COURT MARTIAL

Citation: *R. v. Alix*, 2019 CM 2026

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 ON A MOTION BY DEFENCE THAT NO PRIMA FACIE CASE HAS BEEN MADE OUT

(Orally)

Introduction

[1] Petty Officer 1st Class Alix is facing one charge contrary to section 129 of the *National Defence Act* (*NDA*) for conduct to the prejudice of good order and discipline. The charge emanates from an alleged comment made by him to a private during a mess dinner held on or about 26 October 2018, at the Canadian Forces Base Esquimalt Chief and Petty Officers' Mess. The complainant testified that after the dinner, while she was standing with friends just off the dance floor, Petty Officer 1st Class Alix approached her, put his arm around her shoulder and said, "Want to grab my balls?" or words to that effect. It is the effect of the one alleged comment that underpins the application before the Court.

[2] At the close of the prosecution's case, pursuant to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.05(13), defence presented a motion seeking a directed verdict. He submitted that the prosecution did not introduce

evidence of an essential element of the offence; namely, the prejudice to good order and discipline arising out of the alleged conduct.

Positions of the parties

Defence

[3] In his submissions, defence argued that when one looks at the totality of the evidence, the alleged comment was no more than an invitation made loud enough for only the recipient to hear. He argued that even the initial comment was not heard by the complainant the first time and it was only heard after she invited the member to repeat the comment. The defence position is that if the complainant had accepted the invitation and left with the person in order to act on the invitation, the comment would not have been a Code of Service Discipline offence, and the fact that the invitation was declined does not move it into the realm of criminal behaviour. He referred to paragraph 32 in *R. v. Banting*, 2019 CM 2009, where the Court said "not all inappropriate conduct rises to the level where it constitutes conduct prejudicial to good order and discipline."

[4] Further, it was argued that looking at the totality of the evidence and relying upon paragraph 34 of the *Banting* decision where the court stated, "there must be some evidence that the accused breached an objectively defined norm that he is presumed to know." He further submitted that a single invitation of contact that exists in this case could not rise to the level of harassment.

[5] In addition, he argued that in the Standing Court Martial case of *R. v. Korolyk*, 2016 CM 1002, the Court found subsection 129(2) to be unconstitutional.

Prosecution

[6] The prosecution argued that on the facts before the Court, evidence of prejudice is present. Proof requires either harm or risk of harm to good order and discipline which can be established by either direct evidence or by inference that the trier of fact can make by taking into account all the circumstances with the benefit of military experience and general service knowledge.

[7] Further, if it is established that the conduct in question violates the *NDA*, orders, regulations or instructions, then prejudice will be established.

[8] In this case, the prosecutor argues that there is direct evidence provided by the complainant as to the harm and the prejudice caused by the incident with the accused, which consisted of the feelings she expressed in her testimony of surprise and embarrassment, as well as her expressed feeling that such conduct was not normal and should not have happened at all. During her testimony, she was upset and crying. She expressed how she felt that night and the impact the incident subsequently had on her.

[9] The complainant, C.R. testified that following the event, she was more sensitive and could not concentrate in her job. The condition lasted for several months. She also described worrying that she might run into the accused in the area. Prosecution argued just based on this testimony alone it is open to the panel to find that prejudice was established.

[10] The prosecutor contested the fact that the words were only audible to the complainant as she argued this was not established in the evidence. She stated this was important because the panel could also find that there was a risk of harm, because although there was noise, it was not confirmed that the comment could not have been heard by others.

[11] In addition, she argued that the panel could infer prejudice with the benefit of their military experience and general service knowledge, and they also have the benefit of the documents of which the Court has taken judicial notice. She argued that there are sufficient documents before the Court upon which the panel could rely to infer prejudice.

[12] In this case, the prosecution argued that the accused himself signed acknowledgements that make reference to the DAODs on sexual misconduct and harassment. Further, in addition to those acknowledgement forms signed by the accused, the Court also took judicial notice of the policies themselves, namely Exhibit 5, the CDS OP ORDER, OP HONOUR, dated 14 August 2015; Exhibit 3, Defence Administrative Order and Directive (DAOD) 5012-0. Harassment Prevention and Resolution, and DAOD 5019-5, Sexual Misconduct and Sexual Disorders. Therefore the panel could also reach the conclusion that the conduct violated those orders, which is an additional avenue open to the panel to permit them to reach the conclusion that prejudice occurred.

[13] The prosecution submitted that there is direct evidence before the Court upon which the panel could draw an inference that the conduct was in breach of one of the policies. She emphasized that based on the requirements set out in Exhibit 3, a finding of harassment does not require a series of incidents, and the policy indicates that one incident that has a lasting effect on an individual is sufficient.

<u>The applicable law</u>

[14] The test to be applied in courts martial in responding to a motion that no prima facie case has been made out is captured in Note (B) to QR&O article 112.05:

> (B) A *prima facie* case is established if the evidence, whether believed or not, would be sufficient to prove each and every essential ingredient such that the accused person could reasonably be found guilty at this point in the trial if no further evidence were adduced. Neither the credibility of witnesses nor weight to be attached to evidence are considered in determining whether a *prima facie* case has been established. The doctrine of reasonable doubt does not apply in respect of a *prima facie* case determination.

[15] In the case of *Banting*, as well as the case of *R. v. Scott*, 2018 CM 2025, the Court also relied upon the test set out by the Supreme Court of Canada (SCC) by Fish J., who delivered the decision in *R. v. Fontaine*, 2004 SCC 27 at paragraph 53 and the same test was recently enunciated in *R. v. Barros*, 2011 SCC 51, at paragraph 48 by Binnie J.:

> A directed verdict is not available if there is any admissible evidence, whether direct or circumstantial which, if believed by a properly charged jury acting reasonably, would justify a conviction: *R. v. Charemski*, [1998] 1 S.C.R. 679, at paras. 1-4; *R. v. Bigras*, 2004 CanLII 21267 (Ont. C.A.), at paras. 10-17. Whether or not the test is met on the facts is a question of law which does not command appellate deference to the trial judge.

[16] In short, in rendering a decision on the specific motion before me that no prima facie case has been made out on the essential element of prejudice, the Court must not weigh or assess the quality of the evidence. The test for the Court to apply is whether there is some evidence upon which a properly instructed panel might convict. Some evidence may in fact still be insufficient to establish guilt beyond a reasonable doubt, but the burden of proof rests on the applicant to demonstrate, on a balance of probabilities, that a prima facie case on the charge has not been met.

Relevant evidence

[17] The following relevant exhibits were filed with the Court:

(a) Exhibit 11 – Canadian Fleet Pacific Instruction on Harassment;

(b) Exhibit 12 – Annex D – Joining Instructions;

(c) Exhibit 13 – Member's Personnel Record Resume;

(d) Exhibit 14 – Picture; and

(e) Exhibit 15 – Text message transcript.

[18] In addition to the testimony and the listing of exhibits indicated above, pursuant to Military Rule of Evidence 15(2) the Court took judicial notice of the following documents:

(a) Exhibit 3 - DAOD 5012-0 Harassment Prevention and Resolution;

(b) Exhibit 4 - DAOD 5019-5 Sexual Misconduct and Sexual Disorders;

(c) Exhibit 5 – Chief of Defence Staff (CDS) Operation Order - Operation HONOUR dated 14 August 2015;

(d) Exhibit 6 - CDS Message to Canadian Armed Forces (CAF) on Harmful Sexual Behaviour dated 23 July 2015;

(e) Exhibit 7 – Fragmentary Order (FRAGO) 001 to CDS Op Order – Operation HONOUR dated March 2016;

(f) Exhibit 8 – FRAGO 004 to CDS Op Order – Operation HONOUR dated 5 March 2018; and

(g) CDS Intent Operation HONOUR dated 21 December 2018.

Testimony

[19] In considering the evidence, the judge is to assume that all of the testimonial evidence is true. It is not the Court's function to decide whether witnesses should be believed. The judge is not to weigh the evidence, in the sense of evaluating whether it is reliable. The judge is not, for example, to discount testimony because of concerns about the opportunity of the witness to observe or recall the events accurately. Similarly, the judge is not to assess the witnesses' credibility. The judge is therefore to assume that the witness is not only trying to be truthful, but is also being accurate.

Testimony on the circumstances of the case

[20] Before the Court we have one incident that occurred at a work social function. The complainant testified that the accused, who she did not know, approached her, put his arm around her shoulder and made the comment, "Want to touch my balls?" She stated that the first time the accused allegedly made the comment, she did not understand properly and asked him to repeat it. She testified that he repeated it and she stepped back, stating, "Are you serious?" or "Seriously?" and then turned back to resume speaking with her friends. A second witness, Chief Petty Officer 2nd Class Truchon, who did not hear the comment himself, but only witnessed the complainant's reaction, felt the complainant's reaction was sufficient for him to realize something was going on and he approached the accused, and while focusing on him, looked him in the eyes and said, "Seriously?"

[21] The complainant testified that she was embarrassed by the comment. She said that although she knew she did not do anything wrong, she wondered if she had done something that attracted the accused's attention. She testified that after the incident, she was very sensitive, had problems concentrating and it took her longer to do her job as she kept double-checking herself. She explained that as a Human Resource Administrator she completes paperwork for people and it needs to be done properly.

Analysis

[22] At this stage, a prima facie case is established if the evidence, whether believed or not, would be sufficient to prove the essential ingredient of prejudice such that the

accused person could reasonably be found guilty at this point in the trial, if no further evidence was adduced.

Section 129 of the NDA

[23] In deciding the motion, it is helpful to review the elements of an offence under section 129 of the *NDA*. Firstly, section 129 does not create two distinct offences. It is one offence (see *R. v. Winters*, 2011 CMAC 1). In fact, subsection (1) creates the offence itself and subsection (2) deems the conduct prejudicial when the conditions of subsection (2) are met. Subsections 129(1) and (2) read as follows:

> Conduct to the Prejudice of Good Order and Discipline
>
> Prejudicing good order or discipline
>
> 129 (1) Any act, conduct, disorder or neglect to the prejudice of good order and discipline is an offence and every person convicted thereof is liable to dismissal with disgrace from Her Majesty's service or to less punishment.
>
> Offence and contraventions prejudicial to good order and discipline
>
> (2) An act or omission constituting an offence under section 72 or a contravention by any person of
>
> (a) any of the provisions of this Act,
>
> (b) any regulations, orders or instructions published for the general information and guidance of the Canadian Forces or any part thereof, or
>
> (c) any general, garrison, unit, station, standing, local or other orders,
>
> is an act, conduct, disorder or neglect to the prejudice of good order and discipline.

[24] For the record, based on the most recent clarifications by the Court Martial Appeal Court (CMAC); namely, *R. v. Golzari*, 2017 CMAC 3 and *R. v. Bannister*, 2019 CMAC 2 there are a number of ways an offence under section 129 of the *NDA* could be proven: the first test is subsection 129(2) deemed prejudice; and the second one is prejudice on the facts, being direct evidence of prejudice, or inferred prejudice based on the circumstances.

Deemed prejudice under subsection 129(2) of the NDA

[25] One of the ways to prove prejudice is through subsection 129(2) of the *NDA* that deems conduct prejudicial upon breach of an order. At paragraph 68 of *Golzari*, the CMAC made it clear that the prosecution is not required to prove a standard of conduct as an essential element of a section 129 offence; however, at paragraph 46 of *Bannister*, the CMAC confirmed that the subsection 129(2) provision remains valid, and affirmed that knowledge of a standard of conduct set out in a policy or order is required if the prosecution intends to rely upon a breach of such order.

[26] The prosecution argued there is some evidence before the Court to satisfy the panel that the actions of the accused contravened at least one of these policies, namely DAOD 5012-0.

[27] As defence pointed out in the case of *Korolyk*, Dutil C.M.J. found subsection 129(2) to be constitutionally valid, but found the presumption of deemed prejudice to be refutable. Although the decision in *Korolyk* found that deemed prejudice is refutable, this Court has found on multiple occasions that a breach of the CAF harassment policies is prejudicial to good order and discipline.

DAOD 5012-0, Harassment Prevention and Resolution

[28] The current DAOD 5012-0 identifies the following six criteria in section 33:

(a) improper conduct by an individual;

(b) the individual knew or ought reasonably to have known that the conduct would cause offence or harm;

(c) directed at another individual;

(d) offensive to that individual;

(e) was a series of incidents, or one severe incident which had a lasting impact on that individual; and

(f) occurred in the workplace.

[29] In order for the prosecution to prove a breach of subsection 129(2) or that a breach of the harassment occurred, the six criteria set out in the DAOD must be met and the prosecution must prove that the individual knew or ought to have known that the conduct in question would cause offence or harm.

[30] Chief Petty Officer 2nd Class Grimard testified that, on 16 January 2013, the accused signed the Canadian Fleet Pacific Instruction on Harassment, being Annex A, that acknowledges that he read and understood DAOD 5012-0 Harassment Prevention and Resolution. His signature acknowledges that he was aware of his duties and obligations with respect to the harassment policy and that he was provided with the opportunity to read, review and understand it.

[31] Further, on 21 March 2018, the accused signed Annex D, being the Joining Orders of the Canadian Fleet Pacific, Exhibit 12 where it was indicated that the accused was acquainted with, would observe and enforce the *NDA*, *Security of Information Act*, QR&O and all other regulations, rules, orders and instructions that pertain to the performance of his duties. Within it, the Annex refers to the specifics of the DAODs on

the harassment policy, personal relationships, sexual misconduct, and, at paragraph 12, quotes from Exhibit 5, the CDS OP ORDER, Exhibit 5.

[32] Defence argued that the alleged comment was only a single invitation and submitted that if the complainant had accepted the invitation and left with the person in order to act on the invitation, the comment would not have been a Code of Service Discipline offence. He argued that a single invitation does not rise to the level of harassment. He may indeed be correct; however, that is for the trier of fact to decide. It is important to highlight that the test to be applied by the Court at this stage is only whether there is some evidence upon which the panel can decide the case.

[33] In evidence, we have an improper comment made in the workplace to an individual that the individual found offensive. Further, there is some evidence upon which the panel could rely that the accused had some knowledge of what was expected of him under DAOD 5012-0, Harassment Prevention and Resolution, DAOD 5019-5, Sexual Misconduct and Sexual Disorders, as well as Op HONOUR.

Direct evidence

[34] In *Golzari*, Mosely J.A. discussed the meaning of "prejudice" as set out in section 129 of the *NDA*:

> [78] Prejudice in its ordinary grammatical sense means "harm or injury that results or may result" (Concise Oxford English Dictionary). The addition of the words "to the" before "prejudice" incorporates an element of risk or potential and the expression, read as a whole, does not require that harmful effects be established in every instance. Though evidence of actual harmful effects may exist, it is not required for conduct to be punished in the context of military discipline. Military discipline requires that conduct be punished it if carries a real risk of adverse effects on good order within the unit; this is more than a mere possibility of harm. If the conduct tends to or is likely to adversely affect discipline, then it is prejudicial to good order and discipline.
> [Emphasis added.]

[35] The prosecution argued that the threshold for the essential element of prejudice will be met if there is actual evidence of prejudice based on objective criteria of prejudice or likelihood of prejudice. She argued that there was actual evidence of prejudice to good order and discipline given in the testimony of the complainant.

[36] In her testimony, the complainant said she was surprised, embarrassed, and expressed the feeling that the comment was not normal and should not happen. She explained how she felt that night and the impact the incident had on her subsequently.

[37] She testified that following the event, she felt more sensitive and she could not concentrate in her job for several months. She also stated that she worried that she might run into the accused. The prosecutor argued that this is further evidenced by the fact that the complainant was emotional on the stand and crying.

[38] Defence counsel contested that this amounted to direct evidence of prejudice. He argued that testifying itself is very stressful and that could have been the cause of her being emotional on the stand. It is very possible that this direct evidence, by itself, falls short of proving prejudice beyond a reasonable doubt, however, that is not the test for the Court to apply at this stage of the analysis. The Court must avoid weighing the evidence.

Inferred prejudice

[39] It is possible that the panel may decide that the comment is perceived to be an "invitation" and it does not rise to the level of harassment, and/or the direct evidence falls short of being prejudicial to good order and discipline. However, notwithstanding that, according to the CMAC guidance in *Bannister*, the panel must proceed one step further in their analysis and apply their experience and general service knowledge to inferential reasoning to decide whether the words uttered in this case can be considered conduct to the prejudice of good order and discipline. In other words, relying upon their military experience and general service knowledge, there must be some evidence that the accused breached an objectively defined norm that he is presumed to know where prejudice could be inferred.

[40] The inferential reasoning process that the panel must engage in, takes into account all the contextual circumstances of the case. For example, a trier of fact should consider the difference in the ranks of the players, the location and context where the allegation unfolded. On the facts before us, there is some evidence for the panel to consider in determining whether prejudice can be inferred. Such evidence includes the sexual nature of the comment, the fact that it was made by a senior non-commissioned officer to a private at a social gathering, as well as evidence that neither of them knew each other and the unsolicited randomness of the comment.

[41] The Court is to assume that all the evidence heard is true and it is not the Court's role to decide who should be believed or weigh the evidence in the sense of evaluating whether the evidence is reliable. I must assume that all the witnesses are being truthful and accurate.

[42] In short, although the Court only needs to determine that there is some evidence upon which a trier of fact can determine prejudice in any one of the approaches outlined above, the Court finds that there is some evidence in all of the avenues available for consideration. Some evidence may in fact still be insufficient to establish guilt beyond a reasonable doubt.

Conclusion

[43] This Court finds that a prima facie case has been made out on the charge before the Court and so directs that the trial proceed.

FOR THESE REASONS, THE COURT:

[43] **FINDS** that a *prima facie* case has been made out on the charge before the Court.

[44] **DISMISSES** the application.

[45] **DIRECTS** that the trial proceed.

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 P. Major Craig and Lieutenant(N) J. Besner, Respondent