also have the right to free advice from a Legal Aid lawyer. If you are charged with an offence, you may apply to provincial Legal Aid for assistance. Do you understand?
[Emphasis added.]

MCPL DONDANEAU: I think so, yeah.

CPL BRISBANE-BABIN: I can read it for you again or you can read it yourself.

MCPL DONDANEAU: Well, I’m not—like legal aid, is it, like military, like JAG? Or . . .

CPL BRISBANE-BABIN: Yeah, so there’s . . .

MCPL DONDANEAU: Okay.

CPL BRISBANE-BABIN: Both. So you’ll see on the wall, we have military duty counsel.

MCPL DONDANEAU: Okay.

CPL BRISBANE-BABIN: And then there’s others as well.

MCPL DONDANEAU: Okay.

CPL BRISBANE-BABIN: So our military case, military duty counsel, the number is right up there.

MCPL DONDANEAU: Right. Okay

. . .

CPL BRISBANE-BABIN: So your legal rights, just so we're clear, I'm going over them with you now, but they are up for – you can change at any time. You can choose whatever you want at any time, okay?

MCPL DONDANEAU: Okay.

CPL BRISBANE-BABIN: So the next question is, do you wish to call a lawyer now?

MCPL DONDANEAU: I don't really know. Never been involved in anything.

CPL BRISBANE-BABIN: So that is completely your decision. It is your right to receive legal counsel, but as I said, even if you waive it now, you can call a duty counsel, you can decide to get up and walk out of here at any point. It's up to you.

MCPL DONDANEAU: Okay.

CPL BRISBANE-BABIN: You have to just understand that that is your right. If you want to call a lawyer now, you can do that now. If you want to sit here, go through things with me, and then, at some point, you're like, okay, this is too much. I'm calling a lawyer. You can do that as well. You don't have to say anything. You just need to understand your legal rights and cautions.

MCPL DONDANEAU: No, I understand that.”

[19] Master Corporal Dondaneau raised a two-fold argument based on the requirement for Corporal Brisbane-Babin to ensure that she was advised of the full extent of the jeopardy that she faced.

[20] She argued that she was not advised that she could potentially be charged with a *Criminal Code* offence and secondly that the alleged amount of the fraud was approximately \$80,000. It is her position that if she had of been made aware of the full extent of the alleged fraud that she would not have refused to exercise her right to counsel at the start of the interview. She argued that Corporal Brisbane-Babin minimized the moral gravity of the situation she faced even though he was fully aware of the full extent of the fraud being approximately \$80,000.

[21] It is important to clarify that Corporal Brisbane-Babin was the investigator on this case and was not able to determine which charges would ultimately be laid by the prosecution after the charges were referred to the Director of Military Prosecution

(DMP). There is no evidence before the Court to suggest any bad faith on behalf of Corporal Brisbane-Babin and it is improper to speculate that Corporal Brisbane-Babin was aware that the prosecution would choose to proceed with one alternate charge under the *Criminal Code*, instead of proceeding on all charges under the *NDA*. In short, I can not conclude that his statement regarding the nature of the charges for which she was being investigated was misleading or improper in any manner. The transcript shows that he made it very clear exactly the nature of the fraud that she was being investigated for which was improperly claiming post living differential (PLD) and other allowances related to an address where it was alleged, she was not residing.

[22] It is not uncommon that after reviewing all the evidence, that the prosecution will lay different charges or decide to lay a similar *Criminal Code* charge in the alternative. As explained above, the section 117 *NDA* offence and the charge of fraud under section 380 of the *Criminal Code* are considered mirror offences. Master Corporal Dondaneau was not charged with a fundamentally different offence than that which she was informed she was being interviewed for. Corporal Brisbane-Babin told her that she was being interviewed with respect to the offence of fraud as well as for falsifying official documents.

[23] The evidence in the *voir dire* does confirm that Corporal Brisbane-Babin did not advise Master Corporal Dondaneau of the full extent of the fraud she was suspected of having engaged in. In response, the prosecution argued that it should have been intuitively obvious to Master Corporal Dondaneau that based on the PLD rates and the number of years that she allegedly claimed it, that she had to have known that the amount of money would be significant.

[24] During the interview, I find that Corporal Brisbane-Babin did everything to ensure that Master Corporal Dondaneau understood the nature of the offences he was investigating and the exact subject matter, being PLD fraud related to an address where she did not reside. He did encourage Master Corporal Dondaneau to tell her side of the story and it was obvious that she was trying to do just that, by explaining both her family and living situation.

[25] Canadian jurisprudence has long recognized the importance of the police taking approaches to encourage, persuade or convince a suspect to speak and the Courts have also accepted that they can even try to persuade suspects that it is in their best interests to explain their version of the story. I do not believe that the failure to inform Master Corporal Dondaneau about the extent of the fraud, or to warn her about the possibility of facing criminal charges amounts to deceptive tactics or police trickery. Even if I am mistaken, I do not find that it arises to a level that would shock the conscience of the community.

[26] Next, I considered whether underplaying the jeopardy that Master Corporal Dondaneau faced would amount to an inducement. As the Court stated at paragraph 23 of *R v. Leskosky*, 2020 ABQB 129, 2020 Carswell Alta 2763 “to say that a statement was made “voluntarily” is to say that the statement was not made involuntarily. That is,

the "will" of the individual was "not overborne" A similar test is set out explicitly in MRE 42(2) which reads that the person in authority should not engage in conduct "that a reasonable man would think might have a tendency to cause an innocent accused person to make a false confession."

[27] Based on the flow of the interview and the subject areas discussed, being the addresses where Master Corporal Dondaneau resided, I am not persuaded that knowing the exact amount of the fraud would have resulted in a different decision being made by Master Corporal Dondaneau regarding exercising her right to counsel. I must ask myself whether with the confluence of the factors that arise from the approach used by Corporal Brisbane-Babin that a reasonable person would think that an innocently accused person might tend to make a false confession or that the police conduct was such that it would shock the conscience of the community? On the facts, I simply can not draw this conclusion.

[28] In hindsight, it is convenient to say that had she known that the amount she was alleged to have defrauded was in the amount of \$80,000, she would have exercised her right to counsel immediately. However, I find that the evidence suggests otherwise.

[29] In the interview, I found that Master Corporal Dondaneau had an explanation for her living situation and her PLD hoping that it would resolve any confusion, and it was only at the end of the interview, after she realized the significant amount of evidence that Corporal Brisbane-Babin had acquired against her interests that she realized that she needed to seek legal counsel.

[30] She was told directly that she was being investigated for improperly claiming PLD and the evidence before the Court, suggests that is primarily what the investigation was about.

[31] I would also note that the *MRE* does plan for situations where members might disclose other offences during an interview for which they are not charged, or which do not form the basis of their interview.

(7) When an unofficial confession contains a statement that the accused has committed an offence other than that with which he is charged, the part of the confession relating to that other offence shall not be admitted unless it is relevant to and otherwise admissible in respect of the offence with which he is charged.

[32] However, after viewing the video and reading through the transcript, I find that all the questions and answers are relevant to the offences before the Court. More particularly, they are all relevant to the offences to which Corporal Brisbane-Babin told Master Corporal Dondaneau that he was investigating.

[33] In reviewing the video, I do not find that Corporal Brisbane-Babin offered any inducements in the form of threats or promises that are strong enough to raise a reasonable doubt about whether Master Corporal Dondaneau was overborne. More particularly, pursuant to subsection 42(2) of the *MRE*, I did not find any evidence that

that a reasonable man would think might tend to cause an innocent accused person to make a false confession.

[34] After advising Master Corporal Dondaneau of the jeopardy that she faced with respect to the two *NDA* offences, Corporal Brisbane-Babin then read Master Corporal Dondaneau her rights and provided her with the legal rights and cautions form. In addition, he explained the essence of her rights, in pragmatic terms. As an example, he told her that she could retain any lawyer she wished to without delay, but also provided her a phone number to call military duty counsel. The video shows Master Corporal Dondaneau willingly signed the forms, showing no hesitancy.

[35] Corporal Brisbane-Babin was patient and made it clear that Master Corporal Dondaneau could exercise her rights at any time, even though she had declined to exercise her rights when they were first explained and offered to her. In fact, I noted in the transcript that he repeated this to her several times. She clearly understood that she could change her mind because near the end of the interview when Corporal Brisbane-Babin was explaining to Master Corporal Dondaneau the results of his investigation, she advised him at that time that she wished to exercise her rights to counsel and she wanted to call a lawyer, which she did.

[36] I considered whether there was a potential risk that might arise from the confluence of all the possible factors regarding the voluntariness of her statement and I do not find that to be an issue.

[37] The interview was short and there was a clear absence of oppression throughout. Master Corporal Dondaneau was informed several times that the door was unlocked and that she could leave at any time.

[38] It was clear throughout the interview, Master Corporal Dondaneau had an operating mind. She was free from any intoxicants, had driven herself to the interview and appeared cognizant of the risk she was facing. She was relatively forthright and showed genuine concern for her family. She was logical and thoughtful in her responses as demonstrated through the discussion on a broad range of subject areas.

Conclusion

[39] The Court is satisfied that the prosecution has proven beyond a reasonable doubt that Master Corporal Dondaneau's audio-visual recorded statement made on 28 April 2021 was made voluntarily.

Counsel:

The Director of Military Prosecutions as represented by Major D. Moffat

Major E. Carrier, Defence Counsel Services, Counsel for Master Corporal Dondaneau