

**IN THE U.S. NAVY-MARINE CORPS COURT OF CRIMINAL APPEALS  
WASHINGTON NAVY YARD  
WASHINGTON, D.C.**

**BEFORE**

**JOHN W. ROLPH**

**W.L. RITTER**

**E.S. WHITE**

**UNITED STATES**

**v.**

**Javier A. MORENO  
Corporal (E-4), U.S. Marine Corps**

NMCCA 200100715

Decided 19 July 2007

Review of a Government Appeal pursuant to Article 62, UCMJ.

LT BRIAN MIZER, JAGC, USN, Appellate Defense Counsel  
Maj KEVIN HARRIS, USMC, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

WHITE, Judge:

This case is before us on appeal, pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862, from a ruling by the military judge excluding various items of evidence, and certain arguments, pursuant to MILITARY RULE OF EVIDENCE 403, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

After carefully considering the record of proceedings on this issue below, the Government's brief on appeal, and the appellee's answer, we affirm the military judge's ruling.

**I. Factual Background**

**A. Procedural Posture**

The appellee was tried and convicted on one specification of rape, in violation of Article 120, UCMJ, 10 U.S.C. § 920, in 1999. Subsequently, the Court of Appeals for the Armed Forces (CAAF) set aside the conviction and authorized a rehearing. *United States v. Moreno*, 63 M.J. 129, 144 (C.A.A.F. 2006). The Government decided to retry the appellee. On 16 April 2007,

during the course of a pretrial session of court, pursuant to Article 39(a), UCMJ, the military judge, *sua sponte*, excluded certain items of expected Government evidence related to the possibility the victim was drugged by the appellee the night of the alleged rape. Additionally, the military judge prohibited the Government from arguing the appellee had administered a "date rape" drug to the victim.

The next day, the Government moved for reconsideration, which motion the military judge denied. See Appellate Exhibit XXVIII, Government Motion for Reconsideration of the Judge's *Sua Sponte* Exclusion of Government Evidence, dated 17 Apr 2007. The Government then filed timely notice of appeal pursuant to Article 62, UCMJ.<sup>1</sup>

#### **B. The Expected Evidence and Arguments At Issue**

The victim is expected to testify as follows: On the night of the alleged rape, she arrived at the Eagle, Globe and Anchor Club on base in Okinawa, Japan, around midnight, and joined the appellee, then-Lance Corporal (LCpl) Oriade, and some other Marines. Around 0300, she left the Club with the appellee and LCpl Oriade, and the three of them ended up in the appellee's barracks room. Once at the appellee's room, the appellee handed her a bottle of beer, and made a sexual remark she found offensive. As a result of the remark, she was going to leave, but the appellee encouraged her to stay and drink her beer, which she did. Shortly thereafter, she lost consciousness. When she regained consciousness, the appellee was having sexual intercourse with her. She felt like she was in a dream state, unable to move or resist her attacker, despite her best efforts. She then lost consciousness again. The next time she became conscious, LCpl Oriade was having sexual intercourse with her. This time, she was able to push him off, and get up. She ran from the room and reported the alleged rape to the Command Duty Officer. Government's Appeal Brief, dated 29 May 2007, at 2-4 (citing record of original record of trial at 368-406).

She is also expected to testify she was not a novice drinker, had not drank enough beer that night to induce the response she experienced in the appellee's room, and has never experienced a period of paralysis like that before or after the alleged rape. AE XXVIII at 1.

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<sup>1</sup> The proceedings below have been stayed, pursuant to RULE FOR COURTS-MARTIAL 908(b)(4), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), since 17 April 2007.

The Government also intends to present testimony from Naval Criminal Investigative Service (NCIS) Special Agent Anthony Blane, and from Captain (CAPT) Craig T. Mallak, Medical Corps, U.S. Navy.

Special Agent Blane is expected to testify he was the first to have suggested the possibility the victim had been drugged, that "date rape" drugs were available on Okinawa at the time, and that he investigated another alleged rape case about a year later in which he also suspected the victim had been drugged. AE XXVIII at 1-2. CAPT Mallak is expected to testify that "date rape" drugs were available at the time in both California<sup>2</sup> and Okinawa, that certain "date rape" drugs were not controlled substances at the time, and that the use of "date rape" drugs had gained popularity around that time in California. CAPT Mallak is also expected to testify about laboratory tests on the victim's blood and urine. *Id.* at 2.

Blood and urine specimens were collected from the victim as part of a sexual assault examination, and subsequently tested for the presence of "date rape" drugs. Record at 169.<sup>3</sup> Those tests were negative for the presence of such drugs. Nevertheless, the Government seeks to introduce testimony by CAPT Mallak that the negative test results do not absolutely preclude the possibility the victim was drugged, due to the lapse of time between suspected ingestion and the collection of the specimens, the fallibility of the testing process, and the fact the victim had voided her bladder before submitting the urine specimen.

The Government also seeks to introduce statements by LCpl Oriade to NCIS. LCpl Oriade indicated that, after reflecting on everything that had transpired, it was his opinion the victim was drugged. He also told NCIS that, on the walk back to the barracks from the Club, the subject of "mushrooms" came up, that the appellee said he had some in his room, and so, the appellee, LCpl Oriade, and the victim all went to the appellee's room. AE XXVIII at 2-3.

Finally, the Government seeks to introduce testimony by the appellee at his first trial admitting that, upon learning the

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<sup>2</sup> California is of interest because the appellee had transferred to Okinawa from Twentynine Palms, California, approximately two months prior to the alleged rape.

<sup>3</sup> Where we cite to the "Record" in this decision, we are citing to the record of proceedings on rehearing, as opposed to the record of the original trial.

Command Duty Officer was coming to his room in response to the victim's rape allegation, he threw some beer bottles out the window into the ravine behind the barracks. *Id.* at 3.

Based on the proffered evidence, the Government seeks to argue it is reasonable to infer the appellee drugged the victim.

### **C. The Military Judge's Ruling**

Calling the theory the appellee had drugged the victim "very speculative," and citing MIL. R. EVID. 403, the military judge excluded much of this proffered evidence. He ruled the victim could testify to her perceptions of events, but was "in no position" to tie her perceptions to the conclusion she was drugged. Record at 183, 260-61. He excluded all the proffered testimony of Special Agent Blane and CAPT Mallak. *Id.* at 261-62. He did, however, rule the Government could introduce CAPT Mallak's testimony discounting the negative test results in rebuttal, if the defense opened the door by introducing evidence of the negative test results. *Id.* at 265-66. The military judge also excluded LCpl Oriade's NCIS statements, though he stated LCpl Oriade could testify to the substance of those statements.<sup>4</sup> *Id.* at 262-63. He ruled the Government could introduce the appellee's former testimony, but held the Government could not argue that that evidence showed consciousness of guilt of having drugged the victim. *Id.* at 263-64. Further, he prohibited the Government from arguing the appellee had drugged the victim at all. *Id.* at 264.

## **II. Principles of Law**

When deciding an interlocutory appeal under Article 62, UCMJ, this court may only act with respect to matters of law. Art. 62(b), UCMJ. See also *United States v. Gore*, 60 M.J. 178, 185 (C.A.A.F. 2004); *United States v. Lincoln*, 40 M.J. 679, 683 (N.M.C.M.R. 1994). We review a military judge's evidentiary rulings for abuse of discretion. *United States v. Barnett*, 63 M.J. 388, 394 (C.A.A.F. 2006); *United States v. Bailey*, 55 M.J. 38, 41 (C.A.A.F. 2001); *United States v. Allison*, 49 M.J. 54, 57

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<sup>4</sup> It was proffered that LCpl Oriade has recanted his NCIS statements, making it highly doubtful he would testify consistent with those statements. The military judge's ruling with respect to LCpl Oriade's statements is not completely clear. It appears he tentatively assumed LCpl Oriade would not testify consistent with those statements and that the statements would not be admissible under MIL. R. EVID. 801(d)(1), and then evaluated their admissibility under MIL. R. EVID. 403 if offered as impeachment under MIL. R. EVID. 613.

(C.A.A.F. 1998); *United States v. Bins*, 43 M.J. 79, 83 (C.A.A.F. 1995).

An abuse of discretion means that when judicial action is taken in a discretionary manner, such action cannot be set aside by a reviewing court unless it has a definite and firm conviction that the court below committed a clear error of judgment in the conclusion it reached upon a weighing of the relevant factors . . . . We will reverse for an abuse of discretion if the military judge's findings of fact are clearly erroneous or if his decision is influenced by an erroneous view of the law . . . . Further, the abuse of discretion standard of review recognizes that a judge has a range of choices and will not be reversed so long as the decision remains within that range.

*United States v. Dooley*, 61 M.J. 258, 262 (C.A.A.F. 2005) (quoting *Gore*, 60 M.J. at 187)(internal quotations omitted).

A military judge has wide discretion in determining the admissibility of evidence, and a decision to admit or exclude evidence based on MIL. R. EVID. 403 is within the sound discretion of the trial judge. *United States v. Smith*, 52 M.J. 337, 344 (C.A.A.F. 2000); *United States v. Phillips*, 52 M.J. 268, 272 (C.A.A.F. 2000); *United States v. Rust*, 41 M.J. 472, 478 (C.A.A.F. 1995). Ordinarily, appellate courts exercise great restraint in reviewing a judge's decisions under MIL. R. EVID. 403. *United States v. Harris*, 46 M.J. 221, 225 (C.A.A.F. 1997); *United States v. McDonald*, 53 M.J. 593, 595 (N.M.Ct.Crim.App. 2000), *aff'd*, 55 M.J. 173 (C.A.A.F. 2001).

To be admissible, evidence must be both logically and legally relevant. As a result, evidence that is logically relevant might nonetheless be excluded under MIL. R. EVID. 403. *Barnett*, 63 M.J. at 396; *Bailey*, 55 M.J. at 40. In evaluating legal relevance, a military judge must balance the probative value of the evidence against the danger of unfair prejudice, confusion of the issues or misleading the members, undue delay, waste of time, and the needless presentation of cumulative evidence. MIL. R. EVID. 403. A presumption of admissibility exists; to exclude evidence under MIL. R. EVID. 403, the military judge must find the concerns listed in the rule substantially outweigh the probative value of the evidence.

Finally, the control of arguments before courts-martial is within the discretion of the military judge. RULE FOR COURTS-

MARTIAL 801(a)(3), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.); R.C.M. 919(b), Discussion. See also *United States v. Michaud*, 48 C.M.R. 379, 397 (N.C.M.R. 1973). Rulings in this regard will be overturned only where the military judge has clearly abused his discretion. *United States v. Cordero*, 21 M.J. 714, 716 (A.F.C.M.R. 1985).

### III. Analysis

In this case, the Government appeals from the military judge's ruling *in limine* concerning the admissibility of certain expected evidence and arguments. For the purposes of the ruling, the military judge essentially accepted as true the Government's proffer of the expected testimony. As a result, it cannot be said the military judge's "factual findings" are clearly erroneous. Neither is there any indication whatsoever that the military judge held an erroneous view of the law. Rather, what is at question is the military judge's application of MIL. R. EVID. 403. As noted above, the application of MIL. R. EVID. 403 is committed to "the sound discretion of the trial judge." *Smith*, 52 M.J. at 344.

The military judge here reasonably concluded the Government's theory (that the appellee drugged the victim) was "very speculative" given the evidence, and that the evidence supporting that theory was of "remote relevance." There is no direct evidence a "date rape" drug was used. Indeed, the laboratory tests of the victim's blood and urine were negative for "date rape" drugs. While there are some facts which circumstantially suggest the victim was drugged -- such as her testimony that she passed out without having had much to drink, and was unable to resist when she temporarily regained consciousness, and the appellee's admission he threw beer bottles out the window -- those facts only hint at that possibility, while simultaneously being consistent with other possible explanations.

Having determined the Government's theory was very speculative and the evidence supporting that theory of only remote relevance, the military judge concluded the risk of unfair prejudice to the accused from the suggestion he had drugged the victim substantially outweighed any probative value of such evidence and argument. His decision was not beyond the range of reasonable conclusions, did not abuse his discretion, and we will not disturb it.

### **Conclusion**

For the foregoing reasons, the interlocutory ruling of the military judge that is the subject of this appeal is affirmed. The record is returned to the military judge for appropriate action in accordance with this decision. The stay of proceedings effected by R.C.M. 908(b)(4) is dissolved.

Chief Judge ROLPH and Senior Judge RITTER concur.

For the Court

R.H. TROIDL  
Clerk of Court