



COURT MARTIAL

Citation: *R v Rivas*, 2011 CM 2011

Date: 20110517

Docket: 201102

General Court Martial

Canadian Forces Base Borden
Borden, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal D. Rivas, Offender

Before: Commander P.J. Lamont, M.J.

REASONS FOR THE APPLICATION UNDER S. 276.2 OF THE CRIMINAL CODE TO ADDUCE EVIDENCE OF SEXUAL ACTIVITY

[1] Corporal Rivas is charged with one charge of sexual assault said to have occurred on July 16th, 2010, which is an offence contrary to section 271 of the *Criminal Code* and section 130 of the *National Defence Act*; as well he is charged with two other offences under the *National Defence Act*.

[2] At the opening of his trial by General Court Martial an application was brought under section 276.2 of the *Criminal Code* to adduce evidence of sexual activity between the applicant accused and the witness (the complainant) that is said to have occurred on June 26th, 2010, some three weeks prior to the date alleged in the Charge Sheet. The activity was referred to in the affidavit of the applicant sworn May 16th, 2011, as corrected in the course of his testimony on this application. At the conclusion of argument on the application I reserved my decision until the close of the examination-in-chief of the complainant.

[3] I have now in the presence of the panel of this General Court Martial heard the evidence-in-chief of the complainant and I am satisfied that the proffered evidence of sexual activity on June 26th, 2010, may be adduced. In my view, the evidence of sexu-

al activity is relevant to the issue of the identity of the accused as being the individual who is alleged to have attacked the complainant on the date alleged in the Charge Sheet, July 16th, 2010 because of the physical description of the attacker that is said to have been given by the complainant. The evidence may also be relevant to the issue of whether the complainant had a motive to falsely accuse the accused of attacking her on July 12th, 2010, if the defence chooses to defend the charges on that basis. I am satisfied that the probative value of the evidence of sexual activity on June 26th is significant and is not substantially outweighed by the danger of prejudice to the proper administration of justice.

[4] In so ruling, I have considered particularly the interests of justice as a whole and especially the right of the accused, Corporal Rivas, to make full answer and defence. I consider that there is a reasonable prospect that the evidence of sexual activity on June 26th will assist the panel in arriving at a just determination in this case. While there is some risk of discriminatory belief or bias in the course of the fact finding process as a result of the hearing of evidence of sexual activity I am satisfied that the risk is negligible if the panel is instructed as to the limited use it can make of the evidence and specifically instructed as to the prohibited reasoning that is outlawed by subsection 276(1) of the *Criminal Code*.

[5] It is perhaps unnecessary to add that nothing in these reasons should be taken to amount to a finding of fact by me. The facts of this case will be determined by the panel of this General Court Martial after all the evidence is heard. My role at this stage is only to determine the admissibility of the proffered evidence. The panel, once properly instructed, will determine what weight, if any, is to be given to the evidence of sexual activity that is said to have occurred on June 26th.

[6] Finally, I have considered the complainant's right to privacy as well as the interests of justice and I order that this decision may be published, broadcast or transmitted, but the proceedings of the court held yesterday *in camera* shall not be published, broadcast or transmitted in any way pursuant to section 276.3 of the *Criminal Code*; I order accordingly.

Counsel:

Major É. Carrier, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Captain D.M. Hodson, Directorate of Defence Counsel Services
Captain M.M. Napier, Assistant Judge Advocate Toronto
Counsel for Corporal D. Rivas