COURT MARTIAL

Citation: *R. v. Drew*, 2022 CM 3005

Date: 20220427
Docket: 202134

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Corporal J.F.D. Drew, Applicant

- and -

Her Majesty the Queen, Respondent

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

Restriction on Publication: Pursuant to its power listed at section 179 of the *National Defence Act*, the court martial orders pursuant to section 486.4 of the *Criminal Code* that any information that could identify the person described during these proceedings as the complainant, shall not be published in any document or broadcast or transmitted in any way, except when disclosure of such information is necessary in the course of the administration of justice and when it is not the purpose of that disclosure to make the information known in the community.

REASONS FOR THE APPLICATION MADE BY THE ACCUSED CONCERNING THE EXISTENCE OF A NO PRIMA FACIE CASE ON THE CHARGE

(Orally)

[1] Corporal Drew is charged with one service offence punishable under paragraph 130(1)(a) of the *National Defence Act*, that is to say, assault contrary to section 266 of the *Criminal Code*. It is alleged that this offence would have been committed on J.T., at or near Halifax, province of Nova Scotia, on or about 15 August 2020.

[2] As set out in the *Queen Regulations & Orders for the Canadian Forces* (QR&O), at the close of the prosecution's case, the defence is entitled to move for a non-guilty verdict on the basis that the prosecution has not presented a prima facie case; *i.e.*, a case containing evidence on all essential points of a charge that, if believed by the trier of fact and unanswered, would warrant a conviction.

[3] The trial commenced on 26 April 2022, in accordance with what was requested in the convening order. The prosecution closed its case at the end of the same day.

[4] Then, on the following morning, pursuant to QR&O paragraph 112.05(13), the accused presented a motion of no prima facie with regard to the charge on the charge sheet on the basis that the prosecution had failed to introduce before this Standing Court Martial any evidence concerning one essential element of the offence of assault.

[5] The statement of the offence and the particulars of the first charge read as follows:

"FIRST CHARGE Section 130 of the *National Defence Act*	**AN OFFENCE PUNISHABLE UNDER SECTION 130 OF THE NATIONAL DEFENCE ACT, THAT IS TO SAY, ASSAULT CONTRARY TO SECTION 266 OF THE CRIMINAL CODE OF CANADA** *Particulars*: In that he, on or about 15 August 2020, at or near Halifax, Nova Scotia, did assault J.T."

[6] The evidence introduced by the prosecution before this court martial is composed essentially of the testimony of one witness, which is the complainant. In addition, defence counsel introduced during the cross-examination of the complainant, with the agreement of the prosecution, some text messages involving the complainant and another person other than the accused. The Court also took judicial notice of all matters contained and listed at article 15 of the *Military Rules of Evidence*.

[7] This type of motion at the close of the prosecution's case is different from a request for an acquittal based on reasonable doubt. The latter argument is that there may be some evidence upon which a jury properly instructed might convict, but that it is insufficient to establish guilt beyond a reasonable doubt. Since the concept of reasonable doubt is not called into play until all the evidence is in, reasonable doubt cannot be considered unless the accused either elected not to call evidence or completed his evidence.

[8] The governing test for a directed verdict was set out by Ritchie J. in *United States of America v. Shephard*, [1977] 2 S.C.R. 1067. Some subsequent decisions, such as *R. v. Charemski*, [1998] 1 S.C.R. 679, *R. v. Fontaine*, 2004 SCC 27, and *R. v. Barros*, 2011 SCC 51, provided some clarification about that test.

[9] The Court may not take into account the quality of the evidence in determining whether there is some evidence offered by the prosecution on each essential element of each charge so that a properly instructed jury could reasonably decide on the issue: not "would" or "should", but simply "could".

[10] At the end of the day, the test to be applied is the one mentioned by Fish J. who delivered the decision for the court in *Fontaine* at paragraph 53:

> Accordingly, as McLachlin J. explained in *Charemski*, *supra*, the case against the accused cannot go to the jury unless there is evidence in the record upon which a properly instructed jury could rationally conclude that the accused is guilty beyond a reasonable doubt. [Emphasis in original.]

[11] This test was reiterated with a different perspective by Binnie J. in *Barros*, at paragraph 48, when he said that:

> 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.

[12] The burden of proof rests on the accused to demonstrate, on a balance of probabilities, that this test is met.

[13] The test is the same whether the evidence is direct or circumstantial. The application of this test varies according to the type of evidence in the prosecution's case. Where the prosecution's case is based entirely on direct evidence, application of the test is straightforward. If the judge determines that the prosecution has presented direct evidence as to every element of each offence, the application must be denied. The only issue will be whether the evidence is true and that is for the trier of fact. Where proof of an essential element depends on circumstantial evidence, the issue at trial is not simply whether the evidence is true. Rather, if the evidence is accepted as true, is it the inference proposed by the prosecution the correct inference? The judge must weigh the evidence by assessing whether it is reasonably capable of supporting the inferences proposed by the prosecution. The judge neither asks whether he would draw those inferences, or assesses credibility. The issue is only whether the evidence, if believed, could reasonably support an inference of guilt.

[14] The offence of assault is enunciated at section 265 of the *Criminal Code* and reads in part as follows:

> **265 (1)** A person commits an assault when
>
> > **(a)** without the consent of another person, he applies force intentionally to that other person, directly or indirectly;
> >
> > **(b)** he attempts or threatens, by an act or a gesture, to apply force to another person, if he has, or causes that other person to believe on reasonable grounds that he has, present ability to effect his purpose; or

> **(c)** while openly wearing or carrying a weapon or an imitation thereof, he accosts or impedes another person or begs.
>
> **(2)** This section applies to all forms of assault, including sexual assault, sexual assault with a weapon, threats to a third party or causing bodily harm and aggravated sexual assault.
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> **(3)** For the purposes of this section, no consent is obtained where the complainant submits or does not resist by reason of
>
> **(a)** the application of force to the complainant or to a person other than the complainant;
>
> **(b)** threats or fear of the application of force to the complainant or to a person other than the complainant;
>
> **(c)** fraud; or
>
> **(d)** the exercise of authority.

[15] Section 266 of the *Criminal Code* provides that "every one who commits an assault is guilty of an indictable offence and is liable to imprisonment for a term not exceeding five years."

[16] With regard to the charge of assault, the essential elements of the offence to be proven by the prosecution beyond a reasonable doubt are:

(a) that Corporal Drew is the person who committed the alleged offence;

(b) that Corporal Drew intentionally applied the force;

(c) that the complainant did not consent to the force that Corporal Drew applied; and

(d) that Corporal Drew knew that the complainant did not consent to the force that he applied.

[17] The position of the applicant is that the prosecution did not adduce any evidence on one essential element, which is identifying Corporal Drew as the person who committed the alleged assault.

[18] The prosecution submitted to the Court that it offered to the Court some evidence through the witness on this essential element of the charge of assault, so that a properly instructed panel could reasonably decide on the issue.

[19] In order to make a determination on the issue put before me by the applicant about this charge of assault, I must determine if whether there is evidence in the record upon which a properly instructed panel at a General Court Martial could rationally

conclude that the accused is guilty beyond a reasonable doubt, regarding the essential element of identity, as argued by the defence.

[20] The prosecution put some evidence to the effect that:

(a) the complainant interacted on the night of the alleged assault in an apartment with two persons: somebody she identified as Dyer and another person she identified as Drew. She also referred to the latter as the accused. She mentioned that the apartment was occupied by Drew;

(b) the complainant described on the night in question, that she was subject at different times to unwanted touching, hugging, attempted kissing and grabbing of her buttocks by a person she referred to as being "Drew" or "the accused". She also told the Court that prior to these incidents, the person she referred as being "Dyer" was also in the apartment, but because of his degree of intoxication, he fell asleep not too long after they all got in the apartment, and that he was put in the spare room where he slept. According to her testimony, because he was asleep, he never witnessed what occurred on that night between her and Drew; and

(c) the complainant testified that she considered that on that night, "Dyer" tried to sleep with her, but that "Drew" did not. She explained to the Court that she made that difference because the touching made by "Drew" was of a less degree than the one made by "Dyer". However, the complainant never referred at what time exactly on the night in question the person named Dyer would have tried to sleep with her.

[21] Defence counsel submitted to the Court that there is no evidence whatsoever that could identify the person appearing before the Court as the accused in this trial, namely Corporal Drew, as being the one described by the witness in her testimony.

[22] It is true that at no point in time during her testimony the complainant identified the person attending in the courtroom and being the one subject of the charge, as being the person with whom she interacted on the night in question, and who committed the unwanted touching, hugging, attempted kissing and grabbing of her buttocks. She did not provide any evidence about the person sitting beside the defence counsel in the courtroom. She did not provide any evidence about the identity of this person. The prosecution recognized that no question was asked to that effect.

[23] However, the prosecution submitted that because the complainant knew Corporal Drew for some years and she considered him as a friend, when she referred to "Drew" and "the accused" in her testimony, she was referring directly to the person sitting beside the defence counsel. On this proposition made by the prosecution, I would say that it is not direct evidence of the identity of the accused in this trial, and it is certainly not circumstantial evidence reasonably capable of supporting an inference related to the identity of the accused.

[24] I would agree that in the absence of any link made by the witness between the events she described to the Court and the person present in the courtroom as being the accused, it is difficult to see how any reasonable inference could be made from these circumstances.

[25] In addition, the complainant put two persons in the apartment who made her subject to some physical touching on that evening. In such a context, the importance for clearly identifying who did what becomes highly important in the circumstances of this case.

[26] The complainant did not provide any physical description of the person whom allegedly assaulted her, nor did she identify in court the person sitting beside the defence counsel as being "Drew".

[27] Finally, the fact that the defence counsel made reference to "Drew" or the accused in the questions he asked during his cross-examination of the complainant, is not in any way something to be taken by this Court as being some sort of admission made by Corporal Drew about this essential element to be proven by the prosecution. At no point in time during this trial, Corporal Drew, through his defence counsel, dispensed the prosecution to prove the essential element related to identity.

[28] I come to the conclusion that there is no direct or circumstantial evidence that was presented to the Court regarding the identity of the person who allegedly committed the offence of assault.

[29] Then, it is my decision that Corporal Drew succeeded in demonstrating, on a balance of probabilities, that no evidence was adduced by the prosecution to prove that he was the person who committed the offence of assault.

[30] The application on the basis that the prosecution has not presented a prima facie case is accordingly granted.

[31] The prosecution suggested that if the Court grants the application made by Corporal Drew, then acquitting the accused on the basis of such issue would bring the administration of justice into disrepute, especially considering the societal interest to pursue such matter in a military context.

[32] The prosecution then invited the Court to correct this situation by using its authority pursuant to article 112.32 of the QR&O to recall the complainant as a witness and then allow the prosecution to ask questions regarding the essential element of identity, and allowing the defence counsel to cross-examine her on this same issue.

[33] On this suggestion made by the prosecution, I would say two things. First, as said by Pelletier M.J. in *R. v. Farrant*, 2015 CM 4008 at paragraphs 14 and 15:

> [14] [. . .] The fact of the matter is that there is no evidence on one of the essential elements in this case. This total absence of evidence does not give any choice to the court, if it is to fulfil its duty to rule in strict accordance with the law. It is by acting otherwise, that the court would risk bringing the administration of justice into disrepute.
>
> [15] Indeed, in this country, a person facing criminal or penal charges is presumed to be innocent until the prosecution has proven his or her guilt beyond a reasonable doubt. This burden rests with the prosecution throughout the trial and never shifts. There is no burden on an accused to prove that he or she is innocent. That is a fundamental principle, not a mere technicality.

[34] I totally agree with this comment and I adopt it in the circumstances of this case.

[35] Second, as I mentioned to the prosecution during the hearing on this issue, the Court Martial Appeal Court of Canada (CMAC) commented on this authority for the military judge presiding at the court martial to recall any witness. In *R. v. Dunphy & Parsons*, 2007 CMAC 1, at paragraph 7, the Court said:

> A judge has limited discretion to call witnesses without the consent of the parties. While a judge may ask questions to resolve a misunderstanding or to clarify issues, in this case there was nothing in need of clarification. A judge should never recall a witness after the defence has closed its case when it would cause prejudice to the accused. Here the military judge compromised the fairness of the trial by taking on a role that properly belonged to the prosecutor.

[36] Despite the fact that we are not at the same place in these proceedings as it was for the case of *Parsons*, I think it is more than obvious that if this Court would act as suggested by the prosecution, it would result in the same way as commented by the CMAC, which is that in having the military judge recalling the complainant after the prosecution case is closed, it could compromise the fairness of the trial by having the military judge and the court martial taking on a role that properly belonged to the prosecutor, which is to prove the guilt of Corporal Drew beyond a reasonable doubt.

THEN, FOR ALL THESE REASONS, THE COURT

[37] **GRANTS** the application regarding the first and only charge on the charge sheet.

[38] **FINDS** Corporal Drew not guilty of the first charge.

Counsel:

Captain C.M. Da Cruz, Defence Counsel Services, Counsel for Private J.F.D. Drew, the applicant

The Director of Military Prosecutions as represented by Major M. Reede, for the respondent