



COURT MARTIAL

Citation: *R. v. Remington*, 2021 CM 5024

Date: 20210830

Docket: 202047

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Naval Cadet L.R. Remington, Respondent

Before: Commander C.J. Deschênes, M.J.

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 disclose the identity of the person described in these proceedings as the complainant, including the person referred to in the charge sheet as “T.T.”, shall not be published in any document or broadcast or transmitted in any way.

DECISION ON AN APPLICATION BY THE PROSECUTION FOR TESTIMONIAL AIDS: SUPPORT PERSON AND SCREEN

(Orally)

Introduction

[1] Naval Cadet Remington is charged with one offence punishable pursuant to section 130 of the *National Defence Act* (NDA); that is to say, sexual assault contrary to section 271 of the *Criminal Code*. The offence allegedly took place on or about 3 November 2018 at or near Saint-Jean-sur-Richelieu, Quebec. The Court Martial Administrator (CMA) signed a convening order on 25 March 2021 for the charge to be dealt with by a Standing Court Martial with the proceedings to commence on 31 May 2021 at the Royal Military College (RMC) Saint-Jean, Saint-Jean-sur-Richelieu, Quebec. After an order was granted on 5 May 2021 for a change of venue to Halifax and a change of date of the commencement of the trial as there were preliminary applications that would be filed by both parties, on 13 May 2021 the prosecution served two applications. The first sought an order restricting publication of the identity of the complainant that will be dealt with at the start of the proceedings on 31 August 2021. The second application, the subject of this ruling, seeks an order permitting the use of testimonial aids, specifically permitting the complainant to testify with a support person and permitting her to testify behind a screen. The support person for whom the applicant seeks the order is the complainant’s aunt, who provided an affidavit and testified in support of the application.

Position of the applicant

[2] The applicant contended that this Court has the authority to order the use of testimonial aids, relying upon the powers, rights and privileges of a court martial as are vested in a superior court of criminal jurisdiction, specifically with respect to the examination of witnesses and all other matters necessary or proper for the due exercise of its jurisdiction, as provided for at section 179 of the *NDA*. The applicant also relied on the authority provided at subsection 486.1(2) of the *Criminal Code* which allows a judge to order that a support person of the witness's choice be permitted to be present and to be close to the witness while the witness testifies, since there are no similar provisions in the *NDA* and the *Queen's Regulations and Order for the Canadian Forces* (QR&O) in this regard. Further, subsection 486.2(2) of the *Criminal Code* provides authority for a judge to order that a witness be permitted to testify behind a screen, which would allow the witness not to see the accused during their testimony.

[3] Although article 112.33 of the QR&O provides the authority for a judge to allow a complainant to testify behind a screen where an accused person is charged with an offence under section 271 of the *Criminal Code*, its application is conditional to the specific situation of the complainant: the complainant must be under the age of eighteen years or is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability. The applicant argued that a purposive interpretation should be given to this QR&O article in a way that is consistent with the *Canadian Victims Bill of Rights*, thus providing authority for the Court to issue the order in the case at bar.

[4] The applicant contended that either an order to testify with a support person close to the complainant, or an order permitting her to testify behind a screen, or both of these orders, may be made if the judge is of the opinion that they would facilitate the giving of a full and candid account by the witness or would otherwise be in the interest of the proper administration of justice. This would ensure that the Court hears the best evidence, in compliance with the law. The applicant also contended that the use of these aids in court is particularly important for complainants of sexual violence since testifying in a sexual assault case can be traumatizing and harmful to complainants. The use of testimonial aids does not cause prejudice to the accused.

Position of the respondent

[5] The respondent conceded that section 179 of the *NDA* provides authority for this Court to issue orders allowing the use of testimonial aids. However, he voiced several concerns in relation to the choice of the individual who would serve as support person, and in relation to the evidence that was presented in support of this application. He contended that little weight should be given to the testimony of the affiant, since it should be the person seeking the testimonial aid, the complainant, who would normally provide evidence in support of the application, not the individual who would be serving as a support person. The evidence of the affiant is in fact, hearsay evidence. Producing an affidavit signed and prepared by the individual who would serve as support person, and having her testify in support of the application, violates the best evidence rule.

[6] The respondent was also concerned with the relationship between the complainant and the affiant, who was estranged during the complainant's formative years. Further, he contended that it was apparent from the affiant's testimony, a notebook in hand while on the stand, that she is or was coaching the complainant, acting beyond the role of a support person. He alleged that, should the order for a support person be granted, there is a risk that the complainant and the affiant would discuss the complainant's evidence during the adjournment of her testimony, influencing or tampering with it. Furthermore, the order would be ineffective because of the measures of intervention the affiant testified she had to take during times where the complainant needed her assistance. For these reasons, the respondent argued that the affiant is not suitable for the role of support person for the complainant. The affiant should therefore remain outside the courtroom during the complainant's testimony.

[7] As for the use of a screen, the respondent did not agree to have the complainant testify via video link from a room outside the courtroom; however, he did not oppose the use of the screen as testimonial aid for the complainant. He however contended that the current screen and its set-up do not allow counsel for the respondent to adequately view

the complainant and, therefore, are not conducive to assess the complainant's deportment while on the stand.

Evidence

[8] In support of its application, which was marked as Exhibit M3-1, the applicant introduced an affidavit from E.H, which was marked as Exhibit M3-2, and a book of authorities. E.H., the affiant, also testified. The respondent presented no evidence.

Issue

[9] The Court must determine whether the applicant met her burden, on a balance of probabilities, to demonstrate that the orders she seeks would facilitate the giving of a full and candid account by the complainant, or would otherwise be in the interest of the proper administration of justice.

Analysis

Order for the testimony of the complainant with a support person close to her

Powers of courts martial

[10] The *NDA* and the *QR&O* are indeed silent regarding any specific authority to issue an order allowing a complainant to testify with a support person being close to them. Considering that this particular request by the applicant is articulated in a case involving a sexual assault offence laid pursuant to section 130 of the *NDA* and that the request falls under section 486.1 of the *Criminal Code*, and considering the applicable jurisprudence in this regard, the Court finds that orders allowing the use of testimonial aids at court martial is an authority properly exercised by superior courts of criminal jurisdiction.

[11] Indeed, as section 179 of the *NDA* provides courts martial with powers, rights and privileges as are vested in a superior court of criminal jurisdiction, it is not disputed that courts martial have the authority to impose the orders the applicant is seeking. These powers were exercised to protect the privacy of, or to accommodate, complainants of offences involving sexual misconduct. See a detailed analysis of the authority provided in section 179 of *NDA* in a similar context in *R. v. Gobin*, 2018 CM 2006 where a publication ban was ordered; *R. v. Kirwin*, 2020 CM 5006, where the Court ordered a publication ban for an underage complainant; *R. v. Krajaefski*, 2019 CM 4004, where the rationale for testimonial aids as well as the factors listed at paragraph 486.1(3) of the *Criminal Code* were considered in granting the application for a support dog to be present with the complainant during her testimony.

Authority provided in the Criminal Code

[12] In the criminal justice system, the authority to issue an order permitting a support person to be present for a witness who is eighteen years of age or older, or who does not have a mental or physical disability, is found at subsection 486.1(2) of the *Criminal Code*, which states:

486.1(2) In any proceedings against an accused, the judge or justice may, on application of the prosecutor in respect of a witness, or on application of a witness, order that a support person of the witness' choice be permitted to be present and to be close to the witness while the witness testifies if the judge or justice is of the opinion that the order would facilitate the giving of a full and candid account by the witness of the acts complained of or would otherwise be in the interest of the proper administration of justice.

[13] Prior to amendments made to the *Criminal Code* in 2015, the provision required that the judge needed to be of the opinion that the order was necessary to obtain a full and candid account by the witness. The current scheme clearly has a lower admissibility test for the order to be granted (see *R. v. Jimaleh*, [2016] O.J. No. 5133).

[14] Additionally, the application of this provision is not limited to complainants nor is it limited to any witnesses in sexual offences cases. This provision is broad enough to allow the application to be granted for any witness testifying in proceedings pertaining to any criminal offence.

[15] Subsection 3 of this article sets out several factors that the judge shall consider in determining whether to make the order. These factors are:

- (a) the age of the witness;
- (b) the witness' mental or physical disabilities, if any;
- (c) the nature of the offence;
- (d) the nature of any relationship between the witness and the accused;
- (e) whether the witness needs the order for their security or to protect them from intimidation or retaliation;
- (f) society's interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process; and
- (g) any other factor that the judge or justice considers relevant.

[16] The judge may order that the support person and the witness not communicate with each other while the witness testifies.

Rules of evidence in the context of this application

[17] In determining whether the order should be granted, the Court considered the affidavit and the testimony of the affiant to determine if her presence beside the complainant during the latter's testimony would facilitate the giving of a full and candid account by the complainant of the acts complained of.

[18] Counsel for the respondent argued that the affiant's testimony should be given little weight because it was wholly based on hearsay and that her support would be ineffective, therefore, she is not the right person to fulfill this role.

[19] In *R. v. Levogiannis*, [1993] 4 S.C.R. 475, the Supreme Court of Canada (SCC) addressed the issue of rules of evidence in the context of a constitutional challenge of the then section 486(2.1) of the *Criminal Code* (now section 486.2) which was more limitative than the current scheme, providing authority for the judge to impose an order only for an underage complainant to testify outside the courtroom or behind a screen or other device, when the accused person was charged with an offence listed in the same article. The SCC established that:

One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time. As discussed at length in *L. (D.O.)*, *supra*, the recent trend in courts has been to remove barriers to the truth-seeking process [citations omitted] . . . by relaxing certain rules of evidence, such as the hearsay rules, the use of videotaped evidence and out of court statements, have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth.

[20] More recent decisions from lower courts have, of course, adopted this approach. In case law submitted by the applicant, in particular in *R. v. Hoyles*, 2018 NLCA 46, the trial judge decided that evidence to support such an application was not always required for the exercise of discretion. The nature of the offence, for instance, which is a consideration of the applicable provision, is a matter of record, while other factors, such as the age of the complainant, may be a matter of record. In *R. v. Webber*, 2018 NSSC 308, where the only evidence provided to support the application was based on a stated preference by the complainant two years prior to testify behind a screen, the Court suggested that, in cases involving sexual violence, the trauma of testifying for a

complainant is so notorious that the requirement to call evidence in support of an application for testimonial aids may not be necessary:

[118] The complainant, who alleges these crimes took place at the hands of Ms. Webber, will have to testify about personal matters involving underaged sex work, and an alleged sexual assault, which this Court needs no evidence to understand would be a difficult and potentially embarrassing process.

...

[120] It is accepted that complainants who are called to testify to such allegations as those found in this matter can find it difficult and traumatic to testify to such matters in court. The nature of some alleged sexual offences will often favour the granting of such an application to accommodate witnesses. I find this to be such a case.

[21] Subsection 486.1(2) of the *Criminal Code* clearly provides broad discretion to the judge seized with this type of application. The evidentiary burden is on a balance of probabilities. The order sought is a procedural matter aimed at providing relief, comfort and assistance to vulnerable witnesses who are required to testify at criminal proceedings in order to ensure that they provide candid testimony. Therefore, the level of formality normally expected to prove a fact in criminal courts should not necessarily be imposed in order to meet the requirements of subsection 486.1(2) of the *Criminal Code*; the evidence supporting the application only requires to provide a basis to meet the requirements of this article.

Affiant's evidence

[22] In this case, the applicant chose to present its evidence with the affidavit and testimony of the individual who would be serving as a support person. During her testimony, the affiant was forthcoming and candid in her answers. She testified enjoying a close relationship with her niece. She explained that, about a year ago, the complainant confided in her the allegations forming the basis of the charge. She described the complainant at the time as being teary but contained. She also observed that the complainant seemed terrified at the prospect of having to testify in Court in support of the allegations and seeing the accused again. During emotional episodes when the subject of the proceedings or of her allegations were brought up, which would usually happen before and after virtual meetings the complainant had with the prosecutors assigned to this case, the affiant would have to assist the complainant in calming down. The affiant testified that the complainant was suicidal, suffered from anxiety, fear and depression as well as a lack of self-worth.

[23] The affiant told the Court about an incident that happened the week before the trial when the affiant accompanied the complainant to the Halifax region for these trial proceedings. The complainant did not want to testify; she wanted to leave. Without her support, the complainant may not have appeared for the trial proceedings as she was reluctant to testify.

[24] The affiant further explained that, in her absence, the complainant would not be in a position to provide an accurate testimony in court, as she would just “shut down”. The complainant verbalized to the affiant that she needed her by her side for the duration of these proceedings. In reviewing this credible testimony, the Court is satisfied by the affiant’s evidence that the complainant experiences anxiety and fear in relation to the testimony she will be providing in open court, and that the presence of her aunt by her side would assist her in providing a full and candid account of the event. The Court is also satisfied that the affiant is a support person of the complainant’s choice.

[25] Additionally, the affiant testified to observing the complainant’s anxiety and distress both prior to and after communicating with counsel for the prosecution and when the complainant attended the vicinity of these trial proceedings. It is understandable that, to mitigate the stress and anxiety related to delivery of her testimony as part of the main trial, it was the individual who would serve as support person who was asked to provide the required evidence under oath to substantiate the prosecution’s application. Nevertheless, I find that the testimony of the complainant to support the application is not required in this case and, in fact, would defeat the purpose of seeking the order.

[26] As for the conduct of the affiant in relation to her support role, the Court takes no issue with what can be described as an “active” or proactive support provided by the affiant. She is clearly concerned for the wellbeing of her niece and takes the steps she feels necessary to provide her with the required assistance and support. Her evidence did not indicate she has acted inappropriately in any way in her support role nor that she will deviate from this role in a way that could colour the evidence the complainant will provide in court. Further, she will not be called as a witness in support of the allegations.

[27] In examining the evidence provided in support of the application, the Court considered the factors listed at subsection 486.1(3) of the *Criminal Code*. The relative young age of the witness, who was eighteen years of age at the time of the alleged offence and is now twenty-one years old, close to the age of the mandatory order pursuant to subsection 486.1(1) was considered an important aspect in the determination of the exercise of the authority, along with the fact that the witness for whom the order is sought is a complainant of an alleged major sexual assault.

Society’s interest in encouraging the reporting of offences

[28] Furthermore, the Court considered society’s interest in encouraging the reporting of offences and the participation of victims and witnesses in the criminal justice process. It is common knowledge that complainants called to testify in open court are likely to experience stress and even suffer trauma, having to provide intimate sexual details in relation to the aggression they reported and while having to face the alleged perpetrator. For this reason in particular, complainants should be accommodated in order to allow them to provide an accurate recounting of the events. In addition, persons who believe they have been the victims of a sexual misconduct are more likely to be encouraged to report the offence if they know that measures to limit the trauma of providing testimony in court can be imposed by the judge .

[29] In the context of her decision to order a publication ban for a service offence laid pursuant to section 93 of the *NDA*, Sukstorf M.J. wrote in *R. v. Barrieault*, 2019 CM 2013:

[52] In a situation where a complainant comes forward with a sensitive sexual misconduct complaint and the prosecution decides to lay charges under section 93 or section 129 of the *NDA*, rather than under section 271 of the *Criminal Code*, the prosecution’s decision should not translate to mean that the complainant is deserving of less protection than they would receive if the prosecution pursued charges under the *Criminal Code*. If the publication of the complainants’ names is an impediment to reporting sexual misconduct and it obstructs the access to justice by hampering the CAF’s ability to regulate the misconduct, then the Court must take notice. Hence, the reporting of sexual misconduct is no less deserving of protection simply because the prosecution has exercised discretion to pursue it under the *NDA* and not under section 271 of the *Criminal Code*.

[53] Madame Deschamps’ report revealed that the CAF has struggled to encourage members to report incidents of sexual misconduct, hence, this greater public purpose is of considerable importance.

[30] I adopt these comments in the present context. Complainants in the military justice system should be offered the same, or similar, measures of protection of identity, privacy and dignity as well as measures of accommodation to the extent that these measures do not interfere with the accused’s right to make full answer and defence. This can have the desired effect of encouraging the reporting of offences and participation of victims in the military justice system.

[31] Therefore, having considered the evidence in support of the application, counsel’s submissions, and the applicable factors, the Court finds that the applicant has met its burden to prove, on a balance of probabilities, that an order allowing the affiant to be present and to be close to the complainant while the latter testifies would facilitate the giving of a full and candid account by the complainant of the acts complained of, or would otherwise be in the interest of the proper administration of justice.

Use of a screen

Authority provided in the QR&O

[32] As for the request seeking an order permitting the use of a screen for the complainant during her testimony, the applicant relied mainly on the *Criminal Code* provision to support her request. The Court examined the applicable QR&O, which does provide the authority for a military judge to issue an order for this purpose. Article 112.33 is however more restrictive than the *Criminal Code* provision, as it only incorporates in the military justice system subsection 486.1(1) with additional limitations. Entitled “WITNESS TESTIMONY OUTSIDE COURT ROOM – SPECIAL CASES”, article 112.33 applies to a witness who was, at the time of the trial, under the age of eighteen years or is able to communicate evidence but may have difficulty doing so by reason of a mental or physical disability. The article further limits the authority provided to cases where an accused person is charged with one of the *Criminal Code* offences enumerated in the article. With the exception of three assault-related offences, the list contains offences of a sexual nature punishable under section 130 of the *NDA*. It also lists several *Criminal Code* offences that have been repealed since 2019.

[33] Article 112.33 of the QR&O states at paragraph 3 that:

(3) Where the judge is of the opinion that the exclusion of the complainant or witness from the presence of the accused person or from the court room is necessary to obtain a full and candid account of the acts complained of from the complainant or witness, the judge may order that the complainant or witness testify:

(a) outside the court room, but in the presence of the prosecutor and legal counsel for the accused person; or

(b) behind a screen or other device that would allow the complainant not to see the accused person.

[Emphasis added.]

[34] The article also set out other conditions of application, particularly for a complainant or witness testifying outside the courtroom.

[35] In examining this QR&O provision, it is apparent that its limited application reveals that the *NDA* did not follow legislative changes pertaining to the enhancement of complainants and victims’ rights. This is further demonstrated by the presence of the term “necessary” which has been removed from the *Criminal Code* in 2015, and by the presence of listed offences that have been repealed before then.

[36] Consequently, I accept that article 112.33 of the QR&O must be interpreted broadly. It must be interpreted in relation to complainants’ enhanced rights found in the *Criminal Code*, in the *Canadian Victims Bill of Rights*, as well as in *Bill C-77: An Act to amend the National Defence Act and to make related and consequential amendments to other Acts*, S.C. 2019, c. 15 (Bill C-77), which received Royal Assent on 21 June 2019. This Bill includes a Declaration of Victims’ rights that strengthens the rights of victims of service offences.

[37] In any event, article 486.2 of the *Criminal Code* provides this Court with the authority to issue an order allowing the use of a screen for the complainant. As mentioned earlier in regard to the evidentiary burden required to permit the complainant to have a support person close to her while she testifies, the Court is satisfied that the evidence adduced in support of the application demonstrates that the complainant would have difficulty testifying without the use of a screen as a result of the anxiety she experiences in relation to these trial proceedings, and her fear in seeing the respondent again. I concur with the Court’s comment in *R. v. P. (K)*, [2017] N.J. No. 69 at paragraph 28 that it would be a rare sexual offence case in which an order allowing a complainant to testify behind a screen would be denied.

[38] I, therefore, find that the criteria are met in the case at bar; therefore, an order to use a screen for the complainant’s testimony is hereby granted to obtain a full and candid account.

[39] Since the defence did not oppose this request, the Court asked counsel to discuss an appropriate solution for the screen that would address the respondent's concerns. After the Court closed, counsel came to an agreement on the use of a screen, its location and its appropriate set up. After a review of the agreed-upon installation, the Court was satisfied that counsel's proposed solution, which was the use of a fully closed screen located across from where the accused is seated in order to shield the complainant from seeing the accused, was deemed an appropriate course of action by the Court.

Conclusion

[40] In conclusion, the Court finds that an order allowing the affiant, as a support person, to be permitted to be present and to be close to the complainant while she testifies, and the use of a screen, would facilitate the giving of a full and candid account by the complainant of the acts complained of, or would otherwise be in the interest of the proper administration of justice. The use of these testimonial aids does not interfere with the accused's right to make full answer and defence.

FOR THESE REASONS, THE COURT:

[41] **GRANTS** the application.

[42] **ORDERS** that E.H., the affiant, be permitted to be present and to be close to the complainant while the complainant testifies.

[43] **ORDERS** that E.H. and the complainant not communicate with each other while the complainant testifies.

[44] **ORDERS** the use of a screen during the complainant's testimony, which would allow her not to see the accused during her testimony.

Counsel:

The Director of Military Prosecutions as represented by Major J.D.H. Bernatchez and Lieutenant-Colonel M. Pecknold, Counsel for the Applicant

Lieutenant(N) B. Wentzell and Lieutenant-Colonel A. Bolik, Defence Counsel Services, Counsel for Naval Cadet L.R. Remington, the Respondent