

**UNITED STATES NAVY-MARINE CORPS
COURT OF CRIMINAL APPEALS
WASHINGTON, D.C.**

**Before
J.A. MAKSYM, J.R. PERLAK, B.L. PAYTON-O'BRIEN
Appellate Military Judges**

UNITED STATES OF AMERICA

v.

**MICHAEL J. PINEDA
SEAMAN (E-3), U.S. NAVY**

**NMCCA 201000150
GENERAL COURT-MARTIAL**

Sentence Adjudged: 20 November 2009.

Military Judge: CDR Tierney Carlos, JAGC, USN.

Convening Authority: Commander, Navy Region Midwest, Great Lakes, IL.

Staff Judge Advocate's Recommendation: LT Joseph M. Moyer, JAGC, USN.

For Appellant: Capt Bow Bottomly, USMC.

For Appellee: Capt Mark Balfantz, USMC.

30 June 2011

OPINION OF THE COURT

**IN ACCORDANCE WITH RULE 18.2, NMCCA RULES OF PRACTICE AND PROCEDURE, THIS
OPINION DOES NOT SERVE AS PRECEDENT.**

MAKSYM, Senior Judge:

A general court-martial, composed of members with enlisted representation, convicted the appellant, contrary to his pleas, of one specification of aggravated sexual assault by engaging in a sexual act with a person who was substantially incapacitated in violation of Article 120, Uniform Code of Military Justice, 10 U.S.C. § 920. The members sentenced the appellant to three months confinement and a bad-conduct discharge. The convening authority approved the sentence as adjudged and, except for the bad-conduct discharge, ordered the sentence executed.

Before the appellant filed his brief and assignments of error, he filed motions to compel the production of certain Naval

Criminal Investigative Service (NCIS) reports. We ordered the production of investigations relating to one of the government's witnesses at trial, Seaman (SN) KA. One of the investigations dealt with whether SN KA committed perjury at trial, while another dealt with his death. The investigation into the perjury allegations was attached to the record while the death investigation was reviewed *in camera*. On 19 August 2010, the appellant, through appellate defense counsel, submitted a petition for a new trial to the Assistant Judge Advocate General of the Navy (Military Justice). The petition was then forwarded to this Court on 23 August 2010 pursuant to Article 73, UCMJ, AND RULE FOR COURTS-MARTIAL 1210, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.).

The appellant assigns six errors. We find merit with one of them: the appellant's argument that his petition for a new trial should be granted because of new information derived from the post-trial statements of SN KA. In our decretal paragraph, we set aside the findings and sentence and forward the record of trial to the Judge Advocate General of the Navy so that a new trial may be ordered. As such, we decline to consider the appellant's other assigned errors because they are no longer justiciable.

Background

On the night of 8 May 2009, Lance Corporal (LCpl) REM held a party in her barracks room. Record at 143-44, 159, 336. LCpl REM began drinking relatively early that evening, around 2000. *Id.* at 338-39, 350. Despite numerous different accounts as to how much LCpl REM drank that evening, *id.* at 192-93, 338-39, one thing is certain: LCpl REM drank to the point of intoxication. *Id.* at 145, 185. Among the attendees at the party were the appellant as well as a friend of his, SN KA. *Id.* at 144. The appellant and LCpl REM were neighbors. *Id.* at 337. SN KA and LCpl REM had engaged in a sexual relationship prior to the evening in question. *Id.* at 178, 338.

Later in the evening, LCpl REM went to SN KA's room. *Id.* at 145. According to SN KA's testimony at trial, LCpl REM exhibited signs of intoxication when she arrived at his room to include slurred speech and difficulty standing erect. *Id.* However, he believed that she was able to understand a conversation at that time. *Id.* at 160. He also testified that LCpl REM made sexual advances towards him at that time, *id.* at 145, but that he told her "no" and tried to get her to leave his room. *Id.* at 145-46. Despite this, LCpl REM remained in SN KA's room. *Id.* at 146. As a result, SN KA sent a text message to the appellant stating, "I need help." *Id.* at 146, 161.

The appellant went to SN KA's room and found him there with LCpl REM. *Id.* at 146. The appellant and SN KA tried to get LCpl REM to leave, but she would not. *Id.* They then decided to trade

room keys and have SN KA exit his own room in the hope that LCpl REM would be prompted to leave. *Id.* at 146-47.

SN KA went to the appellant's room briefly before deciding to stop at the party in LCpl REM's room and then attempted to return to his own room. *Id.* at 147-48. SN KA knocked on the door to his room, and the appellant opened it. *Id.* at 149-50, 162. SN KA found LCpl REM on his bed, clothed. *Id.* at 148-51. The appellant and SN KA had a conversation in which the appellant stated that LCpl REM was close to either leaving or falling asleep. *Id.* at 150-51, 162. SN KA then went back to the appellant's room and went to sleep. *Id.* at 151-52.

The subsequent events in dispute occurred in SN KA's room while he was in the appellant's room sleeping. LCpl REM testified at trial that she was "very drunk" when she initially went to SN KA's room. *Id.* at 342. She claimed to have remembered sitting on SN KA's bed with him, and that her next memory was of being alone in the room with the appellant. *Id.* at 342, 365. Her next recollection after that was of waking up naked from the waist down with the appellant having sex with her. *Id.* at 342-43, 366. During the sex act, LCpl REM asked the appellant where SN KA was multiple times. *Id.* at 343-44.

Around 0115, after the sex act was completed, the appellant returned to his room, which was still occupied by SN KA. *Id.* at 152. SN KA left the appellant's room and returned to his own. *Id.* at 152-53. When he got there, he found LCpl REM in his bed, under a sheet, and believed her to be naked. *Id.* at 152-53, 163. Soon after SN KA returned to his room, LCpl REM began crying. *Id.* at 152-53, 163, 346. SN KA asked LCpl REM something to the effect of whether the appellant had forced himself on her or hurt her, *id.* at 164, 168, 369-70, to which she responded, "no." *Id.* at 168-69, 370. SN KA then returned to the appellant's room and asked him whether he had "raped" LCpl REM, to which the appellant responded, "No! Are you an idiot?" *Id.* at 158.

Subsequently, LCpl REM reported the encounter as a sexual assault, which caused the appellant to contact his chain of command so as to notify them that he was being accused of "rape." *Id.* at 212-13. An investigation was initiated, one aspect of which was a Sexual Assault Forensic Exam conducted on LCpl REM. *Id.* at 306. A DNA profile was obtained from LCpl REM's right breast that contained DNA from LCpl REM, the appellant, and an unknown third party. Prosecution Exhibit 19 at 3.

SN KA was one of the numerous prosecution witnesses called at trial to establish a timeline for the night in question. His recitation of the facts at trial was consistent with the account detailed above. Personnel Specialist Second Class (PS2) Jeremy Scarborough, the command representative who the appellant contacted as soon as he knew of the accusation against him, was also called by the prosecution. When asked by the military judge about LCpl REM's initial report, PS2 Scarborough stated that when

he questioned LCpl REM, a few hours after the event in question, about whether she had been sexually assaulted, she responded, "I don't really know if I was." Record at 222. When LCpl REM testified, she claimed to have several gaps in her memory from the evening in question. *Id.* at 343. The prosecution and the defense both called forensic toxicologist witnesses, each of whom testified that someone could be intoxicated to the point of not being able to form memories while at the same time appearing to be in control of their faculties to those around them. *Id.* at 270-72, 461-62.

The defense called several witnesses as well. One was SN Timothy Brennan. SN Brennan testified that LCpl REM made certain statements to him after the incident about why she reported the alleged sexual assault as she did. According to SN Brennan, LCpl REM stated that she only became upset about the sexual encounter with the appellant after SN KA expressed dismay with her. *Id.* at 412. SN Brennan also testified that LCpl REM told him that she felt forced to say that she was "raped" and that she "kind of over-exaggerated" what happened. *Id.* at 412, 419.

The appellant's trial concluded on 20 November 2009. On 11 December 2009, a civilian friend of SN KA's approached the NCIS and told them that SN KA had made statements to her indicating that he had not testified truthfully at the appellant's trial. NCIS Report of Investigation (ROI), dtd 20 Jan 10, Exhibit (1). NCIS investigated the allegations and interviewed SN KA. He gave multiple written statements to NCIS in January 2010 and one on 1 February 2010, which were inconsistent with each other and his testimony at trial. When pressed by NCIS, SN KA eventually claimed that LCpl REM had performed oral sex on him on 8 May 2009 while the appellant was in the room, NCIS ROI, dtd 19 Feb 2010, Exhibit (19), enclosures (C) & (D), and that he and LCpl REM engaged in consensual sexual intercourse on the night of 8 May 2009 before the appellant and LCpl REM had sex. *Id.* at Exhibit (19), enclosure (G). Of particular relevance were SN KA's statements that LCpl REM appeared to be "very much alert" at the time they had sex and would have been able to consent, but that he refrained from disclosing these details earlier because he was afraid he would be accused of having committed sexual assault. *Id.* at Exhibits (18) and Exhibit (19), enclosure (G). LCpl REM was interviewed again as a result of this investigation and she provided a statement consistent with her trial testimony that she did not remember engaging in sexual intercourse with anyone on the night of 8 May 2009. *Id.* at Exhibit (30).

On 1 February 2010, SN KA was found dead in his barracks room. He appeared to have hanged himself, although the autopsy could not rule out homicide. Coroner's Report dtd 20 April 2010.

Jurisdiction

The appellant's adjudged sentence included a bad-conduct discharge. As such, this court has jurisdiction over the

appellant's case under Article 66(b)(1), UCMJ. Article 73, UCMJ, states that an accused may petition the Judge Advocate General for a new trial, and that "[i]f the accused's case is pending before a Court of Criminal Appeals . . . the Judge Advocate General shall refer the petition to the appropriate court for action." The appellant and the Judge Advocate General of the Navy have complied with the statutory and regulatory framework established by Article 73, UCMJ, and R.C.M. 1210. Therefore, the appellant's petition for a new trial is properly before this court, and as such we are empowered to act on that petition.

Grounds for a New Trial

At both oral argument and in his brief, counsel for the appellant argued that grounds exist for a new trial under R.C.M. 1210 based on the theory that "newly discovered evidence" exists that meets the following criteria:

- (A) The evidence was discovered after the trial;
- (B) The evidence is not such that it would have been discovered by the petitioner at the time of trial in the exercise of due diligence; and
- (C) The newly discovered evidence, if considered by a court-martial in the light of all other pertinent evidence, would probably produce a substantially more favorable result for the accused.

R.C.M. 1210(f)(2). Having reviewed the evidence ourselves, we find the appellant's argument compelling.

The evidence in question places a new light on a material fact at issue in this case. The appellant argues that the new evidence calls into question the truthfulness of LCpl REM's testimony. While we agree with that argument, we would not be inclined to grant a new trial on that basis alone due to the fact that evidence was admitted at trial calling into question LCpl REM's credibility and the veracity of her account of the events surrounding the putative sexual assault. We find the stronger argument to be that the new evidence is highly probative on the issue of whether the appellant may have been mistaken as to whether LCpl REM gave consent to engage in a sexual act on 8 May 2009. This issue is crucial in any sexual assault case like the appellant's, where the prosecution's theory is that the victim is substantially incapacitated and therefore incapable of providing consent.

Evidence was presented at trial that the appellant admitted to having sex with LCpl REM on the night in question, but that he did not admit to sexually assaulting LCpl REM. Additionally, SN KA testified at trial that LCpl REM made advances towards him on the night of 8 May 2009, but that he rebuffed her overtures. Furthermore, at trial he testified that LCpl REM exhibited numerous signs of intoxication. However, his post-trial statements gave a much more detailed description of his

interactions with LCpl REM on that night. He discusses specifics of the sex acts in which he and LCpl REM engaged, and how she was "alert" during them. SN KA's post-trial statements are at great variance with his testimony at and, if considered by a fact-finder, could have bolstered the appellant's argument about mistake of fact as to consent. We hold that such corroboration of that defense "would probably produce a substantially more favorable result" for the appellant.

This court fully recognizes that "rehearings and reopenings of trial proceedings, are generally disfavored," and that "relief should only be granted "if a manifest injustice would result absent a new trial" *United States v. Williams*, 37 M.J. 352, 356 (C.M.A. 1993). However, granting a new trial is necessary in the present case so as to avoid a "manifest injustice." The appellant should be allowed to present evidence relating to SN KA's statements. The Due Process Clause of the Fifth Amendment guarantees that "'criminal defendants be afforded a meaningful opportunity to present a complete defense.'" *United States v. Webb*, 66 M.J. 89 (C.A.A.F. 2008) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Without evidence of SN KA's statements, the appellant is denied that right. We are cognizant of the fact that SN KA's credibility is suspect due to the inconsistencies in his statements. However, our task is neither to "determine whether the proffered evidence is true" nor to "determine the historical facts." *United States v. Brooks*, 49 M.J. 64, 69 (C.A.A.F. 1998). Rather, it is within our province to determine whether "the evidence is sufficiently believable to make a more favorable result probable." *Id.* We find that it is.

The new evidence contained in SN KA's statements is in fact material and deserves copious consideration at trial. In *United States v. Johnson*, 61 M.J. 195 (C.A.A.F. 2005), the Court of Appeals for the Armed Forces (CAAF) determined whether new evidence was material for the purposes of granting a new trial under R.C.M. 1210 by employing the materiality test previously applied to MILITARY RULE OF EVIDENCE 412, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2008 ed.). *Johnson*, 61 M.J. at 199. The CAAF looked at "the importance of the issue for which the evidence was offered in relation to the other issues in this case; the extent to which this issue is in dispute; and the nature of other evidence in the case pertaining to this issue." *Id.* (internal quotation marks and citations omitted). The issue of whether LCpl REM engaged in sexual acts earlier in the evening and whether she appeared to consent and be fully cognizant of her actions relates to actual consent and mistake of fact as to consent. This is a more important issue than any other in the case. In fact, this is the central issue in dispute in the case, yet scant evidence was actually presented on this issue at trial because no one else was thought to have been in the room with the appellant and LCpl REM when the criminal sexual act allegedly occurred and no one else had previously provided any testimony as to how LCpl REM was

behaving that evening while engaging in a sexual act. Therefore, we find that the new evidence is material.

While there are inconsistencies within SN KA's post-trial statements and they contradict some aspects of his in-court testimony, they are in fact consistent with other testimony and statements presented by SN KA, LCpl REM, and numerous other witnesses attesting to the pre-existing sexual relationship between LCpl REM and SN KA. Moreover, timelines presented by various witnesses about the evening in question illustrate that such a sequence of events as those described by SN KA in his post-trial statements could have in fact occurred on 8 May 2009. Furthermore, these statements were against SN KA's interests as he was potentially providing NCIS with evidence of prior false official statements, but he explained that he did not disclose all of the details earlier because of fears of being accused of an even greater offense: sexual assault. Based on those factors, we find that the evidence is sufficiently believable to have reinforced the appellant's theory regarding mistake of fact as to consent, and therefore the appellant will not be afforded a meaningful defense and a fair trial until such evidence is considered by a fact finder at a new trial.

Conclusion

The findings and sentence are set aside and the Petition for a New Trial is granted. The record of trial is returned to the Judge Advocate General of the Navy for forwarding to an appropriate convening authority for disposition. R.C.M. 1210(h)(1).

Judge PERLAK and Judge PAYTON-O'BRIEN concur.

For the Court

R.H. TROIDL
Clerk of Court