COURT MARTIAL

Citation: *R. v. Taylor*, 2018 CM 2029

Date: 20181011
Docket: 201743

Standing Court Martial

St-Jean Garrison
St-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Private B.T. Taylor, 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 486.5(1) of the *Criminal Code*, information that could disclose the identity of the person described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR THE DECISION ON SIMILAR FACT EVIDENCE

(Orally)

Background

[1] On 29 June 2017, the prosecution preferred four charges punishable under section 130 of the *National Defence Act* (*NDA*) alleging offences contrary to section 271 of the *Criminal Code* for sexual assault. However, on 24 September, the prosecution withdrew the four charges laid and replaced them with four charges alleging conduct to the prejudice of good order and discipline. On 26 September 2018, the Court Martial Administrator (CMA) issued a convening order for the accused to appear before a Standing Court Martial at St-Jean Garrison on 9 October 2018.

[2] At all material times which occurred during March 2016, both the complainants and the respondent were students at the Canadian Forces Leadership and Recruit School (CFLRS) and resided at St-Jean Garrison, St-Jean-sur-Richelieu, Quebec. They were all part of the same platoon.

The application

[3] On 3 July 2018, the prosecution 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 articles 112.03 and 112.04 seeking to have the evidence of each of the complainants ruled admissible in support of the evidence of the other. On 17 August 2018, the applicant filed its factum to admit evidence of prior discreditable conduct, also known as similar fact evidence.

Positions of counsel

Applicant - prosecution

[4] Following the close of its case, the applicant sought to admit evidence of prior discreditable conduct of each of the complainants as similar fact evidence in the consideration of the other charges. In his application, he submitted that the fact that the four separate incidents occurred in a similar fashion establishes the state of mind of the accused that he intended to touch the complainants. He seeks to negate the potential defence of accident that could be raised by the accused.

[5] Secondly, the applicant submitted that the four separate incidents reveal a pattern of behaviour which demonstrates that the acts occurred and that the accused intended to inappropriately touch the complainants.

[6] The applicant further argues that the probative value of the proposed similar fact evidence outweighs any potentially prejudicial effect and is therefore, properly admissible as proof of the allegations before the court.

Respondent - defence

[7] The respondent argues that there needs to be a pervasive degree of connection between the offences charged and a similar act and he argued, on the facts of his case, such connectedness does not exist.

[8] He argues that the applicant has not discounted the potential for collusion even if it was inadvertent. He says the evidence suggests that there were many conversations that took place between the complainants that were focussed on their impressions of Private Taylor. It was clear in T.M. testimony that she did not want the accused around. He argued that there is extensive evidence of how the complainants came together to discuss the alleged touching. He argued that there are numerous references to "we" and

"us" and that this level of collaborative discussion was in play prior to statements being made to authorities.

[9] The respondent further argues there is an air of reality with respect to the collusion and therefore, it is the applicant's responsibility to discount that potential, even where it is innocent or inadvertent and he argues that the applicant has not done this. He further states we need to decide whether the evidence was tainted by the alleged discussions between the complainants prior to the interviews with Warrant Officer Côté.

[10] The respondent also conceded that since this is a judge alone trial, there is little risk of moral or reasoning prejudice.

The law

[11] In *R. v. Laflamme*, CMAC-342, issued in 1993, Hugessen J.A., writing for the Court Martial Appeal Court (CMAC), clearly stated that, as a statutory requirement, the *Military Rules of Evidence* (*MRE*) must be applied in courts martial despite the fact that they deviate from the common law. In these circumstances, the Court has no other choice than to apply section 22 of the *MRE*. Further, as the test set out at *MRE* 22 is more arduous than the common law test, this Court must ensure that the fairness of the accused's trial is protected by applying the test fairest to him in the circumstances.

[12] As a general principle, both in common law and in the *MRE*, evidence adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, presumptively inadmissible. *MRE* 20 captures the general principle as follows:

> 20 Except as prescribed in this Division, the prosecutor shall not introduce evidence of the general bad character or reputation of the accused, or of another act or other acts of the accused similar in essential respects to the act charged.

[13] In common law, the onus is on the prosecution to satisfy the trial judge on the balance of probabilities before such evidence is admitted that, in the context of the particular case, the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception.

[14] In the *MRE*, the exception permitted for admitting similar fact evidence is set out at section 22 and it reads as follows:

> 22 (1) If it has been established that the act referred to in the charge was done by someone, but the state of mind or identity of the actor is in doubt, the prosecutor may, subject to subsections (2) and (3), introduce evidence of another act or other acts of the accused similar in essential respects to the act charged, where either or both of the following facts are in issue and the evidence tends to prove one or both of them:

> (a) that the state of mind of the accused was wrongful as charged at the material time, that is, that he did the act charged either knowingly, or with wrongful intent, motive or purpose;

[15] Importantly, on the facts before this Court, since identity was conceded by the defence, similar fact evidence may only be admissible under *MRE* 22(1) to prove the accused's state of mind.

[16] *MRE* 22 mandates that the prosecution must establish a real suspicion of guilt with independent evidence, before it is permitted to introduce evidence of similar fact evidence of the accused on other charges. However, *MRE* subsection 22(2) does not permit the introduction of evidence of similar facts for the sole purpose of negating a defence that may be raised by the accused. It reads as follows:

> (2) When attempting to prove the charge against the accused, the prosecutor shall establish a real suspicion of the guilt of the accused on issues of state of mind or identity with evidence other than that of essentially similar acts of the accused, before he may introduce evidence of essentially similar acts of the accused.

Finally, *MRE* 22(3) states as follows:

> (3) Although the prosecutor has evidence to offer within subsections (1) and (2), the judge advocate shall exclude that evidence if he decides that its probative value is slight or that it would have an undue tendency to arouse prejudice against the accused, thereby impairing the fairness of the trial.

Analysis

[17] The proposed evidence submitted by the applicant in its factum is the testimony of the three complainants related to four separate alleged incidents. In short, the prosecution requests that the Court:

(a) infer that the four separate incidents involving the accused actually did happen;

(b) negate the potential defence of accident that could be raised by the accused; and

(c) acknowledge that the facts support the existence of a pattern of behaviour by the accused that demonstrates that he did what he intended to do.

[18] The applicant asks the Court to declare as admissible the testimony provided by each of the complainants to be considered and weighed in consideration of the other complaints on the other charges before the Court.

[19] His argument is predicated on the fact that if the evidence is admitted as similar fact evidence, it can be considered by the Court as a piece of evidence to prove the state

of mind of the accused with respect to the other charges. In short, the prosecution wants to use the evidence provided by each of the complainants towards the charges regarding the others and vice-versa.

[20] Under *MRE* 22(1), similar fact evidence is not admissible where the purpose is to establish the *actus reus* of the offence charged, that is, to permit the prosecution to argue that because the accused had engaged in the improper touching of one candidate that he engaged in similar improper touching with other candidates. In short, it does not permit reliance on an alleged pattern of behaviour to demonstrate that the accused engaged in all the alleged acts as described in the charges before the Court. As such, absent other reliable evidence, the Court may not automatically infer from the similar fact evidence alone that the four separate incidents involving the accused actually did happen.

[21] Secondly, in accordance with article 22(2) of the *MRE*, before the prosecution can introduce any evidence of similar facts on the accused, it must establish a real suspicion of the guilt of the accused on issues of the state of mind or identity with evidence other than that of essentially similar acts of the accused. At paragraph 9, in *R. v. Vezina*, 2014 CMAC 3, Stratas J.A., writing for the CMAC, described "reasonable suspicion" as follows:

> [9] In this regard, it bears repeating that reasonable suspicion is a lower standard than reasonable and probable grounds. There need only be objectively discernable facts implicating the appellant in the criminal activity. Objectively discernable facts can come from the "totality of the circumstances" and inferences drawn therefrom, including information supplied by others, apparent circumstances and associations among individuals. See *R. v. Mann*, 2004 SCC 52, [2004] 3 S.C.R. 59 at paragraph 43; *R. v. Kang Brown*, 2008 SCC 18, [2008] 1 S.C.R. 456; *R. v. Monney*, [1999] 1 S.C.R. 652.

[22] The prosecution was required to provide objectively discernable facts from the totality of the circumstances to support its contention of the accused's state of mind. Based on the inference upon which the applicant seeks to rely, it requests the court to admit the similar fact evidence in order to prove that the accused intended to touch the complainants in a manner that appeared as an accident.

[23] Keeping in mind that the charges before the court relate to alleged contact that lasted no longer than a second and involved contact that most witnesses testified they originally believed to be accidental, the applicant aims to rely upon similar fact evidence to remove the defence of accident with respect to the charges. The Court would have benefited from the prosecution summarizing the evidence it was relying upon that provides insight into the state of mind of the accused. The court did note that E.J. testified that she specifically told Private Taylor not to touch her, but that he did not respond and that he touched her again. Arguably, based on this, there was some evidence, if believed that suggested that Private Taylor had to be aware that he had either inadvertently or deliberately touched E.J. and that such touching was unwelcome. However, with respect to those specific charges where E.J. was the complainant, based on the totality of the circumstances, the court had other evidentiary concerns.

[24] The evidence from all the complainants was consistent in that the accused showed no reaction after the alleged touching. The complainants described him as "blank face", "stoic", "stone-faced", having a "consistent smirk", etc. In fact, one complainant even suggested that because he showed no reaction, it really "creeped" her out. The prosecution provided the Court with limited evidence from the complainants or other witnesses on the accused's state of mind, through his reaction, mental thoughts, or spontaneous utterances. To be clear, a conviction can never be permitted to rest on similar evidence alone and the Court found that the applicant did not establish a real suspicion of the guilt regarding the accused's state of mind regarding the intended inference set out above.

Balancing probative value and prejudice

[25] If I am wrong and I somewhat misclassified some of the evidence, I will proceed to the third step as set out in *MRE* 22(3) which is the balancing. Similar fact evidence becomes admissible only when the prosecution demonstrates on a balance of probabilities that the evidence is relevant and probative to an issue at trial. *MRE* 22(3) states that the trial judge must exclude similar fact evidence if it decides that its probative value is slight or that it would have an undue tendency to arouse prejudice against the accused, thereby impairing the fairness of the trial. The *MRE* test is slightly different from the common law test currently being followed in the civilian courts. It is much more difficult to meet. However, in assessing what factors should be considered in relation to the probative value of the proposed evidence, the common law does provide significant assistance.

Probative value

[26] Probative value is the product of a number of factors. Although the similar fact evidence rule does not require judges to follow any particular step-by-step approach, a measure of the probative value of the similar fact evidence can be gained by examining:

(a) the strength of the evidence that the similar acts actually occurred;

(b) the connectedness between the similar fact evidence and the questions in issue; and

(c) the evaluation of the degree of similarity.

Strength of the evidence

[27] The more compelling the proof of the similar act, the greater the probative value of the evidence. In some cases, the similar act will have resulted in a conviction, in which case the incident has already been proved beyond a reasonable doubt. A prior conviction constitutes strong proof that the similar act in question occurred. In that sense, it has greater probative value than unproven allegations as in the case at bar.

[28] The proof of the similar act depends on the testimony of the witnesses. In this case, the probative value of the evidence can be diminished if the testimonies of the witnesses are not credible. Judges are therefore entitled to take credibility into account in assessing whether the similar fact evidence is probative enough to admit.

[29] In assessing the strength of the evidence before this Court, the Court is of the view that, to make a finding, the credibility of the witnesses is the central issue. During cross-examination of the complainants, the defence raised a number of concerns related to both the plausibility and the veracity of the four complaints, the complainants' motives for making the allegations and he raised the potential for collusion.

[30] As such, the Court must assess the credibility and the reliability of all witness testimonies. The court noted that the complainant T.M., who is the alleged victim of charges 1 and 2 was asked about what she remembered at different times and she responded frequently with "I don't remember" or "it all blended together" and, until her memory was refreshed, she could not remember that they had just started wearing their combat uniforms. She stated several times that the incidents unfolded over two and a half years ago and she did not remember many of the details surrounding them. However, the court did note that her memory recall with respect to charge 2 was significantly better, more reliable and more credible.

[31] As another example, under cross-examination, several of the complainants confirmed that they had originally told the National Investigation Service (NIS) and or Warrant Officer J.R.C. Côté that they thought the incidents had been accidents. These are just a few of the examples that raise question regarding the strength of the evidence and will require more rigorous analysis by the Court prior to finding.

[32] As referred to briefly above, the defence also raised the issue of collusion. For there to be an air of reality to the prospect of collusion, there must be more than proof of opportunity because collusion requires concoction or collaboration and can't be based simply on contact. Collusion or collaboration can arise both from a deliberate agreement to concoct evidence as well as from communication among witnesses that can have the effect, whether deliberate or inadvertent.

[33] Defence argued that where there is an air of reality to the prospect of collusion, "the Crown is required to satisfy the trial judge, on the balance of probabilities, that the evidence is not tainted with collusion" or the similar fact evidence will not be admitted.

[34] The air of reality test is straightforward, if there is "some evidence" if believed could suggest collaboration as discussed earlier, then the onus is on the prosecution to prove on the balance of probabilities that the evidence is not tainted with collusion. He argues that the prosecution has not met this burden and on the facts before the Court, it is apparent that there is an air of reality to the prospect of collusion and it was not appropriately addressed by the applicant. The applicant did rely upon case law that suggested that the mere contact is not suggestive of collusion, however, the facts in those cases were much more discernible then the facts in the case at bar.

[35] Based on the evidence before the Court, although it is unlikely that there was a deliberate agreement between the women to concoct, and the Court does not believe there was, it is plausible that the frequent conversations between the complainants about the alleged "creepiness" of the accused as well as their discussions about the alleged touching may have had an effect either consciously or unconsciously of colouring or tailoring their individual descriptions of the alleged events. In fact, the evidence before the court suggests that the contact that was earlier perceived to be accidental was observed differently after the discussions took place.

[36] The court accepts that even if this was not done for an improper purpose, it is the effect on the accused that the court must assess and not whether or not the complainants actually meant any harm in mutually discussing their feelings. As the respondent argued, the air of reality test is straightforward and the prosecution has not met his burden in proving that the evidence is not tainted nor has the applicant adequately addressed the issue. The Court would agree. Although I am not technically required to continue the analysis, I feel it is appropriate as the facts underlying this application are very unique.

Connectedness

[37] The relevance of similar fact evidence is predicated on the proposition that the accused did the discreditable act sought to be proved. If there is insufficient evidence rationally to connect the accused to the similar act, it can yield no logical, desired inferences. The accused must therefore be linked, through evidence, to the events relied upon as similar fact evidence.

[38] The linking of the evidence does not have to go so far to prove the accused probably committed the similar act. The ultimate decision whether to use the similar act evidence is for the trier of fact to merely be satisfied that there is some evidence linking the accused to the similar fact events, sufficient to enable a reasonable trier of fact to draw that conclusion. It will therefore be enough to meet that burden if there is evidence going beyond simply raising a mere possibility that the accused committed the similar fact event.

Connectedness to a properly defined issue

[39] The question in issue refers to the thing that the similar fact evidence is being offered to prove, while the strength of the evidence simply describes the degree to which the similar fact evidence helps establish the question in issue. If it is not clear what issue the evidence is said to be probative of, there is no way to properly assess its contribution. The Court in *R. v. Handy*, [2002] 2 S.C.R. 908, 2002 SCC 56, emphasized the importance of properly identifying the issue in question and it cautioned that if the issue in question is not defined properly, the gateway for the theory of probative value becomes too broad. The prosecution submitted that the relevant issue connecting the similar fact evidence in the present case is that the accused demonstrated a pattern of

behaviour to intentionally touch the complainants in a way that made it look like an accident.

[40] The defence argues that the required connectedness is non-existent. In the facts before the Court, the probative value of similar fact evidence will depend on coincidence reasoning which is basically the improbability that the fact sought to be proved is untrue given the similar fact evidence. After the submissions of the Applicant, the Court identified the following factors to assist in assessing the similarity of the instances:

(a) the alleged acts were all committed in a quick and subtle manner and the accused showed no reaction on any occasion leaving the complainants with no explanation for the acts committed;

(b) the touching was not so generic or common that they could be explained by coincidence, accidents, simple mistake or error in judgement; and

(c) the acts constituted a method and observed pattern of behaviour in a closely defined context.

Evaluation of the degree of similarity

[41] Based on the submissions of the prosecution, the Court assessed the following factors in evaluating the degree of similarity:

(a) Proximity in time. Given that the incidents all occurred during the month of March 2016, while on the same course, the Court agrees with the prosecution that there is proximity in time between the events;

(b) Extent to which other acts are similar in detail. The applicant argues that there were only small differences between the similar fact conduct and the present conduct. With the exception of the touching of E.J.'s breast, all the touching was done on the buttocks in a similar manner. Further, he stated that the accused's reaction was always the same, in that he behaved as though nothing happened;

(c) Number of occurrences of similar acts. The applicant argued that the probability of coincidence is remote at best that the accused would accidentally find himself touching the complainants on five different occasions in a period of one month;

(d) Circumstances surrounding or relating to the similar act. The applicant argued that the surrounding circumstances are the rapidity of the alleged act of subtle touching inside the CFLRS on women in his platoon, without any reaction on the part of the respondent; and

(e) Distinctive features unifying the incidents. The same method was allegedly used to make the acts look like an accident in the minds of the complainants.

[42] Occasionally, prior discreditable conduct by an accused will have significant probative value in demonstrating the mental state of the accused, be it knowledge or intent. In such cases, the evidence can be sufficiently connected to the issue in question as a matter of common sense, even in the absence of real similarity between the alleged acts in question. From my assessment of the above factors, I agree with the applicant that there may be some probative value. Nonetheless, the probative value must be measured against the prejudice.

Assessing prejudice for the purpose of admissibility

[43] The prejudice balancing act is set up in *MRE* 22(3); if the similar fact evidence has an undue tendency to arouse prejudice against the accused thereby impairing the fairness of the trial, then it should be excluded.

[44] There are two types of prejudice, moral and reasoning prejudice. Moral prejudice refers to the risk that the evidence will be used to infer guilt based on the forbidden chain of reasoning from general disposition or propensity, or by convicting an individual based on nothing more than bad personhood.

[45] The relative seriousness of the similar act as it relates to the offence being tried can give rise to a high risk of moral prejudice. In this case, the prosecution is relying on the fact that the touching appeared to be inadvertent and that, when it occurred, the accused did not appear to acknowledge that any touching had occurred.

[46] Although this Court appreciates that this is a trial before a judge sitting alone, who is presumed to know the law and that the risk of both moral and reasoning prejudice is low, in the Court's opinion, due to the uniqueness of the facts in the case at bar, there is additional prejudice related to the accused that must be weighed.

[47] It is the respondent's position that the alleged incidents did not occur. Once again, the allegations involve the most minor of touching lasting less than a second. Much of the prosecution's argument in support of its similar fact application is based on the absence of the accused's response, his silence, his unresponsiveness or lack of emotion as evidence that he intended the contact to look like an accident. Attempting to rely upon silence as a basis for the admissibility of similar fact evidence, while at the same time removing a defence available to the accused is highly prejudicial and underlies most of the concerns of the court.

The final balancing

[48] Once probative value is assessed and the risk of prejudice is identified in the context of the particular case, the final step is to balance the two.

[49] Given that admitting similar fact evidence will almost always be prejudicial, the best way to conduct the final balancing is to ask whether the similar fact evidence has been demonstrated to be sufficiently probative to justify the risks of prejudice presented by the other evidence. In effect, on the unique facts of the case at bar, a decision to admit similar fact evidence pragmatically undermines the accused's right to remain silent as it forces him to respond and take the stand to answer for his silence on at least some of the charges. Although he has already signaled his intent to take the stand in his defence, he still inherently holds this fundamental constitutional right not to incriminate himself and this right must be upheld.

[50] I conclude that the prosecution has not demonstrated that the similar fact evidence is sufficiently probative to outweigh the prejudicial effect to the accused that will flow from admitting the evidence.

FOR THESE REASONS, THE COURT:

[51] **DISMISSES** the application of the prosecution.

Counsel:

The Director of Military Prosecutions as represented by Major M.-A. Ferron and Lieutenant(N) Besner

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