COURT MARTIAL

Citation: *R. v. Gobin*, 2018 CM 2006

Date: 20180201
Docket: 201725

Standing Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Corporal R. J. Gobin, Respondent

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

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described during these proceedings as the complainant shall not be published in any document or broadcast or transmitted in any way.

DECISION ON AN APPLICATION BY THE PROSECUTION FOR A PUBLICATION BAN

(Orally)

Introduction

[1] The prosecution made a verbal application before the court this morning, 1 February 2018 seeking a publication ban on any information that could identify the victim ordering that it shall not be published in any document or broadcast or transmitted in any way. He makes this submission seeking the Court to rely upon its powers set out at section 179 of the *National Defence Act* (*NDA*) which states:

> **179 (1)** A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to
>
> **(a)** the attendance, swearing and examination of witnesses;
>
> **(b)** the production and inspection of documents;
>
> **(c)** the enforcement of its orders; and
>
> **(d)** all other matters necessary or proper for the due exercise of its jurisdiction.

[2] Section 179 of the *NDA* provides a court martial the same power to decide on matters within its authority as are vested in a superior court of criminal jurisdiction in the exercise of its jurisdiction. Considering the oral application by the prosecution falls under section 486 of the *Criminal Code* (*Cr. C.*), it is clear that a Publication Ban is something that a superior court of criminal jurisdiction is vested with authority to decide.

[3] I advised counsel that it was my understanding that the purpose of section 179 of the *NDA* was to provide the court martial with an inherent power to control its procedure in respect of residual matters that are not dealt with in the *NDA* or its regulations. (see *R. v. Master Corporal J.E.M. Lelièvre*, 2007 CM 1011 at paragraph 5). Defence counsel was not able to provide evidence to support a belief that the court could not rely upon its power under section 179 of the *NDA* to order a Publication Ban.

[4] As defence counsel argued, under the *NDA*, the Court is not obligated to impose mandatory orders that are set out within the *Cr. C*. The court acknowledges that there is precedent whereby courts martial exercise discretion in deciding whether or not to impose mandatory orders in the *Cr. C* when a mandatory provision is inconsistent with the powers set out within the *NDA* such as in the case of Weapons Prohibition Orders. However, in this case, the *NDA* is silent on publication bans.

[5] In arguing why the court has the power to order a Publication Ban, the prosecution relied upon the mandatory provisions set out in paragraph 486.4(2)(b) that relate to the *Cr. C.* charges which states:

> **Order restricting publication — sexual offences**
>
> **486.4 (1)** Subject to subsection (2), the presiding judge or justice may make an order directing that any information that could identify the victim or a witness shall not be published in any document or broadcast or transmitted in any way, in proceedings in respect of
>
> **(a)** any of the following offences:
>
> **(i)** an offence under section 151, 152, 153, 153.1, 155, 159, 160, 162, 163.1, 170, 171, 171.1, 172, 172.1, 172.2, 173,

210, 211, 213, 271, 272, 273, 279.01, 279.011, 279.02, 279.03, 280, 281, 286.1, 286.2, 286.3, 346 or 347, or

(ii) any offence under this Act, as it read from time to time before the day on which this subparagraph comes into force, if the conduct alleged would be an offence referred to in subparagraph (i) if it occurred on or after that day; or

(b) two or more offences being dealt with in the same proceeding, at least one of which is an offence referred to in paragraph (a).

Mandatory order on application

(2) In proceedings in respect of the offences referred to in paragraph (1)(a) or (b), the presiding judge or justice shall

(a) at the first reasonable opportunity, inform any witness under the age of eighteen years and the victim of the right to make an application for the order; and

(b) on application made by the victim, the prosecutor or any such witness, make the order.

[6] A review of the rationale for statutory publication bans is helpful. The case law on publication bans in cases of sexual assault is anchored in two Supreme Court of Canada decisions which were relied upon by the prosecution: *Canadian Newspapers Co. v. Canada (Attorney General)*, [1988] 2 S.C.R. 122 (*Canadian Newspapers Co.*) and *R. v. Adams*, [1995] 4 S.C.R. 707.

[7] According to the court in *Canadian Newspapers Co.*, the mandatory nature of an order under section 486 serves to further the goal of encouraging the reporting of sexual offences. As Lamer J stated, at pages 131-32:

> When considering all of the evidence adduced by appellant, it appears that, of the most serious crimes, sexual assault is one of the most unreported. The main reasons stated by those who do not report this offence are fear of treatment by police or prosecutors, fear of trial procedures and fear of publicity or embarrassment. Section [486] is one of the measures adopted by Parliament to remedy this situation, the rationale being that a victim who fears publicity is assured, when deciding whether to report the crime or not, that the judge must prohibit upon request the publication of the complainant's identity or any information that could disclose it.

[8] In addition, the court in *Canadian Newspapers Co.*, pointed out that complainants must be certain that their names will not be published in order for the object of the publication ban to be achieved. According to Lamer J, at page 132:

> Obviously, since fear of publication is one of the factors that influences the reporting of sexual assault, certainty with respect to non-publication at the time of deciding whether to report plays a vital role in that decision. Therefore, a discretionary provision under which the judge retains the power to decide whether to grant or refuse the ban on publication would be counterproductive, since it would deprive the victim of that certainty. Assuming that there would be a lesser impairment of freedom of the press if the impugned provision were limited to a discretionary power, it is clear, in my view,

> that such a measure would not, however, achieve Parliament's objective, but rather defeats it.
> [emphasis in original]

[9] In his oral submissions, Defence counsel argued that the facts of the case before the court, do not require the imposition of such a ban. While this may be true, as it stands right now, the Court has only been presented with the allegations of a section 271 offence, sexual assault which is captured under paragraph 486.4(2)(b). Based on the reasons set out within *Canadian Newspapers Co* as referred to above, and the fact that the request before the Court is made under paragraph 486.4(2)(b) requiring a judge to comply upon an application of the Prosecution, I see no reason to deviate from the regime set out within the *Cr. C*. Consequently, I will impose the publication ban pursuant to the powers provided to a court martial under section 179 of the *NDA*.

[10] This may very well be a case where after hearing the evidence, it is determined that both the public interest and the interests of the complainant are better served without the Publication Ban. However, at this time, the court must comply with the statutory regime established in paragraph 486.4(2)(b). If both the Crown and the complainant consent or the circumstances which make the publication ban mandatory are no longer present, subject to any rights that the accused may have, as the trial judge, I may reconsider the order.

FOR THESE REASONS, THE COURT:

[11] **GRANTS** the application.

Counsel:

The Director of Military Prosecutions as represented by Major G. J. Moorehead, Counsel for the Applicant

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