



COURT MARTIAL

Citation: *R. v. Simms*, 2016 CM 4023

Date: 20160118

Docket: 201449

General Court Martial

17 Wing, Canadian Forces Base Winnipeg
Winnipeg, Manitoba, Canada

Between:

Her Majesty the Queen, Respondent

- and -

Master Warrant Officer A.W. Simms, Applicant

Before: Commander J.B.M. Pelletier, M.J.

DECISION ON THE ADMISSIBILITY OF EXPERT OPINION EVIDENCE

Introduction

[1] Master Warrant Officer Simms faces five charges in this General Court Martial as a result of an altercation on 30 May 2014 at or near Winnipeg International Airport when it is alleged he unlawfully used force and uttered threats against two military policemen.

[2] The prosecution has completed the presentation of its evidence before the panel. That evidence focussed on the acts allegedly committed during the altercation. No expert evidence was called by the prosecution. The defence is asking the court to qualify Dr Anne Labonte as an expert witness so she can be the first witness for the defence in this trial. Dr Labonte is a psychiatrist treating amongst other patients many military and ex-military members suffering various mental conditions including post-traumatic stress disorder and depression.

[3] The nature and scope of her testimony as an expert has been identified by the defence in the notice of intention at Exhibit VD6-1 as follows: the mental health

condition of Master Warrant Officer Simms; the mental state of Master Warrant Officer Simms at the time of offence, especially the opinion that Master Warrant Officer Simms did not have the intent to commit the acts, subject of the charges; the ability of Master Warrant Officer Simms to appreciate the nature and quality of his acts at the time; and, finally, the capacity of Master Warrant Officer Simms of knowing his actions were wrong at the time.

[4] A *voir dire* was held and Dr Labonte testified. The *voir dire* concerns only the threshold issue of admissibility of the defence expert evidence and its scope. The ultimate value of the evidence will be determined by the panel after final arguments from counsel and appropriate instructions from me.

[5] Expert evidence is an exception to the general rule that witnesses may testify only as to facts within their knowledge not as to their opinions. Therefore, expert opinion evidence is presumably inadmissible. Its admissibility must be established on the balance of probability by the party seeking its admission. Courts must be vigilant both in determining whether the preconditions to admissibility have been met and ensuring that expert opinion evidence does not go beyond permissible bounds.

[6] *Military Rule of Evidence* 81 applies to expert testimony, but the most current statement of the law is found in the Supreme Court of Canada decision of *R. v. Mohan*, [1994] 2 S.C.R. 9, where Sopinka J set out criteria as to the admissibility of expert evidence as follows: relevance; necessity in assisting the trier of fact; the absence of any exclusionary rule; and a properly qualified expert.

[7] In *R. v. Abbey*, 246 CCC (3d) 301, the Ontario Court of Appeal set out a two-step approach in order to apply properly those criteria. The first stage addresses the preconditions to admissibility: first, whether the evidence relates to a subject matter appropriate for expert testimony; secondly, whether the expert is properly qualified to provide the opinion; third, the absence of an exclusionary rule; and fourth, whether the evidence is logically relevant to a material issue.

[8] The second stage involves a cost-benefit analysis of the evidence taking into account its probative value, reliability, significance of the issues and necessity and weighing those factors against its consumption of time and the potential for prejudice including the likelihood that the evidence would confuse the trier of fact.

[9] The first step, the existence of certain preconditions. The first question I must ask is whether the proposed opinion relates to a subject matter that is properly the subject of the expert opinion evidence? The answer to this question is clearly yes. It would appear from the content of Exhibit VD6-1 that the defence may seek to introduce evidence to rebut a potential inference by the court to the effect that a person intends their actions and rebut the presumption that persons do not suffer from a mental disorder so as to be exempt from criminal responsibility. In that context, there is no dispute that the court requires assistance to understand the mental condition of Master Warrant Officer Simms at the time of the alleged offences and its impact.

[10] The second question in the first step is whether the witness is qualified to give the opinion? The prosecution argues that Dr Labonte is qualified to provide her opinion as to the mental condition of Master Warrant Officer Simms generally and at the time of the offences. However, the prosecution submits that she is not qualified to state the opinion appearing at page 8 of her report introduced as Exhibit VD6-3, essentially because she does not understand the legal significance of the terms submitted by defence counsel in the request he formulated seeking her opinion. In short, based on evidence elicited on cross-examination in the course of this *voir dire*, the prosecution submits that Dr Labonte is not qualified to comment on concepts such as: forming an intent; appreciating the nature and quality of action in capacity of knowing the actions are wrong given that she does not know what these terms mean in law.

[11] What an expert in psychiatry ought to be doing in cases such as here is providing the court with expert opinion evidence concerning any condition that impacted on the accused's mental functioning at the time an act was committed. I find that Dr Labonte is qualified to do that. What the prosecution alleges are weaknesses in the value of any opinion she might state where the vocabulary may be close to the text of the law. That is an issue of circumscription of the evidence at the second stage of the admissibility analysis. I find that the expert is qualified to give an opinion on the accused's mental functioning at the time of the acts, subject to the charges, were committed.

[12] The third question on the first step is whether the proposed opinion runs afoul of any exclusionary rule entirely apart from the expert opinion rule. The opinion would involve the use of hearsay given that it will be proffered on the basis of the events related to Dr Labonte by Master Warrant Officer Simms, as evidenced by the report at Exhibit VD6-3. That is the most important and commonly encountered exclusionary rule as regards to expert evidence of psychiatrists.

[13] The case of *Abbey* stands for the proposition that an expert's opinion must be based on a proven foundation of evidence and not on hearsay. In other words, the weight attached to the relevant expert evidence is correlated with the strength of its factual foundation. Yet, in *R. v. Lavallee*, [1990] 1 S.C.R. 852, the Supreme Court of Canada relaxed that previously stated rule in *Abbey* which required that a psychiatrist's opinion be based only on proved facts if they were to be admitted into evidence. *Lavallee* allowed opinion evidence to be admitted if it was based on any admissible evidence, that is, a mixture of admissible and otherwise inadmissible evidence. If the factual foundation for the expert's opinion was rife with hearsay, however, it would likely be accorded little weight. Therefore, I see no obstacle in admitting the testimony of Dr Labonte on that basis.

[14] The fourth and final question in relation to the first step is whether the proposed opinion is logically relevant to a material issue? Logical relevance as explained in *Abbey* means:

[T]hat the evidence have a tendency as a matter of human experience and logic to make the existence or non- existence of a fact in issue more or less likely than it would be without that evidence.

[15] That is a low threshold. At its face, the proposed opinion is relevant to a material issue, the mental elements for the offence and a potential defence of non-criminally responsible; therefore, that question is not an obstacle to the admission of the testimony of Dr Labonte.

[16] I'm turning now to the second step, the "gatekeeper" inquiry. In approaching this cost-benefit stage of the analysis mandated by *Mohan* and *Abbey*, I must keep in mind an important contextual factor; namely, that courts should be extremely cautious in denying an accused the right to call evidence in his or her own defence. Before denying the defence the right to call relevant evidence, its prejudicial effect must substantially outweigh its value. (See *R. v. Seaboyer*, [1991] 66 C.C.C. (3d) 321, at page 391)

[17] Furthermore, I'm aware that as a result of the notice of intention to call expert evidence, at Exhibit VD6-1, having been sent well in advance of the trial, the prosecution is in a position to reply to the defence's evidence and has its own witness at the ready to do so. There is no doubt that the proffered opinion evidence of Dr Labonte will be necessary for the defence to support an argument relating to an alleged lack of intent by the accused and presents a defence of non-criminally responsible.

[18] The prosecution does not contest Dr Labonte's expertise or her capacity to testify as an expert, but has identified real limitations on her expertise in relation to the legal language used in stating her opinions at page 8 of her report. The question is whether those limitations should result in the exclusion of this evidence or whether they should be factors to be considered in evaluating the weight to be given to it.

[19] Dr Labonte's opinions are based on many years of experience in the field of psychiatry and an intimate knowledge of the conditions allegedly suffered by Master Warrant Officer Simms, even if she's relatively new to the specific issues relevant to the defence of non-criminally responsible. Yet, this potential weakness is something that can be raised in cross-examination before the panel and will go to the weight of her opinion. In the circumstances, I conclude that the evidence of Dr Labonte survives the probative value substantial vs prejudicial effect analysis as it pertains to her statement of opinions found at page 8 of her report. She will, therefore, be allowed to testify on these issues.

[20] I now need to decide whether the scope of her foreseen testimony needs to be restrained. In doing so I'm mindful of a trial judge's duty to delineate and circumscribe the evidence permitted to be given by expert witnesses as discussed in *Abbey* at paragraphs 62 - 64 and 72 - 74. In panel cases by General Court Martial, the risk that the integrity of the trial will be hijacked by experts is very real and the duty of vigilance on the part of the trial judge is at its highest.

[21] I have given this issue careful and respectful consideration. I conclude that in the circumstances of this case it is neither possible nor practical to delineate with precision the scope of admissibility of the defence expert's opinion. In my view, a brief description of the guiding principles relating to the scope of Dr Labonte's testimony will be sufficient to ensure that her evidence remains within permissible limits. The lack of expertise of Dr Labonte as to the exact meaning of legal concepts such as intent and nature and quality of the acts that Master Warrant Officer Simms is alleged to have committed is acknowledged.

[22] Defence counsel and his questions to Dr Labonte should avoid confining her strictly to these terms in suggestions or otherwise. Yet, the bottom line is that she will be allowed to provide her opinion as to whether any mental condition suffered by Master Warrant Officer Simms impacted on his mental functioning at the time of the acts subject of the charge, without restriction.

[23] In doing so it may be necessary for her to refer to concepts such as intention to do something and comprehension of what one is doing in layperson terms. I do not see a need to comment or restrict defence in any way on the issue of knowing acts were wrong.

[24] In making this decision to allow defence counsel's proposed line of questioning, I appreciate that the weight of Dr Labonte's opinion and the subject is very much in issue in this trial; however, I have concluded that the potential for prejudice does not substantially outweigh its probative value.

FOR THESE REASONS, THE COURT:

[25] FINDS that the evidence of Dr Labonte is admissible and the scope of her evidence is minimally limited in accordance with the general guidelines I have just outlined.

Counsel:

The Director of Military Prosecutions as represented by Major D. Martin and Captain C.S. Nam

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Warrant Officer A.W. Simms