



COURT MARTIAL

Citation: *R. v. Alix*, 2019 CM 2023

Date: 20190906

Docket: 201914

General Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

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

- and -

Her Majesty the Queen, Respondent

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

DECISION REGARDING DEFENCE APPLICATION TO POSTPONE CROSS-EXAMINATION

(Orally)

Introduction

[1] Relying upon *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.31 and Military Rule of Evidence (MRE) 95, defence counsel applied to this court for the postponement of cross-examination of the complainant who testified first in these proceedings.

Position of parties

[2] In anticipation of a second witness, Chief Petty Officer 2nd Class Truchon's evidence, defence counsel argued that the postponement would assist him in formalizing his questions for the complainant and clarified that the request was not submitted for the purpose of obstructing the proceedings.

[3] In response, the prosecution argued that defence counsel was provided with full disclosure as to what Chief Petty Officer 2nd Class Truchon is expected to say and therefore defence has had sufficient notice to prepare. The prosecution further argued that by postponing the cross-examination, it permits defence counsel to gather additional evidence prior to his cross-examination; is not consistent with the normal course; and adds a level of stress to the complainant. The prosecution's position is that that defence counsel should be cross-examining the complainant before he gets evidence from other witnesses.

[4] Defence counsel argued that there is always different evidence that comes out during the trial that is not included in the witness statements. As an example, he explained that the complainant testified for an hour and a half, notwithstanding her statement being only one page in length. He further argued that there would be less stress on the complainant if he does not have to recall her, which is another possibility. He argues that MRE 95 specifically foresees the possibility of postponing cross examination and the rule has been part of the court martial process for over 50 years.

Analysis

[5] QR&O article 112.31 and MRE 95 confer discretion on a military judge to defer the cross-examination of any witness until any other witness or witnesses have been examined. Judicial discretion has to be exercised in accordance with the statutory framework set out within the *National Defence Act (NDA)* and its supporting regulations. MRE 95 reads as follows:

95 The judge advocate may allow the cross-examination of a witness to be postponed where, in his opinion, the application for postponement is not made for purposes of obstruction.

[6] The judge's role in a criminal trial requires a delicate balancing of all interests to ensure that the trial is conducted in a seemly and orderly fashion with the evidence presented in a way that is intelligible for the panel to comprehend and assess.

[7] Counsel are accorded a wide freedom in cross-examination enabling them to question the witnesses in a manner to test their credibility and reliability. The importance of cross-examination cannot be understated as it is the ultimate means of demonstrating truth and testing veracity and as such, is fundamental to the fair trial for an accused.

[8] While deciding an application under MRE 95, balance must be struck between the rights of the accused and the prerogative of the prosecution to lead its evidence in a particular way. A trial judge must be satisfied that in his or her opinion, the purpose of the defence request for postponement is not for the purpose of obstruction, meaning that counsel is not making the request to intentionally impede, hinder or delay the ongoing court martial proceedings.

[9] In assessing the application, I considered the following factors:

- (a) Is there a possibility of undue influence on any of the witnesses?
- (b) Is there a possibility of threats to witnesses;
- (c) Is there a possibility that a non-deferral would enable subsequent witnesses giving evidence on similar facts to tailor their testimony to circumvent the defence strategy;
- (d) Is there a possibility of loss of memory of the witnesses whose examination-in-chief has been completed;
- (e) Would there be a delay in the trial that results in the non-availability of witnesses if deferral is allowed;

[10] Based on the submissions of counsel, there was no evidence referred to that suggested that the request was being made for any improper purpose or for obstruction. Further, the next witness will be testifying imminently and there is no expected delay in the proceedings.

FOR THESE REASONS, THE COURT:

[11] **GRANTS** the application of the defence to defer the cross-examination of the complainant.

Counsel:

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

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