



COURT MARTIAL

Citation: *R. v. Lawless*, 2024 CM 3004

Date: 20240312

Docket: 202313

Standing Court Martial

4th Canadian Support Division, Garrison Petawawa
Petawawa, Ontario, Canada

Between:

His Majesty the King, Applicant

- and -

Corporal T. Lawless, Respondent

Before: Lieutenant-Colonel L.-V. d'Auteuil, A.C.M.J.

REASONS ON AN APPLICATION MADE BY THE PROSECUTION FOR THE ADMISSIBILITY OF AN UNOFFICIAL CONFESSION

(Orally)

[1] Corporal (Cpl) Lawless is charged with one offence for having fought, on or about 24 November 2022, with a person subject to the Code of Service Discipline, namely Private (Pte) Lirette, while being in the shacks at Garrison Petawawa, contrary to section 86 of the *National Defence Act*.

[2] This preliminary motion was brought on 11 March 2024 by the prosecution during the examination-in-chief of Cpl Poste, a military police (MP) who investigated the matter involving the accused. It was put to the Court as a question of mixed law and fact to be determined by the military judge presiding at this Standing Court Martial. More specifically, the prosecution is requesting from the military judge to make a determination about the admissibility of an unofficial statement made by Cpl Lawless during an interview conducted by Cpl Poste in the context of investigation he was making, further to a call received on the evening of 24 November 2022 at the MP

detachment at Garrison Petawawa. The hearing for this application took place on 11 March 2024.

[3] The evidence for the application, heard in a *voir dire* that I opened, consisted of:

- (a) the testimony of Cpl Poste;
- (b) the testimony of Cpl Lawless; and
- (c) the judicial notice taken by the Court of the facts and matters listed and contained in article 15 of the *Military Rules of Evidence (MRE)*.

[4] The statements of an accused have two aspects, as is the case with most of the evidence submitted by the prosecution: admissibility under the rules of evidence and exclusion under the *Charter*. These two aspects are often confused with each other. The burden of establishing admissibility is on the prosecution. The burden of establishing that admissible evidence should be excluded is on the defence.

[5] To establish the admissibility of the statement of an accused to a person in authority, the prosecution must demonstrate, beyond a reasonable doubt that it was made voluntarily. To have an admissible statement excluded, the defence must prove on a balance of probabilities, first, that it was obtained in violation of a *Charter*'s right and, second, that its admissibility would bring the administration of justice into disrepute.

[6] If it is true that these are two different issues, in terms of both the evidentiary and the persuasive burden, and if this is kept in mind, much confusion will be avoided. For the purposes of the present *voir dire*, I will deal solely with the admissibility of the oral statement made by Cpl Lawless to Cpl Poste on 24 November 2022.

[7] As explained by Hugessen J. of the Court Martial Appeal Court in *R. v. Laflamme*, 5 CMAR 145, the *MRE* were adopted by the Governor in Council and must be applied in a court martial because they have force of law.

[8] However, in my opinion, if there is a rule of evidence on the same principle and it is more favourable to the accused, the Court must consider using that rule.

[9] The essence of section 42 of the *MRE* is the same as that of the common law rule defined by the Supreme Court of Canada (SCC) in *R. v. Oickle*, 2000 SCC 38. However, this decision lists few factors that are not currently contained in section 42 of the *MRE*, such as the operating mind requirement and police trickery. The situation at bar requires the Court to apply the factors outlined in *Oickle*, as they reflect the most favourable situation to the accused when considering the admissibility of an unofficial confession.

[10] *Oickle* holds that for most statements made to a person in authority to be admissible, the prosecution must establish beyond a reasonable doubt, in light of all of

the circumstances, that the will of the accused has not been overborne by things such as inducements, oppressive circumstances, or the lack of an operating mind. In addition, there must not be police trickery that unfairly denies the accused his right to silence.

[11] It is important to remember that no statement by an accused to a person in authority is admissible as an integral part of the evidence filed by the prosecution or for the purpose of cross-examining the accused unless the voluntariness of the statement is demonstrated beyond a reasonable doubt.

[12] A statement is voluntary only if it was not made under the influence of fear of prejudice or hope of advantage induced by promises held out by a person in authority and if it was made by an operating mind. This rule is founded on the desire to prevent convictions based on confessions of questionable reliability, and to dissuade any coercive tactics by the State.

[13] When applying the common law confessions rule, one must be mindful of its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes, as stated by Iacobucci J. on behalf of the majority at paragraph 33 in *Oickle*.

[14] The voluntariness of a statement is determined almost entirely by context. Because of the variety and the complex interplay of circumstances that can vitiate voluntariness, assessing whether a statement is voluntary is governed by guidelines rather than by rules. The judge must consider all of the circumstances surrounding the statement and ask whether they raise a reasonable doubt as to its voluntariness. As stated in *Oickle* at paragraphs 47 to 71, the relevant factors the judge must consider include the following:

- (a) threats or promises;
- (b) oppression;
- (c) operating mind; and
- (d) other police trickery.

[15] In the present *voir dire*, counsel for the prosecution does not contest that the accused made his statement to a person in authority. A person in authority is any person whom the accused reasonably believes to be acting on behalf of the State and to be able to influence the course of the investigation or trial. This definition contains both objective and subjective aspects. It usually applies to persons involved in the arrest, detention, examination, or prosecution of the accused. They hold conventional positions of authority, working as uniformed police officers and prison guards, for example, and are persons in authority simply because of their status. In the present case, Cpl Lawless was interrogated by a MP as part of an investigation. A *voir dire* is therefore clearly

required in this case, and the accused did not waive his right to a *voir dire*. On the contrary, he explicitly requested it through his counsel.

[16] At this stage, it would be appropriate for me to provide a summary of the circumstances relevant to this matter.

[17] On 24 November 2022, Cpl Poste, who is a MP on patrol on Garrison Petawawa, arrived at building P-102 with his colleague, Cpl Giacomelli, at 11:25 p.m. He was sent to that location further to a call made by a paramedic from Renfrew County Ambulance who was dispatched to that location earlier following a call reporting that somebody was injured.

[18] Cpl Poste met with Gunner (Gnr) Kuly and Bombardier (Bdr) Radford. He learned that the latter called the ambulance services, considering that they both found someone with a serious head injury further to, what seemed to be, a fight with another military member.

[19] About ten minutes after he arrived on the scene, Cpl Poste went inside building P-102 with Cpl MacInnes to meet with Cpl Lawless, as it seems that the latter was part of the alleged fight which took place with the person seriously injured.

[20] While in the hallway, Cpl Poste met with Cpl Lawless at the door of his room, with Cpl MacInnes. Cpl Poste did not identify himself or Cpl MacInnes, as they were dressed in their MP operational patrol full-dress uniform, and he was wearing his vest. Cpl Lawless confirmed that he recognized Cpl Poste as being a MP.

[21] Cpl Poste read him a caution in these terms: before you say anything relating to any charge, which has been or may be preferred against you, you are advised that you are not obliged to say anything, but anything you say may be taken down in writing or recorded by other means, or both, and may be used as evidence. Do you fully understand this warning? Cpl Lawless responded with a yes at 11:45 p.m.

[22] According to Cpl Poste, in simpler words, the caution means that you do not have to talk to the Military Police, but if you do, it will be used as evidence. He read a caution to Cpl Lawless to let him know that he was a subject for the investigation and that anything he said could be used as evidence.

[23] According to Cpl Poste, Cpl Lawless seemed intoxicated, he had slurred speech and seemed unsteady on his feet. Cpl Lawless admitted that he had consumed alcohol, and he testified to the same during his testimony before the Court. However, he did not seem confused, he was coherent and understandable the entire time he was questioned, according to Cpl Poste.

[24] Cpl Poste did not make any threat or promises, and neither did Cpl MacInnes. In fact, Cpl Lawless confirmed that he interacted only with Cpl Poste, as Cpl MacInnes did not ask him any question during the interview in the hallway.

[25] Cpl Poste asked Cpl Lawless what happened on that evening. Cpl Lawless explained that he was playing a game of Dungeons and Dragons with Cpl Lirette, and that they were drinking while doing so. The game became heated, and as they are practising a Viking or pagan religion, they settled their differences through fighting.

[26] Cpl Poste asked Cpl Lawless why Cpl Lirette had significantly more injuries than he did, to which Cpl Lawless answered that somebody had to win the fight.

[27] Cpl Lawless confirmed that he remembers the interview he had with Cpl Poste on the night of 24 November 2022. He said that he was very intoxicated on that night. He understood that Cpl Poste was a member of the military police. His memory of that night is not very clear, but he does remember that Cpl Poste made it very clear that he had to speak with him. Because Cpl Lawless was removed from the situation and was told to speak by Cpl Poste who was in uniform, he felt that he had the obligation to speak to Cpl Poste about what happened.

[28] Cpl Lawless told the Court that things were very fuzzy that night because he was drunk, but he remembered that he was told to make a statement and that it could be used as evidence. However, he told the Court that it was not clear to him that his statement could be used to his detriment. It is once he talked to a lawyer further to his arrest and being brought to the MP detachment that he fully understood that any statement he would make to the MP could be used to his own detriment.

[29] However, he told the Court during his cross-examination that he was not told explicitly by Cpl Poste that he had to speak to him about what happened because he is an MP. Considering that he was drunk, he mentioned that while questions were being asked by Cpl Poste, he felt that things were going very fast.

[30] Cpl Lawless confirmed that he was asked by Cpl Poste what transpired, how Cpl Lirette injured his head, what amount of alcohol was consumed, and how the broken glass ended up all over the floor. He answered the questions asked in the manner reported to the Court by Cpl Poste.

[31] I will go now through the four factors previously identified to determine the voluntariness of the statement made by Cpl Lawless to Cpl Poste on 24 November 2022.

[32] I am satisfied that the prosecution proved beyond a reasonable doubt that there was no threat or promises made to Cpl Lawless for obtaining the unofficial confession he made. In fact, Cpl Lawless admitted that there was no such thing done, and the evidence adduced by the prosecution confirmed it to the Court.

[33] I am also satisfied that the prosecution proved beyond a reasonable doubt that there was no oppressive conditions or context arising from the circumstances that put Cpl Lawless in a situation where he made an involuntary statement. He was not

deprived of anything, he was not questioned aggressively for a prolonged period of time, and he was not confronted with fabricated or inadmissible evidence.

[34] I am satisfied that the prosecution proved beyond a reasonable doubt that there was no police trickery. Police trickery has two aspects, making it a distinct inquiry. Along with the first three factors above, it can leave a reasonable doubt as to voluntariness on its own or in combination with other circumstances. Because it also has a more specific objective of maintaining the integrity of the criminal justice system, police trickery can also lead to its exclusion without violating the right to silence nor undermining voluntariness if it is so appalling as to shock the community. In this *voir dire*, there is no such thing that was put as evidence. I did not see, and it was not suggested at all, that there was a presence of police trickery.

[35] Lastly, Cpl Lawless' counsel suggested that the prosecution failed to prove beyond a reasonable doubt, that Cpl Lawless had an operating mind at the time he made his statement.

[36] The "operating mind" is a limited mental component of sufficient cognitive capacity to understand what one is saying, what is being asked and the fact that the statement may be used to one's detriment. Analytical ability is not necessary.

[37] There is a distinction between the ability to understand the content of a statement and the fact that it may be used against one, on the one hand, and a compulsion to make a statement and a lack of caring about the consequences, on the other. Lack of that ability indicates the absence of an operating mind and goes to admissibility. Compulsion and lack of caring about the consequences merely go to weight. The onus of establishing mental capacity is on the prosecution. If there is a reasonable doubt that statements were not the result of an operating mind, they must be excluded. Intoxication, to require exclusion, must be to the extent that the accused was devoid of rationality and understanding so that the statements were not his words.

[38] The evidence indicates that Cpl Lawless was intoxicated, but not to the extent that he was devoid of rationality and understanding. Cpl Lawless confirmed that he understood the caution formulated by Cpl Poste and the meaning of it, including that what he could say may be used as evidence. The fact that, from his perspective, he felt obliged to say something and he might have not appreciated all the circumstances are matters that go to the weight to be given to this evidence by the trier of facts. He understood what was said to him by Cpl Poste, what he was being asked, and that his statement could be used to his own detriment.

[39] Consequently, I am satisfied that the prosecution discharged its onus to prove that Cpl Lawless had an operating mind at the time he made his statement.

FOR ALL THESE REASONS, THE COURT:

[40] **DECLARES** that Cpl Lawless' oral statement made to Cpl Poste on 24 November 2022 is voluntary and admissible in this trial.

Counsel:

Lieutenant-Commander J. Benhaim and Major B. Richard, Military Prosecution Services, counsel for the Applicant

Lieutenant-Commander F. Gonsalves, Directorate of Defence counsel services, counsel for Corporal T. Lawless, the Respondent