



COURT MARTIAL

Citation: *R. v. Richard*, 2019 CM 2004

Date: 20190219

Docket: 201827

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman M.H. Richard, Accused

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

DECISION ON VOLUNTARINESS OF STATEMENT BY THE ACCUSED

(Orally)

Introduction

[1] In the present case, Leading Seaman Richard was interviewed by a military police officer, Master Corporal Sabalbal for suspected use of the drug cocaine. In the context of this interview, the prosecution conceded that Master Corporal Sabalbal was a person in authority.

[2] No statement made by an accused to a person in authority is admissible as an integral part of the prosecution's evidence nor may it be made available for the purpose of cross-examining the accused, unless the voluntariness of the statement has been demonstrated beyond a reasonable doubt. Hence, the onus is on the prosecution to prove voluntariness.

[3] Normally a *voir dire* is required to prove voluntariness and since the accused did not waive his right to a *voir dire*, the Court proceeded into one.

[4] In order to have an admissible statement excluded, the defence must prove, on a balance of probabilities, first, that it was obtained in violation of a *Charter* right and, second, that its admissibility would bring the administration of justice into disrepute.

Voluntariness

[5] The rule for determining voluntariness is set out within section 42 of the *Military Rules of Evidence (MRE)*. The substance of section 42 of the *MRE* is similar to the common law rule defined by the Supreme Court of Canada in *R. v. Oickle*, [2000] 2 S.C.R. 3. However, in *Oickle*, the Supreme Court of Canada also lists a number of factors that are not currently contained in section 42 of the *MRE*, such as the operating mind requirement and police trickery.

[6] For the purposes of the present *voir dire*, the admissibility of the audiovisual statement made by Leading Seaman Richard on 9 June 2017 is considered under section 42 of the *MRE* supplemented by the common law rules of evidence.

[7] *Oickle* holds that in order for statements made to a person in authority to be admissible, the prosecution must establish beyond a reasonable doubt that the accused was not unduly influenced by inducements, oppression and that he had an operating mind. In addition, there must not be police trickery that unfairly denies the accused his or her right to silence. A statement is voluntary only if it was made without the influence of fear of prejudice or hope of advantage induced by promises held out by a person in authority and if it was made by an operating mind.

[8] The voluntariness of a statement is determined almost entirely by context. Because of the complex interplay of circumstances that could vitiate voluntariness, a judge must consider all of the circumstances surrounding the statement and ask whether they raise a reasonable doubt as to its voluntariness.

Facts

[9] Master Corporal Sabalbal, a military police member and investigator, requested Leading Seaman Richard's unit send him to their office for an interview at 1310 Hollis Street, Halifax, Nova Scotia. Leading Seaman Richard confirmed in his interview that he had been told by his coxswain to report to the National Investigation Service offices.

[10] On 9 June 2017, at around 10:55 a.m., Leading Seaman Richard was interviewed by Master Corporal Sabalbal at the military police detachment for about an hour or so. Early in the interview, Leading Seaman Richard confirmed for the investigator that upon reporting to 1310 Hollis Street, that Master Corporal Sabalbal had told him that he had done his due diligence by reporting to them, but that Master Corporal Sabalbal specifically told him that staying and participating in the interview was his choice. Leading Seaman Richard confirmed that he had been told, "This is 100

percent voluntary. You don't have to be here. You did your due diligence coming here. You can carry on."

[11] Early in the interview, Master Corporal Sabalbal explained the charge he was facing and described a *National Defence Act* 129 offence before he read him his rights off of the legal rights and cautions form. In addition to reading them verbatim, he explained the essence of his rights, in pragmatic terms. Leading Seaman Richard willingly signed the forms, showing no hesitancy.

[12] During the interview, when he was coughing, Master Corporal Sabalbal offered Leading Seaman Richard water. The interview was short and there was an absence of oppression.

[13] It was clear that throughout the interview, Leading Seaman Richard had an operating mind. He was free from any intoxicants, had driven himself to the interview and was very cognizant of the risk he was facing. He appeared relatively honest and forthright showing genuine concern for his family and his continued successful recovery. At times, he made jokes such as being the first person to suffer the severest of consequences should he be found guilty.

[14] Upon review of the audiovisual interview itself, it does not appear that Leading Seaman Richard was the subject of any inducements, threats, or coercive behaviour from the investigator that might constitute an inducement, that he had the necessary operating mind and that there was no police trickery.

Defence

[15] Defence counsel was clear in his submissions that although he was not prepared to raise any *Charter* violations at this time, he had concerns about Master Corporal Sabalbal's reliance on the chain of command in ordering Leading Seaman Richard to report to him. Effectively, since the coxswain of the ship told Leading Seaman Richard to report to the NIS, it was an order and there was a potential that it could have unduly influenced the interview. He suggested that it would have been best to approach interviewing subjects in the same manner that civilian police agencies would do so by calling the subject directly.

[16] Further, defence raised an additional concern regarding a supplemental discussion that occurred at the end of the interview. Although he did not allege that this concern invalidated the earlier interview, he found it troubling. He stated that after the interview, Leading Seaman Richard was taken into another room and spoken to by two military police which he suggested had a form of detention attached to it. The prosecution had submitted that the discussion that occurred afterwards is irrelevant as it was after the interview had been completed.

[17] As referred to earlier, in order to have an admissible statement excluded, the defence must prove, on a balance of probabilities, first, that it was obtained in violation

of a *Charter* right and, second, that its admissibility would bring the administration of justice into disrepute. This has not been proven.

Conclusion

[18] The Court is satisfied that the prosecution has proven beyond a reasonable doubt that Leading Seaman Richard's audiovisual recorded statement made on 9 June 2017 was made voluntarily.

Counsel:

The Director of Military Prosecutions as represented by Major M.L.P.P. Germain

Major A.H. Bolik and Captain P.C. Briffett, Defence Counsel Services, Counsel for Leading Seaman M.H. Richard