



COURT MARTIAL

Citation: *R. v. Whitehead*, 2016 CM 3009

Date: 20160421

Docket: 201425

Standing Court Martial

Royal Military College of Canada
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Officer Cadet A.R. Whitehead, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code of Canada*, directs that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

ADMISSIBILITY OF EXPERT OPINION EVIDENCE

(Orally)

[1] Officer Cadet Whitehead asked the court to qualify Professor Moore as an expert witness. The nature and the scope of his testimony, as an expert, has been identified by the defence as follows:

The expert would provide an opinion on the human memory in general, the factors that may compromise the reliability of autobiographical recollections, the difficulty of distinguishing an illusory memory from one based on actual experience and the constructive and reconstructive nature of memory.

[2] According to Officer Cadet Whitehead, the testimony of Professor Moore would assist the court in assessing the reliability of the testimony provided by one of the complainants, Officer Cadet R.S. It would assist the court in understanding how memory may work from a scientific perspective, in the context as the one provided by the complainant over a long period of time, mainly not knowing much about what happened to having a clear recollection of the events at the time she provided her testimony before the court.

[3] The evidence adduced on this issue consists of a document about the nature and scope of the expertise, which is the curriculum vitae of Professor Moore, the written report prepared by Professor Moore on this issue and the written notice sent by the defence regarding the fact that an expert would be called in this trial.

[4] Expert evidence is an exception to the general rule that witnesses may testify only as to facts within their knowledge, not as to their opinions. Rule 81 of the *Military Rules of Evidence* says:

A witness is an expert witness and is qualified to give testimony if the judge advocate finds that

(a) to perceive, know or understand the matter concerning which the witness is to testify requires special knowledge, skill, experience or training;

(b) the witness has the requisite knowledge, skill, experience or training; and

(c) the expert testimony of the witness would substantially assist the court.

[5] In the leading case of *R. v. Mohan*, [1994] 2 S.C.R. 9, Judge Sopinka set out criteria as to the admissibility of expert evidence:

(a) relevance;

(b) necessity in assisting the trier of fact;

(c) the absence of any exclusionary rule; and

(d) a properly qualified expert.

[6] In *R. v. Abbey*, (2009) 246 CCC (3d) 301, Ontario Court of Appeal, a two-step approach was suggested in order to properly apply those criteria. This approach was confirmed by the Supreme Court of Canada in its decision of *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

[7] The standard of proof that must be met by the person calling the expert on these criteria is on the balance of probabilities, so the first step is the existence of certain preconditions to be met by the defence. Is the proposed opinion related to a subject matter that is properly the subject of the expert opinion evidence? The answer is yes. How

memory works or some aspects of it is properly the subject of the expert opinion evidence.

[8] Is the witness qualified to give the opinion? The answer to this is yes. The education, knowledge and experience put before this court, including the fact that the witness had written, presented and testified before the court, clearly make Professor Moore qualified to give an opinion in relation to how memory works from a psychological perspective.

[9] Does the proposed opinion run afoul of any exclusionary rule entirely apart from the expert opinion rule? No. There is no attempt to avoid the application of any other rule according to me.

[10] Is the proposed opinion logically relevant to a material issue? On its face, the proposed opinion is relevant to a material issue which is the reliability of the testimony provided by one complainant.

[11] So, it brings me to the second step which, according to case law, is called the “gatekeeper inquiry.” On this issue, there are three questions that must be asked. First, the one which was at the heart of the debate before this Court yesterday, is the proffered opinion evidence necessary to a proper adjudication of the facts to which that evidence is directed?

[12] Assessing reliability of a witness’s testimony, as the one provided by Officer Cadet R.S., in my opinion, does not require scientific knowledge nor is it something of a technical nature in the circumstances of this case. This witness provided an explanation from the time the incident occurred to the time she testified before this Court about what she did and said, about what she knew and why she did or did not remember some things; and she was cross-examined thoroughly on those issues.

[13] Knowing some aspects of how memory works does not assist the court in its task to assess reliability of her testimony. It does not go beyond knowledge and experience of the judge in order to appreciate the logic and veracity of the testimony. Essentially, was her testimony fabricated or not, and the fact, if it is fabricated, was it done conscientiously or not rely more on what she told and how the court will appreciate it than anything else.

[14] I would add that I read the decision that was submitted to me, *R. v. J.F.*, 2015 ONSC 3067. Judge Conlan wrote that decision and I think her context was a bit different than mine in the sense that she had to assess the confession provided by the accused about his crime. Basically, he confessed his crime, and the fact of having some scientific perspective on why he did such a thing seemed relevant to her in those circumstances. I am not facing the same context.

[15] The fact that Officer Cadet R.S. testified the way she testified and reported things the way she reported them does not require an assessment if it is the result of a false

memory or not and is not crucial in this matter in order to make a decision. Essentially, the court is able to form its own opinion without help.

[16] I would say that, in some other circumstances, as it was reflected by Professor Moore, a judge may, because of the circumstances, come to a conclusion that he may need expert opinion. I am not saying here that Professor Moore is not qualified or has no expertise at all to provide to the court; I am just saying that in order to make the determination the court has to make, his help is not required in the circumstances of this case, so it does not bind any other judge or trial judge about such issue. The decision is for this case only.

[17] Then, it is the Court's decision that Officer Cadet Whitehead failed to meet his burden, which is to prove on a balance of probabilities that the opinion evidence of Professor Moore, as described earlier in this decision, is necessary.

FOR THESE REASONS, THE COURT:

[18] **DECLARES** that the opinion evidence is unnecessary and concludes that Professor Moore cannot provide expert opinion evidence to the court.

Counsel:

The Director of Military Prosecutions as represented by Major M. Pecknold, Major A.-C. Samson and Major J.A. Peck

Major C.E. Thomas and Major D. Hodson, Defence Counsel Services, Counsel for Officer Cadet A.R. Whitehead