COURT MARTIAL

Citation: *R v Déry,* 2013 CM 3023

Date: 20130917
Docket: 201307

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Private J.C. Déry, Accused

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

[OFFICIAL ENGLISH TRANSLATION]

Restriction on publication: By court order made under section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR THE DECISION ON THE ADMISSIBILITY OF THE STATEMENT DATED 27 OCTOBER 2011

(Orally)

BACKGROUND

[1] Private Déry has been charged with sexual assault contrary to section 271 of the *Criminal Code*. At the beginning of this trial by Standing Court Martial on 16 September 2013, before denying or admitting his guilt with regard to each count, or rather after having denied his guilt with regard to the count, counsel for the prosecution opened his case by filing a motion dealing solely with the voluntariness of an oral

statement allegedly made by Private Déry on 27 October 2011 to a Military Police investigator regarding an incident that allegedly occurred on 25 October 2011.

[2] This motion raises a question of law or of mixed law and fact to be decided by the military judge presiding over the Court Martial.

[3] The supporting evidence for this motion consists of the following:

a. the testimony of Petty Officer Second Class Dumas, Military Police, who at the time was an investigator at the Canadian Forces National Investigation Service, Detachment Western Region, and was in charge of the investigation that led to the charge before this court;

b. Exhibit VD1-1, a DVD containing a copy of the interview of Private Déry by the Military Police on 27 October 2011;

c. Exhibit VD1-2, the legal rights form signed by Private Déry on 27 October 2011;

d. Exhibit VD1-3, a map showing the positions of tents, drawn by Private Déry during the interview with the Military Police on 27 October 2011;

e. an oral admission made by the prosecution regarding certain events that occurred on 25 October 2011; and

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

[4] Following an incident that allegedly occurred the night of 24 to 25 October 2011 during an exercise at Canadian Forces Base Wainwright, in Alberta, the Military Police met with Private Déry regarding the alleged sexual assault of a female private.

[5] As was admitted by counsel for the prosecution, at 0322 hours on 25 October 2011, Corporal Hall of the Military Police conducted an interview regarding the allegations made by the complainant in this case, Private I.F.. Corporal Hall read Private Déry his rights in English, and Private Déry stated that he understood those rights but did not wish to talk to a lawyer. Private Déry then gave a written statement. Everything took place at the camp where the incident had allegedly occurred.

[6] Petty Officer Second Class Dumas, a Military Police investigator, was assigned to investigate the case. He allegedly scheduled a meeting with Private Déry for 27 October 2011 at the Military Police office on Canadian Forces Base Wainwright. Private Déry reported for the meeting on 27 October 2011 and was allegedly met by Petty Officer Second Class Dumas in the building's entrance hall. The investigator then told him that the interview would take place at the Royal Canadian Mounted Police

detachment located off-base, given that the equipment that the Military Police needed to record the interview was not working. The investigator therefore went to that location, followed shortly thereafter by Private Déry, who was driven back to the same place by a Military Police officer.

[7] After arriving in the interview room, Petty Officer Second Class Dumas told Private Déry that the interview was being filmed and recorded. He identified himself with two pieces of identification. He asked Private Déry to summarize how he had been brought to the building and to confirm that he had not had any conversations with anyone whatsoever regarding the case.

[8] Petty Officer Second Class Dumas gave, in his own words, an overview of Private Déry's legal and constitutional rights. While this was being explained to him, Private Déry referred to a previous statement he had made two days earlier to another Military Police officer. Petty Officer Second Class Dumas then explained to him that he was giving him a chance to start over, and that he would later compare his version with those he had obtained from the other witnesses.

[9] The investigator obtained some personal information from Private Déry for identification purposes. He then informed him that he was suspected of sexual assault. He informed him of his right to retain and instruct counsel without delay and at no charge, his right to remain silent and his right to remain silent even if he had already discussed his case previously with persons in authority, including the Military Police and members of his chain of command.

[10] Private Déry said that he understood his right to retain and instruct counsel without delay and at no charge but did not want one, and that he understood his right to remain silent, including his right to remain silent despite the previous statement he had made two days earlier to a Military Police officer.

[11] Next, Private Déry recounted the events that occurred the evening of 24 to 25 October 2011. He told the investigator that he was having a barbecue in the kitchen and that after eating and drinking beer with some other privates, he bought more beer. They all went to their tent, where they continued chatting the whole evening while listening to music on his telephone, which he had hooked up to some speakers. At the end of the evening, everyone went to bed.

[12] Before going to bed, he went to the toilet, and on his way back, he was violently confronted by Corporal Foster. They were allegedly pulled off each other. His superiors were then called, and someone told him to go back to bed. He was woken up, and a Military Police officer met with him.

[13] Although he had stated that his telephone was not working because the battery was dead, he admitted to Petty Officer Second Class Dumas that he had lied and had sent a text to Private I.F. after all. However, he continually and categorically denied having touched Private I.F. sexually during the evening. After relating these facts to the

investigator, Private Déry agreed to take a polygraph test. The investigator reviewed his release conditions with him, including the condition of not contacting the complainant. Finally, Private Déry left the interview room and was taken back to the base by the Military Police officer.

[14] 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. 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.

[15] 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 Private Déry on 27 October 2011 under section 42 of the *Military Rules of Evidence* and under the common law rule.

[16] 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.

[17] 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.

[18] 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.

[19] 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.

[20] 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.

[21] 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*.

[22] 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.

[23] 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, Private Déry was interrogated by a Military Police officer as part of an investigation into his suspected sexual assault of a female private on 25 October 2011 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.

[24] I will now analyze the facts using the four factors mentioned above to determine the nature of the oral statement made by Private Déry to a Military Police investigator on 27 October 2011.

[25] 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.

[26] 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.

[27] As regards the statement made by the accused on 27 October 2011 to the Military Police investigator, Petty Officer Second Class Dumas, it is clear that the investigator did not make any direct or implicit threat or offer any benefit that could have tainted the nature of the accused's statement.

[28] Consequently, counsel for the prosecution has demonstrated beyond a reasonable doubt that no threats or promises were made to obtain the oral statement of Private Déry dated 27 October 2011.

[29] Oppression: Oppressive conditions and circumstances have the potential to produce involuntary confessions. I must therefore consider whether Private Déry was

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

b. denied access to counsel;

c. confronted with non-existent or inadmissible evidence;

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

[30] Alone, none of these factors is necessarily grounds for exclusion, but such could be the case depending on its seriousness. However, 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.

[31] I am satisfied that none of these factors raises reasonable doubt with respect to the existence of oppressive conditions and circumstances that would have resulted in an involuntary statement by Private Déry. He was not deprived of anything; he was not denied access to counsel—quite the contrary; he was not confronted with non-existent evidence; and he was in no way submitted to intimidating questioning during his relatively short interview.

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

[33] 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 the accused says can be used against him or her. Analytical ability is not required.

[34] 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 ruled inadmissible.

[35] The evidence submitted by the prosecution, particularly the video recording of the interrogation, clearly reveals that Private Déry possessed the requisite operating mind. He understood what was being said and what was asked of him, and that what he said could be used against him. In fact, he appears to be an articulate individual who was aware of the risks he was facing and had the capacity to ask the necessary questions to understand the situation when he felt that he needed to do so. Consequently, I am satisfied that the prosecution has proved beyond a reasonable doubt that Private Déry had an operating mind when he made his oral statement on 27 October 2011.

[36] 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 police trickery factor includes the more specific objective of maintaining 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.

[37] In the present matter, neither party argued that Petty Officer Second Class Dumas used trickery to obtain the statement. On the contrary, the prosecution showed that the police officer did not use trickery. Rather, he listened to Private Déry's initial version and then confronted him with certain information that exposed contradictions in his story. At no time did Petty Officer Second Class Dumas resort to trickery that was so appalling as to shock the community. In point of fact, he did not use any trickery at all.

[38] Based on my analysis of these factors, individually or as a whole, I conclude that the prosecution has demonstrated beyond a reasonable doubt that the oral statement made by Private Déry on 27 October 2011 was voluntary.

[39] However, Private Déry argues that, in light of his first statement, the prosecution had an obligation to call Corporal Hall as a witness to prove that the first statement did not render the statement at issue in this voir dire inadmissible. Furthermore, Private Déry is of the opinion that the prosecution also should have called as witnesses the other people in authority who had contact with him in the moments leading up to the interrogation that resulted in the statement in issue here.

[40] As Chief Justice Dutil stated in *R v Bergeron-Larose*, 2012 CM 1012, the onus is on the prosecution to enter in evidence a sufficient record of the context giving rise to an accused's statement if the prosecution wishes to have the statement admitted as evidence in court. Each person in authority who could reasonably have affected the voluntariness of the accused's statement must be called to testify.

[41] As for the police officers who accompanied Private Déry to the Royal Canadian Mounted Police detachment on 27 October 2011, it appears from the statement given by the accused that he did not have any conversations with the police officers while he was in transit. His attitude and his words tell the Court that there were no real concerns in this regard and that, in the circumstances of this case, the police officers could not reasonably have affected the voluntariness of Private Déry's statement.

[42] Regarding the impact of the accused's statement dated 25 October 2011 on the statement he made on 27 October 2011, which is now the subject of this voir dire, it appears that Private Déry is making direct reference to the derived confessions rule.

[43] In the present case, Private Déry referred to the fact that the onus was on the prosecution to prove that the first statement that he had made did not taint the second because the first was admissible or had not significantly incited the second statement to the police.

[44] The prosecution argues that it did not have to prove to the Court that the first statement made by Private Déry on 25 October 2011 was valid and had no impact on

the second because the investigator who questioned Private Déry and obtained a statement from him on 27 October 2011 was very careful to advise Private Déry that he was under no obligation to repeat what he had said the first time or to say anything at all because he had made the first statement.

[45] In *R v S.G.T.*, [2010] SCC 20, the Supreme Court of Canada reiterated the derived confessions rule in the following terms at paragraphs 28 and 29:

> [28] The leading case on the derived confessions rule is *R. v. I.(L.R.) and T.(E.)*, [1993] 4 S.C.R. 504. In brief, the derived confessions rule serves to exclude statements which, despite not appearing to be involuntary when considered alone, are sufficiently connected to an earlier involuntary confession as to be rendered involuntary and hence inadmissible. For example, in that case, a young offender was charged with second degree murder and gave an inculpatory statement to the police. The next day, after meeting with his lawyer, the accused came to the police, wishing to modify the statement that he had given the previous day. The trial judge excluded the first statement but admitted the second, and the accused was convicted by a jury. The accused appealed the conviction on the basis that the second statement should not have been admitted. His appeal was ultimately successful in this Court.
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> [29] In outlining the principles applicable to derived confessions, the Court articulated a contextual and fact-based approach to determining whether a subsequent statement is sufficiently connected to a prior, inadmissible confession to also be excluded. In assessing the degree of connection, the Court outlined a number of factors to be considered, including "the time span between the statements, advertence to the previous statement during questioning, the discovery of additional incriminating evidence subsequent to the first statement, the presence of the same police officers at both interrogations and other similarities between the two circumstances" (p. 526). The Court then held:
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> > In applying these factors, a subsequent confession would be involuntary if either the tainting features which disqualified the first confession continued to be present or if the fact that the first statement was made was a substantial factor contributing to the making of the second statement. [p. 526]
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> The Court was clear in adding that "[n]o general rule excluded subsequent statements on the ground that they were tainted irrespective of the degree of connection to the initial admissible statement" (p. 526).

[46] The prosecution admitted the existence of the first statement made by Private Déry, including the date, the exact place and time, the identity of the police officer who questioned him, the subject discussed, the fact that his rights were read to him in English, that he had waived his right to instruct counsel and that he had given a written statement. However, the contents of that statement were not shared with the Court.

[47] That said, applying the contextual approach laid down by the Supreme Court of Canada in *S.G.T.*, the Court was able to make the following findings:

a. two days elapsed between the two statements;

b. no incriminating evidence was uncovered between the two statements;

c. two different police officers carried out two interrogations giving rise to two statements; and

d. during the second interrogation, the only reference to the first statement was initiated by Private Déry.

The police officer who interrogated him knew that the first statement had been given but never referred to it during the interrogation.

[48] The Court finds that the degree of connection between the two statements is rather tenuous, in the circumstances, insofar as there is only a temporal connection between them, given that they came only two days apart.

[49] I agree with the prosecution that when the police officer gave Private Déry an additional caution he expressly mentioned that he was starting from scratch and would disregard anything Private Déry may have said in the first statement. That was enough to prove that there was no connection between the two statements.

[50] Accordingly, the prosecution had no obligation in the circumstances to prove the validity of the first statement and to have it entered in evidence so that the Court could consider its contents, given that there was clearly no connection whatsoever such that the first statement made by Private Déry could have affected the voluntariness of the second one he made.

[51] Therefore, the Court finds that there is no need to call Corporal Hall as a witness or to enter the first statement in evidence because this could not reasonably have affected the voluntariness of the statement made by Private Déry on 27 October 2011. As for the drawing made by the accused, the Court finds that Private Déry made it voluntarily during his interrogation and that, for this reason, it flows from his statement, thus making the drawing admissible. Finally, regarding the admissibility of the legal rights form, the Court is of the opinion that it is admissible under section 103 of the *Military Rules of Evidence*, given that the original was filed for the Court's consideration and that it was identified by a competent witness, namely, Petty Officer Second Class Dumas, who assisted and participated in creating it.

FOR THESE REASONS, THE COURT

[52] **DECLARES** that the prosecution has proved beyond a reasonable doubt that the oral declaration made by Private Déry on 27 October 2011 was voluntary.

AND

[53] **DECLARES** that the legal rights form and the drawing made by Private Déry as part of his statement made on 27 October 2011 are admissible.

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