COURT MARTIAL

Citation: *R. v. Sutherland*, 2022 CM 5022

Date: 20220530
Docket: 202130

Standing Court Martial

Halifax Courtroom Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Master Corporal W.C. Sutherland, Respondent

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

APPLICATION FOR VIDEO LINK TESTIMONY

(Orally)

I. Introduction

[1] The accused, Master Corporal (MCpl) Sutherland, is charged with one offence of sexual assault that allegedly took place on or about 22 April 2020, while aboard Her Majesty's Canadian Ship *Fredericton* when the ship was alongside Souda Bay, Greece. At the beginning of the trial proceedings on 30 May 2022, the prosecution submitted a request for an order to allow the testimony of one witness, Sailor 1st Class (S1) Miner-Turner, to be delivered remotely, arguing that the testimony in person would cause hardship to this witness. The defence is opposing the request. Therefore, I must decide if there is authority to issue an order that allows the witness to appear remotely when the defence does not consent to the testimony taking place by video link. If I find the authority exists, I must decide if this case meets the criteria to impose such order.

Facts

[2] The witness for whom the application is sought, S1 Miner-Turner, is one of the witnesses for the prosecution's case. He is expected to provide evidence regarding the identity of the accused as the person who committed the alleged offence.

[3] S1 Miner-Turner was diagnosed with post-traumatic stress disorder (PTSD) and has been the subject of several Medical Employment Limitations (MELs) since 2021. He has not been in uniform nor performed any duty since July 2021. S1 Miner-Turner moved to a rural area in Nova Scotia in order to avoid stressors associated with living in the city of Halifax. The MELs relevant to the application is in relation to being unfit to work in a military environment.

[4] S1 Miner-Turner is currently treated by Ms Ellis, a nurse practitioner who is the author of the affidavit marked as an exhibit in support of the application. The affidavit informs the Court of S1 Miner-Turner's MELs, and of the diagnosis of PTSD. Ms Ellis stated in her affidavit that S1 Miner-Turner experiences stress and anxiety when in the presence of a number of persons, symptoms that are aggravated when in a military environment.

II. Whether there is authority to issue an order for remote appearance of a witness when one party does not consent. If authority exists, whether this case meets the criteria to issue the order

Position of the parties

[5] The applicant asked this Court to rely upon its discretionary powers set out at section 179 of the *National Defence Act* (*NDA)* to grant the application, contending that a court martial has discretionary power to make the requested order even when the defence does not agree to it. He contended that *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.65 complements the power of section 179, therefore it does not displace its authority. Further, relying on *R. v. Giffin,* 2015 NSPC 24, the applicant suggested that the witness' medical condition be considered in support of his application because the term "mental disability" found at 486.2(1) and (2) is not defined. He suggested that the term is therefore broad enough to include the witness' condition, which would be a sufficient ground to issue the order for this witness. The applicant contended that witnesses in the military justice system are entitled to the same protection than the one provided under the *Criminal Code*. He concluded that, in light of the witness' MELs, and since the credibility of the witness is not at play, this case is an exceptional case as referred to in *R. v. Machtmes,* 2021 CM 2002 that would allow this Court to impose the order he is seeking.

[6] The respondent argued that the credibility and reliability of the testimony of S1 Miner-Turner is essential for the assessment to the credibility of the complainant. Identity is a critical aspect of this case, and the witness' evidence would shed light to this essential element, as well as to other aspects of this case such as the witness' presence at the location of the alleged sexual assault at the material time, his alcohol consumption, and the relationship that the witness had with the accused. Therefore, the

physical presence of S1 Miner-Turner for his testimony is paramount to allow the accused to make full answer and defence. Further, counsel for the defence explained that an order to allow the testimony of this witness via video link is not necessary because he personally met with S1 Miner-Turner in his office last February and there were no issues with his physical attendance at the meeting.

Analysis

[7] Turning to the legal principles relevant to this application, article 112.65 of the QR&Os addresses the authority to order a witness to testify in a location other than the courtroom, providing that:

> (1) Where the prosecutor and the accused person agree and the judge so orders, the evidence of a witness may be taken at any time during court martial proceedings by any means that allow the witness to testify in a location other than the courtroom and to engage in simultaneous visual and oral communication with the court, the prosecutor and the accused person.[Emphasis added.]

[8] This article leaves little room for interpretation; it clearly states that both the prosecutor and the accused person are required to acquiesce to this means of receiving the testimony prior to the judge considering whether to use their discretion to issue an order to this effect. Thus, consent of both parties is a precondition to the exercise of judicial authority to decide whether to issue the order. In this case, the applicant conceded that, because the respondent objected to the witness testifying remotely, the authority to issue the order, if any, would not be the one provided at article 112.65.

[9] Turning to the other authority as suggested by the prosecution, courts martial are statutory courts and as such, their powers and authority are limited to the express power set out within the *NDA* and QR&Os. Section 179 of the *NDA* does confer statutory authority to exercise the same powers vested in a superior court of criminal jurisdiction. It provides that:

> **179 (1)** A court martial has the same powers, rights and privileges — including the power to punish for contempt — as are vested in a superior court of criminal jurisdiction with respect to
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> **(a)** the attendance, swearing and examination of witnesses;
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> **(b)** the production and inspection of documents;
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> **(c)** the enforcement of its orders; and
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> **(d)** all other matters necessary or proper for the due exercise of its jurisdiction.

[10] The matters for which the power may be exercised are expressly listed in this section, which constitutes a clear indication of Parliaments' intent to restrict the exercise of the authority to these matters, consistent with the legal nature of statutory courts. The addition of "all other matters necessary or proper for the due exercise of its

jurisdiction" was meant to allow the exercise of these powers only when it is deemed imperative for the court to exercise its jurisdiction. In other words, paragraph (d), or section 179 of the *NDA* in its entirety, is not meant to be used automatically to fill legislative gaps. Additionally, the general powers set out at section 179 of the *NDA* cannot be used if doing so would contravene another legislative provision.

[11] While it is true that paragraph 179(1)(a) of the *NDA* does provide courts martial with the ability to control its own processes with respect to the attendance, swearing and examination of witnesses, an order permitting a witness to testify via video link is something that could have fallen within a court's power to manage its own process, provided that there is no other provision that otherwise excludes the application of this judicial power. However, there is no void in the law: article 112.65 does cover this authority expressly. It provides an exception to the requirement of the physical presence of witnesses. It is trite to say that a military judge presiding a trial cannot simply disregard an article of the regulations or refuse to apply it when the application of other provisions is more convenient. I am bound by article 112.65.

[12] Clearly, both article 112.65 and its counterpart, article 112.64 in the context of preliminary applications, provide confirmatory statements of the rule that is physical attendance of court participants when their attendance is required in the courtroom. The exception to the rule is to appear by video link, when the conditions set out in the applicable article are met. In this case, because the respondent is not consenting to the remote testimony of S1 Miner-Turner, I am precluded from exercising judicial authority to consider granting the order.

[13] I now turn to the applicant's suggestion to use *Criminal Code* provisions as guidance. First, it appears that the applicant is conflating the criteria applicable to his application with those of section 486.1 or section 486.2 of the *Criminal Code*. Section 486.1 provides courts of criminal jurisdiction with authority to issue an order allowing for some witnesses to testify with a support person of their choice by their side, while the authority pursuant to section 486.2 is for issuing an order allowing a witness to testify outside the courtroom, generally in an adjacent room, or behind a screen in the courtroom, in order to allow these witnesses not to see the accused during their testimony. These orders are granted when the judge "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". The purpose of these two regimes is to offer, when they testify, a sense of security and privacy to those witnesses who are particularly vulnerable, such as children, or such as persons with disabilities. It also aims at protecting the dignity of complainants and victims. Both sections list criteria that must be considered when the judge exercise their discretion, and the disability of the witness, if any, is indeed a criterion to consider when deciding whether the order should be granted. Considering the purpose of these two regimes, which is different from the regime allowing a witness to testify remotely, I do not see how *R. v. Giffin*, a decision from the provincial court of Nova Scotia granting an order for the use of a screen and a support person, can be of any assistance when deciding this application. In short, because these provisions of the

Criminal Code are not relevant to the applicant's request for the witness to testify remotely to accommodate his medical condition, I cannot see how the absence of a definition of one the criteria listed in these provisions of the *Criminal Code* provides relevant guidance.

[14] In any event, the equivalent *Criminal Code* provision to article 112.65 may very well be section 714.1. This section provides that:

> A court may order that a witness in Canada give evidence by audioconference or videoconference, if the court is of the opinion that it would be appropriate having regard to all the circumstances.

[15] Having received no submission from the applicant regarding the authority for the Court to apply this section, and having found that, regardless, I have no authority to issue the order, I see no requirement to expand on the topic of section 714.1.

[16] As for the applicant's reliance on Sukstorf M.J.'s approach in *Machtmes*, I disagree that this decision provides a pathway to grant the order in the case at bar. First and foremost, the circumstances of that case were unique and distinguishable. In her decision, Sukstorf M.J. ruled that, based on the ongoing COVID-19 pandemic and the travel bans in effect, the attendance in court in 2021 of the four witnesses living in Australia was problematic in multiple ways. Given the restrictions imposed for international travellers at that time, the four witnesses would have had to travel to Canada and self-quarantine for two weeks before the commencement of the court martial proceedings, assuming they would even be granted permission to enter the country. Similarly, upon their return to Australia, they would have had to self-quarantine for an additional two weeks. Considering that there were two *Criminal Code* offences that were allegedly committed in Australia, including an offence of child luring, and that the court had no means upon which to compel the testimony of the civilian witnesses of Australian nationality, Sukstorf M.J. ruled that there was no reason to deviate from the regime set out within the *Criminal Code* for their remote appearance. In this regard, section 714.2 of the *Criminal Code* made the taking of video evidence mandatory for a witness located outside of the country of the trial. She was of the view that the circumstances related to international travel in the context of the pandemic justified the use of remote testimony, which was considered superior in contrast to the other alternative of an order for commissioned evidence under section 184 of the *NDA*. Thus, she found she could exercise her discretion in favour of the means that best served the accused's interests.

[17] Had the respondent agreed to the application, the application would have been denied, nevertheless. Indeed, each request to testify via video link must necessarily turn on its own facts and circumstances. Thus, I have considered that this sexual assault case turns on the identity of the person who allegedly committed the offence, and on the credibility of the complainant. Not only is the identity of the person who committed the alleged act very much disputed, it constitutes in fact the main legal issue of these trial proceedings. Considering that the witness for whom the application is sought is not the complainant in this sexual assault case, he is a material witness to the prosecution's case

because he is expected to provide evidence identifying MCpl Sutherland as the person who committed the offence. His credibility carries significantly in the balance of the assessment to the prosecution's case.

[18] As for the witness's medical situation and potential hardship stemming from his physical presence in court for his testimony, interestingly no evidence was produced to show that the witness is unable to travel to Halifax or that he is incapable of, or would suffer hardship from, testifying in person in a court martial setting stripped of its physical or visual military qualities. The affiant's statement in this regard does not address these options. It does not even address the impact of providing testimony in court. Ms Ellis only wrote that the witness has MELs pertaining to being unfit to work in a military environment, aggravated by the presence of several persons. I find that the affidavit was unconvincing and contained opinion-based statements. On the latter point, since Ms Ellis has not been qualified as an expert witness, her opinion regarding the witness' medical situation cannot be considered. Regardless, even if both parties had consented, the circumstances of this case do not support allowing the remote testimony of S1 Miner-Turner, particularly when accommodations, such as ordering military participants to appear in civilian attire during the testimony of S1 Miner-Turner, and keeping court staff to a minimum, can be directed.

III. Conclusion

[19] It is difficult to comprehend that an issue of physical attendance for a prosecution witness would come to light late Friday afternoon just prior to the court proceedings commencing first thing the following Monday, and the application being submitted shortly thereafter, more so when the trial was convened almost a year ago and the witness had MELs imposed on him for close to a year. The last minute, foreseeable application has unfortunately caused delays in the proceedings.

[20] In any event, the application must fail because the precondition of consent of both parties for the exercise of judicial discretion is not met. Had both parties consented, the application would have been denied in any event because the applicant had not provided sufficient evidence demonstrating that the witness, whose credibility is relevant, to be incapable or unable to travel to Halifax and to testify in a non-military courtroom setting.

FOR THESE REASONS THE COURT:

[21] **DENIES** the application.

Counsel:

The Director or Military Prosecutions as represented by Major M. Reede and Major A. Orme, Counsel for the Applicant

Mr T. Singleton, Singleton and Associates Barristers and Solicitors, 1809 Barrington Street, Suite 1100, Halifax, NS, Counsel for the Respondent