COURT MARTIAL

Citation: *R. v. Reid*, 2022 CM 2002

Date: 20220131
Docket: 202116

Standing Court Martial

Lieutenant-Colonel Philip L. Debney Armoury
Edmonton, Alberta, Canada

Between:

Corporal G. Reid, Applicant

-and-

Her Majesty the Queen, Respondent

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

DECISION ON DEFENCE MOTION OBJECTING TO PROSECUTION WITNESS NOT PREVIOUSLY IDENTIFIED

(Orally)

Introduction

[1] Prior to the close of the prosecution's case, the prosecution learned that a witness who they believed was previously either unwilling or unavailable to testify was in fact available. The witness, then-Corporal Goodrunning, is a relevant witness with respect to the allegations set out in the fourth charge before the Court.

[2] When the prosecution advised the Court and defence counsel that they had learned of the availability of this witness, the defence opposed the prosecution calling then-Corporal Goodrunning based on a number of arguments, one of which was notwithstanding that the prosecution's case was still open and that article 111.11 of the *Queen's Regulations and Orders*

for the Canadian Forces (QR&O) bars the prosecution from adding any additional witnesses after the start of the court martial.

[3] In an earlier decision, delivered on 27 January 2022, I ruled that QR&O article 111.11 was not a legal impediment to the prosecution calling a late witness while their case was still open.

[4] On 30 January 2022, I heard submissions from both the prosecution and the defence on whether the timing of the prosecution's decision to call then-Corporal Goodrunning breached Corporal Reid's right to make full answer and defence as guaranteed by section 7 of the *Charter* as well as his right to a fair trial pursuant to paragraph 11(*d*) of the *Charter*.

Position of the parties

Applicant

[5] The defence position is that there has been a breach of the accused's section 7 and paragraph 11(*d*) *Charter* rights based on the prosecution's failure to provide reasonable notice prior to the start of the court martial.

[6] He argues that the bar for establishing prejudice has been met and the only issue left for this Court to decide is the determination of remedy.

[7] He views his case as exceptional as key irrevocable decisions were made in the defence case based on the expected evidence to be called and consequently, he seeks a remedy of the exclusion of this late witness.

Respondent

[8] Conversely, in his oral submissions, the prosecution made the following arguments:

(a) during the investigative stages, then-Corporal Goodrunning provided two audio recorded statements which were previously disclosed to the accused;

(b) the prosecution attempted to contact this witness prior to finalizing its witness list, however, due to her lack of responsiveness to their telephone calls and voice messages, they respected that she was not interested. The witness confirmed the same lack of interest when in November 2021, Corporal Reid also attempted to contact her several months before the trial;

(c) further, when her commanding officer contacted her during the court martial to inquire why she was not testifying, the witness reconfirmed again that she was not interested. However, the next morning, she changed her mind and decided she would like to testify;

(d) although the prosecution could have previously compelled her to testify, in light of the prosecution's policy to respect the views of complainants, they proceeded with their case on the basis that she was unavailable and decided to lead only the evidence from the two other witnesses;

(e) when the witness had a change of heart regarding her decision, the prosecution felt it was important that she be provided the opportunity to testify and notified both the Court and defence of this development; and

(f) in fulfillment of their ongoing duty to assess their case, the prosecution conducted a follow up interview with then-Corporal Goodrunning. The interview was conducted on 25 January 2022 by way of MS Teams and was observed by her former commanding officer, counsel for both the prosecution and the defence.

Analysis

[9] Section 7 of the *Charter* protects the right of an accused to make full answer and defence. It is also well understood that section 7 incorporates procedural fairness as an element of fundamental justice. Consistent with this, in order for an accused to be able to make full answer and defence, the Crown must provide them with complete and timely disclosure: (see *R. v. Stinchcombe,* [1991] 3 S.C.R. 326).

[10] Before being entitled to a remedy under subsection 24(1) of the *Charter*, the party seeking such a remedy must establish a breach of his or her *Charter* rights. In a case of late disclosure, the underlying *Charter* infringement will normally be to section 7.

[11] In short, in most cases of late disclosure, if prejudice is identified, the determination of remedy under subsection 24(1) of the *Charter* requires a balance between remediating the prejudice to the accused, while still safeguarding the integrity of the justice system.

Establishing prejudice: have Corporal Reid's Charter rights been breached?

[12] An assessment of the prejudice flowing from a late request to call a witness must necessarily turn on its own facts, circumstances as well as its timing.

[13] In common law, when the case for the prosecution is still open, trial judges are provided broad discretion to permit such last-minute requests. However, as a trial proceeds, the level of discretion afforded to judges narrows. In this case, the prosecution identified then-Corporal Goodrunning as a witness prior to the closing of its case.

[14] In the current case, then-Corporal Goodruning is expected to be able to provide evidence that is material to the fourth charge before this court martial.

[15] It is well established that in order to show prejudice, an accused must show, on the balance of probabilities, that he lost a realistic opportunity to garner evidence, or make decisions

about the defence (see *R. v. Chaplin*, 1993 ABCA 323) (affirmed *R. c. Chaplin*, [1995] 1 R.C.S. 727).

[16] Based on the submissions of counsel and the evidence before the court, the Court finds that this late decision by the prosecution does prejudice somewhat the case of Corporal Reid.

Remedy

[17] The next step requires the Court to craft a remedy appropriate to the prejudice suffered by Corporal Reid with respect to this late decision by the prosecution for then-Corporal Goodrunning to testify.

[18] Although there are a wide variety of remedies available, counsel for the defence submitted that based on the circumstances of this case, the only viable remedy for his client is the exclusion of the testimonial evidence of then-Corporal Goodrunning. He specifically withdrew his previous recommendations for a mistrial as well as his request for a severance of the fourth charge from the original charge sheet and also agreed that this is not such a case that would lead to a stay of proceedings.

[19] In crafting the appropriate remedy, the Court must not simply design a remedy that is appropriate with regard to the rights of Corporal Reid, but it must also consider the rights of the prosecution who represents the public and the greater public interest.

[20] In normal circumstances for this type of case, the remedy provided for late disclosure is that of an adjournment to permit the defence to prepare for cross-examination as well as the provision of sufficient time to adjust their defence strategy.

[21] In short, only when the prejudice cannot be remedied by an adjournment and disclosure order will the exclusion of evidence be considered an appropriate and just remedy.

[22] At paragraph 24 of *R. v. Bjelland*, 2009 SCC 38 the Supreme Court of Canada makes it abundantly clear when evidence should be excluded:

> [24] Thus, a trial judge should only exclude evidence for late disclosure in exceptional cases: (a) where the late disclosure renders the trial process unfair and this unfairness cannot be remedied through an adjournment and disclosure order or (b) where exclusion is necessary to maintain the integrity of the justice system. Because the exclusion of evidence impacts on trial fairness from society's perspective insofar as it impairs the truth-seeking function of trials, where a trial judge can fashion an appropriate remedy for late disclosure that does not deny procedural fairness to the accused and where admission of the evidence does not otherwise compromise the integrity of the justice system, it will not be appropriate and just to exclude evidence under s. 24(1).

[23] Although I find the late decision to have then-Corporal Goodrunning testify in the court martial is prejudicial to the accused's right to make full answer and defence, the remedy imposed must be contextual. There was no suggestion that this late disclosure arose from Crown misconduct, that it would lead to unreasonable delay and the accused is not in custody. The Court finds no viable argument suggesting that excluding her as a witness is necessary to maintain the integrity of the justice system.

[24] Notwithstanding this, the exclusion of evidence may be warranted where the evidence is produced after irrevocable decisions about the defence have been made by the accused which makes his trial unfair. In this case, the defence argued that they made the following decisions based specifically upon the disclosure received and the list of witnesses to be called.

(a) decision of whether or not to put the accused's character at issue. The defence argued that this is an important decision that the accused has to make. When or if character becomes an issue at trial, then the prosecution can respond in kind so it requires careful consideration and assessment of witnesses. Defence argued that they decided this based on the witnesses, they would not open that door and decided to litigate their case based on the facts;

(b) cross-examination. Two witnesses have already given evidence on the fourth charge and he submitted that his cross-examination of these witnesses would have been different if then-Corporal Goodrunning was testifying. In his view, although witnesses could be recalled, this is not an appropriate remedy in the circumstance since the mischief is not going to be fixable; and

(c) election. Relying upon the case of *R. v. Calder*, 2010 NSSC 146, where there was an important late disclosure that would have affected pre-trial decisions made with respect to the accused's right to trial by a jury, versus by judge alone, he drew parallels with this case. He explained that they assessed their case carefully in deciding whether to proceed by a General Court Martial (GCM) or a Standing Court Martial (SCM) and similar to the case of *Calder*, such decisions on election are irrevocable.

[25] In this case, there are four charges on the charge sheet and there were a total of three witnesses who testified for the prosecution. Both sides confirm that full disclosure of then-Corporal Goodrunning's prior interviews was timely and complete. Rather, it is simply the notice that she would testify that was not. Both sides also admitted that they both respectively tried to contact her and she either did not respond or indicated that she was not interested in testifying. Quite frankly, there is not a significant amount of evidence in this case and even less as it relates to the fourth charge.

[26] In this case, the defence argued that the accused's decision to re-elect trial by SCM (judge alone) instead of being tried by GCM (judge and panel) was made after the prosecution had disclosed its witness list in accordance with QR&O article 111.11 as well as after they also canvassed who would be testifying.

[27] Defence confirmed in its evidence that in November 2021, Corporal Reid reached out personally to then-Corporal Goodrunning inviting her to testify. This was done prior to him re-electing trial by SCM in December 2021. Although, counsel for Corporal Reid was clear that he could not determinatively say that knowing that then-Corporal Goodrunning was going to testify would have changed his decision on the election, the fact that Corporal Reid was denied the full

factors to be considered and weighed, did prejudice him. The evidence suggests that he did take the election seriously, but the fact that he is not seeking a remedy of a mistrial to be retried by a GCM is also evidence that he simply wishes the matter to proceed, albeit without the additional witness testifying.

[28] The representations of counsel suggest that although then-Corporal Goodrunning's evidence is expected to be limited to the fourth charge, she is likely to proffer both exculpatory and inculpatory evidence with respect to the accused.

[29] Another factor to be considered by the trial judge is the importance of the evidence to the prosecution's case. Upon questioning by the Court, the prosecution advised that in his assessment, without then-Corporal Goodrunning's testimony, there is still sufficient evidence before the Court on all the elements of the fourth charge. From this, I can conclude that she was not specifically sought out by the prosecution at this late juncture to provide evidence of an element of the offence that would otherwise fail without her evidence.

[30] Trial judges must also consider the nature and the seriousness of the charges in deciding whether or not the case before them qualifies as exceptional. Although the fourth charge is not as serious as the other three, the allegations suggest that in the presence of subordinates, Corporal Reid made disparaging comments regarding Indigenous persons. The evidence suggests that then-Corporal Goodrunning was both a witness to these comments made and at the time had completed an Indigenous recruitment program within the Canadian Armed Forces (CAF).

[31] In my view, having access to all the evidence to assess the nature of this allegation is important for the maintenance of discipline, efficiency and morale within the CAF. Further, the CAF has made commitments to strengthening its relationship with Indigenous communities and has made government-wide reconciliation a very high priority.

[32] I find that excluding her evidence would have an adverse impact on the trial fairness from the point of view of the CAF, the unit and society at large because it impairs the truth-seeking function of the Court which in this case would significantly benefit from then-Corporal Goodrunning's evidence and perspective.

[33] Notwithstanding her original hesitation to testify, the fact that she has had a change of heart and can provide the Court with her perspective is a consideration this Court cannot dismiss. If she is now agreeable and available, in my view, she must be provided the opportunity to be heard.

[34] Based on the weighing of all the factors in this case and balancing all the interests, I do not find that this is a case that qualifies as exceptional where excluding then-Corporal Goodrunning's evidence is necessary in the fairness of the trial.

[35] Consequently, I order the following remedies:

(a) after then-Corporal Goodrunning has testified in examination-in-chief, the defence will be provided a reasonable adjournment to prepare for her cross-examination and to adjust its defence strategy as required; and

(b) I note that the defence also indicated that they likely would have pursued their questioning of the two witnesses who testified on the fourth charge very differently. I understand that they are currently in isolation due to COVID-19 protocols. However, should they be required, we can ensure that they are made available to testify via MS Teams or through any other virtual means if the defence needs to question them further.

FOR THESE REASONS THE COURT:

[36] **DISMISSES** the application;

[37] **FINDS** then-Corporal Goodrunning be permitted to testify.

[38] **IMPOSES** the following remedies:

(a) after then-Corporal Goodrunning has testified in examination-in-chief, the defence will be provided a reasonable adjournment to prepare for her cross-examination; and

(b) if the defence determines that they will need to recall the other witnesses, the Court will permit this.

Counsel:

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The Director of Military Prosecutions as represented by Major G. Moorehead, Captain B. Richard and Captain S. Mulrain, Counsel for the Respondent