COURT MARTIAL

Citation: *R. v. Martin*, 2022 CM 5023

Date: 20220330
Docket: 202164

General Court Martial

Canadian Forces Base Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen, Applicant

- and -

Petty Officer, 1st Class J. T. Martin, Respondent

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

APPLICATION FOR VIDEO LINK TESTIMONY

(Orally)

I. Introduction

[1] The accused, Petty Officer, 1st Class Martin, is charged with three offences pertaining to events that allegedly took place while aboard Her Majesty's Canadian Ship (HMCS) *Harry Dewolf*. The first and second charges, laid pursuant to section 129 of the *National Defence Act* (*NDA*), allege conduct to the prejudice of good order and discipline in relation to harassment on the basis of race that would have taken place between 1 January 2020 and 31 March 2021 toward two crewmates of the rank of sailor 2nd class (S2). The third charge, ill-treated a person who by reason of rank was subordinate to him, contrary to section 95 of the *NDA*, alleges that between 1 and 31 March 2021, the accused struck the leg of S2 Brady with his knee.

[2] The trial proceedings commenced on 28 March 2022 in Halifax, Nova Scotia. After the completion of hearings regarding preliminary applications, the prosecution informed the Court on 29 March 2022 that two witnesses were now in a seven-day

isolation period, in compliance with provincial COVID-19 protocols. Following concerns raised by the Court regarding how the prosecution would present its case in the time allocated for the trial, the prosecution submitted an application seeking an order to allow for the testimony of the two witnesses to be delivered using video link, so that they could testify during their isolation without causing delays to the trial proceedings. The defence opposed the application. I must therefore decide whether a court martial has the authority to issue an order allowing the two witnesses to testify remotely using video link when the defence opposes the request.

Facts

[3] In this regard, the applicant informed the Court that the prosecution's case is composed of *viva voce* evidence that would be provided by four witnesses. All four reside in the Halifax region. One of the two witnesses regarding whom the application is sought, S2 Brady, is the alleged victim of the first and third charges. His period of isolation started 29 March 2022. The other witness, S2 (now sailor 1st class, S1) Parsons, is the alleged victim of the second charge. His period of isolation started 28 March 2022, the date of the commencement of these trial proceedings. In addition to these witnesses, the prosecution informed the Court that a third witness may also have to self-isolate for a period of seven days and would most likely have to be included in the order he is seeking.

[4] The video link technology is available in the courtroom, and the alleged victims have access to, and are able to use, the technology required to testify remotely. However, the Court noted that there have been some connectivity issues in the courtroom since the beginning of the court martial proceedings.

II. Whether a court martial has authority to issue an order allowing witnesses to testify remotely using video link when one party opposes the request

Position of the parties

[5] In support of his application, the applicant asked this Court to rely upon its discretionary powers set out at section 179 of the *NDA* to grant the application, contending that a court martial has discretionary power pursuant to this *NDA* section to make the requested order even when the defence does not agree to it. The applicant contended that the wording of article 112.65 of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O), which provides a specific authority to issue the order, is non-exhaustive as it only addresses cases where both parties are consenting to this mode of hearing evidence in court. Relying on the decision granting a similar application, and the approach adopted by Sukstorf M.J. in *R. v. Machtmes*, 2021 CM 2002, the applicant further explained that article 112.65 of the QR&O does not prohibit evidence taken by video link if the military judge determines that it is in the interest of justice to do so despite the opposition of one of the parties. Indeed, section 179 does provide broader authority than that found at article 112.65. The applicant further suggested that this

Court should be guided by the criteria established at section 714.1 of the *Criminal Code* when making the appropriate determination.

[6] The respondent argued that the wording of article 112.65 limits the Court's discretionary powers to order testimony of witnesses remotely because the consent of the accused is required as a pre-condition in every case. He contended that the applicant's interpretation of article 112.65 is equivalent to applying the article as if it were mere Notes to the QR&O, because these Notes have no force and effect in law. He finally submitted that, should section 714.1 of the *Criminal Code* be used as guidance, he intends to produce evidence demonstrating that the credibility and reliability of the two witnesses are the foundation of his defence. Therefore, their presence in court for their testimony is paramount to allow the accused to make full answer and defence.

Evidence

[7] In support of his application, the applicant introduced, on consent, an agreed statement of facts. The Court took judicial notice of the facts and matters covered by section 15 of the *Military Rules of Evidence* (*MRE).* Pursuant to paragraph 16(2)(b) of the *MRE*, the Court took judicial notice of the following facts:

(a) existence of the ongoing worldwide COVID-19 pandemic; and

(b) the required period of isolation in Nova Scotia.

Analysis

[8] Turning to the applicable legal principles, the *NDA* contains no specific authority for a court martial to allow a witness to testify remotely. However, article 112.65 of the QR&O addresses the authority for a court martial to order a witness to testify in a location other than the courtroom:

> (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.]

[9] This article is unambiguous; both parties are required to acquiesce to this means of collecting evidence prior to the judge deciding whether to exercise his or her discretion to issue an order to this effect. In other words, consent of both parties is a precondition to the exercise of judicial authority to decide whether to issue the order. In this case, it is undisputed that because the defence objected to the witnesses testifying remotely, I have no authority to issue an order pursuant to article 112.65.

[10] Turning to the applicant's suggestion that the Court use the powers set out in the *NDA*, I have examined the wording of section 179 which does confer courts martial with the authority to exercise the same powers vested in a superior court of criminal jurisdiction for the due exercise of its 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;
>
> (c) the enforcement of its orders; and
>
> (d) all other matters necessary or proper for the due exercise of its jurisdiction.

[11] Section 179 has often been argued by counsel as a catch-all provision to provide authority when the law applicable within the military justice system is silent on judicial powers and authority exercised by other courts pursuant to the *Criminal Code*. However, it is not simply so. Section 179 does not provide an at-large, by default, judicial authority to military judges when there is a void or ambiguity in the *NDA* or in the QR&O. In *R. v. Barrieault*, 2019 CM 2013, Sukstorf M.J. wrote, regarding section 179, that:

> [21] The exercise of inherent jurisdiction is a special and extraordinary power to be exercised only sparingly and in the clearest of cases and where it is required to maintain the authority and integrity of the court process. To put it simply, a military judge must exercise its power set out in section 179 in such a way that it does not contravene a statutory provision and the court cannot use section 179 as an end run around existing legislation.

[12] I would add that the words found at paragraph (d), "all other matters necessary or proper for the due exercise of its jurisdiction", clearly show parliament's intent to limit the exercise of these powers only when it is imperative. Indeed, by its very nature as a statutory court, the powers and authority of a court martial are limited to those that are specifically provided for in the *NDA* and the QR&O.

[13] In sum, the general powers set out at section 179 of the *NDA* do not constitute a by-default authority when there is a void in the law, and these powers cannot be used if doing so would contravene another legislative provision.

[14] Additionally, both section 179 of the *NDA* and article 112.65 of the QR&O should be read in the context of the legislation and regulations in which they are incorporated, and in the context of the justice system within which they operate, which aims at enforcing discipline. Embedded in the *NDA*, the Code of Service Discipline is meant to achieve discipline, esprit de corps, and morale within the Canadian Armed Forces. Being mindful of this principle when reading article 112.65 in the context of the

legislation and regulations in which they are incorporated, article 112.64 proves to be a good example. This article imposes similar conditions of application of article 112.65, but for preliminary proceedings. This article provides:

> (1) Where the prosecutor and the accused person agree, and the judge so orders, the accused, the prosecutor or the judge may appear at preliminary proceedings by any means that allow the judge, the prosecutor and the accused to engage in simultaneous visual and oral communication.
>
> (2) Paragraph (1) does not apply in respect of an accused person's plea of guilty at preliminary proceedings.

[15] Articles 112.64 and 112.65 implicitly recognise the general rule that court martial participants, including the accused even when pleading guilty, are required to be physically present during court proceedings. I am of the view that it is because the physical presence at trial proceedings assists the Court in enforcing discipline more effectively. This is one of the reasons restrictive conditions may have been imposed by the regulations before the judge can decide to exercise their discretion in deciding to grant the exceptional measure of remote appearance.

[16] In a nutshell, I reject the applicant's suggestions that article 112.65 does not apply when one of the parties does not consent to the order, and that the Court retains discretionary power pursuant to section 179 of the *NDA* to make the requested order when the defence does not agree to it. In addition to the reasons expressed above, the applicant's contention would inevitably lead to the conclusion that courts martial have discretionary authority to refuse to apply an article of the QR&O under the guise of the powers of section 179 of the *NDA* when it is more convenient to do so.

[17] 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 in-person attendance in court in 2021 of the four witnesses living in Australia was problematic on a number of levels. 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 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 Court. 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, in the context of these exceptional circumstances,

the presiding judge found she could exercise her discretion in favour of the means that best served the accused's interests.

[18] In addition to the very distinguishable factual circumstances and legal issues of the case of *Machtmes,* Sukstorf M.J. clearly stated in her decision that her approach could be applied when in presence of special circumstances. Her decision was not meant to reverse the rule of physical presence in Court every time counsel face hurdles to ensure the physical presence of their witnesses in court.

[19] On a side note, even if both parties had agreed for the witnesses to testify remotely, giving me authority to consider the request in such a scenario, I would have nevertheless denied the application. Indeed, each request to testify via video link must necessarily turn on its own facts and circumstances. Considering the specific circumstances of this case, the video link technology is available in the courtroom, but there have been connectivity issues from the outset, offering sporadic access to the videoconference functions to connect remotely with witnesses. Although I was informed that it has improved, there is no guarantee that it would be functioning adequately. More importantly, I note that there are a total of four witnesses in support of the applicant's case. At least two of them, possibly three, are required to self-isolate for a period of seven days starting on 28 March 2022 for one, and on 29 March 2022 for the other. Two of the three witnesses are the alleged victims. If the order was to be granted, it would translate into only one witness for the prosecution testifying in Court on collateral issues, leaving most of the evidence of the prosecution, composed of the material witnesses, to be heard remotely. Ultimately, most of the case for the prosecution before a panel at a general court martial for service offences would be delivered virtually, countering the spirit of the Code of Service Discipline which provides as a rule the physical presence of participants for courts martial proceedings.

[20] Lastly, the charges pertain to service offences: two offences of conduct to the prejudice of good order and discipline, and of one offence of abuse of subordinate. Therefore, contrary to the applicant's claim, section 714.1 of the *Criminal Code*, along with the jurisprudence pertinent to its application, is of little assistance.

[21] In sum, the applicant has failed to demonstrate that I have authority to issue an order for the remote appearance of the prosecution's witnesses when the defence does not consent, and neither the *NDA* nor the QR&O provides the level of discretion for such order when one party refuses to have a witness appear by video link.

III. Conclusion

[22] 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, I would have denied the application because the virtual presentation of most of the prosecution's case before a panel at a general court martial for service offences counters the spirit of the Code of Service Discipline.

FOR THESE REASONS, THE COURT:

[23] **DENIES** the applicant's motion.

Counsel:

The Director of Military Prosecutions as represented by Major G. J. Moorehead and Lieutenant-Commander H. E. Burchill, Counsel for the Applicant

Major É. Carrier, Defence Counsel Services, Counsel for Petty Officer, 1st Class J.T. Martin, Accused and Respondent