COURT MARTIAL

Citation: *R. v. Ryan*, 2018 CM 2016

Date: 20180508
Docket: 201744

Standing Court Martial

Canadian Defence Academy
Kingston, Ontario, Canada

Between:

Lieutenant(N) B. Ryan, Applicant

- and -

Her Majesty the Queen, 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 arising in this trial by Standing Court Martial that could identify any person who is described during these proceedings as a complainant shall not be published in any document or broadcasted or transmitted in any way.

By court order, pursuant to section 179 of the *National Defence Act* and section 276.3 of the *Criminal Code*, this court directs that no person shall publish in any document, or broadcast or transmit in any way, any of the following: (a) the contents of an application made under section 276.1; (b) any evidence taken, the information given and the representations made at an application under section 276.1 or at a hearing under section 276.2; (c) the decision of a judge to hold a hearing under subsection 276.1(4) and the determination made and the reasons provided under section 276.2, unless (i) that determination is that evidence is admissible, or (ii) this court after taking into account the complainant's right of privacy and the interests of justice, orders that the determination and reasons may be published, broadcast or transmitted.

DECISION RELATING TO AN APPLICATION UNDER SECTION 276 OF THE CRIMINAL CODE

(Orally)

Introduction

[1] On 20 June 2017, the prosecution preferred one charge punishable under section 130 of the *National Defence Act* (*NDA*) alleging an offence contrary to section 271 of the *Criminal Code* for sexual assault and a second charge punishable under section 130 of the *NDA* alleging an offence contrary to section 262 of the *Criminal Code* for criminal harassment. On 25 April 2018, the Court Martial Administrator (CMA) issued a convening order for the accused to appear before a Standing Court Martial at the Canadian Defence Academy on 8 May 2018.

The application

[2] On 20 April 2018, counsel for Lieutenant(N) Ryan provided the CMA with notice, under *Queen's Regulations and Orders for the Canadian Forces* (QR&O) 112.04, of his intention to bring an application pursuant to section 187 of the *NDA* and QR&O article 112(5)(*e*) seeking a stay of proceedings. The application was accompanied by a statutory declaration of Phyllis Nadeau that detailed the evidence relevant to the sexual assault charges before the court. An amended notice of application was filed with the CMA on 25 April 2018. In addition, on 25 April 2018, the applicant provided notice of application seeking a hearing pursuant to section 276.1 of the *Criminal Code* to be heard on 8 May 2018 at 0930 hours, or as soon after that time as the application can be heard.

Positions of counsel

[3] Relying upon the Supreme Court of Canada's (SCC) decision in *R. v. Darrach*, [2000] 2 S.C.R. 443, counsel for the applicant seeks evidence of specific instances of prior sexual activity to be proffered in support of his application for abuse of process. He submits that the intended purpose of this evidence is to factually support what the Canadian Forces National Investigation Service (CFNIS) Western Region (WR) knew when and how the CFNIS conducted their investigation, not to show that A.M. is more likely to have consented to the sexual activity or is less worthy of belief.

[4] Although the prosecution made oral submissions during the hearing, it did not advocate a specific position on the application.

Background

[5] Subsection 276 (1) of the *Criminal Code* serves as a barrier to the admissibility of evidence of prior sexual conduct when it is to be relied upon for prohibited purposes. It does not matter whether the alleged sexual activity was with the accused or with any

other person, it is not admissible to support an inference that "by reason of the sexual nature of that activity" she was more likely to have consented to the sexual activity that forms the subject matter of the charge, or she is less worthy of belief (the "twin myths"). The legislative purpose of the provision ensures that a complainant does not undergo humiliating cross-examination on subject matter that is not relevant to the alleged assault before the court. In effect, this provision makes it more palatable for complainants to come forward with a complaint.

[6] However, section 276 does not categorically prohibit the admission of evidence of a complainant's sexual activity. The decision of the SCC in *Darrach* makes it clear that the section is "[f]ar from being a 'blanket exclusion', s. 276(1) only prohibits the use of evidence of past sexual activity when it is offered to support two specific, illegitimate inferences."

[7] However, given the importance of the presumption of innocence within our judicial system, it is imperative that an accused's defence not be unnecessarily curtailed without clear justifiable reasons. Hence, section 276 protects the right of the accused to a fair trial while recognizing the prejudicial and distorting effects of prohibited inferences drawn from a complainant's prior sexual conduct.

Assessing section 276 application

[8] Pursuant to paragraph 276.1(4)(c) of the *Criminal Code*, as the judge overseeing the court, I was required to consider the application to assess whether the evidence sought was capable of being admissible under subsection 276(2). In order to be admissible, evidence of a complainant's sexual history must meet the requirements of subsections 276(2) and (3). At the preliminary stage, I had to give facial consideration to ensure that the information and evidence set out in the written application was not absolutely barred under subsection 276(1) and that it could satisfy the three criteria in subsection 276(2), having regard to the factors in subsection 276(3), without having to decide that the criteria are met. In short, the affidavit must establish a connection between the complainant's sexual history and Lieutenant(N) Ryan's defence. The evidence sought must relate to specific instances of sexual activity, as opposed to general sexual behaviour of the complainant and it must also be relevant to an issue at trial.

[9] My obligation at the early stage is only to give the application facial consideration as a matter of admissibility. Given that the evidence was capable of being admissible, then the application proceeded to an evidentiary hearing held under section 276.2 where the application was considered in camera. Pursuant to subsection 276.2(3), as the judge overseeing this matter, I was required to consider the three subsection 276(2) criteria in determining the admissibility of the evidence.

[10] I considered whether the evidence related to specific instances of sexual activity and the purpose for which the evidence was sought. The applicant seeks the admission of specific instances of sexual activity as outlined within an affidavit filed with a pre-

trial motion related to abuse of process. The affidavit includes multiple exhibits. At paragraphs 4, 5 and 6 of his application, the accused set out specific instances he wishes to rely upon. Although there was some discussion about whether the generalized nature of their sexualized relationship could be relied upon, the case of *R. v. L.S.*, 2017 ONCA 685 which relied upon the case of *R. v. Aziga*, [2008] O.J. No 4669 makes it clear that in situations where there is an established relationship, that the required specifics could include reference to the parties, to the relationship, the relevant period, and the nature of the relationship. Hence, the court found that the request did relate to specific instances of sexual activity.

Assessing the intended purpose of the evidence and the relevance to the issue at trial

[11] At paragraph 7 of his application, the applicant submits that he seeks to rely upon specific instances of previous sexual history between himself and A.M. to support his allegation that CFNIS WR conducted a negligent or abusive investigation which caused unreasonable delay, causing his memory to fade and the evidence required in his defence to be unavailable. He argues that their negligence caused irreparable prejudice to his ability to make full answer and defence and to a fair trial. He submits that to support his application, he must introduce those facts that the complainant told the CFNIS during her interviews so it is clear what the CFNIS knew at the respective stages of the investigation.

[12] Evidence is relevant if it renders a fact slightly more probable than it would be without the evidence. Hence, based on the pre-trial motion, the Court finds that the information the applicant seeks to introduce is relevant for the purpose he seeks to rely upon.

[13] However, relevance alone is not sufficient to warrant the admission of evidence of a complainant's prior sexual conduct. In *Darrach*, the SCC explained that even when evidence of prior sexual conduct is adduced for a non-prohibited purpose, the trial judge must still weigh the probative value of the evidence against its prejudicial effects.

Significant probative value not substantially outweighed by danger of prejudice to the proper administration of justice

[14] Evidence of a complainant's prior sexual conduct may be admitted under paragraph 276(2)(c) if it has "significant probative value that is not substantially outweighed by the danger of prejudice to the proper administration of justice."

[15] In this weighing process, the court considered the particular myths and stereotypes the evidence might support and ensured that the admission of the evidence would not open the door to an attack on the complainant. It is not simply about protecting her privacy, but rather it is about ensuring that the trier of fact, in this case, myself does not rely upon evidence, either directly or indirectly, to support any of the prohibited myths that are not relevant to the alleged sexual assault before the court.

Weighing of probative value of the evidence against its prejudicial effects

[16] After hearing oral submissions from counsel, I took into account and weighed the eight factors set out in subsection 276(3). The following factors affected my determination as to the admissibility of the sexual conduct evidence:

(a) the interests of justice, including the right of the accused to make a full answer and defence; the information is only being sought for the purpose of the accused's application and defence. It is not being admitted for the trial itself, so there is minimum risk that it will be relied upon for prohibited purposes;

(b) society's interest in encouraging the reporting of sexual assault offences; it was noted that A.M. reported this information to police as evidence as she felt it comprised the full nature of the offences against her;

(c) whether there is a reasonable prospect that the evidence will assist in arriving at a just determination in the case; the evidence is sought to prove what CFNIS WR knew when and how they conducted their investigation;

(d) the need to remove from the fact-finding process any discriminatory belief or bias; the information being examined is what was in the hands of the investigators when they made the decisions that they did. Counsel on both sides have admitted they have confidence that the court can keep itself in an unbiased position and not rely upon any of the facts for a discriminatory belief;

(e) the risk that the evidence may unduly arouse sentiments of prejudice, sympathy or hostility in the jury; this application is before a judge alone and should not unduly arouse sentiments of prejudice or hostility against the victim;

(f) the potential prejudice to the complainant's personal dignity and right of privacy; there is no prejudice to the complainant's dignity, personal security or full protection of the law as she will not be cross-examined in open court regarding any of the details. Although her right of privacy will be affected, originally she readily provided these details to the CFNIS intending for them to be investigated and tried in open court.

Conclusion

[17] The court finds that the admission of the evidence sought by the applicant, for the narrow purpose of the pre-trial application of abuse of process is consistent with the interests of justice. Importantly, it protects the right of the accused to make full answer and defence and contributes to a just determination of the issues at trial. Further, as it is

restricted only to the application, the complainant will not be subjected to unfair, irrelevant or intrusive questioning on matters not relevant to the charged offences before the court. It ensures respect for the complainant's dignity and prevents the fact-finding process from being tainted with discriminatory suggestions and beliefs.

FOR THESE REASONS, THE COURT:

[18] **GRANT**S the application and orders the admissibility of the evidence pursuant to subsection 276(2) of the *Criminal Code* and as described in the application.

Counsel:

Lieutenant-Commander B.G. Walden, Defence Counsel Services, Counsel for the Applicant

The Director of Military Prosecutions as represented by Lieutenant Colonel S.D. Richards and Major A. van der Linde, Counsel for the Respondent