

COURT MARTIAL

Citation: *R. v. Alix*, 2019 CM 2025

Date: 20190910

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 OF THIRD PARTY SUSPECT

(Orally)

Introduction

[1] Petty Officer 1st Class Alix is facing one charge, contrary to section 129 of the *National Defence Act (NDA)* for an alleged improper comment made by him to a private during a mess dinner, held on or about the 26 October 2018, at the Canadian Forces Base Esquimalt Chief and Petty Officers' Mess.

[2] In the trial proper, during his cross-examination of the prosecution's witnesses, defence counsel engaged in a line of questioning suggesting that it was not the accused, but rather another known person who made the alleged comment. Although the prosecution did not originally oppose this line of questioning in the cross-examination of its own witnesses, upon reflection and after conducting their own interview with the known person, they objected to defence counsel advancing this line of defence.

[3] To be clear, an accused is entitled to adduce evidence that a third party, and not the accused, committed the alleged offence. However, when an accused alleges that a known third party suspect committed the offence, the accused bears the burden of

showing that the proposed evidence has “some nexus with the alleged offence”. Without the nexus, the evidence would lack probative value (see *R. v. McMillan*, (1975), 7 O.R. (2d) 750).

[4] This decision is in response to the defence’s application seeking that this Court allow evidence of a third party suspect defence to be considered by the panel.

[5] The Supreme Court of Canada (SCC), in the case of *R. v. Grandinetti*, 2005 SCC 5 affirmed the test to be applied is “a sufficient connection between the third party and the crime” to justify admitting this evidence.

[6] The test for an accused is not an onerous one. The accused must point to some evidence tending to connect the third party with the commission of the offence. Evidence of a third party’s means, motive, or opportunity to commit the offence often establishes the requisite nexus. If there is no evidence to establish such a connection, the third party evidence is neither logically relevant nor probative and is therefore inadmissible.

[7] The prosecution’s position is that the defence has not met the threshold requirements of the admissibility of evidence for a known third party suspect. She argued that the evidence does not support a significant connection between the known third party, being Sergeant Gaudet, and the offence. She argues that there is no direct evidence of Sergeant Gaudet’s involvement in the offence and there has been no attempt by defence counsel to put this evidence before the Court. She argued that defence did not call Sergeant Gaudet to provide that evidence, and that the witnesses he called did not provide any direct evidence indicating that Sergeant Gaudet was the person who made the comment and was responsible for the offence for which the accused was charged. Sergeant Gaudet was called as a witness by the prosecution and when asked whether he could have made the comment, he disputed it in strong terms. The Court noted that Sergeant Gaudet appeared genuinely surprised. Prosecution argued that Sergeant Gaudet’s assertion that he did not make the comments was not tested. She further argued that the evidence was not relevant and probative.

The Law

[8] Although the prosecution strongly argued that there is no direct evidence of Sergeant Gaudet’s involvement, the evidence to support such an application may come from direct or circumstantial evidence as long as it has sufficient probative value to justify its reception. If there is an insufficient connection between the third party and the crime, the evidence will lack the requisite air of reality (see *Grandinetti* at paragraphs 46 to 48 and *R. v. Murphy*, 2012 ONCA 573).

[9] Inferences based on the evidence may be drawn but speculation is not permitted. The evidentiary burden on the accused is discharged if the defence shows that there is some evidence upon which a reasonable panel, properly instructed, could acquit (see *Grandinetti*, paragraphs 48).

Air of reality

[10] In addition to sufficient evidence to support a nexus between the third party and the offence, there must be an air of reality (see *R. v. Cinous*, 2002 SCC 29). The air of reality 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 panel to give effect to the defence (see *R. v. Grant*, 2015 SCC 9). In other words, the accused must simply introduce some evidence in order for the panel to be instructed on the defence.

Analysis

Evidence must be relevant, material and admissible

[11] The evidence introduced in the *voir dire* to support of a **third party suspect** defence, as with other evidence adduced in the court martial, must be relevant, material and admissible. *R. v. Williams* (1985), 50 O.R.(2d) 321, leave to appeal refused, (1985), 18 C.C.C. (3d) 356n (S.C.C.).

Evidence must be relevant to and admissible on the material issue of identity

[12] Master Seaman Roux testified that she was at the same mess dinner and stayed until the end of the evening. She did not hear the alleged interaction between the complainant and the person who allegedly made the improper comment. She indicated that, throughout the evening, she circulated and socialized with everyone as did most of the others.

[13] Master Seaman Roux testified that while she was seated on a chair waiting for a taxi, Sergeant Gaudet sat on the floor right beside her and he started rubbing her legs. She said that she moved her legs to the side and Petty Officer 1st Class Montgomery who was present and watching them, said words to the effect of, “Hey, don’t do this.” Master Seaman Roux testified that she got up, walked around, and not long after the taxi arrived. She indicated that Petty Officer 1st Class Montgomery stayed with her until the taxi arrived, which she greatly appreciated. She testified that, at that point, all Sergeant Gaudet could do was hold himself up and tell her his address.

[14] The prosecution acknowledged that there was some evidence presented in the testimony by Master Seaman Roux that claimed that Sergeant Gaudet rubbed her legs, but the prosecutor also pointed out that Master Seaman Roux also testified that she did not know Sergeant Gaudet at that time and she subsequently figured out who he was after a discussion with someone else. Master Seaman Roux also told the Court that she had not seen Sergeant Gaudet following that mess dinner until she arrived here for the purpose of this court martial.

[15] The evidence on which an accused relies to demonstrate third party involvement must be relevant to and admissible with respect to the material issue of identity. Defence argued that identity is not an issue as the alleged third party was identified as being Sergeant Brian Gaudet. Master Seaman Roux was not challenged on her identification of Sergeant Gaudet. In fact, defence counsel argued that the fact that Petty Officer 1st Class Montgomery witnessed the incident between Master Seaman Roux and Sergeant Gaudet combined with the fact that Master Seaman Roux needed to get Sergeant Gaudet's address provides further confirmation of his identity.

Sufficient connection opportunity or evidence of opportunity

[16] The accused has the burden of proving that there is a sufficient connection between the third party and the charge before the Court. In *Grandinetti*, the Court stated the following at paragraph 48:

The defence must show that there is some basis upon which a reasonable, properly instructed jury could acquit based on the defence: *R. v. Fontaine*, [2004] 1 S.C.R. 702, 2004 SCC 27, at para. 70. If there is an insufficient connection, the defence of third party involvement will lack the requisite air of reality: *R. v. Cinous*, [2002] 2 S.C.R. 3, 2002 SCC 29.

[17] This was also affirmed by Abella J. affirmed this point in *Grandinetti*, where she wrote:

The requirement that there be a sufficient connection between the third party and the crime is essential. Without this link, the third party evidence is neither relevant nor probative. The evidence may be inferential, but the inferences must be reasonable, based on the evidence, and not amount to speculation. [para. 47]

[18] The term “opportunity” or “evidence of opportunity” was used to describe the nature of the connection between the third party and the conduct charged that is essential to provide an air of reality to the **third party suspect** defence.

[19] In the application, Sergeant Gaudet was called by the prosecution. He confirmed that he was in attendance at the same mess dinner on 26 October 2018 at the Canadian Forces Base Esquimalt Chief and Petty Officers' Mess. He admitted that during the mess dinner he was very intoxicated and does not remember very much. He did admit that during the dinner portion of the festivities, he stood up to speak.

[20] Prosecution argued that the only relevant evidence of assistance was that Sergeant Gaudet was at the mess dinner; however, she argued that the evidence of Sergeant Gaudet's presence must be contextual, as the attendance at an event that involved numerous people has to have less weight than an event where there are fewer people present. She suggested that there is only light evidence and opportunity. Although it is loose evidence of opportunity, when taken on its own, she argued it does not establish a connection between Sergeant Gaudet and the offence.

[21] Defence argued that there is clearly evidence that Sergeant Gaudet was at the mess dinner and stayed late enough that he had sufficient opportunity to have made the comment. Defence argued that the facts do not need to place Sergeant Gaudet at a specific spot during the mess dinner at a specific time. Defence argued it is sufficient to suggest that he was at the mess dinner.

[22] He emphasized that there was evidence that Sergeant Gaudet was making the rounds, talking with everyone, flirting and socializing. There is also evidence before the Court that suggested that Petty Officer 1st Class Alix was behaving similarly.

[23] Master Seaman Roux further testified that she is friends with the complainant and several days after the event, she had a Facebook Messenger exchange with her. In the exchange, which is partly in French and English, which Master Seaman Roux referred to as *franglais*, the complainant asked her if she knew who the individual was who made the improper comment to her. Master Seaman Roux testified that she responded by asking if the individual who made the improper comment wore an Army uniform. After the complainant responded, Master Seaman Roux stated that it was probably the reservist, as he was very drunk. In her testimony, Master Seaman Roux was insistent that was the message that she understood to have been communicated. The text exchange went as follows, and the Court will only quote a portion of it:

CR:

Salut Melissa, Est-ce que tu te rappelle de ma situations au mess dîner vendredi passé? Le gars qui m'a pris par les épaules et qui m'a demandé: Do you want to grab my balls

C'est quoi son nom??

CR:

Crime je me rappelle pas de ça or toute... t'étais tu army?

Yes army all the way genre en vert! Lol!

On a eu du fun

Bahahha! C'était probablement le réserviste.

Il était vraiment saoul

CR:

☹️🙄☹️ non je me rappelle pas de ça ...

Désoler de rire c'est juste drôle comme random question ça! Il devait être saoul pour dire ça de même

Quin y'avait l'sir de ca.... ben saoul ☹️

CR :

Le réserviste???

Je sais pas si lui il est reservist ou pas mais il travail au malahat

En tout cas ... j'en ai parlé avec mon PO et j'si rencontré mon Coxn

Ce pm

CR : CR : Même Cpo Truchon a réagi en lui disant «serious...OP HONOR» en s'approchant de lui

Vraiment???

Oui

Ok ya quelqu'un qui a dealer avec right away... au moin. Toi as-ti dit quelques chose?

Il t'a pas toucher rien? Il a juste dis sa?

Je me suis tassé et dit serieux

Il m'a pogner par les épaules comme si j'étais sa best body

CR :

Hummmm

J'espère que tu vas être mon amie pareills

CR :

Ben oui. T'inquiète

seneux

Pas longtemps après je quittait avec Valérie et Adena

En tout cas, j'ai décidé d'aller de l'avant parce qu'un moment donné cet personne va tomber sure quelqu'un qui va avoir peur de réagir et devenir une victime

[24] Master Seaman Roux testified that after receiving the message, she did not do anything with it nor did she advise her chain of command as she did not expect anyone to be court-martialled for such an incident. She said that when she learned the accused was being court-martialled, she recalled the message exchange. She testified that she felt bad for the accused because she thought that the complainant had named the wrong person. She stated that she never worked with the accused and they only had conversations while outside smoking.

[25] Master Seaman Roux testified that eventually she gave the message exchange to defence counsel. She stated that based on her interpretation of the message exchange, she believed the member who made the comment was Sergeant Gaudet because of what the complainant told her, being that he wore an Army uniform compounded by the fact that she knew that Sergeant Gaudet was intoxicated and had acted similarly towards her.

[26] The Court noted that when the complainant was asked about the message exchange, at first she did not recall it. However, when the defence showed the exchange to her, she recalled engaging in it, but explained that her interpretation of that specific

part of the exchange was that Master Seaman Roux had asked her whether she herself was Army to which she responded with words to the effect, “Yes. Army all the way.”

Motive

[27] In addressing motive, on the facts of this case, defence suggests that the comment was likely motivated by a poor attempt at humour or possibly it was an attempt to gain a sexual partner. He submitted that there is evidence that Sergeant Gaudet was engaged in other similar incidents that evening that would presumably have been based on the same motive. As explained earlier, Master Seaman Roux testified that while waiting for a taxi, Sergeant Gaudet was flirting with her and rubbed her leg. According to defence counsel, if Sergeant Gaudet had motive and inclination to do that, then they could also be applied to the alleged conduct before the Court.

[28] Although the prosecution argued that Sergeant Gaudet had no motive, the reality is that the evidence suggests that the improper comment made to the complainant was random and made by someone she did not know. Motive will vary depending on the nature of the offence. What is at issue is effectively an invitation extended by a drunk male member to an unknown female member in order to ascertain whether she might be interested in engaging in sexual contact with him.

Disposition evidence is relevant and animus

[29] When disposition evidence is tendered to support a **third party suspect** defence, the manner in which the disposition is established varies. This is not a murder or sexual assault case which would demand an accused to have a propensity for violence or some other aversion. The alleged offence was simply an inappropriate comment made by a drunk male member to a junior ranked female.

[30] Master Seaman Roux testified that she and Sergeant Gaudet shared a taxi to their respective residences. She said that at the end of the night, Sergeant Gaudet had a hard time speaking, standing up straight and keeping his eyes open. With respect to other behaviour, she said she witnessed him flirting and chatting with “all the girls”.

[31] The prosecution argued that since it was not established that Sergeant Gaudet was correctly identified as being the individual that had rubbed Master Seaman Roux’s legs, which, she asserted, was weak evidence that on its own, cannot provide evidence of propensity.

[32] When asked whether he might have been the one who engaged in the alleged offence before the Court, Sergeant Gaudet strongly asserted that despite being intoxicated, he does not have a propensity to act this way. However, defence counsel argued that although Sergeant Gaudet suggested he does not have the disposition to act this way on a day-to-day basis, the evidence of the leg rubbing and flirting at the function in question suggests that on that evening, combined with the significant

amount of alcohol he consumed, he did have the disposition or animus to act in accordance with the alleged conduct.

Summary

[33] In summary, when the accused alleges that a known third party suspect committed the offence, there must be “sufficient connection between the third party and the crime” to justify admitting this evidence (see *Grandinetti* at paragraph 47). The test is not onerous but the accused must point to some evidence tending to connect the third party to the commission of the offence. Evidence of a third party’s means, motive or opportunity to commit the offence often establishes the requisite nexus.

[34] Prosecution argued that there is not sufficient evidence to allow the Court to conclude that this defence is admissible and that there is no air of reality to it. She further asserted that it is unreasonable to suggest that because there was not a previous objection to the line of questioning, it justifies the presentation of evidence that would otherwise not be admissible and that because there was a wrong not previously addressed by the Court, it is not a licence to let it to continue.

[35] However, a court martial must be cautious in restricting the powers of an accused to call evidence in his or her defence. It follows from this that the prejudice must substantially outweigh the value of the evidence before a judge will exclude evidence relevant to a legal defence available to an accused.

[36] Sergeant Gaudet was at the mess dinner until the very end. By his own admission, he was very intoxicated and cannot remember much of what occurred that evening. The evidence as a whole suggests that all the parties including the accused and the third party suspect, circulated during the function socializing and talking.

[37] In this case, both the accused and the third party attended the same function, were of similar rank, both named Brian, are approximately the same age, both intoxicated and both alleged to have been flirtatious. The complainant stated that she recognized the person to be someone who stood up to speak during the dinner. There is evidence before the Court that both Sergeant Gaudet and Petty Officer 1st Class Alix stood up to speak at the dinner. In her testimony, Master Seaman Roux understood from the exchange with the complainant that the member who made the inappropriate comment wore an Army uniform.

[38] In her testimony, Master Seaman Roux said she disclosed the message exchange that she had with her friend because she believed the wrong man was being accused. Petty Officer 1st Class Alix wears a Navy uniform.

[39] The Court notes that the complainant gave a different understanding of the message exchange and the Court also noted that Chief Petty Officer 2nd Class Truchon’s evidence is inconsistent with the suggestion that the offence may have been committed by Sergeant Gaudet.

[40] However, at this stage, the Court is not to assess credibility of the witnesses and the evidence, nor shall it engage in the weighing of the evidence as that role is reserved exclusively for the panel. It is their function to assess the strength of the evidence and to decide which evidence to believe. The Court simply must determine if there is some evidence that is relevant to the facts in issue and to ensure that the probative value of the evidence is not substantially outweighed by its prejudicial effects.

[41] Given the principles set out in *Cinous*, the Court finds that the evidence linking the third party to the offence is more than speculative. There is circumstantial evidence that connects Sergeant Gaudet to the offence.

Probative value versus prejudicial effect

[42] The prosecution passionately argued that accusing a person who denied any involvement in the strongest terms and was entirely unaware that he was even being called as a witness for this purpose, on such a flimsy basis, is prejudicial to trial fairness and far outweighs any probative value.

[43] In response to the prosecution's suggestion, defence counsel argued that the facts that surround this case are not prejudicial to trial fairness, but they certainly weaken the prosecution's case because there is strong, reliable evidence that suggests that there may be another explanation with respect to this allegation. Defence counsel argues that it is not prejudice, but reality, and it is a defence that should be put to the panel.

Conclusion

[44] Although in some circumstances the Court would agree with the prosecution's position on this, it is swayed by the confusing message exchange that confirms that several days after the dinner in question, contrary to her testimony, the complainant still did not know the identity of the member who allegedly made the inappropriate comment to her. Despite the competing interpretations of the message as to whether the alleged perpetrator was wearing an Army uniform or not, it is clear that in that exchange the complainant was still trying to figure out the identity of the individual. Hence the issue of identity is a live issue and an issue that the panel must decide. In light of the fact that the third party defence could raise a reasonable doubt about the guilt of the accused, this defence should rightfully be considered by the panel.

[45] In summary, the Court finds that there is an air of reality to the third party suspect defence such that it should be put to the panel.

FOR THESE REASONS, THE COURT:

[46] **GRANTS** the defence's application.

Counsel:

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

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