COURT MARTIAL

Citation: *R v MacLellan,* 2011 CM 3004

Date: 20110520
Docket: 201067

General Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Captain J. C. MacLellan, Accused

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

REASONS ON APPLICATION MADE BY THE ACCUSED FOR THE ADMISSIBILITY OF UNOFFICIAL CONFESSION

(Orally)

[1] Captain MacLellan is charged with three offences punishable under section 85 of the *National Defence Act* for having used insulting language to a superior officer. Essentially, it is alleged that he used insulting words at three different times while having a single heated verbal exchange with his Commanding Officer, Lieutenant-Colonel Lewis, on 24 July 2010 at the gliding school in Debert, Nova Scotia.

[2] At the opening of this trial by General Court Martial on 4 April 2011, prior to plea and after the oaths were taken, the prosecutor, in accordance with section 191 of the *National Defence Act* (*NDA*), wanted the military judge presiding at this court martial to hear and determine, in the absence of the members of the court martial panel, about the admissibility of a written unofficial statement made by the accused signed on 10 September 2010.

[3] The preliminary motion is brought by way of an application made under Queen's Regulations and Orders (QR&O) sub-subparagraph 112.05(5)(*e*) and article 112.07 as a question of law or mixed law and fact to be determined by the military judge presiding at this General Court Martial. The hearing for this matter was held from 4 to 6 April 2011.

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

a. The testimonies heard, in the order of their appearance before the court, of Lieutenant-Commander Carberry and Major Kavanagh;

b. Exhibit VD1-1, a copy of a caution statement form signed by Captain MacLellan on 2 September 2010;

c. Exhibit VD1-2, a copy of an email sent by Kevin Macdonald to Lieutenant-Commander Carberry dated 8 September 2010 providing an attached statement made by Captain MacLellan;

d. Exhibit VD1-3, an unsigned statement of events of 24 July 2010 made by Captain MacLellan;

e. Exhibit VD1-4, a statement form for suspect and witness signed by Captain MacLellan on 10 September 2010 and a statement of events of 24 July 2010 signed on 10 September 2010 by Captain MacLellan;

f. Exhibit VD1-5, a copy of a situational assessment letter made and signed by Major Kavanagh on 31 August 2010, a copy of a two-page harassment complaint made by Lieutenant-Colonel Lewis on 17 August 2010, and 3 written statements made by Captain MacRae, Captain Hubley, and Mr Samson;

g. The judicial notice taken by the court of the facts and issues under Rule 15 of the Military Rules of Evidence.

[5] There can be two issues with statements by the accused, as with almost every piece of the prosecution's evidence: admissibility and exclusion under the *Charter*. They are often confused. The prosecution has the onus of establishing admissibility. The defence has the onus of establishing that admissible evidence ought to be excluded. To establish admissibility of an accused's statement to a person in authority, the prosecution must prove voluntariness beyond a reasonable doubt. To have an admissible statement excluded, the defence must prove on the balance of probabilities: first that it was obtained with infringement of a *Charter*'s right, and second, that its admission could bring the administration of justice into disrepute.

[6] If the fact that these are two separate issues, differing in both onus and burden of proof, is kept in mind, considerable confusion will be avoided. Here, in this *voir dire*, I am dealing only with the issue of admissibility under the common law rule, the one concerning

the *Charter* not being raised by the accused in this *voir dire* or through the usual notice of application required in such case.

[7] It is essential to remember that no confession by an accused to a person in authority is admissible as part of the prosecution's case, or in cross-examination of the accused, unless it is proved beyond a reasonable doubt to have been voluntary. Put differently, as said by the Supreme Court of Canada in *Oickle*[1]:

> ... First of all, because of the criminal justice system's overriding concern not to convict the innocent, a confession will not be admissible if it is made under circumstances that raise a reasonable doubt as to voluntariness....

[8] Voluntariness requires that the statement, first, was not obtained by fear of prejudice or hopes of advantage held out by a person in authority, and second, was the product of an operating mind. The basis for such rule are to avoid convictions based on confessions that might be unreliable and deter coercive tactics by the state.

[9] In applying the confessions rule it is important to keep in mind its twin goals of protecting the rights of the accused without unduly limiting society's need to investigate and solve crimes, as stated by Justice Iacobucci for the majority in *Oickle*[2].

[10] Whether a statement was voluntary is almost completely contextual. Because of the variety and complicated interaction of circumstances that can vitiate voluntariness, the inquiry is governed more by guidelines than by rules. The judge should consider the entire circumstances surrounding the statement and ask if it gives rise to a reasonable doubt as to voluntariness. Again, as said in *Oickle*[3]:

> ... Trial judges must be alert to the entire circumstances surrounding a confession in making this decision.

[11] As articulated in the decision of *Oickle*[4], relevant factors for the trial judge analysis for the admissibility of a confession made by the accused include:

a. Threats or promises;

b. Oppression;

c. The operating mind requirement; and

d. Police trickery.

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

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[1] *R* v *Oickle* SCC 38 at para 68
[2] Id. para 33
[3] Id. para 68
[4] Id. para 41 to 71

[13] On the morning of 24 July 2010, on Debert Airfield, Lieutenant-Colonel Lewis, the Regional Gliding School (Atlantic) Commanding Officer, was trying to get a hold of his Flight Safety Officer, Captain MacLellan. He wanted the latter to sign some candidates' pilot permits in order to allow them to fly solo that morning. Among many things he had done to contact him, the CO sent an email asking the accused where he was. However, for some reason, he put carbon copy (cc) the Regional Cadets Support Unit (Atlantic) CO and XO on that email.

[14] Around noon, the RGS (A) CO finally found Captain MacLellan near the trailers on the airfield. He went out of his car, and both individuals started quickly to have a very heated argument concerning the CO's email and Captain MacLellan alleged absence from the airfield. Both individuals talked to each other in a loudly manner in front of officers, parents, and some cadets. Then, Lieutenant-Colonel Lewis left and got in his car.

[15] Further to that event, the CO informed on the same day, by email, Lieutenant-Commander Carberry about the exchange that had just occurred with Captain MacLellan and commented about how he felt. In response, he was told by the XO to take some time to thing about what he wanted to do before doing anything else.

[16] The day after, on 25 July 2010, RGS (A) CO put in an email an account of what happen from his perspective and requested Lieutenant-Commander Carberry to look at the incident in order to see if some action should be taken, considering it could be considered as some sort of insubordination behaviour from Captain MacLellan. He also informed the XO that he had started to secure written statements of people who witnessed the incident.

[17] Lieutenant-Commander Carberry replied by email that he will look into the incident, that RGS (A) CO must stay out of the investigative process, meaning by this that he will make sure that written statements are secured but that he has no involvement in the taking of them.

[18] On 26 July 2010, Captain MacLellan went to Lieutenant-Commander Carberry's office, on his own initiative, to inform and discuss what was going on at RGS (A) between the CO and his staff and also to provide his view about the heated verbal exchange he was involved in with Lieutenant-Colonel Lewis on the 24 July.

[19] The XO listened to Captain MacLellan but clearly stated to him that he did not want to hear from him at that time about what happened on 24 July with Lieutenant-Colonel Lewis because he was investigating the matter. So, a discussion took place between them but nothing was said about the incident of 24 July. The conversation lasted about three to four minutes.

[20] At the end of the month of July or at the beginning of the month of August 2010, after he gathered witnesses' testimony and put his mind on the issue, Lieutenant-Commander Carberry made an informal assessment of the facts and concluded, at that time, that the situation had to be addressed from an administrative perspective only

because he did not see at that time any evidence supporting the laying of any charge. He then left for his three weeks vacation.

[21] This approach seemed to not please Lieutenant-Colonel Lewis, and on 17 August 2010, in accordance with Defence Administrative Orders and Directives (DAOD) chapter 5012-0, Harassment Prevention and Resolution, he transmitted his formal complaint by email to Commander Reddy. In this complaint, Lieutenant-Colonel Lewis reiterated what he said in his initial email he sent to Lieutenant-Commander Carberry about the 24 July incident, relaying on the exact same evidence.

[22] A situational assessment was conducted by the administrative officer, Major Kavanagh, as the official advisor to the RCSU (A) Commanding Officer on this matter. Major Kavanagh discussed the matter with some people at the superior chain of command level, reviewed the facts and came to the conclusion, in accordance with the harassment policy, that a disciplinary investigation must be conducted prior to proceeding with any administrative investigation. He provided his conclusion on that subject to Commander Reddy through a letter dated 31 August 2010, Exhibit VD1-5.

[23] At the end of the month of August 2010, while he just came back form three weeks leave, Lieutenant-Commander Carberry was ordered by Commander Reddy to proceed with a formal disciplinary investigation concerning this incident that occurred on 24 July 2010 between Lieutenant-Colonel Lewis and Captain MacLellan.

[24] Lieutenant-Commander Carberry considered that he was then at the last step of his investigation for gathering evidence on that matter and he decided to meet Captain MacLellan as a suspect. In the afternoon of 2 September 2010, he asked Major Kavanagh to get Captain MacLellan and bring him in his office. In presence of Major Kavanagh, Lieutenant-Commander Carberry conducted a formal interview with Captain MacLellan in his office. He assumed that Captain MacLellan knew that he was investigating the 24 July 2010 incident. He legally cautioned Captain MacLellan and had him fill and sign a caution statement form to that effect, Exhibit VD1-1.

[25] After being cautioned, Lieutenant-Commander Carberry and Captain MacLellan discussed the incident. The interview lasted about 15 to 20 minutes. Further to that, Captain MacLellan was asked by Lieutenant-Commander Carberry if he wanted to provide a written statement. He showed interest in doing so. He was provided with a pen and paper. He had some hesitation and some time later, asked Lieutenant-Commander Carberry if he could provide one later, after having consulted his lawyer. LCdr Carberry agreed to that request.

[26] According to Major Kavanagh, who attended the entire interview, no threats or promises were made by Lieutenant-Commander Carberry to Captain MacLellan during the interview. He also confirmed that Captain MacLellan was never said, during the overall interview, that he could leave the office at any time he wished. Lieutenant-Commander Carberry took some notes about this interview but Major Kavanagh didn't. The interview was not videotaped or audiotaped.

[27] On his return from the long weekend on the first week of September, on 7 September 2010, Lieutenant-Commander Carberry inquired to Captain MacLellan about his intent to provide a written statement. The latter said that he had to talk to his lawyer and that it still was his intent to provide one. On 8 September 2010, Lieutenant-Commander Carberry received by email from Captain MacLellan's lawyer his typed but unsigned statement, Exhibits VD1-2 and VD1-3.

[28] On 10 September 2010, Lieutenant-Commander Carberry had Captain MacLellan sign his statement before Major Kavanagh and him, Exhibit VD1-4. No threats or promises were made by Lieutenant-Commander Carberry to Captain MacLellan in order to have him sign his statement. Neither of Lieutenant-Commander Carberry or Major Kavanagh reviewed Captain MacLellan's written statement in order to compare it with what he said during his 2 September 2010 interview. However, during the cross-examination, Lieutenant-Commander Carberry confirmed that the written statement made by Captain MacLellan did not reflect all what was said by Captain MacLellan on 2 September 2010, especially the nature of the words he pronounced at the time of the incident with Lieutenant-Colonel Lewis.

[29] This review of the circumstances, disclosed by the evidence heard during this *voir dire*, established clearly that only one unofficial confession was made by Captain MacLellan and that he provided eight days later, a signed copy of his unofficial written statement concerning the same confession he made earlier on 2 September 2010.

[30] A person in authority is anyone whom the accused reasonably believes is acting on behalf of the state and could therefore influence the course of the investigation or prosecution. This definition contains both objective and subjective components. It typically applies to those formally engaged in the arrest, detention, examination or prosecution of the accused. Those in conventional authority positions, such as uniformed police officers and prison guards, are persons in authority simply by reason of their status.

[31] Lieutenant-Commander Carberry was by the effect of his rank, cumulated with the fact that he clearly enunciated to Captain MacLellan that he previously talked to him on 26 July 2010 as a person in authority about the incident while he cautioned him, and also by simply cautioning him, a person in authority toward Captain MacLellan concerning the interview he was conducting on 2 September 2010. It is clear, on a balance of probabilities, that the *voir dire* was required and these circumstances. Additionally, the accused did not waive his right to a *voir dire*. To the contrary, he requested one by taking issue with voluntariness concerning the written statement he made.

[32] Before proceeding with the factors' analysis in order to determine voluntariness of Captain MacLellan' written statement, I still concern by the fact that maybe all the circumstances were not put before the court in order for me to make a decision on that issue.

[33] The prosecution is obliged to give sufficient details of the circumstances surrounding the taking of the statement and the actual taking of the statement itself to satisfy the trial judge beyond a reasonable doubt that it was voluntarily made. Inherent in such an approach is that the court must have evidence before it on the statement *voir dire* that provides a sufficient record of what was said by whom, where, when, and in what context. The court may then assess the likelihood of inducements, threats, or coercive behaviour that may constitute an inducement, and finding an absence of same, may conclude that the prosecution has proved voluntariness beyond a reasonable doubt[5].

[34] It is true that the court knows enough about the circumstances surrounding the actual taking of the statement on 2 September 2010. It knows what happened previously on 26 July 2010 with Lieutenant-Commander Carberry, how and when Captain MacLellan was brought to Lieutenant-Commander Carberry' office on 2 September 2010, the manner he was invited to provide a written statement, and all the circumstances after that very moment in which it resulted in having Captain MacLellan sign his written statement on 10 September 2010. What has not been put before the court is what happened during the interview itself.

[35] Considering that the 2 September 2010 interview was not audio or video recorded, the only way for the court to know about the circumstances of the interview itself that lasted about 15 to 20 minutes, was to hear from Lieutenant-Commander Carberry and Major Kavanagh about what items were discussed, how it was done, by who, and especially in what context. These 20 minutes appear to be essential for the court in order to assess the likelihood of threats or promises, oppression, trickery, and the existence of Captain MacLellan's operating mind in regard of the written statement he provided later.

[36] From the evidence adduced by the prosecution, the court knows that it can not fully relied on Captain MacLellan's written statement to find out about those circumstances because it has been established by the defence counsel, through his cross-examination of both witnesses, that it does not reflect accurately what was said on 2 September 2010 by Captain MacLellan during his interview and that both witnesses did not review the written statement in that fashion. In fact, such thing as the insulting words pronounced by Captain MacLellan toward Lieutenant-Colonel Lewis during the incident are not contained in the written statement, while Lieutenant-Commander Carberry indicated to the court that he put them in his notes at the time or just after the interview. In fact, the substance of what was said during the interview was never introduced as evidence during the hearing, other than the fact that there is notes about that, and that from Major Kavanagh perspective, no threats, promises, or offers were made to Captain MacLellan during it.

[37] In the absence of those essential details that allow the court to assess the circumstances and help it to understand better what led Captain MacLellan to provide, after the interview, a written statement, it is difficult for the court to asses properly if there is an absence of any inducements, threats, or coercive behaviour in order for it to

[5] See MacFarlane, Fater & Proulx, *McWilliam's Canadian Criminal Evidence*, at chapter 8.30.10

conclude that the prosecution has proved voluntariness beyond a reasonable doubt concerning the substance and the provision of a written statement by Captain MacLellan.

[38] Here, the issue is not about the accuracy of what was put in Captain MacLellan's written statement in comparison to what he said during the interview, which is a matter of weight to be determined further by the trier of facts. It concerns the fact to give sufficient details of the circumstances of the actual taking of the statement that would allow the court to determine voluntariness issue concerning the written statement.

[39] Considering the absence of those details, the court is not satisfied that the Prosecution has proved beyond a reasonable doubt that Captain MacLellan's written statement signed on 10 September 2010 was voluntarily made.

FOR THESE REASONS, THE COURT:

[40] Finds that Captain MacLellan's written statement signed on 10 September 2010 is not admissible in this trial.

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