COURT MARTIAL

Citation: *R. v. MacIntyre*, 2018 CM 4014

Date : 20180623
Docket : 201646

General Court Martial

Halifax courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between :

Her Majesty the Queen

and -

Sergeant K. J. MacIntyre, Accused

Before : Commander J.B.M. Pelletier, 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directs that any information that could identify anyone described in these proceedings as the complainant "M.V.M" shall not be published in any document or broadcast or transmitted in any way.

DECISION ON WHETHER THE DEFENCE OF MISTAKEN BELIEF IN CONSENT WILL BE PUT TO THE GENERAL COURT MARTIAL PANEL

(Orally)

Introduction

[1] At the conclusion of the evidentiary stage of this trial, counsel for the defence has notified me as presiding military judge that the accused seeks to rely upon the defence of honest but mistaken belief in consent and therefore that this defence should be put to the panel of the General Court Martial as part of my final instructions. That defence would be combined with arguments to the panel to the effect that the prosecution has not discharged its burden of proving beyond reasonable doubt the

absence of consent. The threshold evidential burden has in my view been met to make this request from counsel a live issue.

The law

[2] What I need to determine is whether the defence of honest but mistaken belief in consent has an air of reality on the basis of what is known as the *Cinous* test, based on *R. v. Cinous*, [2002] 2 S.C.R. 3, where the Supreme Court of Canada identified the question to be answered as to "whether there is evidence upon which a properly instructed jury acting reasonably could acquit if it accepted it as true." (at paragraph 86) This is a question of law that requires the judge to determine whether the evidence adduced in the trial is sufficient to give rise to the defence. Defences that do not have an air of reality must be removed from consideration by the jury or panel to avoid confusing panel members and muddy their deliberations.

[3] I must determine if the evidence emanating from any source in the trial would be sufficient to allow a properly instructed panel acting reasonably to acquit the accused on the basis of that defence. In doing so, I must assume that the evidence relied upon by the accused is true. I must make no determination on the credibility of witnesses, must not weigh the evidence, make findings of fact or draw determinate factual inferences.

[4] The *Cinous* test is uniformly applicable to all defences. There is no special test for sexual offences. The case of *R. v. Osolin* [1993] 4 S.C.R. 595 holds that for there to be an "air of reality" to the defence of honest but mistaken belief in consent in an allegation of sexual assault, there must be: (1) evidence of lack of consent to the sexual acts; and (2) evidence that, notwithstanding evidence of lack of consent, the accused honestly but mistakenly believed that the complainant was consenting. In other words, the evidence must show that the accused believed that the complainant had affirmatively communicated, by words or conduct, consent to engage in the sexual activity in question, in spite of a lack of consent.

[5] Also, in the context of sexual assault, Parliament has set out statutory conditions for the application of the defence. Those are found at section 273.2 of the *Criminal Code*, reading as follows:

> It is not a defence to a charge under section 271, 272 or 273 that the accused believed that the complainant consented to the activity that forms the subject-matter of the charge, where
>
> (a) the accused's belief arose from the accused's
>
> (i) self-induced intoxication, or
>
> (ii) recklessness or wilful blindness; or
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> (b) the accused did not take reasonable steps, in the circumstances known to the accused at the time, to ascertain that the complainant was consenting.

[6] It has been determined, for instance in the recent Court Martial Appeal Court (CMAC) decision of *R. v. Gagnon*, 2018 CMAC 1, that it is the duty of the presiding military judge assessing whether a defence has an air of reality to ascertain whether one of the statutory bars in section 273.2 is present (*Gagnon,* paragraph 12 by Trudel J.A. and paragraphs 74 and 97 by Bell C.J.). If that is the case, there will be no air of reality to a defence of mistaken belief in consent.

[7] Furthermore, it is also important for me to assess whether what is advanced is really a mistake of facts and not a mistake of law. Indeed, section 273.1 of the *Criminal Code* defines consent as "the voluntary agreement of the complainant to engage in the sexual activity in question" and specifies that no consent is obtained for the purpose of section 271 where a number of situations are present. A mistaken belief based on such a situation cannot ground a finding that the defence of mistaken belief is open to the accused. This is confirmed in the reasons of the majority of the CMAC in *Gagnon,* which quotes with approval Professor Hamish Stewart to the effect that "[t]he defence of mistaken belief in consent is available if the accused has an honest belief in communicated consent that is not tainted by the various factors listed in ss. 273.1 and 273.2." (*Gagnon,* paragraph 27).

[8] Finally, as illustrated once again by the CMAC decision in *Gagnon,* the Supreme Court of Canada, in the case of *R. v. Park*, [1995] 2 S.C.R. 836, has ruled that when the sole issue is one of credibility, the defence of mistaken belief in consent should not be put to the panel. As stated by Bell CJ in his reasons at paragraph 78 of *Gagnon*:

> Normally, where the versions of events as to what occurred are diametrically opposed, there can be no air of reality to the defence of honest but mistaken belief in consent, and a judge should refuse to put the defence to the jury. This will normally arise where the acceptance of one version necessarily involves the rejection of the other; the sole issue is one of credibility (consent or absence of consent) and the defence of mistaken belief in consent should not be put to the jury. However, it must always be borne in mind that a jury may decide to accept all or none of a witness's testimony, or accept parts of it in conjunction with other versions.
> [citations omitted]

[9] If it is possible for the panel to accept parts of the complainant's evidence and parts of the accused's evidence, to find that there is a scenario—a third version of events—that supports a defence of honest but mistaken belief, I must leave the defence with the panel on the basis of *Park*.

The facts

[10] There is no need to lay out the analysis in detail of all of the facts heard in the trial at this stage of the proceedings as I simply need to ensure that the parties understand my reasoning in relation to the specific decision I am asked to make. That being said, I do need to briefly summarize those facts that bear on the issue of consent from the versions of the complainant and accused to allow a proper understanding of my conclusions.

[11] The position of the complainant, the first witness heard in this trial, is that she woke up in her hotel room with the accused lying next to her, naked. She could feel his skin on her skin. She does not know how he got in her room, let alone into her bed. She testified that he was in a spooning position in relation to her, his belly towards her back. He kept on trying to place his hand on her hip, moving down towards her legs. She kept removing his hand and saying "no" while moving in and out of consciousness as she was extremely sleepy at the time. He tried to kiss her and she refused, closing her mouth to prevent him from inserting his tongue in it. She told him, "I love my husband and I don't want to cheat on him." She moved over to her belly to signify she did not want these contacts to continue and fell asleep. She woke up hearing him ask her, "Do you like it?" and realizing he was positioned behind her and was inserting his fingers and his penis in and out of her vagina from behind. He moved his penis increasingly harder inside of her, making moaning noises. She complained that he was hurting her but he continued until he ejaculated. Feeling semen on her body, she asked if he had just come. He responded affirmatively, adding that she should not worry as he was fixed, meaning vasectomized.

[12] As for the accused, he testified that he entered the complainant's room for the first time in the late hours of 26 or early hours of 27 September in the company of another female officer, for the purpose of taking M.V.M. to bed. When time came for both to leave, he heard the complainant say, "He can stay," but he left the room at the same time as the other female officer. He returned later alone to look for his misplaced jacket containing his wallet, hotel room key and significant amount of cash. He knocked on the door and the complainant answered. He asked for permission to enter to look for his jacket and she accepted. He found his jacket near where he had previously sat. After having used the bathroom on his way out, she engaged him in conversation. They both sat on the bed and continued talking. She lay down and he asked if he could lie down too. She said, "Yes." At one point, they both fell asleep in the spooning position. They woke up and she positioned her face near his. They discussed kissing, leading to what he described as consensual kissing. At that point, she told him, "We should not be doing this; I am your boss" or words to that effect. After a brief pause the kissing continued with increased intensity. They both undressed themselves and went under the sheets, in the bed. They continued kissing and straddling each other; his leg on top, then her leg on top. Eventually she got on her knees. He got behind her and eventually inserted his fingers into her vagina. She began to breathe heavily and moan. After a few minutes, she appeared to have an orgasm. He asked her if she could go again and she started massaging the outside of her vagina while he penetrated her from behind. At that point she told him not to come inside of her. As a consequence, he ejaculated on her back some time later. She asked if he had come inside of her, to which he replied "no". He also mentioned that he was "fixed." They both lay down on the bed, his stomach in contact with her back. They fell asleep.

[13] In cross-examination, the prosecutor reviewed the sequence of events with the accused, focusing on the various sexual acts he alleged, with the accused stating that the

complainant was an active participant throughout, she never said “no”, never pushed back and there was no hesitation on his part to the effect that she consented.

Issue

[14] In the course of the hearing to determine the question of whether the defence of mistaken belief in consent should be put to the panel, I solicited comments from counsel on four distinct areas, in this order given that the prosecution had seized the opportunity to state its position prior to the hearing:

(a) did the evidence show two diametrically opposed versions that could bar the defence within the meaning of *Park*?

(b) did Sergeant MacIntyre believe that M.V.M. consented to the sexual activities, considering the meaning of consent under section 273.1 of the *Criminal Code*?

(c) was this belief honest and unrelated to his recklessness or wilful blindness?

(d) was the statutory limitation of paragraph 273.2(b) of the *Criminal Code* engaged?

Position of the parties

[15] As for the first question, the prosecution argues that the testimony of M.V.M. and Sergeant MacIntyre cannot be realistically combined. As the issue is purely one of credibility, of consent or of lack of consent, the defence should not be submitted to the panel. For its part, the defence submits that the facts of this case are not sufficiently opposed to bar the defence of mistaken belief in consent to be put to the panel.

[16] As for the second question, the prosecution’s initial position appeared to be that, yes, Sergeant MacIntyre believed there was consent. I asked the prosecutor whether the words that the accused admits having heard from the complainant to the effect that “We should not be doing this; I am your boss” could constitute a manifestation of a lack of agreement to continue to engage in sexual activity, at that time the kissing, that he alleges was consensually occurring. The prosecutor did not think so in the overall circumstances but, in fairness, he was not entirely sure.

[17] As for the third question, the prosecution’s position is that the accused’s belief was honest and unrelated to his recklessness or wilful blindness except if it is found that he had received the expression of a lack of agreement to continue to engage in the activity. The fourth question was to be answered negatively on the basis of the evidence provided by the accused, although it was qualified as being artificial, given the irreconcilable position of the complainant and the accused on the facts.

[18] For its part, the defence took the view that there were no concerns about the second, third and fourth questions. Sergeant MacIntyre believed that M.V.M. consented to the sexual activities in a manner consistent with the legal meaning of consent under section 273.1 of the *Criminal Code*. The words heard from M.V.M. to the effect that "we should not be doing this" were not expressing a lack of agreement in the circumstances. Sergeant MacIntyre's belief was honest and there is no evidence of recklessness or wilful blindness that could justify denying the defence. Finally, the statutory limitation of paragraph 273.2(b) of the *Criminal Code* was not engaged as the steps taken to ascertain consent were reasonable in the circumstances known to Sergeant MacIntyre at the time.

Analysis

[19] I must first address the prosecution's argument to the effect that the defence of mistaken belief in consent should not be put to the panel as this is a type of case referred to in *Park* where the testimony of the complainant and the accused are diametrically opposed and cannot be realistically combined.

[20] Looking at paragraph 26 of *Park*, I find that the issue of how opposed the versions are is one of degree. The facts in *Park* potentially illustrate one end of the spectrum where the complainant alleges sexual activity and the accused denies there has been any such activity. Yet, that paragraph alludes to two situations. The first which should lead a judge to put the defence to the jury is described as one when the complainant and the accused give similar versions of the facts and the only material contradiction is in their interpretation of what happened. The second, illustrating when the defence should generally not be put to the jury, which was indirectly alluded to in *Gagnon* at paragraph 21, is when the accused clearly bases his defence on voluntary consent, and he also testifies that the complainant was an active, eager or willing partner, whereas the complainant testifies that she vigorously resisted.

[21] This second situation is quite close to this case. The only variation being on the issue of vigorous resistance to some of the sexual acts which are agreed to have occurred, specifically penetration. Yet, there are no indications of consent in her version. The closer we get to what could be seen by the accused as consent on her part relates to her testimony to the effect that she did not actively resist when he penetrated her with his fingers and penis because she thought there was no point. Yet, the accused's version on that specific sexual activity or activities is that she was an active, eager and willing participant. The accused testified that she was moaning with pleasure and had an orgasm when he was using his fingers. He also said she was masturbating when he penetrated her and eventually ejaculated on her back.

[22] This situation is, in my view, closer to the case of *R. v. Flaviano,* 2013 ABCA 219 where the fact situation was one where there was an agreement as to the sexual acts performed, yet the complainant testified that she said "no" initially and then, faced with the aggressive actions of the accused, she decided to comply; did not say "no" or "stop". On the other hand, the accused testified that she readily accepted his initial offer

for sexual activity and that things progressed from there with no indication of withdrawal of consent, which he said would have made him stop.

[23] *Flaviano* was an appeal from a judge-alone trial where the trial judge had found that the accused was not to be believed and consequently that the Crown had proven absence of consent beyond a reasonable doubt but then acquitted on the application of the defence of honest but mistaken belief in consent. As described by the Court of Appeal of Alberta at paragraph 27:

> That meant that even after effectively rejecting, as false, the respondent's evidence that the complainant immediately agreed to his sexual requests, the trial judge thought she should consider whether he nonetheless "honestly" believed the complainant had communicated her consent. A moment's reflection will illustrate the inherent difficulty in such an undertaking.

[24] Indeed, the members of the panel, on the facts of this case, will come to analyze an honest but mistaken belief defence only if they first rejected the accused's version of the facts as it pertains to the element of consent to the sexual acts performed. Having arrived at that point, they will have accepted the prosecution's evidence, hence the version of the complainant. Asking them to then consider whether the accused honestly believed that he had obtained consent would confuse them and divert their attention from factual determinations that are pertinent to the issue of innocence or guilt.

[25] On the facts of this case, the versions of the complainant and accused are divergent enough so that they cannot be reconciled to allow the defence of honest but mistaken belief in consent to be placed before the panel. There is no third version of events that could support that defence. The acceptance of one version involves the rejection of the other.

[26] The evidence of the accused supports a defence of consent. The issue to be decided is purely one of credibility—of consent or non-consent—and submitting the defence of mistaken belief in consent to the panel would detract the panel members from their primary task of deciding that important issue.

[27] Having come to this finding, there is no need to comment on questions two, three and four.

Conclusion

[28] I find that a reasonable panel, properly instructed and acting judiciously, could not come to a conclusion both that the complainant did not consent to the sexual activity and that the accused could honestly have had a mistaken belief about her non-consent. Therefore, I refuse to put the defence of mistaken belief in consent to the panel.

Counsel:

The Director of Military Prosecutions as represented by Major L. Langlois and Lieutenant(N) J. Besner

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