HEARING BY A MILITARY JUDGE

Citation: *R. v. Kohlsmith and Zapata-Valles*, 2021 CM 3007

Date: 20210615
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General Court Martial (Kohlsmith)
Standing Court Martial (Zapata-Valles)

Gatineau, Quebec, Canada

Between:

Sergeant R.D. Kohlsmith
Corporal A.A. Zapata-Valles
Applicants

- and -

Her Majesty the Queen,
Respondent

Application heard jointly in Gatineau, Quebec, on 25 May 2021.
Decision rendered orally in Brampton, Ontario, on 31 May 2021.
Written reasons delivered in Gatineau, Quebec, 15 June 2021.

Before: Lieutenant-Colonel L.-V. d'Auteuil, A/C.M.J.

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.

REASONS ON ACCUSEDS' APPLICATION SEEKING A DECLARATION OF CONSTITUTIONAL INVALIDITY OF SECTIONS 278.93 AND 278.94 OF THE *CRIMINAL CODE* PURSUANT TO SECTION 52 OF THE *CONSTITUTION ACT, 1982* FOR A BREACH OF THEIR RIGHTS GUARANTEED BY SECTIONS 7 AND PARAGRAPH 11(*d*) OF THE *CHARTER*

(Orally)

[1] Sergeant Kohlsmith and Corporal Zapata-Valles are both charged with one service offence punishable under paragraph 130(1)(a) of the *National Defence Act* for sexual assault contrary to section 271 of the *Criminal Code*. They are unrelated matters.

[2] The General Court Martial of Sergeant Kohlsmith is convened for 13 September 2021 and it will be held at Toronto, Ontario, and the Standing Court Martial of Corporal Zapata-Valles is convened for 31 May 2021 and it will be held at Brampton, Ontario. The prosecutor in both cases is Major Dhillon and I have been assigned to preside at both courts martial. Each accused is represented by a different defence counsel: Captain Da Cruz acting on behalf of Sergeant Kohlsmith and Captain Sommers representing the interests of Corporal Zapata-Valles.

[3] Sergeant Kohlsmith filed with the Office of the Chief Military Judge, on 30 April 2021, his application seeking a declaration of constitutional invalidity of sections 278.93 and 278.94 of the *Criminal Code* from the court martial. Corporal Zapata-Valles did the same thing on 3 May 2021. The applicants would like the Court to declare that these sections are of no force or effect pursuant to section 52 of the *Constitution Act, 1982*, because they violate their rights under section 7 and paragraph 11(*d*) of the *Charter*.

[4] In the context of a pre-trial conference call held on 23 April 2021, I determined with counsel for the court martial of Sergeant Kohlsmith that the preliminary hearing for this matter would take place on 25 May 2021, at the Asticou Centre courtroom in a hybrid format. As I previously said, he then filed his application sometime after.

[5] On 7 May 2021, I held a pre-trial conference call with counsel involved in the matter of Corporal Zapata-Valles, where I was told by Captain Sommers that his client intended to raise a similar constitutional question as the one in the matter of Sergeant Kohlsmith. I suggested that such preliminary application be heard on 25 May 2021 in a joint preliminary hearing with the matter of Sergeant Kohlsmith, as they seem both raising similar or exact same legal issues before the Court.

[6] On 10 May 2021, after he spoke with the counsel representing Sergeant Kohlsmith, counsel for Corporal Zapata-Valles confirmed that both counsel were agreeable to my suggestion to participate in a joint hearing on 25 May 2021 in the manner I proposed. The prosecutor concurred with both defence counsel on this question.

[7] On 20 May 2021, the respondent filed its memorandum of fact and law for that specific legal issue raised by both applicants. On 21 May 2021, I held a final pre-hearing conference call with counsel to discuss about procedural matters concerning the hearing.

[8] Then, on 25 May 2021, the hearing on the preliminary application took place in a hybrid format at the Asticou Centre courtroom, in Gatineau.

[9] In addition to both notices in writing and the written response, the respective convening order and charge sheet for both applicants were introduced as evidence.

[10] Finally, respective defence counsel introduced a notice of a constitutional question served, by email on 30 April 2021 by Sergeant Kohlsmith, and on 24 May 2021 by Corporal Zapata-Valles, to the Attorney General of Canada and the one for each province and territory. I was informed by counsel that none of them had manifested any interest in participating at the hearing.

[11] Both applicants are of the opinion, in the context of a sexual assault charge, that the process imposed by some *Criminal Code* provisions since December 2018 allowing a judge to determine the admissibility of presumptively inadmissible evidence related to sexual activity of a complainant other than the one that forms the subject matter of the charge, or a record in their possession or control that contains personal information relating to a complainant for which there is a reasonable expectation of privacy raises concerns about its constitutional validity.

[12] In their opinion, the cumulative effect of combining a number of factors give rise to a violation of their rights under section 7 and paragraph 11(*d*) of the *Charter*, which are their right to make full answer and defence and the right to a fair trial.

[13] The factors they identified gravitate around two main issues:

(a) First, the obligation for the applicant to reveal some aspects of his potential defence prior to the end of the prosecution case because of the advance notice requirement, often with the result of providing such information well in advance of the complainant's testimony at trial; and

(b) Second, the involvement of the complainant at the admissibility hearing, especially concerning the degree to which such thing is permitted and the impact it may have on the role of the prosecution.

[14] If I come to the conclusion that there is such a violation of their constitutional rights, then both applicants suggested that it is not subject to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

[15] Consequently, if I conclude that the impugned provisions are inconsistent with the provisions of the Constitution, I shall declare that sections 278.93 and 278.94 of the *Criminal Code* are of no force or effect.

[16] Both defence counsel expressed their intent to ask the court martial to declare admissible some evidence of other sexual activities of the complainants to be used during the cross-examination of the latter in their respective trial if I dismissed the present application.

[17] For the prosecution, these provisions are a new chapter resulting from an ongoing dialogue between the legislator and the courts concerning the ability of the Canadian justice system to better protect individuals victimized by sexual offences, and reflects a balanced approach between the constitutional right of a person accused of such crime to make full answer and defence, the complainants' constitutional privacy rights, and the constitutional equality rights.

[18] As such, the respondent suggested that the impugned provisions fill a legislative gap for the use of some type of information in possession of an accused in relation to a complainant. For the prosecution, the advance disclosure of the application allows participants, including the complainant, to make meaningful submissions on the question to be decided by the judge. In addition, it submitted that the complainant's participation at the admissibility hearing enhances the trial fairness, as previously determined by courts prior to the enactment of the provisions, which would include being represented by counsel at the hearing and the ability to fully participate to it.

[19] Then, from the prosecution's perspective, the impugned provisions are constitutionally valid.

[20] Finally, the prosecution is of the opinion that if I find that these provisions breach both accuseds' *Charter* rights, they constitute a reasonable limit prescribed by law as can be demonstrably justified in a free and democratic society.

[21] Consequently, the prosecution strongly suggested that the application made by both accuseds should be dismissed.

[22] The constitutional validity of sections 278.93 and 278.94 of the *Criminal Code* is not a new issue before trial courts in Canada. In fact, since coming into force in December 2018, it seems that judges are divided on this question, which resulted in having two cases decided at trial level, *R. v. J.J.*, 2020 BCSC 29 and *R. v. Reddick*, 2020 ONSC 7156, being granted leave to appeal by the Supreme Court of Canada. In both cases, the hearing is tentatively set for October 2021.

[23] This issue is new before a court martial as only one military judge saw it being raised before her. On 6 May 2021, in *R. v. Tait*, 2021 CM 2009, Sukstorf M.J. denied a preliminary application involving the same legal question argued before me.

[24] As I indicated it in my decision delivered orally, I had the benefit of reading her decision and I agree with her on the result as she expressed it in the summary of her decision at paragraphs 39 to 44:

> [39] For the reasons that follow, I find that the complainant is entitled to receive the defence's full notice of application and/or factum as well as the sworn affidavit prior to the Stage 2 hearing. I further find that the complainant's and her independent legal counsel's participation at the hearing includes the ability to ask questions of the affiant. The purpose of this type of *voir dire* is to assist and provide the trial judge with the necessary information needed for the judge to make an informed decision on relevancy and no party has the right to exploit it for an improper purpose. Consequently, a trial judge has a duty to limit and control any cross-examination.
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> [40] With respect to the Notice of Constitutional Question, I find that sections 278.93 to 278.94 of the *Criminal Code* do not infringe the accused's rights under section 7 and paragraph 11(*d*) of the *Charter* because the statutory procedure set out for the determination of the admissibility of evidence of extrinsic sexual history can be applied in a manner consistent with the principle against self-incrimination, the right to a fair trial and the complainant's rights to privacy and equality. After *Seaboyer*, Parliament specifically provided trial judges with discretion to ensure

> that they do not exclude relevant evidence whose probative value is not substantially outweighed by its potential prejudice. The changes enacted with the new provisions in sections 278.93 and 278.94 did not change or remove this discretion.
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> [41] The SCC has continually reminded trial judges that they hold the ultimate responsibility for enforcing compliance with the mandatory regime. Although the SCC recognized that the "vetting" of such applications pre-trial provide benefit in focusing all parties on the legitimate use of such evidence, it also made it clear that an early ruling on the admissibility of prior sexual activity is not set in stone and there may be circumstances when it is appropriate to reopen and reconsider the application (see *R. v. Barton*, 2019 SCC 33 at paragraphs 65 and 68; *R. v. R.V.*, 2019 SCC 41; *R. v. Goldfinch*, 2019 SCC 38 at paragraph 145).
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> [42] The SCC also recognized that cross-examination is a key element of the right of an accused to make full answer and defence and a judge's failure to allow relevant cross-examination will almost always be grounds for a new trial. In short, if the defence is denied the right to call and challenge evidence, then it is synonymous to the denial of his right to rely on a defence to which he is legally entitled.
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> [43] Consequently, a trial judge must exercise her discretion to hear and possibly revisit decisions when the door to admissibility opens or when the appropriate relevance has been established, which sometimes will not occur until after a complainant has testified and the appropriate evidence is before the court.
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> [44] Unlike the findings rendered in some courts, this Court finds that there is no statutory bar or common law limitation that prevents a trial judge from hearing a section 276 application after a complainant has testified in their examination-in-chief. Further, I find that the purpose and objectives of the legislative regime, including the recent changes, are met by permitting such a mid-trial application.

[25] I think it is important to highlight the fact that, as Sukstorf M.J. expressed it at paragraph 40 of her decision in *Tait*, both *Criminal Code* provisions "set out for the determination of the admissibility of evidence of extrinsic sexual history can be applied in a manner consistent with the principle against self-incrimination, the right to a fair trial and the complainant's rights to privacy and equality."

[26] Regarding the issue for the applicants to provide advance notice, I came to the conclusion that there is sufficient flexibility and authority for the trial judge to properly manage the moment when such notice is provided to the complainant in order to apply the necessary balance to preserve the constitutional rights of the applicants and the complainants. As mentioned at paragraphs 114 and 115 in *Tait*:

> [114] Consequently, I find that there is sufficient judicial discretion in the legislation to permit a trial judge to conduct the necessary balance of ensuring that the application is heard at a time that preserves all the participatory rights that Parliament intended for complainants, while still ensuring an accused's right to a fair trial. I note that this Court's view is consistent with the finding of Christie J., at paragraph 60 of *A.M.*:
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> > [60] It is the view of this court that requiring pre-trial disclosure of the defence's cross-examination material, versus allowing for mid-trial disclosure of the material, unnecessarily infringes the applicant's rights set out above because of the danger that it will render the cross-examination ineffective. A witness with full advance notice of impeachment material is in a position to tailor their evidence to fit the disclosure. In the case at bar, the witness is a sexual assault complainant whose testimony is central to the

> prosecution's case. Therefore, any unnecessary risk of tainting the complainant's testimony that occurs by requiring the defence to proceed with a s. 276 application before trial can be fatal to a fair trial.

[115] As Christie J., further wrote in *A.M.*:

> [110] The only difference that results from the timing of this application being mid-trial is that the complainant would not know the detailed particulars of the communications prior to giving her evidence in chief. There would be no opportunity to tailor the evidence in chief to line up with the text messages. This is in everyone's best interests. This is fundamental to the search for truth and the fair trial rights of the accused. Use of prior inconsistent statements to impeach a witness is a well-established means of testing the credibility and reliability of witnesses. The evidence of the complainant in this case, as in many cases, is crucial. While there are circumstances where the complainant may be aware of defence strategy prior to trial, this does not mean that it should be encouraged or that it should be the norm.

[27] It must be remembered that in its decision of *R. v. Darrach*, 2000 SCC 46, the Supreme Court of Canada made the determination that there is no infringement on the accused's right to not reveal his defence in the procedural context to decide a question pursuant to section 276 of the *Criminal Code* because the party seeking to introduce evidence must be prepared to satisfy the court that it is relevant and admissible. The same determination was made in this decision concerning the accused's right to silence.

[28] Concerning the degree of involvement of the complainant in the admissibility hearing, I agree with Sukstorf M.J. that it permits the prosecution to limit and focus on public interest, while leaving to the complainant to defend her privacy interests. As such, the prosecution continues to play its main role of assessing the overall evidence, which includes the evidence provided by the complainant, without fear of being potentially seen or appearing to be seen as biased.

[29] It must be remembered that the participation of the complainant is for a very specific issue to be determined by the judge of law, which is limited to the admissibility of specific evidence. In such a context, it then comes to the trial judge to control the cross-examination of an accused person to the relevant issues for ensuring the respect of his or her *Charter*'s rights during an *in camera voir dire* on the admissibility of such evidence.

[30] As said in *Tait* at paragraphs 79 and 80:

> [79] With the purpose of the *voir dire* placed in context, it is clear that it is incumbent on the trial judge to tightly limit the evidence and any cross-examination to the pivotal issues that the trial judge needs in order to make a decision on the narrow issue that is before the court. With this context and with the fact that the testimony given in the *voir dire* is protected by section 13 of the *Charter,* the risk to an accused is clearer. What this means is that the testimony of an accused cannot be tendered later by the prosecution to try to incriminate an accused, it can only be used to challenge a defendant's credibility.
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> [80] Similarly, a judge can order that the prosecution conduct its cross-examination first, leaving no requirement for a complainant's lawyer to engage further. As Ms Way pointed out, if a complainant's counsel does seek to cross-examine, then it is limited to the four corners of the affidavit and it is not a broad invitation to test other waters.

[31] Finally, I could not agree more with the view expressed by Sukstorf M.J on how things should unfold if an application is made by an accused for a determination by the trial judge of the admissibility of sexual activity other than the one that forms the subject matter of the charge or any record relating to a complainant that is in the possession or control of the accused. As she said at paragraphs 130 and 131 in *Tait*:

> [130] It is for this reason that I must insist that if the defence chooses to pursue such an application, they must serve their notice to the Court and the prosecution prior to the trial and it must include sufficiently detailed particulars to satisfy Stage 1. If the applicant satisfies Stage 1, it will trigger the complainant's rights to retain counsel. By serving the notice at least seven days pre-trial, this permits the prosecution to discuss with the complainant the defence's intent to introduce such evidence and ensure she is provided assistance in retaining legal counsel in advance of the trial. Once retained, the complainant's legal counsel can listen to the complainant's direct testimony so there is no requirement to go back and read transcripts, etc. However, the complainant will not receive the defence materials until after her direct examination, but it must be prior to her cross-examination on the specific topic to ensure that she is not ambushed.
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> [131] In response to one of the queries of defence counsel on the "consultation role of the prosecution with the complainant", in light of the role of a complainant's counsel providing independent legal advice to a complainant, this alleviates pressure on the prosecution to advocate for and protect the interests of a complainant. The prosecution will still have a role in the management of a complainant as their key witness and holds responsibility to keep the complainant informed of the process as it unfolds and ensure that she is aware of her full rights. As an example, it is imperative that the prosecution advise a complainant of the existence of a section 276 application and then facilitate the complainant in the retention of legal counsel. However, most importantly, the prosecution is not placed in an untenable position of having to consult with the complainant who is a witness in the midst of her testimony.

FOR ALL THESE REASONS, I:

[32] **DISMISS** the application made by both applicants.

[33] **DECLARE** that sections 278.93 and 278.94 of the *Criminal Code* do not violate Sergeant Kohlsmith's and Corporal Zapata-Valles' rights under section 7 and paragraph 11(*d*) of the *Charter*.

Counsel:

Captain C. Da Cruz, Defence Counsel Services, Counsel for the Applicant, Sergeant R.D. Kohlsmith
Captain D. Sommers, Defence Counsel Services, Counsel for the Applicant, Corporal A.A. Zapata-Valles

The Director of Military Prosecutions as represented by Major C. Walsh, Counsel for the Respondent