Citation: R. v. Corporal M.A. Wilcox, 2009 CM 2022

Docket: 200849

GENERAL COURT MARTIAL
CANADA
NOVA SCOTIA
VICTORIA PARK, SYDNEY

Date: 25 June 2009

PRESIDING: COMMANDER P.J. LAMONT, M.J.

HER MAJESTY THE QUEEN
v.
CORPORAL M.A. WILCOX
(Accused)

RULING REGARDING ADMISSIBILITY OF EVIDENCE
(Rendered orally)

[1] This ruling is made at the conclusion of *voir dire* proceedings launched at the request of the prosecution to determine the admissibility of a series of oral statements attributed to the accused by members of his unit. Some statements are alleged to have been made immediately upon hearing a gunshot from inside a tent occupied by the accused and the deceased at the Kandahar Airfield, Afghanistan, on the date alleged in the charge sheet. Other statements are said to have been made over a period extending from within a few days of the death to many months later.

[2] In the course of proceedings the scope of the *voir dire* expanded as the prosecution led evidence of other incidents involving the accused that were said to be admissible on grounds including that the behaviour constituted evidence of similar facts.

[3] As well, the defence argued that the opinion evidence of a nurse given in the course of the *voir dire* should not be permitted to be led before the panel.

[4] It goes without saying that the conclusions of fact that I have reached on these *voir dire* proceedings are limited to those matters that are strictly necessary to deal with the issues raised before me, as it is the panel of this court that will ultimately determine the facts of the case.

[5] The issues for consideration engage several provisions of the Military Rules of Evidence (MRE) in Divisions IV, V, and VI, as well as the rules of evidence that apply in criminal proceedings in Canada. The relevant MREs are 20 and 22, evidence of similar facts; 30, spontaneous words in emergency situations; 39 and 40, official confession; 41 and 42, unofficial confession; and 49, statements not treated as confessions.

[6] In addition to this, the prosecution submits that some statements are admissible on the basis that they constitute admissions by the accused against his own interest. In my view, the argument that statements might be admitted in this case under common law rules of evidence, such as, admissions against interest, cannot succeed.

[7] MRE 26(1) provides that:

> "26.(1) Except as provided in this Division, Division VI and Division VII, an extra-judicial statement is not admissible."

[8] Arguably, the expansive language of this MRE might even exclude extra-judicial statements that are not offered for a hearsay purpose. The point was not argued before me and I have proceeded on the basis that the purpose for which a statement is adduced does not matter. A specific rule must permit the statement in question before it can be admitted in evidence. Thus, the prosecution must satisfy the court that a proffered extra-judicial statement is admissible under one or more provisions of the MREs before the statement can be admitted. It follows also that where a statement is inadmissible under the MREs it cannot be led in evidence before the panel of this court.

[9] With respect to statements. The statements in issue fall into two broad groups: The first group are statements or utterances attributed to the accused immediately or very shortly after the witnesses heard a gunshot from the tent occupied by the accused and the deceased. I refer to the evidence of Corporal Andrews, Sergeant Joyce, Sergeant Aston, Master Corporal McKay, Master Corporal Pouchelu, Corporal Henry, and Master Corporal Morse.

[10] Within this first group of statements some of the utterances appear to have been directed to the specific individuals who testified as to their content; such as, Corporal Andrews, Sergeant Joyce, Sergeant Crosby, and Master Corporal Morse. Other statements were more a general cry for assistance or an exclamation to the Deity. Master Corporal McKay, Master Corporal Pouchelu, and Master Corporal Morse report hearing statements made by the accused apparently directed to the deceased, either apologizing to him as he was attempting to comfort him or rendering medical assistance to him in his last moments of life.

[11] MRE article 30 in Division V provides:

> "Where a person has participated in or observed acts or events with which the charge in question is concerned, and these acts or events were of an exciting, startling or shocking character, words about them spoken spontaneously by the participant or observer, while he was under the influence of the original excitement or shock engendered by those acts or events, whether during or after their occurrence, are admissible and may be quoted by a reporting witness."

[12] I accept the submission of the prosecution that the evidence of these witnesses, as to the statements or utterances they attribute to the accused made at the time of or shortly following the gunshot, are admissible under MRE 30. It is clear from the surrounding circumstances, including the nature of the relationship between the accused and the deceased, and the evidence of the accused's state of shock and upset, that the discharge of the weapon and the injury to the deceased was a startling and shocking event for the accused and that the state of shock and excitement lasted for some considerable time following the gunshot. I find that the words and utterances attributed to the accused by these witnesses were spoken while the accused was under the influence of the excitement or shock caused by the discharge of the gun and the injury to the deceased. They were also spoken spontaneously without prompting or any inducement to speak on the part of any of the witnesses, with the exception of the statements directed to Sergeant Joyce.

[13] It is argued by the defence that none of the statements should be admitted into evidence because the witnesses all give different and perhaps inconsistent versions of what was said by the accused, and in the absence of clear evidence as to precisely what was said the evidence should not be heard by the panel. I do not accept this submission.

[14] I do not understand counsel to be suggesting that the witnesses give contradictory accounts of the words attributed to the accused. The prosecution evidence and argument has satisfied me on a balance of probabilities that the statements in issue are those of the accused and that is sufficient to justify their consideration by the panel.[1]

[15] I also accept the submission of the prosecution that some of the statements which are admissible as spontaneous words in an emergency situation are also admissible as unofficial confessions under MRE 42. My reasons for so holding will become clear in the discussion of the second group of statements.

[16] The defence objects to the admissibility of the evidence of Sergeant Joyce as to statements made to him by the accused on the ground that the statements are an official confession and therefore inadmissible under MRE 40(1).

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[1]See *R. v. Evans* (1993) 3 S.C.R. 653

[17] MRE 39 is entitled "Official Confession Defined" and provides:

> "An official confession is a confession made by the accused, whether or not he has been charged, or might expect to be charged, with an offence at the time of making a statement ..."

And I go on to:

> "(*b*) in the course of giving information pursuant to regulations or orders issued by the Chief of the Defence Staff under QR&O 1.23, or in response to an order to him by a superior officer to give information required for any proper military purpose."

I accept the submission of the defence that the statements made by the accused to Sergeant Joyce amount to an official confession. They were made in response to what the accused would reasonably perceive to be an order from a superior for information that was required by Sergeant Joyce for a proper military purpose; that is, to understand the events surrounding an unauthorized discharge of a weapon in dangerous situation. Thus, although the statements to Sergeant Joyce would be admissible as spontaneous words in an emergency situation under MRE 30, the evidence of Sergeant Joyce as to statements made to him by the accused and the actions the accused may have demonstrated in the course of those statements are inadmissible because they are an official confession.

[18] The second group of statements in issue are oral statements attributed to the accused made in conversation with the reporting witness after the shocking circumstances of the shooting were no longer operating on the mind of the accused: I refer to the evidence of Corporal Ryles who spoke with the accused in the lineup at the Tim Hortons a day or two after the shooting; Master Corporal Keigan who had a conversation with the accused when both were back in Canada; Sergeant Crosby who had a conversation with the accused in a tent a day or two after the shooting; and Corporal Woodland.

[19] I accept the submission of the prosecution that the evidence of Corporal Ryles, Master Corporal Keigan, and Sergeant Crosby as to statements made to them by the accused are admissible under MRE 42 as being unofficial confessions. MRE 42 provides:

> "(1) Subject to subsection (9) and Division IX (Effect of Public Policy and Privilege), a statement by the accused alleged to be an unofficial confession may be introduced in evidence by the prosecutor if he proves that

> (*a*) there is evidence that the accused did make the statement attributed to him; and
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> (*b*) the statement was voluntary in the sense that it was not made by the accused when or because he was or might have been significantly under the influence of
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> (i) fear of prejudice induced by threats exercised, or
>
> (ii) hope of advantage induced by promises held out, in relation to the offence in question, by a person in authority.
>
> (2) The only inducements by way of threats or promises significant for the purpose of excluding a statement of the accused under subsection (1) are those that a reasonable man would think might have a tendency to cause an innocent accused person to make a false confession."

[20] Counsel for the accused submits that the statements were made to persons in authority. The term is defined in MRE 42(3) as follows:

> "A person in authority is one who was in a position relative to the accused at the material time to exercise or hold out inducements of the character described in subsections (1) and (2) or was someone who might reasonable have appeared to the accused to be in such a position."

This definition is similar to the same term "persons in authority" that applies to the common law confessions rule addressed by the Supreme Court of Canada in *R. v. Grandinetti*. In my view, there must be an association between the individual making the inducement and the process of investigation, charging, or prosecution of the statement-maker before it can be said that the person to whom the statement is made was a person in authority. In this case there is no evidence of any such association between any of the witnesses who gave evidence of statements made by the accused and the investigation, charging, or prosecution of the alleged offences before the court.

[21] The defence submits that those witnesses who were superior in rank or position to the accused should be regarded as persons in authority. This submission is fully answered by MRE 42(5) which provides that:

> "A person who holds a higher service rank than the accused is not, for that reason alone, a person in authority within subsection (3)."

[22] The defence also submits that the court did not hear from a number of people, both American service members and Canadian, some of whom were military police or security forces personnel, who may have had dealings with the accused at some point during his time in custody and therefore we cannot know if any one of them offered improper threats or inducements. The answer to this is, it is only "persons in authority," as defined, who can make the threats or offer the promises that can result in the exclusion of the induced statements. And there is simply no evidence that would support the conclusion that any of these unknown persons is a "person in authority" as defined in the MREs. Even though, in a normal sense, they may have exercised some authority as members of a military hierarchy that does not constitute them persons in authority for the purposes of MRE 42.

[23] In addition, on the evidence before me it is entirely a matter of speculation as to whether any threats or promises were made by any of the unknown individuals.

[24] Even if a reporting witness were found to be a person in authority there is no evidence before me of any threats or promises inducing any of the statements made to the witnesses Corporal Ryles, Master Corporal Keigan, and Sergeant Crosby. The evidence is rather much to the contrary, that the accused was treated in an understanding, cordial, professional, and even friendly manner throughout the period in question by everyone he came in to contact with until he left the theatre a few days after the shooting.

[25] I conclude that the statements attributed to the accused by Corporal Ryles, Master Corporal Keigan, and Sergeant Crosby are admissible as unofficial confessions under MRE 42.

[26] The evidence of Corporal Woodland was that he had a private conversation with his friend the accused concerning a shooting and that the accused said that what he did was stupid and he did not mean to shoot Kev. The conversation is said to have occurred some time in February or March of this year as the two of them were driving. In cross-examination the witness effectively withdrew this part of his evidence, ultimately agreeing with counsel that he could not be sure that the accused admitted to the shooting. In these circumstances, I consider that there is really insufficient evidence of a statement made by the accused to the witness Corporal Woodland and the pre-condition to admissibility established by MRE 42(1)(*a*) and by the Supreme Court of Canada in *R. v. Evans* is not met.

[27] And I move now to a consideration of similar facts. In the course of the *voir dire*, the court heard evidence of two incidents in which the accused is said to have taken part in a game of "quick draw." I understand this to refer to a contest in which the participants reach for a holstered weapon to see how fast the weapon can be produced

and perhaps trained in the manner memorialized and perhaps exaggerated by Hollywood of the Old Wild West.

[28] The first such incident took place at Camp Wainwright where members of the accused's unit were engaged in work-up training prior to their deployment to Afghanistan, and the second is said to have occurred in the camp at Kandahar some days prior to the date of the alleged offence. The prosecution submits that this is evidence of a propensity on the part of the accused to engage in the game of quick draw and is relevant to the state of mind of the accused at the time of the shooting death of Corporal Megeney and to the *actus reus* of one or more of the offences charged against him to negative certain defences that might be raised by the accused and as narrative evidence of the standard of care in respect of weapons that soldiers in the circumstances of the accused are expected to meet.

[29] It is argued that this is evidence of similar facts which is admissible notwithstanding that the evidence may reflect unfavourably upon the character of the accused as long as the probative value of the evidence, on an issue in the case, outweighs the prejudice caused by the admission of the evidence.

[30] Generally, this kind of evidence is inadmissible. MRE 20 provides, and I quote:

> "Except as prescribed in this Division the prosecutor shall not introduce evidence of the general bad character or reputation of the accused, or of another act or other acts of the accused similar in essential respects to the act charged."

But MRE 22(1) provides an exception as follows:

> "If it has been established that the act referred to in the charge was done by someone, but the state of mind or identity of the actor is in doubt, the prosecutor may, subject to subsections (2) and (3), introduce evidence of another act or other acts of the accused similar in essential respects to the act charged, where either or both of the following facts are in issue and the evidence tends to prove one or both of them:
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> > (*a*) that the state of mind of the accused was wrongful as charged at the material time, that is, that he did the act charged either knowingly, or with wrongful intent, motive or purpose; or
> >
> > (*b*) that there has been no mistake in the identity of the accused as being the person who did the act charged."

[31] In my view, there are large differences between the rules governing similar fact evidence at common law and the rule as articulated in the Military Rules of Evidence. Importantly, for present purposes, similar fact evidence is only admissible under MRE 22(1) for either or both of the two specified purposes. Thus, it is not admissible under 22(1) where the purpose is to establish the *actus reus* of the offence charged; that is, to permit the prosecution to argue that because the accused played games of quick draw in the past that that was what he was engaged in at the time relevant to the charges. Nor does MRE article 22 permit the introduction of evidence of similar facts for the purpose of negativing a defence which may be raised by the accused or as narrative evidence.

[32] Thus, the only proper reason advanced in support of the admissibility of the similar fact evidence is in relation to the state of mind of the accused at the relevant time. Because the charges against the accused are manslaughter, either by the unlawful act of careless use of a firearm or by criminal negligence, and negligent performance of a military duty, the state of mind of the accused that the prosecution seeks to prove is either negligence or a wanton and reckless disregard for the lives and safety of other persons.

MRE 22(3) provides:

> "Although the prosecutor has evidence to offer within subsections (1) or (2), the judge advocate shall exclude that evidence if he decides that its probative value is slight or that it would have an undue tendency to arouse prejudice against the accused, thereby impairing the fairness of the trial."

"Prejudice against the accused" really means, in this context, a harmful effect on the reasoning processes of the finders of the facts; that is, the panel of this General Court Martial, because either the evidence of other acts would tend to distract the panel from their central duty of determining what happened at the time of the alleged offence or the evidence would lead to an improper line of reasoning that because the accused acted in a certain manner on the prior occasions he was therefore acting in the same manner on the occasion in question.

[33] In my view, the evidence of the two instances of quick draw on the issue of the state of mind of the accused at the time relevant to the charges is of slight probative value and, as well, the evidence would have an undue tendency to arouse the prejudice I have referred to and would impair the fairness of the trial. The evidence of similar facts is excluded.

[34] To be clear, I have ruled that some of the statements attributed to the accused are admissible. Some of those statements which I have ruled to be admissible may refer to the term "quick draw." If the evidence of the witness reporting a statement attributed to

the accused uses the term "quick draw," the statement itself is not excluded by this ruling on the inadmissibility of evidence of similar facts. In addition, a witness who reports the use of the term "quick draw" by the accused may give evidence of the witness's own understanding of the term, but they cannot give evidence that the accused may have engaged in such conduct.

[35] I am prepared to revisit these conclusions on the renewed application of the prosecution if in the course of the trial the nature and conduct of the defence raises an issue on which the evidence of quick draw becomes more probative than it appears at this point in the trial.

[36] Finally, I consider that the opinion evidence of the nurse Captain Harvey is admissible. It is not inadmissible either on the ground of medical privilege or on the ground that the examination was compelled by military authorities. This is not a case like *R. v. White*,[2] where the statement of the accused was compelled by a provincial statute and was sought to be introduced into evidence as proof of an element of the offence charged in violation of the *Charter* guaranteed right against self-incrimination.

[37] Order accordingly.

Commander P.J. Lamont, M.J.

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[2](1999) 2 S.C.R. 417