COURT MARTIAL

Citation: *R v Cyr*, 2012 CM 3012

Date: 20120919
Docket: 201213

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sergeant J.S.F. Cyr, Applicant

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

OFFICIAL ENGLISH TRANSLATION

REASONS FOR THE DECISION ON THE ADMISSIBILITY OF THE ACCUSED'S STATEMENTS DATED 1 AND 3 NOVEMBER 2010

(Orally)

BACKGROUND

[1] Sergeant Cyr is charged with stealing contrary to section 114 of the *National Defence Act*, wilfully making a false statement in a document made by him and required for official purposes contrary to paragraph 125(*a*) of the *National Defence Act*, improperly selling public property contrary to paragraph 116(*a*) of the *National Defence Act*, and, lastly, an offence under section 130 of the *National Defence Act* for possessing a prohibited device contrary to subsection 92(2) of the Criminal Code.

[2] At the beginning of the trial before the Standing Court Martial on 10 September 2012, before denying or admitting Sergeant Cyr's guilt on each of the counts, defence counsel representing Sergeant Cyr filed a motion for which written notice had been received by the Office of the Court Martial Administrator on 25 July 2012 and an

additional motion for which written notice had been received on 24August 2012, seeking an order from the Court Martial under subsection 24(2) of the *Canadian Charter of Rights and Freedoms* (hereafter the *Charter*) to exclude certain evidence on the basis of an alleged infringement of the accused's rights under sections 8 and 9 and paragraph 10(*b*) of the Charter.

[3] This preliminary motion is presented under section 112.05(5)(*e*) of the *Queen's Regulations and Orders for the Canadian Forces* (hereafter QR&O) as a question of law or a question of mixed fact and law to be determined by the military judge presiding at the Court Martial as specified under section 112.07 of the QR&O.

[4] It is important to point out here that because of the range of the alleged violations and because of the prosecution's stated intention to introduce five statements of the accused (two oral and three written statements) considered to be unofficial confessions within the meaning of section 42 of the *Military Rules of Evidence*, I decided to hear these arguments in three separate voir dires. The present decision concerns the second voir dire that I heard and deals only with the voluntariness of the oral and written statements allegedly made by Sergeant Cyr on 1 and 3 November 2010 to a Military Police investigator.

[5] The evidence produced in support of this motion consists of the following elements:

a. The testimony of Master Corporal Goulet, Military Police officer, a patrolman with the Patrol Section at the Valcartier Garrison's Military Police Detachment who assisted the person in charge of the investigation leading to the charges before this Court;

b. The testimony of Sergeant Bernier, Military Police officer and head guard at the Valcartier Garrison detention barracks;

c. Exhibit VD2-1, a DVD containing a copy of the Military Police's interview with Sergeant Cyr on 1 November 2010;

d. Exhibit VD2-2, the written transcript of the Military Police's interview with Sergeant Cyr on 1 November 2010;

e. Exhibit VD2-3, a DVD containing a copy of the Military Police's interview with Sergeant Cyr on 3 November 2010;

f. Exhibit VD2-4, the written transcript of the Military Police's interview with Sergeant Cyr on 3 November 2010;

g. Exhibit VD2-5, a written statement by Sergeant Cyr to the Military Police dated 3 November 2010;

h. Exhibit VD2-6, the control register of the detention barracks of the Valcartier Garrison regarding Sergeant Cyr's stay there from 1 to 3 November 2010;

i. Exhibit VD2-7, the legal rights form signed by Sergeant Cyr on 1 November 2010;

j. Exhibit VD2-8, a written statement by Sergeant Cyr to the Military Police dated 1 November 2010;

k. Exhibit VD2-9, the legal rights form signed by Sergeant Cyr on 3 November 2010; and

l. The judicial notice taken by the Court of the facts and matters contained in Rule 15 of the *Military Rules of Evidence*.

[6] Following two searches carried out by the Military Police on 29 and 30 October 2010, in his absence because he was outside of the country, Sergeant Cyr was arrested by the Military Police close to his home on 1 November 2010. It appears that Sergeant Meunier, a Military Police officer, had called the accused beforehand in order to agree on an appropriate location close to his home to arrest him. The purpose of this was to avoid having to arrest Sergeant Cyr in front of his family.

[7] Master Corporal Goulet, a Military Police officer, was the arresting officer. He was accompanied by Corporal Bergeron, a trainee at the time, who did not actively participate in the arrest.

[8] Master Corporal Goulet informed Sergeant Cyr of the reasons for his arrest and of his legal rights. He then handcuffed him and seated him in the back of his vehicle. They drove to the Military Police Detachment at the Valcartier Garrison. The trip took about 30 minutes. He described Sergeant Cyr as being calm and cooperative. He and Sergeant Cyr did not speak.

[9] Upon their arrival at the Valcartier Garrison's Military Police Detachment, Master Corporal Goulet brought Sergeant Cyr to an interview room, where he was under constant supervision. He undid and removed the handcuffs, and informed him that Sergeant Meunier, a Military Police officer, would come to see him.

[10] Sergeant Meunier came to meet with Sergeant Cyr for a few minutes to explain to him what would happen next. He told him that he would interview him.

[11] Then, Sergeant Cyr was transferred to an interrogation room. Sergeant Meunier, who was alone with him in the room, informed him of the offences of which he was suspected, of his right to remain silent and of his right to retain and instruct counsel without delay.

[12] Sergeant Cyr stated that he understood the suspicions against him, that he understood that he had the right to remain silent and that he did not wish to talk to a lawyer. He was informed by Sergeant Meunier that he could change his mind and that he could do so at any time during the interview, in which case, he would stop questioning him immediately to allow him to do so.

[13] During the interview, Master Corporal Goulet was on the other side of a mirror through which he had an excellent view of the interview. His main task was to observe and take notes on the interview.

[14] Sergeant Meunier interrogated Sergeant Cyr. In response to his questions, Sergeant Cyr admitted that he had stolen most of the items mentioned by the investigator in the interview. He also stated that he had pawned the DeWalt tool kit and that he believed that the kit had been sold, given that he had not returned to the pawn shop to pick it up. He also stated that he and his spouse had used marihuana.

[15] Towards the end of the interview, Sergeant Cyr provided a written statement in which he summarized all of the confessions he had made orally to the investigator. The interview took place in the afternoon and lasted about three hours. Sergeant Cyr was described as being depressed and sad, albeit calm and relieved after he confessed. Following the interview, Sergeant Cyr had the opportunity to meet with a priest in a different interview room from the one in which he was interrogated.

[16] Master Corporal Goulet then decided to keep Sergeant Cyr in custody out of concern that he was suicidal and because some evidence had to be verified and he did not want Sergeant Cyr to have a chance to make this evidence disappear upon his release.

[17] An account in writing to that effect was prepared. Sergeant Cyr was handed to the head guard of the Valcartier Garrison's detention barracks, Sergeant Bernier. Sergeant Bernier acknowledged the account in writing, and Sergeant Cyr was put in a cell. He was given a meal that evening. As an accused, he did not have any specific tasks to carry out.

[18] Sergeant Cyr was detained from about 1700 hrs on 1 November, and was released early in the afternoon of 3 November. During his detention, he was alone in his cell and under constant supervision. On the morning of 2 November, he saw a psychologist, as he had requested. He was able to contact his spouse in the afternoon of the same day. On the morning of 3 November, Sergeant Meunier, in his capacity as the patrols warrant officer, came to enquire about Sergeant Cyr's state.

[19] Early in the afternoon of 3 November, Sergeant Meunier interrogated Sergeant Cyr a second time. He was therefore transferred to the interrogation room. Sergeant Meunier, this time in the presence of Master Corporal Goulet, who was in the room, conducted the interview.

[20] Sergeant Meunier informed Sergeant Cyr of the offences of which he was suspected, of his right to remain silent, of his right to remain silent even if he had discussed the matter previously with persons in authority, including the police, and of his right to retain and instruct counsel without delay and at no cost.

[21] Sergeant Cyr stated that he understood the offences of which he was suspected and that he had the right to remain silent, despite the fact that he had already discussed the matter in a previous interview with Sergeant Meunier, and indicated that he did not wish to talk to a lawyer.

[22] He was then questioned about some other items whose legitimate owner he claimed to be, about the DeWalt tool kit and about some other transactions he had carried out at the same pawn shop. He also admitted who had supplied him with marihuana.

[23] At the end of the interview, he was released. He then went home in the company of Military Police officers whom he willingly showed the items that were Canadian Forces property. He then returned to the Canadian Forces Base Kingston with some members of his unit.

[24] The statements of an accused trigger 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. The burden of establishing admissibility is on the prosecution. The burden of establishing that admissible evidence should be excluded is on the defence. In order 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. In order 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 right and, second, that its admissibility would bring the administration of justice into disrepute.

[25] If it is true that these are two different issues, in terms of both the evidentiary and the persuasive burden, if this is kept in mind, much confusion could be avoided. For the purposes of the present voir dire, I will deal solely with the admissibility of the oral and written statements made by Sergeant Cyr on 1 and 3 November 2010 under section 42 of the *Military Rules of Evidence* and under the common law rule.

[26] As explained by Justice Hugessen of the Court Martial Appeal Court in *R c Laflamme*, CMAC 342, the *Military Rules of Evidence* were adopted by the Governor in Council and must be applied in a court martial because they have force of law.

[27] 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.

[28] The essence of section 42 of the *Military Rules of Evidence* is the same as that of the common law rule defined by the Supreme Court of Canada in *R v Oickle*, [2000] 2

SCR 3. However, the Supreme Court decision lists a number of factors that are not currently contained in section 42 of the *Military Rules of Evidence*, 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.

[29] 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.

[30] 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.

[31] 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 Justice Iacobucci on behalf of the majority at paragraph 33 of *Oickle*.

[32] 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.

[33] In the present voir dire, counsel for the prosecution does not contest that the accused made his statements 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. Here, Sergeant Cyr was

interrogated after he was arrested and detained by a Military Police officer. A voir dire is therefore clearly required, and the accused did not waive his right to a voir dire. On the contrary, he specifically requested it.

[34] I will now analyze the facts using the four abovementioned factors to determine whether the oral and written statements made by Sergeant Cyr on 1 and 3 November 2010 were voluntary.

[35] Fear of prejudice or hope of advantage: it is not necessary for the accused to have confessed spontaneously or not to have been influenced by the conduct or questions of the police. All of the circumstances must be examined when assessing voluntariness. The question is whether there is reasonable doubt that a statement was voluntary because of threats made or advantages offered, considered separately or in combination with other circumstances. Imminent threats or torture clearly affect the voluntariness of a statement, but most cases are not that clear-cut. Veiled threats, for example, require closer examination. The police often, appropriately so, offer some kind of inducement to obtain a statement. This becomes improper only when the inducements, whether standing alone or in combination with other factors, are strong enough to raise a reasonable doubt. The fundamental question is whether the investigators offered some kind of inducement, regardless of whether they did so in the form of a threat or a promise.

[36] While the form of inducement offered by a person in authority is one of the most important considerations when benefits are alleged, it does not in itself determine whether a statement was voluntary. I must therefore determine whether inducements were offered that "standing alone or in combination with other factors, [were] strong enough to raise a reasonable doubt about whether the will of the subject has been overborne" (see *Oickle* at paragraph 57). While inducements can help in establishing that a threat or promise was made, I must consider the strength of the alleged benefit in the broader context in which the statement was made to determine whether it was voluntary. Despite this being an essentially subjective test, since it depends on the fact that the accused experienced hope or fear, the authorities must have done something to provide an objective basis for a subjective response. In the absence of oppression or benefits, the accused's own timidity or subjective fear of the authorities will not render a statement inadmissible unless external circumstances involving the police officers or any other circumstances, such as the lack of an operating mind, cast doubt on whether a statement was voluntary.

[37] Regarding the statement of 1 November 2010 counsel for the defence submits that the police's use of the geographic map of Afghanistan found at the suspect's was threatening enough for the police to gain control of the suspect, making it much easier to obtain a confession from Sergeant Cyr. In my opinion, no threats were made to Sergeant Cyr. He was confronted with certain facts ascertained by the police following the search of his home, and he decided to admit that he had taken the map and other items. There is nothing to prevent a police officer interrogating a suspect from showing the suspect the result of the search and from explaining to the suspect his or her opinion on what the

consequences of this discovery might be, as long as the police officer does not do so to make the suspect so afraid as to conclude that he or she has no other choice, in light of the threat, but to make a confession. Here, the suspect described his conduct as [TRANSLATION] "innocent", as if to suggest that what he had done was stupid. However, in itself or in combination with other elements of the interrogation, it is the Court's opinion that this was not a threat on the part of Sergeant Meunier.

[38] Also regarding the same statement, counsel for the defence submits that Sergeant Meunier was so directive that he did not give the suspect the choice of identifying the Canadian Forces property at his home. In fact, he proposed that, in exchange for Sergeant Cyr admitting what the stolen items were, he would write in his report that the sergeant had been cooperating. In reality, Sergeant Meunier merely told the suspect that his cooperation would be mentioned in his report, but he did not combine this with a promise of clemency in terms of the sentence or the nature of the charges that might be brought, or in terms of more favourable treatment. Sergeant Meunier was willing to note Sergeant Cyr's cooperation in his report, nothing more. This assured Sergeant Cyr that a positive attitude on his part would be noted, but it did not tell him how it would actually benefit him. This was therefore not a promise or inducement that casts reasonable doubt on whether a statement was voluntary.

[39] Lastly, telling a suspect that admitting his or her involvement in an offence will make the suspect feel better is not a threat or promise as such. At the most, it is a suggestion made to the suspect to help him or her consider to what extent he or she should talk to an investigator. In the circumstances, in which he was duly informed of the consequences of talking to a police officer, combined with the fact that he was given the opportunity to retain and instruct counsel without delay, a right he waived, Sergeant Cyr decided to admit which items had been stolen. Considered alone or in the general context of the interview, this inducement does not raise reasonable doubt about whether the statement was voluntary.

[40] Consequently, counsel for the prosecution has demonstrated beyond a reasonable doubt that no threats or promises were made to obtain the oral and written statements dated 1 November 2010 from Sergeant Cyr.

[41] Regarding the oral and written statements of Sergeant Cyr dated 3 November 2010, counsel for the defence did not raise any specific points with respect to a threat or a promise that could cast doubt on the voluntariness of these statements. It appears that the prosecution submitted all of the evidence on the events that took place during Sergeant Cyr's detention from the end of his statement dated 1 November 2010 to the beginning of his statement dated 3 November 2010, and the Court can detect no threats or promises there. The Court notes that, in reality, there were no threats or promises made that could cast reasonable doubt on whether the statements were voluntary.

[42] Consequently, the Court concludes that counsel for the prosecution has demonstrated beyond a reasonable doubt that no threats or promises were made to obtain the oral and written statements dated 3 November 2010 from Sergeant Cyr.

[43] Oppression: Oppressive conditions and circumstances have the potential to produce involuntary confessions. I must therefore determine whether Sergeant Cyr

a. was deprived of food, clothing, water, sleep, or medical attention;

b. denied access to counsel;

c. was confronted with non-existent or inadmissible evidence; and

d. was submitted to aggressive, intimidating questioning for a prolonged period of time.

[44] Alone, none of these factors is necessarily grounds for exclusion, but such could be the case depending on its seriousness. Moreover, when combined with other factors or other circumstances, these factors can be of great importance when it comes to determining whether a statement was voluntary.

[45] I am satisfied that none of these factors raises reasonable doubt that oppressive conditions and circumstances resulted in an involuntary statement by Sergeant Cyr, be it the oral and written statements dated 1 November 2010 or those dated 3 November 2010. Even though Sergeant Meunier seemed to have shaken the suspect through his somewhat colourful style and language, he actually did no more than present him with what was discovered in the searches. He confronted Sergeant Cyr with what was found and left him free to decide whether to speak or not. The police officer did not create an oppressive atmosphere by using extreme measures. He was not aggressive and did not use non-existent evidence, and Sergeant Cyr was deprived of nothing. I am also satisfied that he had free access to counsel following his arrest and during his detention and that he was never denied counsel. In fact, he clearly refused to retain and instruct counsel each time this right was mentioned to him, and he never expressed the desire to do so.

[46] Consequently, I conclude that counsel for the prosecution has demonstrated beyond a reasonable doubt that the accused suffered no oppression when making the statements that are the subject of the present voir dire.

[47] Operating mind: The operating mind test requires that the accused possess a limited degree of cognitive capacity, sufficient to understand what is being said and asked, and that what accused says can be used against him or her. Analytical ability is not required.

[48] There is a distinction between, on the one hand, being able to understand the content of a declaration and the fact that it may be used against you and, on the other hand, feeling pressured to make a statement and being unconcerned about the consequences of doing so. The lack of capacity indicates the lack of the required operating mind and directly affects admissibility. The accused’s feeling pressured or being unconcerned about

the consequences simply affects the weight that must be afforded to a statement. The burden of proving mental capacity lies on the prosecution. If there is reasonable doubt that the statements were not the product of an operating mind, they must be excluded.

[49] The evidence submitted by the prosecution, particularly the video recording of the two interrogations, clearly reveals that Sergeant Cyr possessed an operating mind. He understood what was being said and what was asked of him, and that what he said could be used against him. I am therefore satisfied that counsel for the prosecution has demonstrated beyond a reasonable doubt that Sergeant Cyr possessed an operating mind when he made the oral and written statements dated 1 November 2010 and 3 November 2010.

[50] Other police trickery: Police trickery has two objectives, which call for a distinct inquiry. When considered with the other three factors, police trickery, alone or in combination with other circumstances, raises reasonable doubt about whether or not a statement was voluntary. Because the more specific objective of police trickery is to maintain the integrity of the criminal justice system, the use of police trickery, though neither violating the accused's right to silence nor undermining voluntariness, can lead to exclusion of the statement if the use is so appalling as to shock the community.

[51] In the present matter, neither of the parties argued that trickery was used to obtain statements from Sergeant Cyr. On the contrary, counsel for the prosecution has demonstrated that the police officers basically confronted the accused with the facts they were aware of. When Sergeant Cyr stated that some of the items belonged to him, the police officers did not challenge what he said, but simply believed his statements or concluded that they had to verify them. At no point did the police officers use trickery that was so appalling as to shock the community; indeed, they used none.

[52] Based on my analysis of these factors, individually or as a whole, I conclude that counsel for the prosecution has demonstrated beyond a reasonable doubt that the oral and written statements made by Sergeant Cyr on 1 and 3 November 2010 were done so voluntarily.

FOR THESE REASONS, THE COURT:

[53] FINDS that counsel for the prosecution has demonstrated beyond a reasonable doubt that the oral and written statements made by Sergeant Cyr on 1 and 3 November 2010 were done so voluntarily.

Counsel:

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