COURT MARTIAL

Citation: *R. v. Machtmes*, 2021 CM 2005

Date: 20210319
Docket: 202035

General Court Martial

Bay Street Armoury
Victoria, British Columbia, Canada

Between:

Master Sailor R.D. Machtmes, Applicant

- and -

Her Majesty the Queen, Respondent

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

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court orders that any information that could disclose the identity of the person described during these proceedings as the complainant, including the names of family members, address and any professional or nicknames used, or a witness, shall not be published in any document or broadcast or transmitted in any way, except when disclosure of such information is necessary in the course of the administration of justice, when it is not the purpose of that disclosure to make the information known in the community.

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

(Orally)

Introduction

[1] Master Sailor Machtmes is facing three charges. The first two charges are contrary to section 130 of the *National Defence Act* (*NDA*), that is to say, for luring a child, contrary to paragraph 172.1(1)(b) of the *Criminal Code* and invitation to sexual touching, contrary to section 152 of the *Criminal Code*. The third charge relates to an allegation of disgraceful conduct,

contrary to section 93 of the *NDA*. The third charge emanates from allegedly engaging in sexualized conversations via social media with a person presenting as a minor.

[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), the defence counsel presented a motion seeking a directed verdict. If the prosecution has not presented a prima facie case, accused persons are entitled to a directed verdict of acquittal. The defence counsel submitted that the prosecution did not introduce evidence of any harm that flowed from Master Sailor Machtmes having engaged in these communications. The defence counsel argued that the conversations were similar to two people talking in a locker room and further to C.'s testimony, the conversations were of the type C. would have engaged in with his friends in the past.. He argued that there were no photos or other inappropriate things shared and that there needs to be something that brings the conversations to a shocking level.

[3] The defence counsel further argued that the prosecution presented ninety-eight pages of conversations, but the majority of it is not criminal. There are just a few occasions where the conversations are alleged to have crossed the line. He argued that it would be difficult to say that it is a crime simply for an adult to be communicating with a youth on Instagram.

[4] In response to the motion, the prosecution asked the Court to summarily dismiss the motion, stating that there is clear evidence by which the accused could reasonably be found guilty and that the context in which the alleged offence occurred is also important. He argued that there is a master sailor who is on operation having the alleged discussions with an underage person, who by law is protected. The prosecution argues that C.'s mother was so shocked that she brought the IPAD containing the conversations to the police station. The prosecution further argued that the police agreed with her that the conversations were wrong and an investigation ensued. The prosecution argued that these are not conversations between two adults, but rather an adult and a fifteen-year-old youth who needs to be protected.

The applicable law

[5] In applying the applicable test, the Court has historically relied upon both the law set out by the Supreme Court of Canada (SCC) as well as the direction provided at Note (B) to QR&O article 112.05. The test for a directed verdict was set out by Fish J. who delivered the decision in *R. v. Fontaine*, 2004 SCC 27 at paragraph 53 which was enunciated in *R. v. Barros*, 2011 SCC 51 at paragraph 48 by Binnie J.:

> [48] 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.

[6] The test to be applied in courts martial 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.

Issue

[7] In rendering a decision on a motion alleging that no prima facie case has been made out, the court martial must not weigh or assess the quality of the evidence on the essential elements of the charge. The test 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. The burden of proof rests on the defence counsel to demonstrate, on a balance of probabilities, that a prima facie case on the charge has not been met.

Analysis

[8] The prima facie case standard is used as a screening process to determine whether it is justifiable and sensible to have a case proceed to the trier of fact, who is designated by law to render an ultimate factual decision on the matter.

[9] In deciding the application, it is helpful to review the elements of an offence under section 93 of the *NDA*. Section 93 reads:

> 93. Every person who behaves in a cruel or disgraceful manner is guilty of an offence and on conviction is liable to imprisonment for a term not exceeding five years or to less punishment.

[10] In deciding on the application by the defence counsel, the Court must first assess whether the prosecution has provided some evidence that the particularized alleged offence occurred. Next, in the context in which the alleged conduct occurred, the Court must determine whether prosecution has provided some evidence that the consequence of the alleged conduct is disgraceful before finally addressing the blameworthy state of mind.

[11] In assessing the application before the Court, there was no dispute on the other elements, but rather defence counsel solely alleged that the element of disgraceful conduct was not established on the evidence.

Testimony

[12] In assessing the evidence, the judge is to assume that all of the evidence she hears is true. It is not her 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 being truthful, but is also being accurate.

Constable Byrne (New South Wales Police)

[13] Constable Byrne testified that he was on duty when F., the mother of the complainant C., brought C.'s laptop to the police station in Parramatta, New South Wales, Australia. After reviewing the photos, Constable Byrne told the court that he apprised his supervisor of the situation and then took photographs of the communications, uploading them into the police files, to generate a police report. He told the Court that he advised F. to continue to monitor C.'s Instagram use and to block the user "randymanmax".

Detective Anderson (New South Wales Police)

[14] In his testimony, Detective Anderson, told the Court that he was provided the police file for further investigation when it was deemed serious enough for him to investigate.

[15] In his testimony, he described the alleged communications as online grooming of a juvenile. He testified to having viewed the Instagram account and he noted by the individual's profile that he was a Canadian sailor. He also viewed and took a photo of a Service Medal that the Instagram user "randymanmax" had posted as having been awarded. He explained that, after reviewing the "randymanmax" account, he made the connection to the Canadian military. He later uploaded his file through Interpol in order to forward the file for further investigation by Canadian officials.

Corporal Howitt, Royal Canadian Mounted Police (RCMP)

[16] Corporal Howitt explained that at the relevant time she was working for the National Child Exploitation Crime Centre (NCECC) which acts as the coordination centre between national and international police forces that deal with child exploitation cases. Her job at the time required the intake and triage of files to determine whether a file was viable and should be sent to a police jurisdiction for investigation.

[17] She testified to having received the file before the Court from Interpol Canberra, New South Wales. She described the file as relating to a man claiming to be in the Canadian Navy who was talking inappropriately to a youth of fifteen years in Australia. She testified that in reviewing the Instagram "randymanmax" account, she observed many nature photos and different travel photos. She testified that from the photos she was able to determine that the person behind the "randymanmax" Instagram account lived in British Columbia.

Civilian Member Mize, RCMP

[18] Civilian Member Mize testified that she was responsible for intake of the files for the British Columbia Integrated Child Exploitation (BC ICE). She testified that she reviewed the file that contained the allegations before the Court and, upon her review, she believed that the offence of luring had occurred and that she authorized Constable Chan to author a judicial request to determine the identity of the individual behind the "randymanmax" account.

Constable Chan, RCMP

[19] Constable Chan testified to his efforts which concentrated on uncovering who was behind the "randymanmax" account.

Complainant F

[20] C.'s mother, F., testified that she intercepted the communications before the court when her son's IPad was charging at the family IPad charging station. She explained that the messages appeared on the screen and she read them. She explained that she monitored the messages for a while and replied to a number of messages before taking the IPad to the police station.

[21] In one of her responses to a message from "randymanmax", she wrote, "You know your inappropriate don't u". She also stated that she wrote others such as, "Your acting creepy n I have more respect now." She testified that she had wanted to scare him off but was not successful. She also told the Court that, when she realized that "randymanmax" was Canadian, she emailed Canadian authorities who told her what she should do, which, to her, was too complicated. She then took the IPad to the Parramatta police station, asking if she was being too paranoid and wanting to know what to do.

[22] F. also testified that when she met with Constable Byrne from the New South Wales police, he agreed that the messages were inappropriate. She stated that he agreed that they were predatory and wrong and that he took the IPad to speak with his sergeant. She told the Court that Constable Byrne advised her to have C. block "randymanmax" and delete C.'s whole account.

C.'s testimony

[23] C. testified to having created an Instagram account in order to reach out to other people who were suffering from mental health problems at the end of 2017 or early 2018. He testified that on his fifteenth birthday, he received a birthday greeting from "randymanmax". When asked how some of the sexual messages he received made him feel, he said, "I guess a bit uncomfortable – but I brushed it off – didn't take a lot of things seriously."

[24] In the communications at pages 36 and 37, "randymanmax" had asked to see a photo of C. and his girlfriend, to which C. replies that he does not have any of them together, and then "randymanmax" asks for a photo of just her, which C. refused to provide. He told the Court that he knew not to send any photos of his girlfriend to someone that neither of them knew.

Disgraceful conduct

[25] The assessment as to whether or not the proven conduct is "disgraceful conduct" requires assessment of the accused's conduct in its context. A contextual assessment must also include consideration as to the manner by which the incidents might be viewed in both the military and the non-military community. It also includes the alleged purpose for which the statements in the communications were made.

[26] The term "shockingly unacceptable" is a term that is often used to describe incidents that are disgraceful. In addition, there are many other descriptions that capture the essence of what is

meant by the term such as: shameful, dishonourable, degrading, inducing strong revulsion or profound indignation.

[27] An assessment of "harm" or "risk of harm" is often part of the context and can inform the analysis. The more severe the harm or risk of harm, the more likely something is to bring disgrace to the Canadian Armed Forces (CAF) or tarnish the CAF as an institution to the point that it is considered disgraceful.

[28] Conversely, the more shockingly unacceptable the facts, in light of CAF operational and military community norms, the less is required on the scale of harm. In other words, the Court may find that the allegations, taken in the military context are shockingly unacceptable/disgraceful, even if harm or risk of harm is minimal.

Assessment

[29] In performing the task of limited weighing, the judge's task is to determine whether it would be reasonable for a properly instructed panel to infer the guilt of the accused if the prosecution's evidence was believed. Thus, this task of "limited weighing" never requires consideration of the inherent reliability of the evidence itself. It should be regarded, instead, as an assessment of the reasonableness of the inferences to be drawn from the circumstantial evidence.

[30] The context of this case involves an adult master sailor, who at the time of the allegations would have been forty-three years old, communicating with a young boy who the accused understood to be fifteen years of age. C. testified that he had created an Instagram account specifically to reach out to others who had similar mental health problems. The accused was in Australia on a port visit while on an operational deployment with the Canadian Navy, which Captain (Navy) Elbourne confirmed was also a diplomacy operation to pursue Government of Canada objectives.

[31] The communications alarmed F., C's mother, to the extent that despite knowing very little about Instagram, she tried to scare or ward off "randymanmax".

[32] When that did not work, concerned for C., she then personally determined for herself that "randymanmax" was Canadian and emailed Canadian authorities looking for assistance. When that became too complicated, she brought the IPad to the Parramatta police for their review. She told the Court that Constable Byrne advised her that the actions of "randymanmax" were predatory and he opened a file. Detective Anderson was provided the file for further investigation, which he did, and forwarded it to Interpol. Two separate intake officers, being both Corporal Howitt of the National RCMP NCECC unit as well as RCMP Civilian Member Ms Mize, from the BC ICE unit, both felt that there was sufficient alleged conduct to be investigated further.

[33] The contextual assessment includes how this sort of allegation is viewed in both the military and the non-military community. The recurring description used by some of the witnesses was that the communications appeared to be predatory. Although the term "shockingly

unacceptable" is a term that is often used to describe incidents that are disgraceful, it is not the only term to be captured under *NDA*, section 93. In the context of a Canadian sailor being held out as engaging in these communications, this behaviour can also be termed as shameful or dishonourable, which courts have found to be viable descriptions for disgraceful conduct.

[34] Further, the simple belief as articulated by Civilian Member Mize that the criminal offence of luring had occurred is, in itself, sufficient to attract significant jeopardy and consequences in a criminal context and that, in and of itself, meets the test of "some evidence" with respect to disgraceful conduct. Canadian law defines child luring as using the Internet to get in touch with someone known to be under the age of eighteen with the intent to commit certain offences which includes invitation to sexual touching of a third person, in this case being C.'s girlfriend.

[35] 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.

[36] In summary, 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 vulnerability of the youth, who by law is entitled to protection; the fact that the offences flowed from the youth reaching out for help in resolving his mental health issues; his age being 15, the accused's age of 43, the accused's rank as a master sailor in the Royal Canadian Navy, the testimony of all the witnesses, including several police officers who expressed their reasonable belief that an offence had occurred, as well as the nature of the charges before the Court.

[37] On the facts before the Court, there is some evidence for the panel to consider in determining whether disgraceful conduct can be inferred.

Conclusion

[38] I conclude that Master Sailor Machtmes has not demonstrated on a balance of probabilities that no evidence was adduced to prove that the alleged conduct was disgraceful.

[39] It is my decision that a prima facie case has been made out against the accused on the charge of disgraceful conduct, contrary to section 93 of the *NDA*.

FOR THESE REASONS, THE COURT:

[40] **DENIES** the applicant's application.

Counsel:

Lieutenant-Colonel D. Berntsen, Defence Counsel Services, Counsel for Master Sailor R.D. Machtmes, Counsel for the Applicant

The Director of Military Prosecutions as represented by Major M.A. Ferron, Counsel for the Respondent