COURT MARTIAL

Citation: *R. v. Alix*, 2019 CM 2018

Date: 20190816
Docket: 201914

General Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Petty Officer 1st Class B.L. Alix, Accused

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

DECISION ON VOLUNTARINESS OF STATEMENT BY THE ACCUSED

(Orally)

Introduction

[1] The incident that gave rise to the charge before the Court involved an alleged inappropriate comment made after a mess dinner at the Chief and Petty Officers' Mess at Canadian Forces Base (CFB) Esquimalt, in October 2018. The facts of this case reveal that shortly after the alleged incident occurred, on his own initiative, the accused sent an email to his supervisor, Chief Petty Officer 2nd Class Truchon, requesting the opportunity to apologize to the complainant. The supervisor set up a meeting between the two and asked if he could personally attend, which the accused agreed to. There were only three members at the meeting which included the accused, the complainant, and Chief Petty Officer 2nd Class Truchon. It is the apology rendered at that meeting which is the subject of the current *voir dire*. There were no notes taken, nor were there any recordings of the meeting.

[2] Statements made by an accused are admissions, and, as such, admissible for the truth of their contents. When statements are made by an accused to ordinary persons such as friends, colleagues, fellow military or family members, they are presumptively admissible without the necessity of a *voir dire*. It is only where the accused makes a statement to a person in authority that the prosecution bears the onus of proving the voluntariness of the statement as a prerequisite to its admission.

Process

[3] In terms of process, during submissions, defence counsel raised a concern that the prosecution had not provided the required notice, through a Form 1, pursuant to the *National Defence Act* (*NDA*) and the *Queen's Regulations and Orders for the Canadian Forces* (QR&O). The Court is not going to address the circumstances where formal notice is required and the reasons for it; however, the court highlights that case law supports that it is the defence that must initiate the process to show that there is a valid issue for consideration.

[4] The appropriate process for evaluating the admissibility of a statement such as the apology before the court, is set out in *R. v. Hodgson*, [1998] 2 S.C.R. 449, which the Supreme Court of Canada had occasion to apply later in the case of *R. v. Grandinetti*, [2005] 1 S.C.R. 27. At paragraph 37, Abella J., described the appropriate process and test as follows:

> In *Hodgson*, the Court delineated the process for assessing whether a confession should be admitted. First, there is an evidentiary burden on the accused to show that there is a valid issue for consideration about whether, when the accused made the confession, he or she believed that the person to whom it was made was a person in authority. A "person in authority" is generally someone engaged in the arrest, detention, interrogation or prosecution of the accused. The burden then shifts to the Crown to prove, beyond a reasonable doubt, either that the accused did not reasonably believe that the person to whom the confession was made was a person in authority, or, if he or she did so believe, that the statement was made voluntarily. The question of voluntariness is not relevant unless the threshold determination has been made that the confession was made to a "person in authority".

[5] In short, while the prosecution bears the burden of proving the voluntariness of a confession beyond a reasonable doubt, it is the accused that must provide an evidential basis for claiming that the receiver of a statement is a person in authority. In this case, the recipient of the apology was actually the complainant, who was subordinate to the accused, and a junior member by a significant rank difference. However, the meeting where the apology was rendered was set up and attended to by the accused's supervisor. Chief Petty Officer 2nd Class Truchon testified as to what occurred during that meeting.

[6] If the person to whom the statement is made is a person who an accused reasonably believes could influence or control the proceedings against him, that person may be a person in authority and the defence must raise the issue with the trial judge. Although the prosecution was not convinced that the statement was made to a person in authority, defence counsel felt that it was.

[7] After some discussion, it was agreed between counsel, that in the circumstances, given the fact that the accused emailed his supervisor as a precursor to the apology and given the supervisor's presence and direct role in coordinating the meeting, it was prudent that the statement be explored in a *voir dire*. As such, defence counsel was considered to have met its evidential burden and the burden shifted to the prosecution to establish beyond a reasonable doubt that Chief Petty Officer 2nd Class Truchon was not a person in authority and if he was that the statement was made voluntarily.

Position of the parties

Prosecution

[8] The prosecution argued that the accused's apology is admissible in two ways: firstly, it is her position that it does not constitute an official confession to a person in authority and, therefore, it is presumptively admissible; and, secondly, if the Court finds that it was made to a person in authority, then the evidence supports that his apology was initiated by the accused and it was completely voluntary.

Defence

[9] Relying upon the test set out in *Hodgson*, the defence argued that Chief Petty Officer 2nd Class Truchon was a person in authority; secondly, that there is no evidence on the record as to what was actually said, nor can the email be found to support the contention that the accused initiated the apology. Defence counsel argued that, in his testimony, Chief Petty Officer 2nd Class Truchon only described how Petty Officer 1st Class Alix was feeling and the general impression of what he said, but there were no specific words referred to. Defence counsel argued that, on the evidence, it is completely unclear as to what was said or what Petty Officer 1st Class Alix was actually apologizing for.

[10] Defence counsel argued that there is no other evidence before the Court other than Chief Petty Officer 2nd Class Truchon's testimony of his personal impression. However, he also submitted that Chief Petty Officer 2nd Class Truchon did not appear to remember everything, and there were no notes nor recordings made.

[11] Defence counsel argued that Chief Petty Officer 2nd Class Truchon testified that he met with the chain of command to discuss the accused's case and how it would be handled. Defence counsel argued that Chief Petty Officer 2nd Class Truchon met with the commanding officer (CO), the executive officer (XO), the coxswain and the head of department (HOD) prior to the apology being rendered. He submitted that they were all influential players in not only the investigation, but also with respect to any decision on whether or not there would be charges laid. He submitted that the prosecution has not proven beyond a reasonable doubt that the confession was free from influence.

[12] Finally, the defence submitted that there was no evidence that Petty Officer 1st Class Alix was provided sufficient warning of the jeopardy he faced in making an apology. He argued that at the time of the apology, Chief Petty Officer 2nd Class Truchon knew it was very likely that the accused would be charged, at least with respect to the drunkenness. At no time prior to the apology did he advise the accused of this fact.

Issues

[13] In deciding on the admissibility of the apology, the Court must decide the following issues:

(a) was the statement made to a person that the accused reasonably believed could influence or control the proceedings against him?

(b) if the Court determines that the statement was not made to a person in authority, then as set out above, the statement is admissible;

(c) if the Court determines that the statement was made to a person in authority, then the court must proceed further to assess whether:

i. the statement was voluntary?

ii. the statement was obtained in violation of a *Charter* or other common law right and if so, would its admissibility would bring the administration of justice into disrepute?

Facts

[14] The incident before the Court occurred on 26 October 2018. Chief Petty Officer 2nd Class Truchon stated that a few days after the mess dinner, he met with the CO to discuss the way ahead. Chief Petty Officer 2nd Class Truchon also testified that during that time he also met with the XO, his HOD at the time as well as the coxswain.

[15] Although he could not provide a detailed timeline, Chief Petty Officer 2nd Class Truchon testified that shortly after meeting with the various members of the chain of command, he received the email from the accused where he expressed his desire to apologize to the complainant. He testified that the first time he met personally with the accused on this issue was approximately two weeks after the incident occurred. He stated that the purpose of that meeting was to discuss the intended apology to the complainant.

[16] Chief Petty Officer 2nd Class Truchon testified that the meeting where the accused rendered the apology lasted ten to fifteen minutes. Chief Petty Officer 2nd Class Truchon felt that the accused's apology was genuine. He indicated that the accused apologized to the complainant in French, which was her primary and strongest language. Chief Petty Officer 2nd Class Truchon said that although he noted the accused had to search for some vocabulary, he did not observe the accused struggling to communicate.

With respect to the accused's mental health at that time, Chief Petty Officer 2nd Class Truchon indicated that the only thing he observed was that, prior to the meeting, the accused showed genuine remorse, which he felt was a normal reaction.

[17] Chief Petty Officer 2nd Class Truchon testified that in rendering his apology, the accused stated that his behaviour at the mess dinner was not acceptable and that he took full responsibility for his conduct.

Was the statement made to a person that the accused reasonably believed could influence or control the proceedings against him?

[18] The charge before the Court relates to an alleged inappropriate comment made after a mess dinner by the accused, a senior non-commissioned officer to a private. Defence argued that it was not unrealistic for the accused to believe and expect that the matter could be resolved administratively, through the harassment process, rather than through the disciplinary route.

[19] The evidence on this *voir dire* was limited to the testimony of Chief Petty Officer 2nd Class Truchon. Chief Petty Officer 2nd Class Truchon was not just a witness to the incident at the mess dinner, having provided a statement to the ongoing unit disciplinary investigation (UDI), but he admitted to meeting with the pivotal members of the chain of command afterwards to discuss how the mess dinner incident should be handled.

[20] As the accused's supervisor, Chief Petty Officer 2nd Class Truchon had significant control over the accused's career by writing his performance evaluation reports, personnel development reports, approving his holidays, etc.

[21] The Court must determine whether there was realistic potential that Chief Petty Officer 2nd Class Truchon had influence over the accused's future, which may or *may* not have included some influence over either the UDI or the discretionary decision regarding whether the matter would be addressed administratively or through the furtherance of charges.

[22] Under *Military Rule of Evidence* (*MRE*) 42, the following guidance is provided on who is a person in authority:

> (3) A person in authority is one who was in a position relative to the accused at the material time to exercise or hold out inducements of the character described in subsections (1) and (2) or was someone who might reasonably have appeared to the accused to be in such a position.
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> (4) A person may be a person in authority within subsection (3) and possess power by military law to order the accused to answer relevant questions, and yet clearly not exercise nor purport to exercise this power in a particular case, so that a voluntary confession within subsections (1) and (2) might in some circumstances be made by the accused to such a person.
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> (5) A person who holds a higher service rank than the accused is not, for that reason alone, a person in authority within subsection (3).

[23] There was no evidence to suggest that Chief Petty Officer 2nd Class Truchon had primary control over the accused's prosecution, nor was he the investigating authority conducting the UDI. However, Chief Petty Officer 2nd Class Truchon did testify that he met with the pivotal decisions makers in the chain of command to discuss how the alleged incident should be addressed and the evidence suggests that he not only received feedback from the chain of command on the intended course of action, but his testimony also suggested that he was in a position to offer his own recommendations.

[24] In the context of a military environment, with its hierarchical structure and by operation of QR&O 5.01(e) which sets out a duty to report any infringements of statutes, regulations, rules, orders and instructions, the Court must consider the complex interplay that exists at a unit level where UDIs are conducted by members in the chain of command and then based on the results of the UDI, charges are then laid by them.

[25] Members of the chain of command are first and foremost statutory decision makers responsible for making decisions that directly impact the career, promotion and administrative management of the accused. However, in response to this specific incident, the chain of command also became actors in the administration of military justice as they had to decide whether or not charges should be laid against the accused. Collectively, at this point, they held a great deal of power over the accused. When the facts are viewed through this prism, I am influenced by the comments of my brother judge, Pelletier M.J. in *R. v. Maze*, 2014 CM 4015 where he stated:

> [25] In the context of the military justice process, a person in authority is a person who the accused believes to be engaged by controlling or influencing the proceedings against him: Corporal Maze testified to the effect that he believed that Master Corporal Hall and Sergeant Delamere could influence the procedures by laying charges or cause the incident to be investigated disciplinarily, leading to charges being laid.

[26] When the accused reached out to his supervisor, he was acutely aware that his supervisor had met with the chain of command and there was no escaping the fact that Chief Petty Officer 2nd Class was in a position to influence a decision on whether he would be charged or not. The alleged conduct before the court was minor and under normal circumstances, it was not something that would automatically result in the laying of charges. I find that there is indeed a realistic possibility that the accused believed that Chief Petty Officer 2nd Class Truchon had influence over what would occur. Although Chief Petty Officer 2nd Class Truchon testified that he did not provide the accused any assurances, he did admit that he discussed this possibility with the accused when he met with him and that there had been discussion at various levels that if the accused apologized, the matter might be dealt with administratively.

[27] Based on the above context, I find that based on the context provided and Chief Petty Officer 2nd Class Truchon's direct involvement in the delivery of the apology, that the statement was made to a person in authority.

Voluntariness

[28] As referenced above, since the Court has found that in the specific context of the facts before the court, the apology was made to a person in authority, then the prosecution bears the onus of proving the voluntariness of the statement as a prerequisite to its admission.

[29] Further, if the prosecution does prove that the statement was voluntary, then it turns to the defence to prove, on a balance of probabilities that the statement was obtained in violation of a *Charter* or other common law right and that its admissibility would bring the administration of justice into disrepute.

[30] The rule for determining voluntariness is set out within section 42 of the *MRE*. It reads as follows:

> 42 (1) Subject to subsection (9) and Division IX (Effect of Public Policy and Privilege), a statement by the accused alleged to be an unofficial confession may be introduced in evidence by the prosecutor if he proves that
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> (a) there is evidence that the accused did make the statement attributed to him; and
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> (b) the statement was voluntary in the sense that it was not made by the accused when or because he was or might have been significantly under the influence of
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> (i) fear of prejudice induced by threats exercised, or
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> (ii) hope of advantage induced by promises held out, in relation to the offence in question, by a person in authority.

[31] The substance of section 42 of the *MRE* is similar to the common law rule defined by the SCC in *R. v. Oickle*, 2000 SCC 38. However, in *Oickle*, the SCC 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.

[32] *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 or oppression and that the accused had an operating mind. In addition, there must not be police or chain of command 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.

[33] Voluntariness is the cornerstone of the confessions rule. The voluntariness of a statement must be determined almost entirely by context. As discussed above, in a military setting, where there is a hierarchical command structure, and the requirement for individuals to obey military orders, where supervisors control a member's career at the same time that they have a role to play within the disciplinary process, there is a complex interplay of circumstances that surround the giving of a statement which could vitiate its voluntariness. As such, a military judge must consider all of the circumstances and ask whether they raise a reasonable doubt as to the voluntariness of an apology.

Prosecution

[34] The prosecution argued that the accused contacted Chief Petty Officer 2nd Class Truchon on his own initiative and was not promised anything to induce the apology nor did he discuss the impact of the consequences of providing one. She referred the Court to MRE 42 (2) which reads as follows:

> (2) The only inducements by way of threats or promises significant for the purpose of excluding a statement of the accused under subsection (1) are those that a reasonable man would think might have a tendency to cause an innocent accused person to make a false confession.

[35] The evidence before the Court suggests that there was no outward suggestion that guaranteed the member that he would receive favourable treatment if he made the apology and assumed responsibility for his actions.

Defence

[36] Defence counsel did not lead any evidence. He did challenge the voluntariness of the alleged statement on grounds that when the accused offered his apology, Chief Petty Officer 2nd Class Truchon admitted that he was aware that there was an ongoing UDI for which he had provided a statement and he testified that he expected, at a minimum, some disciplinary action to flow for at least an allegation of drunkenness. Defence argued that, in these circumstances, the accused ought to have been warned or cautioned that his apology could be used in evidence against him. Defence counsel did not allege that the accused's *Charter* rights were breached, but he raised it as a concern for the Court to assess in terms of whether the statement was voluntarily given in all the circumstances.

[37] Also in his submissions, defence relied upon the reasoning in *R. v. Shaw*, 2011 ABPC 155 at paragraph 10 in suggesting that the prosecution must present some evidence of the statement or comment made by the accused. He argued that the prosecution did not prove what was actually said and therefore, the Court's analysis should end there.

[38] Although the court acknowledges that it is not clear what was actually said or what conduct the accused was apologizing for, the court disagrees with the defence's position that this needs to be proven at this stage. A *voir dire* is not an inquiry into what words were actually spoken during that interchange. Rather, this *voir dire* is to determine whether the statement made was voluntary. What was said and the weight to be given to what was said are matters for the panel to decide in the court martial if I determine that the statement or comments are admissible. As in the case of *Shaw*, relied upon by the defence, the evidence in that case was not complete, but it still merited further analysis.

[39] Defence also argued that even if the idea of apologizing was initiated by the accused under his own mistaken belief it would mitigate his situation, if this was confirmed by the chain of command as being a good idea, then based on this fact, it could amount to inducement. He referred the Court to *Oikle*, where the authority's confirmation

of an accused's course of action by a person in authority amounted to an inducement. In other words, if the chain of command affirmed that "it would be better" or a "good idea" for the accused to apologize, thereby admitting guilt, then it is a relevant consideration for the Court in determining voluntariness.

Was the statement voluntary?

[40] Chief Petty Officer 2nd Class Truchon testified that he did not advocate to Petty Officer 1st Class Alix that he should apologize, but rather, he testified that the idea was initiated exclusively by the accused himself via an email. He testified that as his supervisor, he did not place any undue pressure nor did he threaten him.

[41] Based on the evidence of Chief Petty Officer 2nd Class Truchon, it was clear that from the original email request and the subsequent meeting that Petty Officer 1st Class Alix had with Chief Petty Officer 2nd Class Truchon and the final meeting where the accused offered an apology to the complainant, that the accused had an operating mind and was free from any intoxicants.

[42] In his testimony, Chief Petty Officer 2nd Class Truchon denied any suggestion that he told the accused that if he apologized he would not be charged or that the matter would be addressed administratively rather than through the disciplinary route.

[43] The evidence suggests that although he did not promise the accused that this matter would proceed administratively, he did admit the possibility it was discussed between them. After the apology was rendered, Chief Petty Officer 2nd Class Truchon did meet with the accused in the smoking area and he told the accused that he thought the apology was a good gesture on the accused's part.

[44] Keeping in mind that the doctrine of inducements is primarily concerned with reliability, it is for this reason the Court must focus on this underlying premise. Whether an apology is rendered in response to a promise, or even when based on an expectation by the accused that the chain of command would pursue a lesser course of action against him, courts have generally found them to be inadmissible.

[45] In his cross-examination of the Chief Petty Officer 2nd Class Truchon, the defence inquired whether either Chief Petty Officer 2nd Class Truchon or anyone else in the chain of command had held out hope of advantage to the accused with a suggestion that he would not be charged if he apologized. The line of questioning by the defence suggested that someone relayed to the accused that if he apologized, the matter would be addressed through the harassment policy and not with the laying of charges.

Analysis

[46] In his submissions, defence argued there is no evidence on the record that the accused was cautioned or warned about the consequences he was facing and the potential effect that the apology might have on pending charges. Based on the facts, it was

distinctly possible in the circumstances that he was under the mistaken belief that if he apologized the matter would be considered resolved.

[47] Kerwin J, writing for the SCC in the case of *Boudreau v. The King*, [1949] S.C.R. 262, 7 C.R. 427 provided the following guidance at page 267:

> The fundamental question is whether a confession of an accused offered in evidence is voluntary. The mere fact that a warning was given is not necessarily decisive in favour of admissibility, but, on the other hand, the absence of a warning should not bind the hands of the Court so as to compel it to rule out a statement. All the surrounding circumstances must be investigated and, if upon the review the Court is not satisfied of the voluntary nature of the admission, the statement will be rejected. Accordingly the presence or absence of a warning will be a factor and, in many cases an important one.

[48] It is imperative that the court examine the statement in the context of all of the surrounding circumstances, the role of the chain of command and their responsibility as decision makers in the military justice system. In this particular case, the accused's supervisor was aware that the accused was under investigation and he admitted that he was under the understanding that at least a charge of drunkenness would be laid against him.

[49] The *Shaw* case outlines a number of cases from the common law principle of the right of an accused to remain silent that exists independent of the *Charter*, right to silence. There is the case of *R. v. Gach*, [1943] 79 C.C.C 221, where Taschereau J. states, with the concurrence of two judges, that no statement given to a person in authority is admissible unless a proper caution has been given. Very similarly, Watt J. in the case of *R. v. Worrall* [2002] O.J. No. 2711 articulates that the caution should be given when a reasonably competent police investigator is in possession of information that should alert him or her to the "realistic probability, that the person may have been involved in the commission of an offence."

[50] The court is concerned that the operation of this fact when combined with additional factors identified above, decreases the trustworthiness of the apology. Importantly, fairness is an integral part of the assessment of voluntariness and a pivotal concern within the military justice system. Despite knowing that there was an ongoing UDI, and the fact that he felt that it was highly likely that the accused would be charged as a consequence of his actions, coupled with the accused's belief (no matter how it arose) that an apology would mitigate his situation, triggered a heightened level of procedural fairness owed to the accused. When the accused reached out to his supervisor to indicate that he wanted to apologize, knowing what he did regarding pending charges, it triggered a duty on the supervisor to ensure that his subordinate understood the full consequences of the legal jeopardy that he faced.

Conclusion

[51] Upon review of the evidence surrounding the giving of the statement, there is no evidence to suggest that the accused was the subject of any threats, or coercive behaviour from Chief Petty Officer 2nd Class Truchon, the chain of command or any other person.

It is also clear that he had the necessary operating mind and that there was no trickery employed.

[52] In order to have an admissible statement excluded, the defence needed to prove on a balance of probabilities that the statement was obtained in violation of a *Charter* or other common law right and, secondly, that its admissibility would bring the administration of justice into disrepute.

[53] In this case, in light of all the information known to Chief Petty Officer 2nd Class Truchon at the time when the accused sent him an email and discussed the possibility of providing an apology, this should have triggered a query from Chief Petty Officer 2nd Class Truchon to his chain of command to seek advice and ensure that the accused was appropriately advised of the potential jeopardy he faced in light of the ongoing UDI. The charges facing the accused were minor and there was a very realistic possibility that the accused did have a reasonable belief that offering such an apology would resolve the issue. However, notwithstanding that they believed that charges were likely going to be pursued, the chain of command needed to have that conversation with the accused to ensure that he was not proceeding on a mistaken presumption.

[54] The court wants to be clear in saying that it does not think that the chain of command were wrong in facilitating the apology. In fact, in cases of low-level misconduct, this type of approach is applauded. When we resolve incidents such as this at the lowest level, everybody wins; however, without having provided the accused with an appropriate warning at the time, the court finds that by permitting the prosecution to later rely upon the apology as evidence against him in his own court martial, then the procedural fairness owed to the accused at the time is undermined.

[55] The chain of command's task in balancing competing interests is very complex and the landscape surrounding why someone offers an apology is even more complicated. Case law is filled with examples of accused persons who apologized for conduct they did not commit or in circumstances they may not remember what took place. Apologies occur more readily when someone is alleged only to have breached a social norm. Mess dinners are infamous for their rowdiness and pranks played out between attendees. It often happens that someone is offended. In light of the current climate in Operation HONOUR, the offering of an apology in the context of alleged conduct before the court may have been done by the accused to demonstrate that he understands that if it actually happened, it is inappropriate. In the context of the alleged misconduct, it is also very conceivable that the accused might not remember what happened and feels that by taking the high road, he will mitigate his situation. Further, within the military culture displaying the courage to offer an apology when someone has been offended within a social context is recognized as an important step to making amends and a reflection that the member has assumed responsibility for his or her conduct.

[56] Although it was not clear what the accused apologized for or why, an apology is prejudicial to the accused's interests, and for the Court to permit the trier of fact to rely

upon an apology rendered in the circumstances before the Court, would bring the administration of military justice into disrepute.

FOR THESE REASONS THE COURT:

[57] **DECLARES** the inadmissibility of the statement with respect to the apology to the complainant.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant(N) J.M. Besner

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Petty Officer 1st Class B.L. Alix