COURT MARTIAL

Citation: *R. v. Turner*, 2021 CM 4013

Date : 20211210
Docket : 202053

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between :

Her Majesty the Queen

- and -

Warrant Officer V.N.E. Turner, Accused

Before : Commander J.B.M. Pelletier, 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 obtained in relation to the proceedings of the Standing Court Martial of Warrant Officer Turner which could identify anyone as a victim or complainant, including the person referred to in the Charge Sheet as "C.H.", shall not be published in any document or broadcast or transmitted in any way.

RULING ON THE ADMISSIBILITY OF EVIDENCE FOLLOWING A *VOIR DIRE*

(Orally)

Introduction

[1] This is the Court's decision on the *voir dire* on the admissibility of evidence requested to be elicited on cross-examination of the complainant about the details of her financial situation and of a claim for financial compensation which she may have made in relation to the Canadian Armed Forces (CAF) Sexual Misconduct Class Action Settlement.

Background

[2] Warrant Officer Turner is facing one charge under section 130 of the *National Defence Act* (*NDA*), for sexual assault, contrary to section 271 of the *Criminal Code*. This alleged offence would have occurred in August or September 2001 in Winnipeg, Manitoba.

[3] The proceedings of this Standing Court Martial commenced as specified in the Convening Order on 6 December 2021 at Canadian Forces Base (CFB) Kingston, Ontario.

[4] Prior to the commencement of proceedings, the defence filed a notice of application on 5 November 2021 seeking an order that the prosecution inquire as to whether the complainant in this case has filed a claim under the CAF Sexual Misconduct Class Action Settlement. It was understood that if such a claim exists as expected, the defence would then file a third party records application to obtain its production.

[5] The prosecution reacted by a motion requesting the Court to summarily dismiss the defence's application, arguing that it had no reasonable prospect of success as any inquiry that could be ordered would be unsuccessful by virtue of the confidentiality promised to complainants or applicants to the settlement class action. Finding that the issue was essentially the same as decided by a colleague Sukstorf M.J.in the case of *R. v. Chand*, 2021 CM 2010, a decision involving a similar application filed by the same defence counsel, I agreed with the prosecution and summarily dismissed the application on 18 November.

The line of questioning pursued and the objection

[6] The complainant's direct examination took place on the morning of 9 December 2021 and the cross-examination commenced the next day, after an adjournment was granted to the defence. Within the first two minutes of the cross-examination, defence counsel engaged in a line of questioning about the personal financial situation of the complainant, which led to an objection by the prosecution, on the basis of relevance.

[7] In immediate reply to the objection, defence counsel submitted that there is a possible pecuniary motive for the complainant to have fabricated the allegation. Adding that a complainant who is in dire financial state is more likely to have reasons to seek to obtain financial gain from the complaint than a complainant who is wealthy, justifying, in counsel's view, the requirement for him to question the complainant on the details of her personal financial situation.

[8] Dubious, I mentioned to counsel that I failed to see how making a sexual assault complaint to police, hence initiating a criminal investigation which presumably led to charges being laid, preferred and the trial convened in this case, was related to financial gain. Defence counsel replied that it is his hypothesis that the complainant in this case filed her complaint to receive a financial award under the CAF Sexual Misconduct Class Action Settlement process. The prosecution maintained its objection, arguing that the Class Action Settlement process is distinct and separate from the process going on in this court, namely determination of the guilt or innocence of the accused on a charge of sexual assault.

The voir dire

[9] Given the situation the Court was confronted with, I decided to enter into a *voir dire*, pursuant to the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.61. Indeed, the defence is seeking the admission of the answer to its question. The prosecution is opposed. The admissibility of the evidence is therefore in question and the parties agree that the resolution of the disagreement about the admissibility of the financial information issue requires the consideration of evidence, most importantly, evidence related to the CAF Sexual Misconduct Class Action Settlement process. I did stress to the parties that the purpose of the *voir dire* was to determine, for the duration of the trial, the permissibility, on the basis of relevance, of any questions to the complainant related to details of her financial situation, including any questions related to whether she had filed a claim and the details of any claim under the CAF Sexual Misconduct Class Action Settlement process.

[10] I turned to the defence for the presentation of evidence and the following evidence was produced by defence counsel:

(a) a joint statement of facts listing a number of publications such as newspaper articles, posting, etc., between July and September 2019 to publicize the settlement reached in the CAF Sexual Misconduct Class Action Lawsuit and the possibility for persons to make a claim for financial compensation;

(b) a sample of nine such articles revealing that the announcement received large media coverage in Canada and abroad;

(c) the text of the Final Settlement Agreement of the Sexual Misconduct Class Action Lawsuit; and

(d) evidence that further to her complaint to police in 2019, the complainant was informed by email on 21 July 2020 about the possibility for her to present a claim.

[11] The prosecution agreed to the presentation of the above evidence by the defence and did not see fit to present further evidence. The parties then made closing addresses on the *voir dire*.

[12] The defence submits there is a reasonable possibility that the personal financial information counsel seeks to obtain from the complainant during cross-examination, including information on any claim she would have made under the CAF Sexual Misconduct Class Action Settlement process, is logically probative to demonstrate a motive to fabricate by the complainant as it pertains to the incident subject of the charge.

[13] For its part, the prosecution submits that the settlement of the class action lawsuit approved by the Federal Court of Canada was arrived at for the purpose of encouraging those who feel they have been victimized to apply. The Final Settlement Agreement provides that claimants do not have to disclose the name of anyone who has victimized them and reveals a settlement process that is focussed on harm suffered by the person victimized rather than the specific acts committed by any perpetrator. The system is not adversarial and it is restorative in nature. It has nothing to do with any criminal process which may be ongoing in parallel. As provided in the settlement, on the claim form itself and as recognized by my colleague Sukstorf M.J. at paragraph 30 of her decision in *Chand*, claimants are promised confidentiality.

[14] The prosecution argues that lifting such confidentiality in this case would have repercussions on other cases of persons victimized who may have chosen to complain to police and become complainants. Consequently, allowing the defence to cross-examine the complainant to obtain financial information and obtain answers as to whether she has submitted a claim under the CAF Sexual Misconduct Class Action Settlement process would generate prejudicial effects which far outweigh the prejudice to the defence. Finally, allowing such questioning would be engaging on a road leading to a certain dead end as the claim details are considered a "record" under section 278.1 of the *Criminal Code* according to interlocutory decisions of courts martial in *Chand* and *R. v. Kohlsmith and Zapata Valles*, 2021 CM 3007 (*Zapata Valles*), hence subject to the record process at section 278.3, a process which the prosecution argues can only lead to a result where such records are held to be inadmissible.

Analysis

[15] In my analysis of the issues relevant to this *voir dire*, I have accepted as a hypothesis that the complainant has indeed filed a claim under the CAF Sexual Misconduct Class Action Settlement process even if this fact is unknown. This has been done at the request of the defence in order to put the defence's best case forward. Nevertheless, this most favourable view does not alter my conclusion to the effect that

the financial information sought by the defence is inadmissible in these proceedings as it is irrelevant.

[16] Indeed, despite the fact that time constraints do not permit me to engage in lengthy and fulsome analysis of all of the issues that have been raised by counsel, especially the prosecution, I have gained sufficient knowledge and have analyzed the issue sufficiently to conclude that I substantially agree with the submissions of the prosecution to the effect that details of the complainant's finances and any information coming from a claim related to the settlement of the class action lawsuits for sexual misconduct within the CAF has no link whatsoever with the procedures in this trial on a charge of sexual assault.

[17] The issue in this *voir dire* is whether questions in cross-examination relating to the personal financial information of the complainant, including specifically whether she has filed a claim under the CAF Sexual Misconduct Class Action Settlement process are relevant to a possible motive to fabricate details of the alleged assault, absent any other evidence giving an air of reality to a motive to fabricate.

[18] The basic principles teach us that any evidence which is not probative of the fact a party seeks to establish by its introduction by reason of a lack of natural, common sense connection with that fact is irrelevant.

[19] Here, the item of evidence sought are answers from the complainant tending to show that she would have invented her story to seek and/or obtain financial compensation, including whether she has filed a claim with the CAF Sexual Misconduct Class Action Settlement Claim's Administrator on the basis of her story.

[20] I cannot possibly conceive that submitting such a claim would constitute a motive to lie. The evidence presented in the course of this *voir dire* reveals that the admissibility of such claim and the amount that one could receive for the harm suffered is not dependent on a sexual assault complaint having been made or on its outcome, if one was made.

[21] The complainant could not have gone to police to bolster her claim for financial compensation because there are no links between the two processes. The logical relevance is therefore dubious and its legal relevance, a cost-benefit analysis, even more so. As found by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 S.C.R. 9 at page 21:

> Other considerations enter into the decision as to admissibility. This further inquiry may be described as a cost benefit analysis, that is "whether its value is worth what it costs." Cost in this context is not used in its traditional economic sense but rather in terms of its impact on the trial process. Evidence that is otherwise logically relevant may be excluded on this basis, if its probative value is overborne by its prejudicial effect, if it involves an

> inordinate amount of time which is not commensurate with its value or if it is misleading in the sense that its effect on the trier of fact, particularly a jury, is out of proportion to its reliability. [Citation omitted.]

[22] That statement of the law addresses another important issue: the assessment of relevance by the application of the general exclusionary rule. I have already found that the proposed evidence of a claim having been made is not logically relevant. Further, it is not legally relevant. Taking advantage of the presence of a complainant on the witness stand during cross-examination to ask her about details of her personal finances, including whether she has submitted a claim as part of a compensation process that is entirely unrelated to her complaint and testimony in this trial will not only be a waste of court time and a needless violation of the complainant's privacy but it would also, as confirmed by defence counsel, open the door for further useless inquiries such as an application for disclosure of records which will consume significant resources and force the adjournment of this trial for weeks and, given judicial availability, possibly for months. Furthermore, as argued by the prosecution, it would risk compromising the very nature of the financial compensation scheme as it pertains to its confidentiality, at least as it pertains to claimants who may also be complainants in criminal trials before military and civilian courts.

[23] The cost-benefit analysis clearly reveals that the value of allowing the defence to engage in a line of questioning on the financial means of the complainant is not worth what it costs, even in consideration of full answer and defence in a criminal case which requires me to find that defence evidence should be excluded solely where the risks of prejudice substantially outweigh its probative value. I find that it is the case here.

[24] I also agree with the prosecution to the effect that the stated aim of the defence to obtain the details and documents related to a possible claim under the CAF Sexual Misconduct Class Action Settlement process would lead this Court to embark on a dead end road. As mentioned, it has been found that such claim documents are "records" under section 278.1 of the *Criminal Code* as recognized by courts martial in *Chand* and *Zapata Valles*. As such, I agree with the prosecution that the admissibility of the claim would most certainly be barred even if I was to spend the energy required to hold a hearing after involving the record holder, the complainant, and their respective counsel in a hearing. Indeed, the admissibility of these documents is likely to be either barred by the application of the limitations found at subsection 278.3 (4) and/or the application of the criteria of likely relevance at both stages of the analysis.

Conclusion

[25] The outcome of this *voir dire* to the effect that the evidence sought to be admitted is not relevant should not come as a surprise for defence counsel. He was the source of failed requests to obtain similar evidence on three previous occasions, especially as it pertains to claims information, earlier in this case and twice in the other

court martial cases I referred to in these reasons, mainly on the basis that the information sought pertaining to complainants is based on pure speculation and its relevance is dubious. My conclusion on this *voir dire* is in my view in line with what I found earlier in this case and with what my colleagues found in other cases.

FOR THESE REASONS, THE COURT DIRECTS AS FOLLOWS:

[26] Questions in cross-examination or otherwise pertaining to the personal financial means of the complainant are inadmissible on the basis of relevance and will not be allowed.

[27] Questions in cross-examination or otherwise on any details related to a claim under the CAF Sexual Misconduct Class Action Settlement process or which would solicit, directly or indirectly, any information related to whether the complainant has submitted such a claim are inadmissible on the basis of relevance and will not be allowed.

Counsel:

The Director of Military Prosecutions as represented by Major A. Dhillon and Lieutenant(N) A. Keaveny

Captain D.P. Sommers, Defence Counsel Services, Counsel for Warrant Officer V.N.E. Turner