



COURT MARTIAL

Citation: *R. v. Captain A.G.M.*, 1997 CM 26

Date: 27 August 1997

Docket: F199726

Standing Court Martial
Halifax, Nova Scotia, Canada
Canadian Forces Base Halifax

Her Majesty the Queen

- and -

Captain A.G.M., accused

Before: Commander R.F. Barnes, M.J.

Warning

Subject to sub-section 486(3) and 486(4) of the *Criminal Code* and section 179 of the *National Defence Act*, the court has directed that the identity of the complainant and any information that would disclose the identity of the complainant shall not be published in any document or broadcast in any way.

FINDING

(Orally)

[1] With respect to the motion that a *prima facie* case has not been made out by the prosecution, I note that the court at the outset took judicial notice under Military Rule of

Evidence 15 paragraph (2) of the contents of Canadian Forces Administrative Orders, including administrative order 19-39 on sexual harassment. However, that judicial notice specifically does not include the publication of those orders or the sufficiency of notification of those orders to any individual in the Canadian Forces.

[2] Unlike statutes and civilian regulations, military orders, such as Queen's Regulations and Orders and CFAOs, are not gazetted in the Canada Gazette, so that means that deemed knowledge to the accused is unavailable. Normally the prosecution, if it wishes to rely on a contravention of an order such as 19-39 as the proof of prejudice to good order and discipline, the prosecution will adduce evidence of its availability in the unit; of the availability, that is, of the order in the unit of the accused person in compliance with articles 1.21 and 4.26 of Queen's Regulations and Orders. No such evidence has been led in this case.

[3] Other means of establishing the essential element of prejudice to good order and discipline in the second offence are through the use of expert opinion evidence or the use of judicial notice. There has been no expert opinion evidence on this element of the second offence. And the angry reaction of the complainant and the surprised and sympathetic response of Lieutenant(N) F. are not sufficient substitutes for expert opinion evidence on that topic.

[4] The prosecution's request that judicial notice be taken that this conduct by Captain A.G.M. is prejudicial to good order and discipline is tantamount at this stage in the trial to a request to reopen the case for the prosecution. It is simply not appropriate to take judicial notice of an element of the offence after the defence has made a motion that a no *prima facie* case has been made out with respect to a lack of evidence relating to the very same essential ingredient; that is, prejudice to good order and discipline. I make no comment on the competency or the propriety of a court martial taking judicial notice of such a thing during the case for the prosecution.

[5] In the result, the motion must succeed.

[6] Would you stand up, Captain A.G.M..

[7] ACCUSED: Yes, sir.

[8] PRESIDENT: The court finds you not guilty of the second charge.

[9] You may sit down.

Counsel:

Major J.S. MacKay, Deputy Judge Advocate Gagetown, Counsel for Her Majesty the Queen

Lieutenant(N) D.J. Demirkan, Deputy Judge Advocate Halifax, Assistant Counsel for Her Majesty the Queen

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