COURT MARTIAL

Citation: *R. v. Alix*, 2019 CM 2027

Date: 20190911
Docket: 201914

General Court Martial

Canadian Forces Base Esquimalt
British Columbia, Canada

Between:

Her Majesty the Queen, Applicant

- and -

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

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

RULING ON PROSECUTION'S APPLICATION FOR REBUTTAL WITNESS

(Orally)

Introduction

[1] Pursuant to Military Rule of Evidence (MRE) 20 and the common law, a prosecutor shall not introduce evidence of the general bad character or reputation of the accused, or of another act or other acts of the accused similar in essential respects to the act charged. MRE 20 reads as follows:

> **Evidence of Character and Similar Facts Not Ordinarily Admissible before Finding**
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> **20** Except as prescribed in this Division, the prosecutor shall not introduce evidence of the general bad character or reputation of the accused, or of another act or other acts of the accused similar in essential respects to the act charged.

[2] However, when an accused person tenders propensity evidence about a third party in an effort to demonstrate a probability that the third party committed the offence, the prosecution may be permitted to tender evidence about the character of the

accused, even though that evidence would not have been admissible as part of the prosecution's case in chief.

[3] At the close of the defence case, in accordance with MRE 21, the prosecution applied to the Court to call a witness in rebuttal. MRE 21 reads as follows:

> **Character Evidence**
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> **21 (1)** The accused may, by cross-examination or by witnesses, introduce evidence of his good character or reputation and, if he does so, the prosecutor may similarly introduce evidence to rebut it.
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> **(2)** A witness testifying as to the character or reputation of the accused may
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> **(a)** report the general reputation of the accused among those who know him or would know about him respecting traits of his character relevant to the charge; and
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> **(b)** state his **personal** opinion of the general character of the accused in respects relevant to the charge.
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> **(3)** When a witness is testifying as to the character or reputation of the accused, he shall not give evidence of particular acts of the accused as the basis of his report or opinion of the reputation or character of the accused, but shall answer questions concerning the duration and nature of his acquaintance or association with the accused, or with others who would be likely to know the accused.
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> **(4)** Notwithstanding Divisions V, VI, VII and VIII, hearsay or opinion evidence permitted under this article is admissible.
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> **(5)** This section applies to testimony in the course of examination-in-chief, cross-examination and re-examination.

[4] The general rule with respect to the order of evidence at trial is that the prosecution must introduce all the evidence in its possession upon which it relies on as probative of guilt before closing its case.

[5] This rule prevents the accused from being taken by surprise and being deprived of the opportunity to make a proper investigation with respect to the evidence adduced against him. This rule also provides a safeguard against the importance of a piece of evidence, by reason of its late introduction, being unduly emphasized or magnified in relation to the other evidence.

[6] As such, rebuttal evidence by the prosecution is restricted to evidence to meet new facts that have been introduced by the defence.

[7] This Court has discretion to admit evidence in rebuttal which has become relevant to the prosecution's case as a result of defence evidence which the prosecution could not reasonably be expected to anticipate.

[8] The prosecution cannot be expected to adduce evidence as part of its case to meet every defence that the accused might possibly raise even if the defence already

alerted them to the fact that it would be calling a witness that would testify regarding a third party.

[9] The evidence by way of rebuttal is not restricted to being determinative of the fact in issue, provided that it is related (see *R. v. Aalders*, [1993] 2 S.C.R. 482). It is admissible where it is related to an essential issue that is determinative of the case or if it goes to an essential issue that the prosecution could not have foreseen.

[10] A trial judge also has discretion to admit evidence that might have only had marginal importance during the prosecution's case in chief, but was enlarged or took on added significance as a result of the defence's evidence. That discretion includes matters raised during the cross-examination of prosecution's witnesses, provided that it was not a live issue at the end of the prosecution's case and the admission of such evidence would not cause an unfairness to the accused.

Basis for propensity evidence

[11] So, what exactly is propensity evidence? Justice Boswell, in the case of *R. v. Pan*, 2014 ONSC 6053, provides a very succinct and clear definition which I will repeat in almost its entirety.

> [25] When I speak of "propensity evidence" in this ruling, I mean evidence of misconduct that is outside of the subject matter of the indictment, and which does nothing more than disparage someone's character. When the subject matter of propensity evidence is an accused person, it is presumptively inadmissible, despite the fact that it may be relevant: *R. v. Handy*, [2002] 2 S.C.R. 908. An accused person is called upon to answer only to a specific charge of criminal conduct, not to defend his or her general character.
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> [26] The reason that propensity evidence is presumptively inadmissible has to do with its tendency to cause prejudice to an accused person. As Justice Sopinka described in *R. v. B. (C.R.)*, [1990] 1 S.C.R. 717 at p. 744:
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> > The principal reason for the exclusionary rule relating to propensity is that there is a natural human tendency to judge a person's action on the basis of character. Particularly with juries there would be a strong inclination to conclude that a thief has stolen, a violent man has assaulted and a pedophile has engaged in pedophilic acts. Yet the policy of the law is wholly against this process of reasoning.

Position of the prosecution

[12] The prosecution argued that since the defence has put forward a third party defence and introduced evidence of a third party; namely, Sergeant Gaudet's character or disposition to commit the offence in issue, then the prosecution wishes to tender similar evidence about the character of the accused.

[13] The essence of the prosecution's argument is that the Court heard evidence of Sergeant Gaudet's drunken behaviour on the night in question and in order to ensure that the panel is not left with a distorted picture, the panel is entitled to hear about the

accused's similar propensity to engage in the conduct as described, which until now has been considered to be inadmissible.

Position of the defence

[14] Defence counsel argued that he did not introduce evidence of Sergeant Gaudet's character or disposition to commit the offence in issue and therefore this rule that permits the prosecution to call rebuttal evidence is not triggered.

[15] Defence submits that because the general disposition of the third party has not been put into evidence, the rebuttal witness should not be allowed. He only put forward specific acts, and as such the character of the accused should not be put into issue. He stated that he intentionally did not call evidence of general disposition and propensity.

[16] Defence counsel argues that the panel is only aware of the alleged acts by Sergeant Gaudet on the evening in question and he refers the Court to the decision of *Pan* at paragraphs 30 to 33.

Analysis

[17] In *R. v. Luciano*, 2011 ONCA 89, at paragraph 115, Watt J.A. described the applicable rule as follows:

> [115] Where an accused advances a defence that a third party committed the offence with which the accused is charged and adduces evidence of the third party's disposition or propensity as circumstantial evidence of the third party's conduct, the prosecutor may be permitted to adduce responsive evidence of the accused's disposition or propensity: *R. v. M.(W.)* (1996), 112 C.C.C. (3d) 117 (Ont. C.A.), at pp. 123-24, aff'd [1998] 1 S.C.R. 977.

[18] Both counsel relied upon paragraph 32 of *Pan*, giving their interpretation and arguing their position. Defence refers to paragraph 32 of that decision and suggested that the accused has tendered evidence of specific acts connecting Sergeant Gaudet to the offence and therefore the prosecution should not be permitted to submit rebuttal evidence. However, the prosecution submitted that there was nothing more adduced than Sergeant Gaudet's behaviour that evening, and absolutely no evidence that linked him to the offence. Paragraph 32 reads as follows:

> [32] One suggested way of approaching the propensity evidence tendered by the accused person is to ask whether the evidence adduced by the accused invites a comparison between the accused and the third party suspect based on their characters. If the answer is yes, then the Crown will generally be permitted to call rebuttal evidence in the form of bad character evidence about the accused. If the answer is no, then the Crown will not be permitted the same opportunity. A "no" answer will typically follow if the accused has tendered evidence of specific acts connecting the third party to the offence, as was the case in *R. v. Vanezis*.
> [Footnote omitted.]

[19] Defence argued that the Court heard that the actions of the alleged perpetrator, were flirtatious comments; they were not successful flirtatious comments, but that was the intention. The perpetrator was drunk on that particular evening, and this goes directly to the offence, as does the rubbing of the leg which suggests the third party suspect had motive to engage in that type of behaviour.

[20] On the facts before the Court, defence introduced evidence of Sergeant Gaudet being drunk and flirtatious and rubbing the leg of Master Seaman Roux. This, on its face, is in fact evidence of misconduct that is outside of the subject matter of the indictment. The propensity evidence tendered by defence was, in my view, evidence that Sergeant Gaudet engaged in similar misconduct to the offence before the Court and invites a comparison between he accused and the third party in terms of their behaviour. Although I agree with defence counsel that he did not adduce evidence of Sergeant Gaudet's general disposition, the similar misconduct that was entered into evidence on the exact same evening in question at the exact same function opened the door to invite the prosecution to reply with its own bad character evidence.

Probative value versus prejudicial effect

[21] However, the real issue for this Court to decide is the balancing act between the probative value of the evidence to the live issue in this court martial and the likely prejudice that may arise as a result of permitting this evidence. The evidence in rebuttal only becomes admissible when the trial judge, in the exercise of her discretion, permits the evidence to be admitted because of the defence evidence.

Probative value

[22] With respect to the probative value, the live issue is the third party defence that has been led in evidence. The propensity evidence of Sergeant Gaudet being drunk and flirtatious at the same mess dinner may support a finding that he may have engaged in the offence before the Court. It would jeopardize trial fairness to suggest that the accused should be protected from an examination of his own propensity when a shadow has been deflected onto Sergeant Gaudet's propensity. I do believe that in these circumstances, the panel should be given the opportunity to weigh this evidence against the evidence that they heard regarding the conduct of Sergeant Gaudet.

Prejudicial effect

[23] As I explained to counsel, the real risk of prejudice arises with respect to the prospect that the panel could misuse the propensity evidence about Petty Officer 1st Class Alix. It is expected that the rebuttal evidence is intended to rebut the alternate suspect defence by describing Petty Officer 1st Class Alix's own propensity to engage in this type of conduct. I note that the court record already shows that Petty Officer 1st Class Alix had been engaged in banter and was described as being loud and somewhat unruly during the dinner.

[24] I am satisfied that given the fact that this is a panel with general military experience and familiarity with military mess dinners that they could be provided an appropriate instruction to mitigate the risks to any prejudice.

FOR THESE REASONS, THE COURT:

[25] **GRANTS** the prosecution's application.

Counsel:

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

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