COURT MARTIAL

Citation: *R. v. Alix*, 2019 CM 2024

Date: 20190909
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 ALLOW MAIN TRIAL EVIDENCE INTO A *VOIR DIRE*

(Orally)

Introduction

[1] Defence counsel applied to this court to adduce evidence before the panel of the General Court Martial (GCM) of an alternative suspect defence. Before any evidence can be considered, the accused must first demonstrate through a *voir dire* that there is an air of reality to this defence. A *voir dire* is a hearing held within a court martial, by the trial judge and in the absence of the panel, in order to determine questions of law. It is often referred to as a trial within a trial.

[2] Procedurally, within the *voir dire*, defence requested that the evidence already admitted and heard by the panel in the main trial to be considered within the *voir dire*. The prosecution objects to evidence from the main trial being considered by the court in the *voir dire*.

Issue

[3] The issue before the court is whether the court may permit the evidence heard within the main trial into the *voir dire* itself.

Analysis

[4] *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.61 reads as follows:

> (2) The procedure in a *voir dire* shall be:
>
> (a) the party seeking to establish the admissibility of the evidence may present evidence as the party sees fit and witnesses may be called . . .
>
> (b) the other party may present evidence as [they see] fit and witnesses may be called;
>
> (c) the party seeking to establish the admissibility of the evidence, and then the other party, may make a closing address . . .

[5] Aside from the QR&O provisions above, a trial judge is not subject to any specific procedural rules that apply in the management of the evidence in a *voir dire*. The procedure for holding a *voir dire* is at the discretion of the trial judge. (see *R.* v. *Sadikov*, 2014 ONCA 72).

[6] Procedurally, in common law, the evidence from a *voir dire* itself does not form part of the evidence at trial unless agreed to by the parties or the trial judge otherwise directs. However, the request before the court is for the evidence already admitted in the main trial before the panel to be considered in the *voir dire* itself by the trial judge.

[7] In general, absent consent from the prosecution, in an application concerning the admissibility of evidence, in terms of fairness, the court agrees with the prosecution that witnesses would have to be called. However, the admission of evidence from the main trial into the *voir dire* does not change this. There is nothing that precludes the admission of evidence that has already been heard and the prosecution and defence are still at liberty to recall any of the witnesses who testified and ask them additional questions that they may feel are specifically relevant to the *voir dire* itself.

[8] Defence counsel rightfully pointed out that the air of reality test for admissibility of the defence requires the trial judge to take the proposed evidence at its greatest strength to determine whether the record would contain a sufficient factual foundation for a properly instructed jury to give effect to the defence.

[9] In order for the Court to assess whether the appropriate nexus between the third party and the alleged misconduct exists, it must review issues of identity, opportunity, motive, animus; and, possibly, the strength of the Crown's case.

[10] The air of reality test requires a trial judge to consider the totality of the evidence, and assumes the evidence relied upon by the accused is true. The trial judge must compare the evidence of the accused in the *voir dire* to that which has been established by the prosecution in its case so far. There is no other way for the Court to determine that the evidence is connected to the case and to determine its relevancy other than to consider the admissible evidence already on the record. It is nonsensical and not a prudent use of judicial resources to ask the prosecution to lead all its evidence again for the Court's consideration of this matter.

[11] As the prosecution may not have foreseen the accused's defence and the *voir dire,* the prosecution remains entitled to recall its witnesses if required. However, much of the evidential foundation can be found or inferred from the testimony of the complainant, accused, other witnesses, the factual circumstances of the case, or any other evidence on the record. Furthermore, it is important to remember that the trial judge, as gatekeeper, is not to make findings of fact, weigh evidence, determine credibility, draw determinate inferences, or even assess the likelihood of success of the proposed defence. The Court is only to concern itself with the air of reality and whether or not this defence can be left with the panel.

FOR THESE REASONS, THE COURT:

[12] **GRANTS** the defence's application and rules that the prosecution's evidence in the main trial can be considered within the *voir dire* in order to consider whether or not the there is an air of reality to the proposed defence being considered by defence counsel.

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