COURT MARTIAL

Citation: *R. v. August*, 2018 CM 3012

Date: 20180817
Docket: 201762

Standing Court Martial

St-Jean Garrison
St-Jean-sur-Richelieu, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Private J. August, Accused

Before: Lieutenant-Colonel L.-V. d'Auteuil, D.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that any information that could identify the persons described during these proceedings as the complainants shall not be published in any document or broadcast or transmitted in any way.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 FOR DECISION ON SIMILAR FACT EVIDENCE

(Orally)

[1] The prosecution wishes to rely on the evidence provided by one complainant about the identity of the author of the alleged misconduct relating to one count of sexual assault to assist in proving the identity of the author of an allegation of the exact same nature in a separate count involving a different complainant, that the accused committed that service offence on another occasion, and it would like to do it for the three charges on the charge sheet.

[2] More specifically, it would like the trier of fact adjudicating one count to use the evidence adduced in order to have additional evidence in proving that the accused is the person who committed the alleged offence on the other counts, and reciprocally for all of them.

[3] In order to do so, the trial judge should, therefore, apply the similar fact evidence test to decide whether the evidence can be used in this way in the context of a multi-count trial, which explains why the prosecution presented a notice of application to that effect.

[4] Evidence adduced solely to show that the accused is the sort of person likely to have committed an offence is, as a rule, inadmissible. In common law, admissibility of similar fact evidence depends on whether, in the particular circumstances of the case, its probative value outweighs the prejudicial effect. The more morally repugnant the evidence shows the accused to be, the higher its prejudicial effect, requiring increased probative value for admission.

[5] The current regime before a court martial for determining the admissibility of similar fact evidence is set out at section 22 of the *Military Rules of Evidence* (*MRE*) and it reads as follows:

> (1) If it has been established that the act referred to in the charge was done by someone, but the state of mind or identity of the actor is in doubt, the prosecutor may, subject to subsections (2) and (3), introduce evidence of another act or other acts of the accused similar in essential respects to the act charged, where either or both of the following facts are in issue and the evidence tends to prove one or both of them:
>
> (a) that the state of mind of the accused was wrongful as charged at the material time, that is, that he did the act charged either knowingly, or with wrongful intent, motive or purpose; or
>
> (b) that there has been no mistake in the identity of the accused as being the person who did the act charged.
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> (2) When attempting to prove the charge against the accused, the prosecutor shall establish a real suspicion of the guilt of the accused on issues of state of mind or identity with evidence other than that of essentially similar acts of the accused, before he may introduce evidence of essentially similar acts of the accused.
>
> (3) Although the prosecutor has evidence to offer within subsections (1) and (2), the judge advocate shall exclude that evidence if he decides that its probative value is slight or that it would have an undue tendency to arouse prejudice against the accused, thereby impairing the fairness of the trial.

[6] In the decision by the Court Martial Appeal Court (CMAC) in *R. v. Laflamme*, CMAC-342, issued in 1993, Hugessen J.A., on behalf of the Court, clearly stated that considering *MRE* are the rules of evidence for a court martial and that they were adopted pursuant to section 181 of the *National Defence Act*, they must be applied as a statutory requirement despite any anomaly or the fact that they deviate from the common law. In these circumstances, this court has no other choice but to apply section 22 of the *MRE*.

[7] In addition, from a constitutional perspective, one of the rights of the accused is to a just and fair trial. As a matter of fact, section 22 of the *MRE* is more restrictive than the common law rule of evidence because it is limited to the state of mind of the accused and his identity. In fact, it is limited to two categories, instead of applying to any category of evidence as is the rule today in accordance with the common law. This section of the *MRE* is more favourable to the accused than the common law rule because it is more restrictive about the admissibility of evidence in those circumstances and, for that reason, I would strictly apply section 22 of the *MRE*.

[8] Paragraph 22(3) of the *MRE* tells us that the onus is on the prosecution to satisfy the trial judge on the balance of probabilities before such evidence is admitted that, in the context of the particular case, the probative value of the evidence in relation to a particular issue outweighs its potential prejudice and thereby justifies its reception. The court will proceed to such analysis in accordance with the decision of the Supreme Court of Canada (SCC) in *R. v. Handy*, 2002 SCC 56, which is clearly binding on this specific question.

[9] Then, in assessing the probative value of the evidence, consideration should be given to such factors as:

(a) the strength of the evidence that the discreditable or criminal act occurred;

(b) the connection between the accused and the similar fact event, and the extent to which the discreditable or criminal act supports the inferences sought to be made; and

(c) the extent to which the matters it tends to prove are at issue in the proceedings (the materiality of the evidence).

[10] In assessing the risk of prejudice caused by the evidence, consideration should be given to such issues as:

(a) “moral prejudice,” being the risk that the evidence will be used to draw the prohibited inference that the accused is the kind of bad person likely to commit the offence charged; and

(b) “reasoning prejudice,” which includes the risk that:

i. the trier of fact may be distracted from deciding the issue in a reasoned way because of the inflammatory nature of the proposed evidence;

ii. the trier of fact may become confused about what evidence pertains to the crime charged, and what evidence relates to the alleged similar act;

iii. the trial will begin to focus disproportionately on whether the similar act happened; and

iv. the accused will be unable to respond to the allegation that a similar act occurred, because of the passage of time, surprise or the collateral nature of the enquiry.

[11] Prosecution adduced evidence to support the theory of its case, which goes as follows:

(a) The alleged incident described in the particulars of the three charges occurred on the morning of 13 November 2016, between 3:30 and 5:30 a.m.

(b) It allegedly occurred in a context of a basic training course.

(c) The alleged incidents would have taken place on the 5th floor, Green Sector ROMEO, Mega Complex building, on St-Jean Garrison.

(d) Private August's room is in Green Sector TANGO.

(e) Private August was from a different platoon than the complainants.

(f) The three complainants were sleeping in cubicles 1, 4 and 29. These cubicles were not fully walled.

(g) A.W. was woken up by a person on top of him, his boxers and covers pulled down. He thought he was dreaming. The person had his penis in his hand, gripping and stroking it to make him hard. The person's head was about two inches from his penis. He had no erection. From his perspective, the incident lasted about three to five seconds. He remembered that he said something to that person and the latter sidestepped slowly, facing him, and left his cubicle. A.W. went back to sleep. A.W. described the person that he saw. He said that it was a person with dark hair, medium build, not thin, not "super fat", and bigger than him. He did not recognize the person and did not know if the person wore a t-shirt. Later, he was awoken by J.J., who was talking on the phone. He heard the story told by J.J. and realized that what happened to him was not a dream. At some point, he was told by J.J. or C.K. that the person was Private August. Later on that morning, he found a white spot on the boxers he was wearing for sleeping and 12 hours later, gave it to police. A DNA test was processed and the DNA found on A.W.'s boxers was Private August's, but it was not sperm.

(h) J.J. explained to the court that he had a weird sex dream. He felt that he grabbed a person's wrist above his genitals. He woke up, fully opened his eyes and found that he had an erection; however, there was nobody in his cubicle when he woke up. Another recruit came some moments after in his cubicle, naked with a towel on. He recognized Private August, who he had seen a few times previously at the smoke pit and, more specifically, on the afternoon of the day before the incident. Private August was calm and he was smiling. He told J.J. that he was screaming

while sleeping and wondered if he was okay. J.J. replied he wanted to go back to sleep. Private August left and J.J. went back to sleep. The complainant identified the accused in court as the person he saw in his cubicle and running away later while being chased by C.K. J.J. told said he was awoken by C.K. chasing Private August on the floor.

(i) He was told by C.K. about what has just happened to him and he realized it was not a dream. He felt as though he was attacked by somebody. He was ashamed and embarrassed. He started to shake and cry. He called the green desk to have military police (MP) come. He identified the clothes left on the floor as the ones worn by Private August. Private August admitted that they were his clothes.

(j) C.K. woke up in early morning with somebody kneeling beside this bed, with his arm fully stretched and his hand under his covers but above his boxers. He felt that somebody was holding his penis. He realized that he had an erection and saw a person beside his bed grabbing his crotch without any other movement. He sat up and yelled at that person. The person was scared, stood up, made his way slowly out of the cubicle and ran. C.K. ran after him but lost him. He woke up everybody on the floor and turned on the lights for that purpose. He described the person as having short hair, native, was medium built and had brown skin. He saw the face of this person and identified the accused in court as the person's face he saw in his cubicle. He saw J.J. and explained to him what happened. He confirmed that J.J. called the green desk with his help. At about the same time, A.W. joined them and discussed what had just happened. He learned from J.J. that the name of the person was Private August.

[12] The three complainants were met by the police and provided statements separately. There were brought together in a room, and also in another area later. They were together for some hours. They discussed in broad terms about what happened, but nothing in detail. They were mainly trying to recover emotionally from what happened that Sunday morning.

[13] The court concludes that there is no real credibility issue in this matter. The story told by each witness was clear and straightforward as much as the court can assess their testimony at this time. It is clear that they were emotionally affected to different degrees and in various ways. They were not making a story but told sincerely the truth as they could They did not really know the individual, and they had no interest other than telling the truth and letting the court decide. During their examination and cross-examination, they were able to clarify questions and recognize mistakes. There were few discrepancies with the previous statements they made. They provided logical explanations to the court with respect to any differences and told the court about what they remembered at the time they testified before the court.

[14] The evidence adduced by the prosecution through A.W. and J.J. raised some concerns when the court proceeded to its analysis, more specifically, concerning the connection between the accused and these two similar fact events.

[15] The relevance of similar fact evidence is predicated on the proposition that the accused did the discreditable act sought to be proved. If there is insufficient evidence rationally to connect the accused to the similar fact event, it can yield no logical, desired inferences. The accused must therefore be linked, through evidence, to the events relied upon as similar fact evidence.

[16] The linking evidence does not have to go so far as to prove the accused probably committed the similar act. Since the ultimate decision whether to use the similar fact evidence is for the trier of fact, at the admission stage the judge need merely be satisfied that there is 'some' evidence linking the accused to the similar fact events sufficient to enable a reasonable trier of fact to draw that conclusion. It will therefore be enough to meet that burden if there is evidence going beyond simply raising a "mere possibility" that the accused committed the similar fact event.

[17] The court based its decision on different case law. First, such an issue has been raised and discussed by the Supreme Court of Canada in *Sweitzer v. R.*, [1982] 1 S.C.R. 949, at page 954. In a unanimous decision of the court delivered by McIntyre J., the latter said:

> Before evidence may be admitted as evidence of similar facts, there must be a link between the allegedly similar facts and the accused. In other words, there must be some evidence upon which the trier of fact can make a proper finding that the similar facts to be relied upon were in fact the acts of the accused for it is clear that if they were not his own but those of another they have no relevance to the matters at issue under the indictment.

[18] Later, in *R. v. Perrier*, 2004 SCC 56, at paragraph 24, another unanimous decision delivered by Major J., the SCC said:

> 24 The threshold is not particularly high. The trial judge must determine whether there is "some evidence" linking the accused to the similar acts. However, evidence of mere opportunity or possibility is not sufficient.

[19] There is also the decision of *Lacroix c. R.*, 2008 QCCA 78, a decision of the Quebec Court of Appeal, where Chamberland J.A., dissenting, had to apply what I have just quoted, the decision of *Sweitzer*, in the context of a multi-count approach, and confirmed the approach described by the SCC; more specifically, at paragraphs 51 to 55. The dissenting decision of Chamberland J.A. was confirmed later by the SCC in a short decision that can be found at *R. v. Lacroix*, 2008 SCC 67.

[20] Finally, in *R. v. MacCormack*, 2009 ONCA 72, a decision of the Court of Appeal for Ontario, Watt J.A. for the Court expressed the view of the Court regarding this specific issue at paragraph 59:

> [59] Like the "similarity" requirement, which indicates a common perpetrator of the similar acts, a demonstrated link between the accused and the similar acts is also a precondition to admissibility: *Arp* at para. 54; *R. v. Sweitzer*, 1982 CanLII 23 (SCC), [1982]

> 1 S.C.R. 949, at p. 954. In a trial on a multi-count indictment, the link between an accused and an individual count will be relevant to the issue of identity on the other counts that disclose the required degree of similarity in the manner in which those offences were committed: *Arp* at para. 53. The requirement that there be a link between the allegedly similar acts and the accused demands that there be some evidence upon the basis of which the trier of fact can make a finding that the similar acts were those of the accused. Evidence of mere opportunity to commit the similar acts is not sufficient: *Arp* at paras. 54 and 57; *Harris v. Director of Public Prosecutions*, [1952] A.C. 694, at 708 (H.L.).

[21] When I look at the evidence of A.W. to be considered as similar fact evidence, at most there is a mere possibility that the act described was one of the accused. There is no identification. There is a general physical description provided by the witness, but there is no evidence that puts the accused at the location at the time of the alleged commission of the offence. The court concludes that the evidence of A.W. linking the accused to the similar fact events related to the two other charges is not sufficient to enable a reasonable trier of fact to draw that conclusion.

[22] The evidence of J.J. In that case, the accused was identified by the witness, but there is no similar act as the one described for the two other alleged offences. It is very difficult to see some degree of similarity concerning the acts between the evidence of J.J. and the two other counts. Consequently, this evidence is not admissible as similar fact evidence in relation to the two other charges.

[23] So I am left with the evidence of C.K. in relation to the two other charges. In that case, I proceeded with a full analysis as I described earlier. First, I looked at the strength of the evidence that the similar acts occurred, meaning that the act described by C.K. occurred. This evidence is very compelling. The act was clearly described and the identity was established in some way by the witness. Clearly, for me, there is no collusion regarding this evidence.

[24] The extent to which the proposed evidence supports the desired inferences. Here, clearly there is a link between the identity and the act. And when I look at the evidence provided by A.W., as you will see later, I found that there were similarities regarding the act. And then I concluded that the proposed evidence adduced by A.W. could support the desired inference concerning the second charge involving A.W. However, in the case of the count involving J.J., which is the first charge, there is a link between identity, but what is missing is a description of similarities in the manner in which what happened to C.K. is similar to what has been described by J.J. regarding the first charge.

[25] I am not inclined to think that this evidence would support the desired inference, but for other reasons, I will continue with my analysis and later you will see that it fails also for other reasons.

[26] Now, the connectedness to a properly defined issue. The issue here relates to identity. I think there is no doubt regarding that. How is the strength of the inference to be assessed? Clearly, there is proximity in time regarding what has been described by C.K. and what has been described to the court by A.W. and J.J.

[27] The extent to which the other acts are similar in detail. The events of C.K. to be used as similar fact evidence, when it has to be used in the context of the second charge, clearly, there are many details that are similar: the fact that both were awoken; that they were touched; the specific placed touched in the genital area; and the fact that the person left, and in the way the person left, also makes it very similar. However, as you may suspect, it is difficult to consider the evidence of J.J., because there's no evidence of an act that has been described by the witness. Therefore, it is very difficult to compare in detail, other than at some point in time he had an erection and sometime later when there was Private August in his cubicle, but clearly, if I understand correctly the evidence, he never said that he was touched in any way.

[28] The circumstances surrounding or relating to the similar acts. In both instances for both counts, when I look at the evidence adduced by C.K., clearly as a matter of time and place, these circumstances are sufficient for me to say that there are similarities, being: close in time, allegedly taking place about the same time and place, clearly the place. It is the additional circumstances that make the evidence of C.K. similar to what has been described in support of the first and second charge. Clearly, for me, the evidence of C.K. is strongly connected to the second charge, but is more or less connected to the first charge.

[29] The materiality of the evidence. This must be taken in the perspective of: Is the evidence material to one main issue? Here, clearly, it is related to identity which is an essential element of the offence to be proven under each count. In the case of C.K., there is some other evidence confirming what he saw, especially related to identity, because when he ran after the person, this person was recognized by J.J., so there is some independent evidence to that effect.

[30] Now, the second step for the court is to proceed with the assessment of the prejudice for the purpose of the admissibility. As I mentioned previously, the court has to proceed with the analysis on the moral prejudice and the reasoning prejudice.

[31] When I look at the evidence of C.K. for the second charge involving A.W., clearly it points as being used for identity and not to prove that Private August would be the kind of person to do such a thing. This is where I see that because of similarities in the act, this kind of evidence is adduced and aimed for a limited purpose, which is identity. To that effect, I think the moral prejudice of this count is very low.

[32] However, for J.J., which relates to the first charge, it would raise more the issue of propensity for Private August to commit such an act. Because the identity already has been described by J.J. for the first count, it would be more a matter to prove that Private August is the kind of person who would allegedly committed such an offence as described by C.K, and this is where I have some kind of difficulty in that context, and I see the moral prejudice here as very high.

[33] As to the reasoning prejudice, the parties clearly recognized that when the trial occurs before a judge sitting alone, the chance that the court would be distracted by such evidence is very low, because it is recognized that a judge, acting as a trier of facts, can make the proper distinctions, and be able to understand and use that kind of

evidence adduced for a very limited purpose. So, the reasoning prejudice is low, which brings me to the third step.

[34] The balancing: Which one outweighs the other? That is the final analysis. So the evidence of C.K. in relation to the second charge which involved A.W., I come to the conclusion that the probative value that I qualified as being very high, outweighs the prejudice effect and I find the evidence of C.K. regarding the identity issue as admissible for the purpose of the analysis of the second charge. However, concerning the evidence of C.K. in relation to the first charge, I concluded that the prejudicial effect outweighed the probative value in that case.

[35] As I explained, the probative value assessed, especially the two items, the extent to which the proposed evidence supports the desired events and the connectedness, make the probative value of this evidence in the context of an analysis of the first charge very low, and I conclude that the moral prejudice is very high. So when I balance both, clearly I came to the conclusion that the prejudicial effect outweighs the probative value in that context.

FOR THESE REASONS, THE COURT:

[36] **GRANTS** the application in part.

[37] **DECLARES** admissible the evidence of C.K. to be used for analysis in the context of the second charge on the specific issue of identity of the author of the alleged service offence.

[38] **DISMISSES** the application of the prosecution to use the evidence of A.W. for the analysis related to the issue of identity of the author of the alleged service offence on the first and third charge.

[39] **DISMISSES** the application of the prosecution to use the evidence of J.J. for the analysis related to the issue of identity of the author of the alleged service offence on the second and third charge.

[40] **DISMISSES** the application of the prosecution to use the evidence of C.K. for the analysis related to the issue of identity of the author of the alleged service offence on the first charge.

Counsel:

The Director of Military Prosecutions as represented by Major A.J. van der Linde and Lieutenant(N) C. Porter

Major F. Ferguson and Major A. Gélinas-Proulx, Defence Counsel Services, Counsel for Private J. August