HEARING BY MILITARY JUDGE

Citation: *R. v. Duvall*, 2017 CM 2007

Date: 20171002
Docket: 201717

Preliminary Proceedings

Asticou Centre
Gatineau, Quebec, Canada

Between:

Captain S.P. Duvall, Applicant

- and -

Her Majesty the Queen, Respondent

Before: Commander S.M. Sukstorf, 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*, directs that any information that could identify the persons described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION ON FURTHER DISCLOSURE APPLICATION

(Orally)

Introduction and background

[1] On 9 November 2016, Captain Duvall was charged with sexual assault, contrary to section 271 of the *Criminal Code*, an offence punishable under section 130 of the *National Defence Act*. The charge was preferred by the prosecution, Lieutenant (Navy) MacKinnon, on 2 March 2017. The particulars read as follows:

> In that he, between 01 August 2010 and 31 January 2011 at Canadian Forces Base Gagetown, Gagetown, New Brunswick, did sexually assault A.D., contrary to section 271 of the *Criminal Code of Canada*.

[2] On 20 April 2017, Major Leblond, from the prosecution, informed Captain Duvall that she had assumed responsibility of the file.

[3] On 23 May 2017, Lieutenant-Commander Walden requested additional disclosure.

[4] On 6 July 2017, Major Leblond provided additional disclosure with unsubstantiated redactions.

[5] On 24 August 2017, Lieutenant-Commander Walden requested that Major Leblond provide unredacted copies of some of the items disclosed on 6 July and 24 August 2017 and again requested Major Leblond provide a will-say statement. In this request, Lieutenant-Commander Walden specifically asked whether the complainant had informed Major Leblond of her willingness to testify and if so, to disclose this fact. Lieutenant-Commander Walden also stated that he was ready to schedule this matter for trial.

[6] On 21 September 2017, this matter was scheduled for trial from 23-27 October 2017.

[7] On 27 September 2017, after the notice of application was filed, Major Leblond disclosed some, but not all, of the requested information. At the same time, Major Leblond provided a will-say statement and disclosed a witness to be called at trial, Captain Conley, who hitherto had not been identified by the complainant, or anyone else as having been a witness to the alleged events. Major Leblond further stated that Captain Conley had only recently been mentioned by the complainant as being a witness.

[8] On 11 May 2017, Major Leblond had a conversation with the complainant that was recorded in the notes of Master Corporal Yuill. Major Leblond redacted portions of these notes before disclosing them. Major Leblond initially claimed "prosecution privilege" over the redactions. Major Leblond has still not disclosed the information that had been redacted.

[9] The Crown resists the application on the basis that the redactions are subject to litigation privilege and are irrelevant. She states that the notes relate to information that she discussed with the complainant about prosecution practices and procedures.

Issue

[10] Are the redacted police notes of Master Corporal Yuill subject to privilege or are they clearly irrelevant?

Position of the respondent

[11] The prosecution has argued that the notes were taken by Master Corporal Yuill at her request when she participated in an interview with a witness and that the redacted portion relates only to the prosecution's practice and procedure and was therefore privileged. She further argued that the redaction is also irrelevant.

Analysis

[12] It is important to begin the analysis with reference to the decision of Sopinka J. in *R. v. Stinchcombe*, [1991] 3 S.C.R. 326, 68 C.C.C. (3d) 1, (*Stinchcombe*) and the duty (which is derived from section 7 of the *Charter* and the right of the accused to make full answer and defence) that the prosecution has to disclose to the defence all relevant information. It does not matter whether the prosecution plans to call that evidence or if the evidence hurts the prosecution's case. Justice Sopinka stated at paragraph 22:

> The trial judge on a review should be guided by the general principle that information ought not to be withheld if there is a reasonable possibility that the withholding of information will impair the right of the accused to make full answer and defence, unless the non-disclosure is justified by the law of privilege.

[13] In short, the basic principle is that no information should be withheld from the defence if there is a reasonable possibility that the withholding of the information will impair the right of the accused to make full answer and defence. However, this principle is also subject to the law of privilege which requires the exercise of discretion by the Crown as to what information should or should not be disclosed.

[14] The Supreme Court of Canada in *R. v. Chaplin*, [1995] 1 S.C.R. 727 (*Chaplin*) amplified the procedural structure of the principles set out in the *Stinchcombe* decision. The defence's application identified the specific material in existence that it sees as relevant and ought to have been produced. Hence, in accordance with *Chaplin*, the Crown's exercise of that discretion is reviewable by a trial judge and the onus is on the prosecution to justify non-disclosure by demonstrating that the information is privileged.

[15] As the military judge assigned to preside at the court martial, I afforded the prosecution the opportunity to call evidence to justify its position. Prosecution made oral submissions and provided the Court with case law upon which it relied in not disclosing the redacted portion.

[16] In terms of litigation privilege, it is important to highlight that the role of the military prosecutor is to assist in the administration of military justice in the Canadian Armed Forces. In the administration of military justice and the public interest, prosecutors are impartial and neutral. He or she performs a public duty which requires them to ensure that all available relevant evidence is presented in a fair, impartial and objective manner. It is not the duty of the prosecutor to take an adversarial position in the administration of justice. (see *R. v. Eddy*, 2014 ABQB 164, paragraphs 88-90). So, in essence, the prosecution does not have a "client"; there are no adversarial parties

against whom he or she must maintain a zone of privacy with respect to the "litigation privilege" as it is understood in the civil context.

[17] However, in the Canadian criminal justice system, common law recognizes that the prosecution's role is different and parameters are set to facilitate this. Common law recognizes that prosecution may claim work product privilege. As the case of *R. v. Trang*, 2002 ABQB 19 (*Trang*) sets out and is recognized within the *Martin Report* that *Trang* refers to at paragraphs 68 and 69, what is privileged are notes that involve thought processes or considerations of counsel in the preparation of his/her case. In the criminal context, "work product" generally includes, but is not limited to:

(a) prosecution's notes on a file;

(b) prosecution's memoranda on a file;

(c) correspondence;

(d) prosecution's opinion; and

(e) prosecution's trial strategy.

[18] My review of the redacted portion revealed that the paragraphs contain no legal opinions, strategies or conclusions of the prosecution, but rather the redacted portion is primarily a benign description of the next steps in the upcoming prosecution. However, there is some information in the redacted portion that the prosecution may have wished to control the timing of its release, which it is fully entitled to do. Nonetheless, as this case is now scheduled for trial, there is no further justification to withhold this information. In essence, it is the exclusion of these paragraphs in an otherwise substantive interview that raises concern for the defence.

[19] Further, the court in *R. v. Basi*, 2008 BCSC 1858 (paragraph 72) clearly indicated that the:

> . . .[E]lement of the privilege is that the documents or communications must be prepared, gathered, or annotated by counsel, or person under counsel's direction, or the litigant himself if he is self-represented. Thus, in criminal matters, litigation privilege will apply to counsel's work product, which was prepared for the dominant purpose of litigation.

The interview and the associated interview notes clearly were not prepared for the dominant purpose of the prosecution preparing for trial and, as such, they cannot avail themselves of this "work product" privilege protection.

[20] I specifically reviewed the redacted portion to see whether the claimed "work product" contained any new factual information. In *R. v. O'Connor*, [1995] 4 S.C.R. 411 at paragraph 87, L'Heureux-Dubé, J stated that the Crown is not obliged to produce work product "provided [. . .] it contains no material inconsistencies or additional facts

not already disclosed." In my view it does not appear to, but since the Court is not privy to exactly what information was disclosed to the defence at the time of the application, it cannot be sure. The Court also noted that although the prosecution can control the timing of its disclosure of certain aspects of its case, such as the willingness of the complainant to testify, this interview did take place on the 11th of May 2017 and I note that Lieutenant-Commander Walden was seeking information specifically on this point as recently as the 24th of August 2017.

Notes Relevance

[21] In follow-up interviews, the prosecution has an obligation to disclose new and inconsistent information from witnesses who have previously provided statements, as well as interview notes from witnesses who have not previously provided statements. To be clear, the notes were not taken when the prosecution was preparing the complainant for direct examination, but rather they were taken, by the military police, at the request of the prosecution when she spoke with the complainant to gather additional information, explain the prosecution's role and to describe what would happen moving forward. It is clear that during the interview, the prosecution acted very professionally, ethically and very carefully balanced her role as an independent neutral party while at the same time trying to keep the complainant informed as to what would happen under various scenarios.

[22] Defence counsel argued that these redacted portions of an interview with a complainant would be important to his client in preparing his defence. He specifically expressed concern as to why a new witness was added to the list at such a late stage and what may have been discussed during that interview. Although the redacted portion may or may not contain new factual information, the remaining portions of the disclosed notes do. Hence, it is understandable that the redacted notes of the interview trigger the interest of the defence.

[23] However, relevancy for disclosure purposes must be assessed in regard to its usefulness to the defence and, as such, a contextual view of the information is important. Although there may be no new facts revealed in those few paragraphs, the fact that a conversation of that nature took place, may be of interest to the defence. Relevant information includes any information where there is a "reasonable possibility that it may assist the accused in the exercise of the right to make full answer and defence" (see *Chaplin*). Relevancy must be given a generous interpretation. If it is of some use, then it is relevant and should be disclosed. It is possible that the context of that part of the conversation between the prosecution and the complainant may be useful to the defence in assessing its own position and, as such, it should be disclosed (*Chaplin* quoting *Egger*).

[24] In summary, the defence identified the redacted information within the notes of an interview the prosecution had with the complainant when these notes were disclosed to him. The prosecution sought to justify non-disclosure and argued that the information was irrelevant and/or privileged. After hearing the evidence and submissions by the

prosecution, as well as reviewing the redacted notes, the Court found that the material did not fall within privileged work product. Secondly, the Court reviewed the redacted portions for relevancy. As argued by the prosecution, the redacted portion may not include any additional facts as we perceive them today, however, relevancy must also be considered in the "context" in which the redacted statements were made. The Court in *Stinchcombe* (paragraph 33 made it clear that "all information in the possession of the prosecution relating to any relevant evidence" should be supplied. To remove a small portion of the evidence that unfolded within an interview where relevant information was disclosed, runs contrary to the intention of providing "all evidence" to enable the defence to be able to make full answer and defence. In this situation, it is the context under which the statements were made that may be relevant to the defence.

[25] As such, I order that the redacted notes be immediately disclosed to the applicant.

Counsel:

Lieutenant-Commander B. Walden and Major F. Ferguson, Defence Counsel Services, Counsel for the applicant

The Director of Military Prosecutions as represented by Major M.-E. Leblond, Counsel for the respondent