Citation: *R. v. Private S. Seifi,* 2009 CM 3022

Docket: 200905

GENERAL COURT MARTIAL
CANADA
ONTARIO
MOSS PARK ARMOURY, TORONTO

Date: 7 May 2009

PRESIDING: **LIEUTENANT-COLONEL L-V. D'AUTEUIL, M.J.**

HER MAJESTY THE QUEEN
v.
PRIVATE S. SEIFI
(Accused)

A DECISION CONCERNING AN APPLICATION MADE BY THE ACCUSED FOR THE EXCLUSION OF A STATEMENT PURSUANT TO PARAGRAPH 24(2) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS* FOR AN ALLEGED VIOLATION OF SECTION 7, PARAGRAPHS 10(*A*), AND 10(*B*) OF THE *CANADIAN CHARTER OF RIGHTS AND FREEDOMS*
(Rendered Orally)

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[1] Private Seifi is charged with one offence punishable under section 130 of the *National Defence Act* for a sexual offence contrary to section 271 of the *Criminal Code*, and alternatively he is charged with an offence for an act to the prejudice of good order and discipline contrary to section 129 of the *National Defence Act*.

[2] At the opening of this trial by a General Court Martial on the morning of 27 April 2009, prior to plea and after the oaths have been taken, Captain Drebot, on behalf of the prosecution, verbally notified the court that a question of law or mixed law and fact has arisen and must be heard by the court without the presence of the panel members. More specifically, he told the court that the prosecution intended to introduce a statement made by the accused. The prosecution also informed the court that it was ready to admit that the person to whom Private Seifi made the statement was a person in authority.

[3] It is further to this admission that Private Seifi's defence counsel verbally notified the court that he would present an application for the exclusion of the same

statement under paragraph 24(2) of the *Canadian Charter of Rights and Freedoms*, thereafter the *Charter*, alleging an infringement of his rights guaranteed by section 7, paragraphs 10(*a*) and (*b*) of the *Charter.* More specifically, he submitted to the court that when Private Seifi was put to attention by the person in authority, just before he provided the statement on 10 July 2008, he was then detained and none of the usual cautions related to his right to remain silent, to be told the reason of his detention, and to be given an opportunity to consult a lawyer, were given to him by the said person in authority.

[4] The court suggested to both parties that it would be possible to proceed with a blended *voir dire* considering that both issues seemed to rely on the same evidence as it was possible to do so. However, this offer was declined by both parties and the court proceeded with the first *voir dire*, dealing only with the question of the admissibility of the statement made by the accused to a person in authority. On 29 April 2009, this court made the decision that the statement was admissible in the trial because the prosecution had proved beyond a reasonable doubt that it was voluntary.

[5] The preliminary motion for the actual *voir dire* was brought first by way of a verbal application made under Queen's Regulations and Orders, QR&O, article 112.05(5)(e) and 112.07(1) as a question of law or mixed law and fact to be determined by this court after the commencement of the trial. However, further to the instruction of the court, the defence counsel provided a notice of application to it and the prosecution the day after he announced his intent verbally.

[6] The *voir dire* concerning the admissibility of the accused's statement made on 10 July 2008, took place on 29 and 30 April 2009. The evidence during this hearing consisted of:

a. The testimony of Sergeant Jardine;

b. Exhibit M1-2, chapters 5 and 6 of the publication entitled "Military Justice at the Summary Trial Level";

c. A formal admission made by the prosecution that Sergeant Jardine was a person in authority when Private Seifi made the statement for which this *voir dire* is held; and

d. The judicial notice taken by the court martial of the facts in issue under Rule 15 of the Military Rules of Evidence.

[7] The key issue in this *voir dire* is about the fact that Private Seifi was detained or not when he was put to attention by Master Corporal Jardine, which is the rank appointment she was wearing at the time of the incident. Generally, the legal

requirement is that it is when detention arises that cautions concerning the specific rights aforementioned must be given to a person by a person in authority.

[8] A determination concerning the issue of detention to be made by a court relies on a contextual analysis. In order to do so it would be appropriate for me to summarize, first, the circumstances of the alleged detention during which the statement was made based on the evidence introduced before this court during this *voir dire*, and then proceed with the legal analysis.

[9] On 10 July 2008, Sergeant Jardine, who was wearing the appointment of Master Corporal at that time, was an instructor on a QL3 Med Tech course at Canadian Forces Base Borden (CFB Borden). At that time, the course was running for over a month, considering that it started in June 2008, and was involving about 20 candidates.

[10] Private Seifi, the accused in this trial, and G.L.E.C., the alleged complainant in the particulars of the charges, were both candidates on that course.

[11] At 1500 hours on 10 July 2008, a lecture for all candidates on the course took place behind the CFMMS building on CFB Borden, in an open field used sometimes as a vehicle compound. It was decided to hold the lecture at that location because the nature of it required a soft ground and some space for letting the candidates practise. The instructor responsible for the lesson was Sergeant Dipak and the instructor assisting him was Master Corporal Jardine as she was then known.

[12] The lecture was on rescue carries for rapid medical extractions. First, a demonstration by the instructors was made to the candidates. Following that, the candidates paired themselves in order to practise. Essentially, one candidate was carrying the other on his or her back using the technique taught previously by the instructors, and they had to cover a 50-foot distance between two pylons. When the candidates arrived at the end of the one-way run, they then switched positions and the second candidate had to carry the first one back to the starting point with the same technique. It was described by Sergeant Jardine as a relay because the candidates were forming two rows and as soon as a pair of two candidates was done, then another one had to perform the task.

[13] It was not a competition and the execution of this relay was controlled. People encouraged each other in order to support those who were involved in the task.

[14] Both instructors placed themselves at halfway of the relay in order to supervise the candidates involved. After awhile, both instructors moved to the starting point. While talking, Sergeant Jardine saw G.L.E.C. coming back to the starting point, what she described as the finish line, carrying Private Seifi on her back. Suddenly Sergeant Jardine saw G.L.E.C.'s hands flying up in the air and she heard G.L.E.C. saying loudly, "Fuck you Seifi."

[15] The behaviour of G.L.E.C. was very disruptive for the course and very unusual. Sergeant Jardine has known her for over a month as a candidate and, up to that point, she has never been a problem on the course. According to Sergeant Jardine, from the beginning of the course, G.L.E.C. was getting along with everybody.

[16] Sergeant Jardine went to G.L.E.C. and tried to find out what was going on. She saw G.L.E.C. walking around in a small area, emotionally distressed and unable at first to talk. Then, Sergeant Jardine found out from G.L.E.C. that it was alleged that Private Seifi grabbed her breast.

[17] Sergeant Jardine was taken aback by such situation because of the nature of it, and because it had never occurred to her before. She was mad because, first, of the big disruption caused by this incident which had the potential to result in some delay on the tight schedule of the course, and second, because somebody in her class was the subject of the alleged harassment.

[18] In order to find out the truth, i.e., if he did or did not do this, and because she considered that she was there for the well-being of everybody on the course, she decided to meet Private Seifi immediately after she talked to G.L.E.C.. At first, she called his name very loudly in his direction. Because she got no reaction from him, then she started to walk towards him and then he started to walk towards her. When she met him, Private Seifi's posture was very relaxed, lax, and dizzy, kind of. She had to get him at the attention position, which is, according to her, the protocol from the beginning of the course when an instructor talks to a candidate.

[19] She asked him, "What the fuck happened?" Having no answer, she then asked, "Did you grab G.L.E.C.'s boobs?" Private Seifi answered, "No, I didn't. No, I didn't. I want out of the Army. All I want to do is love."

[20] Sergeant Jardine explained to the court that as an instructor she had to keep order on the course. She was not arresting Private Seifi, and because of that she did not provide him any caution concerning the right to remain silent, she did not inform him of the reasons of the conversation, and she did not provide him about his right to retain and instruct counsel.

[21] The conversation ended and she went to the course warrant in order to report the incident. Later, she brought G.L.E.C. to the military police shack. She considered that when G.L.E.C. made a statement to her, it was a breach of G.L.E.C.'s code of discipline and ethics.

[22] Later, Private Seifi was dismissed from the course because of previous incidents he was involved in prior to the one of 10 July 2008.

[23] Section 7 reads as follows:

> Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.

[24] Section 7 of the *Charter* protects the right to remain silent, which is broader than either the common law confession rule or the rule against self-incrimination. The essence of the right to silence is the freedom to choose whether to make a statement.

[25] The state is free to use legitimate means of persuasion to encourage a suspect to make a statement, but must allow the suspect to make an informed choice about whether to speak to authorities. The right to counsel is essential in assisting the suspect in making that choice.

[26] The right to choose is defined objectively. Tricks may not be used to induce a suspect to unknowingly make a statement to authorities after having elected to exercise the right to silence. Thus, an undercover police officer may not elicit a statement from a suspect under detention who has expressed the desire not to make a statement.

[27] The right to silence is not absolute, since it may be waived, and this right applies only after detention. As stated by Justice Sopinka in *R. v. Hebert*, [1990] 2 S.C.R. 151, at paragraph 117:

> The right to remain silent, viewed purposively, must arise when the coercive power of the state is brought to bear against the individual - either formally (by arrest or charge) or informally (by detention or accusation) - on the basis that it is at this point that an adversary relationship comes to exist between the state and the individual. The right, from its earliest recognition, was designed to shield an accused from the unequal power of the prosecution, and it is only once the accused is pitted against the prosecution that the right can serve its purpose.

[28] Paragraphs 10(*a*) and (*b*) read as follows:

> 10. Everyone has the right on arrest or detention
>
> *a*) to be informed promptly of the reasons therefore;
>
> *b*) to retain and instruct counsel without delay and to be informed of that right;

[29] For the purpose of these paragraphs, detention is a restraint of liberty by an agent of the state, other than arrest, in which a person may reasonably require the assistance of counsel. In addition to physical restraint, there is detention with the assumption of control over the movement of a person by a demand that may have significant legal consequences and that prevents or impedes access to counsel (see *R. v. Therens*, [1985] 1 S.C.R. 613, at paragraph 53).

[30] Even without legal consequences, there is a detention known as "psychological detention," when a person submits to a deprivation of liberty reasonably believing that

there is no other choice because most citizens are not aware of the precise legal limits of police authority.

[31] Proof of psychological detention is not dependent on the testimony of the accused's subjective belief in detention. It may be inferred from the evidence of the behaviour of the police and the accused.

[32] The decision of the Supreme Court of Canada in *R. v. Mann* is helpful in providing some meaning concerning the limits for physical and psychological detention when the court says, at paragraph 19:

> "Detention" has been held to cover, in Canada, a broad range of encounters between police officers and members of the public. Even so, the police cannot be said to "detain", within the meaning of ss. 9 and 10 of the *Charter*, every suspect they stop for purposes of identification, or even interview. The person who is stopped will in all cases be "detained" in the sense of "delayed", or "kept waiting". But the constitutional rights recognized by ss. 9 and 10 of the *Charter* are not engaged by delays that involve no significant physical or psychological restraint.

[33] Here, the case at bar is, was Private Seifi detained when he made his statement on 10 July 2008, to Master Corporal Jardine?

[34] Before proceeding with the analysis concerning the exclusion of the statement, the nature of the evidence in this *voir dire* requires that I make certain findings as to the credibility of the witness.

[35] Sergeant Jardine testified in an honest, calm, and straightforward manner. It is clear from her testimony that she had a clear recollection of the evidence surrounding the incident because of its unusual nature. She did not avoid any questions, took her time to think in order to provide accurate answers, and when she considered it necessary, she asked counsel to repeat or clarify questions that she did not understand. She provided many details to the court without being prompted, despite the fact that she was emotionally involved at the time of the incident because of the nature of it. It appears to the court that she carefully related to the court all the details she knew and stayed away from any speculation. Her testimony is credible and reliable.

[36] The prosecution admitted that Master Corporal Jardine was a person in authority when Private Seifi made his statement, but what kind of person in authority? As stated by the prosecution, it is true that by her rank and position, Master Corporal Jardine was a person in authority. However, considering the context, her authority was more similar to the one a teacher has in a classroom than to the one a police officer has when investigating the commission of a potential offence.

[37] As an instructor on a course, Sergeant Jardine clearly explained to the court that her primary concern was the discipline within the group and the well-being of the

members of that group, which is normal for an instructor who would like to ensure that candidates are provided a good learning environment. When the incident occurred, she was mainly preoccupied by what really happened than by the guilt of the person who allegedly committed the offence.

[38] As a military instructor, it was not proven that Sergeant Jardine had authority to lay a charge in accordance with Queen's Regulations and Orders, article 107.02. She did not arrest Private Seifi because she stated that it was not her intent to do so. In fact, the court understood that she believed that she had no reasonable grounds to do so, and because Private Seifi was not found committing an offence or being charged with, then she never considered that she had authority to do so.

[39] As expected in a learning environment, when candidates have to talk to their instructors, they must do it in an orderly and respectful manner. In a military context, it is not surprising, as expressed by Sergeant Jardine in her testimony, that candidates on a course will be put to the attention position when they talk to their military instructor. As expressed by Sergeant Jardine, it was the protocol all along the course.

[40] As a non-commissioned member, it was a legal obligation for Sergeant Jardine to report the incident to her superior in her chain of command as it is her duty to do so pursuant to *Queen's Regulations and Orders*, article 5.01(*e*), which says:

> "A non-commissioned member shall:
>
> > (*e*) report to the proper authority any infringement of the pertinent statutes, regulations, rules, orders and instructions governing the conduct of any person subject to the Code of Service Discipline."

[41] However, it is a matter of logic that before reporting anything, she had to find out what was going on. She had also to do that because of her duty as an instructor to make sure to put an end to the disruption to the lecture that was going on.

[42] When Private Seifi was put to the attention position by Sergeant Jardine, it was done in the presence of some candidates and in an open area. Sergeant Jardine asked only two questions and then Private Seifi left the place.

[43] It is clear that when he made his statement, Private Seifi was not physically restrained; however, was he psychologically restrained?

[44] In the present *voir dire*, the court may only infer from the evidence of the behaviour of the instructor and the accused, considering that no subjective belief has

been put forward by the applicant. However, it does not preclude the court to reach a conclusion that Private Seifi was detained or not.

[45] Private Seifi was not asked to go to a different place by Sergeant Jardine in order to be asked some questions. He showed up on his own when he was asked by Sergeant Jardine to come forward; Private Seifi left after he made his statement. The nature of the two questions asked by Sergeant Jardine, combined with the steps she went through previously, demonstrates that she was not trying to confirm the guilt of Private Seifi, but that she was trying to confirm if something really occurred and if Private Seifi was really involved. It does not appear to the court that Sergeant Jardine approached Private Seifi with reasonable suspicion, but instead with an intention to confirm if there was any reason to have some.

[46] It is true that Private Seifi could not go where he wanted when he was put to the attention position by Sergeant Jardine, but not for a very long time. However, it is clear from her testimony that it was not done in order to restrain him on the psychological side of things. She clearly did that as a usual way to talk to candidates. From the entire facts put before this court during this *voir dire*, I conclude that Private Seifi was not in a significant psychological restraint situation when he was put to the attention position by Sergeant Jardine just before he made his statement.

[47] As it appears from Sergeant Jardine's testimony, from the time the disruption occurred up to the time Private Seifi ended his statement, not much time elapsed. From an objective point of view, which is the one of a reasonable person being aware of all those circumstances, it appears to the court that it is less than likely that Private Seifi was psychology restrained, i.e., detained, which would have constituted the trigger to caution him about his right to remain silent, to be told the reason of his detention, and to be given an opportunity to consult a lawyer.

[48] It is the conclusion of this court that Private Seifi failed to prove on a balance of probabilities that his rights under section 7, paragraph 10(*a*) and (*b*) of the *Charter* were infringed. Then, it is not necessary for this court to proceed with an analysis of the applicant's request under paragraph 24(2) of the *Charter*.

[49] The application is dismissed.

LIEUTENANT-COLONEL L-V. D'AUTEUIL, M.J.

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