COURT MARTIAL

Citation: *R. v. W. (T.S.),* 2018 CM 2004

Date: 20180126
Docket: 201702

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal T.S.W., Offender

Before: Commander S.M. Sukstorf, M.J.

Restriction on Publication: By court order, pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, directs that any information that could identify anyone described in these proceedings as the subject or victim of the offence or the accused shall not be published in any document or broadcast or transmitted in any way.

NOTE: Personal data identifiers have been redacted in accordance with the Canadian Judicial Council's "*Use of Personal Information in Judgments and Recommended Protocol*".

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Master Corporal T.S.W., on 12 December 2017 you admitted your guilt to one charge under section 130 of the *National Defence Act* (*NDA*), that is to say, sexual assault, contrary to section 271 of the *Criminal Code* (*Cr. C.*).

Evidence

[2] In this case, the prosecutor read the Statement of Circumstances and then provided the documents required at the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) article 112.51 that were supplied by the chain of command. Further, an Agreed Statement of Facts was also introduced on consent to inform the Court on the specific facts pertaining to Master Corporal T.S.W. The Agreed Statement of Facts included statements by the offender's son and common law spouse.

[3] Further, the Court benefitted from submissions by counsel to support their joint position on sentence highlighting the facts and considerations relevant to Master Corporal T.S.W. In addition, both counsel made submissions with respect to the court's mandatory consideration of whether a prohibition order under paragraph 147.1(1)(d) of the *NDA* should be ordered.

[4] Pursuant to section 179(2) of the *NDA*, the Court considered victim impact statements provided by the victim, her family members as well as counsel's submissions and, as a result, the evidence before the court has enabled me to be sufficiently informed of the offender's personal circumstances allowing me to consider any indirect consequence of the sentence, so I may impose a punishment adapted specifically to his circumstances and the offence committed.

[5] The Statement of Circumstances filed in court is reproduced to provide a full account of the circumstances of both the offence and the offender:

"Statement of Circumstances

1. At all material times, XXXX Master Corporal T. W. was a member of the Canadian Forces Joint Signals Regiment, Canadian Armed Forces, Regular Force.

Background

2. On 5 August 2015, MCpl W. was deployed to Lviv, Ukraine as a supporting member of the Theatre Activation Team ("TAT"), *Operation Unifier, Roto 0*, where he was employed as a satellite signals technician and crypto custodian.

3. The Operational threat level in theatre during that time was assessed as high, due to identified security risks posed by various organized crime groups operating within the Canadian area of responsibility, as well as active espionage threats directed at Canadian Forces personnel.

4. On 5 September 2015, the TAT Commander authorized and Organized Cultural Tour of the city of Lviv, Ukraine. Various force

protection orders were issued to mitigate security risks, including the requirement that members remain in their assigned groups of four (4). MCpl W. participated in this tour, however, at the conclusion of the tour, he failed to report at the scheduled departure rendezvous point, and did not board the bus which transported members back to the Canadian Forces base in Central City, Ukraine.

5. While the other three members of MCpl W.'s assigned group were aware that MCpl W. was missing, his absence was initially concealed from the chain of command. It was not until approximately 0115hrs on 6 September 2015, that the chain of command and the Military Police in theatre were made aware of the fact that MCpl W. had been missing since 1830hrs, 5 September 2015.

6. A large scale search was initiated by the Task Force chain of command, which involved all CAF personnel in theatre. An Incident Response Team, accompanied by local Ukrainian law enforcement authorities, deployed to search the downtown area of Lviv, while concurrent searches were conducted at the Canadian Forces Base in Central City. This search was frustrated, in part, by the failure of certain of MCpl W.'s colleagues to divulge all they knew about what might have happened to him.

7. On 6 September 2015 at approximately 0320hrs, after attempts to locate MCpl W. had met with no success, the chain of command ordered a search of MCpl W.'s personal belongings, including his personal computer, in an attempt to discover any information which could possibly assist in locating the whereabouts of MCpl W.

8. The Military Police in theatre located MCpl W.'s personal laptop and engaged MCpl Mead to conduct a search of the computer to determine if social media sites or the internet browser history could be accessed which might reveal information which could assist in locating MCpl W. At approximately 0440hrs, MCpl Mead, gained access to MCpl W.'s personal laptop.

9. While accessing the computer, MCpl Mead discovered a series of digital images which depicted a young nude female. MCpl Mead recognized the subject of the images as being J.K, the 12 -or- 13year old step daughter of MCpl W. MCpl Mead observed that some of images depicted MCpl W., who he could identify by a distinctive tattoo on his wrist, touching the nude breast and vagina of J.K who appeared to be sleeping.

10. MCpl Mead immediately stopped accessing the computer and reported what he had seen to the Military Police as he believed the

images were criminal in nature. Upon viewing the images on the laptop, the laptop was seized by the Military Police and the Canadian Forces National Investigation Service were contacted.

11. On 6 September 2015, at approximately 0600hrs, MCpl W. approached Ukrainian law enforcement authorities in downtown Lviv, identifying himself as a Canadian soldier and was transported back to the Canadian Forces Camp by Canadian Military Police.

CFNIS Investigation

12. On 9 September 2015, a team from the Canadian Forces National Investigation Service deployed to the Ukraine, reviewed the evidence seized, and arrested MCpl W. for Possession/Production of Child Pornography contrary to section 130 of the *National Defence Act*, Pursuant to Section 163.1 of the *Criminal Code* and Sexual Exploitation contrary to section 130 of the *National Defence Act*, Pursuant to Section 153 of the *Criminal Code*.

13. On 9 September 2015, MCpl W. was released from custody by a Custody Review Officer with a number of release conditions, including a condition that he not be alone with children under the age of 16.

14. Since his arrest in 2015, MCpl W. has remained on duty and employed by the Canadian Forces. For a significant period of time he has been attach posted to the Joint Personnel Support Unit Detachment in Kingston.

Circumstances Surrounding the Offence

15. The digital images discovered in the Ukraine established that on 8 September 2014 MCpl W. did touch J.K in a sexual manner while she was sleeping at his residence in [the township of South Frontenac], Ontario. On that date, MCpl W. entered J.K's bedroom while she was asleep and intentionally placed his hand and finger on the left exposed breast of J.K. He then proceeded to expose her nude lower body thereby exposing her vagina. He proceeded to use one finger to digitally penetrate her vagina while she remained asleep.

16. The sexual touching of J.K by MCpl W. on 8 September 2014 was intentional, and at all material times, MCpl W. knew that J.K. was unconscious and that she did not consent to this touching.

History of Disciplinary Proceedings & Guilty Plea

17. Two Records of Disciplinary Proceedings (RDP) were signed in favour of MCpl W. On 25 April 2016, a number of disciplinary charges relating to the unauthorized absence of MCpl W. in the Ukraine were laid by his unit. On 28 April 2016, a second set of charges were laid by the CFNIS concerning the images discovered in the Ukraine and from evidence seized at his residence in [the township of South Frontenac], Ontario.

18. Ten charges were preferred by the Director of Military Prosecutions on 16 January 2017, including:

a. One charge of Disobeying a Lawful Command of a Superior Officer contrary to Section 83 of the *National Defence Act*;

b. One charge pursuant to Section 130 of the *National Defence Act*, for Making Child Pornography, contrary to Section 163.1(2) of the *Criminal Code of Canada*;

c. One charge pursuant to Section 130 of the *National Defence Act*, for Sexual Interference, contrary to Section 151 of the *Criminal Code of Canada*;

d. One charge pursuant to Section 130 of the *National Defence Act*, for Sexual Assault, contrary to Section 271 of the *Criminal Code of Canada*;

e. Two charges pursuant to Section 130 of the *National Defence Act*, for Possession of Child Pornography, contrary to Section 163.1(4) of the *Criminal Code of Canada*;

f. One charge pursuant to Section 130 of the *National Defence Act*, for Voyeurism, contrary to Section 162(1)(a) of the *Criminal Code of Canada*;

g. One charge of Conduct to the Prejudice of Good Order and Discipline contrary to Section 129 of the *National Defence Act*;

h. One charge of Absence without Authority contrary to Section 90 of the *National Defence Act*; and

i. One charge of Drunkenness contrary to Section 97 of the *National Defence Act.*

> 19. On 12 December 2017, further to a negotiated resolution of all charges, MCpl W. entered a Guilty Plea to the single count of Sexual Assault against J.K. The Director of Military Prosecutions withdrew the remaining charges."

Circumstances of the offender

[6] Master Corporal T.S.W. is 37 years old and enrolled in the Canadian Armed Forces (CAF) in June 1999 as a Primary Reservist. He transferred to the Regular Force in March 2002. By all accounts, he appears to have served his country well and has no previous conduct or criminal record for the court to consider. He has a high school education. He was awarded the following medals for his service in the Balkans and Afghanistan: NATO Non-Article 5 Service Medal, Canadian Peacekeeping Service Medal, General Campaign Star – SW Asia and 1st Rotation Bar to the GCS-SWA. He also earned his Canadian Forces Decoration. Master Corporal T.S.W. was diagnosed and suffers from post-traumatic stress disorder (PTSD) arising from his two tours of duty in Afghanistan. He was assessed by Dr S. Jadot in September 2012 and again in October 2012 by Dr G. Fraser at the Operational and Trauma Stress Support Centres for anxiety disorder, tour related, sub-syndromal for PTSD. In January 2018, Dr Smith noted that there was no evidence to support any causal link between Master Corporal T.S.W.'s possession or use of pornographic material and his operational stress injury as the former predates the latter.

[7] J.K. was born in 2002 and is the biological daughter of A.K. Master Corporal T.S.W. and A.K. were married in April 2006 and have one son D.W., who was born in 2008.

[8] Since the date of their marriage, Master Corporal T.S.W. acted as a parental figure to J.K. and, at all material times, was in a position of trust and authority towards J.K.

[9] Master Corporal T.S.W. and A.K. separated in June 2013; however, pursuant to a custodial arrangement concerning D.W. and J.K., Master Corporal T.S.W. continued to exercise access to both children at his residence in the township of South Frontenac, Ontario, up until his arrest in September 2015.

[10] On 8 September 2014, while exercising custody of J.K, Master Corporal T.S.W. used the camera function on his Nexus cellular phone to record a series of images of J.K. while she was sleeping nude in her bed at his residence in the township of South Frontenac, Ontario. In some of the photos, Master Corporal T.S.W. is touching the nude breast of J.K. and is digitally penetrating her vagina.

Victim impact statements

[11] The court considered the following impact statements provided in hard copy and in the case of the victim's mother and stepfather, they were read into the court's record.

Impact of offence on J.K.

[12] As a result of this offence, Dr L. Corrigan noted that J.K. suffered a significant deterioration in her mental health and has exhibited symptoms including increased suicide ideation, school absences, anxiety, depression, increased irritability and social isolation. His medical assessments of J.K. note that she suffers from an exaggerated startle effect and has acted out aggressively with friends. J.K. also suffers from symptoms of paranoia, panic attacks and difficulty in achieving restful sleep.

[13] A statement written by J.K. on 9 January 2018 was considered by the court.

Impact on family of J.K.

[14] The following statements written by family members were considered by the court:

(a) A.K., mother of J.K. who has been significantly impacted by the events;

(b) A.K., the maternal grandmother of J.K.;

(c) M.K., an aunt of J.K.; and

(d) P.C., the spouse of A.K.

Impact on Master Corporal Mead (colleague who discovered the images)

[15] Subsequent to discovering the images of J.K., Master Corporal Mead developed symptoms of PTSD causally linked to this incident. As a result, Master Corporal Mead is currently on a permanent medical category and is scheduled to be released from the CAF for medical reasons.

Impact on Master Corporal T.S.W.'s family and requests for change of release conditions

[16] The court also considered the following statements written by family members as well as supporting documents outlining the impact of the events on the offender and his family:

(a) A statement written by D.W., the son of Master Corporal T.S.W. and sibling of J.K;

(b) A statement written by A.M., common law partner of Master Corporal T.S.W.;

(c) Master Corporal T.S.W.'s release conditions, dated 9 September 2015;

(d) Master Corporal T.S.W.'s first request for change of release conditions, dated 26 November 2015;

(e) Lieutenant-Colonel Walkling's response to Master Corporal T.S.W.'s first request for change of release conditions, dated 23 February 2016;

(f) Master Corporal T.S.W.'s subsequent release conditions, dated 25 February 2016;

(g) Master Corporal T.S.W.'s second request for change of release conditions, dated 31 May 2017;

(h) Master Corporal T.S.W.'s additional memo relating to his second request for change of release conditions, dated 19 June 2017;

(i) Lieutenant-Colonel Walkling's response to Master Corporal T.S.W.'s second request for change of release conditions, dated 20 June 2017;

(j) Master Corporal T.S.W.'s third request for change of release conditions, dated 13 December 2017;

(k) Lieutenant-Colonel Roy's response to Master Corporal T.S.W.'s third request for change of release conditions, 22 December 2017; and

(l) A letter from Dr R.G. Smith, a psychiatrist with 33 Canadian Forces Health Services Centre, Canadian Forces Base Kingston, dated 23 January 2018.

Joint submission

[17] On 25 January 2018, in a joint submission, the prosecution and defence counsel recommended that I impose a sentence of 18 months' imprisonment in addition to imposing the accompanying military punishments of dismissal with disgrace from Her Majesty's service and a reduction in rank to private.

[18] The joint submission before the court is reviewed in the context of the current Supreme Court of Canada (SCC) guidance in *R. v. Anthony-Cook,* 2016 SCC 43. In that decision, the SCC clarified that a trial judge must impose the sentence proposed in a joint submission "unless the proposed sentence would bring the administration of justice into disrepute, or is otherwise not in the public interest."

[19] In rendering its decision, the SCC highlighted the professional responsibility of both the prosecutor and defence counsel as key players in the administration of the criminal justice system. Counsel are highly knowledgeable about the circumstances of the offender and the offence, as well as with the strengths and weaknesses of their

respective positions and are well placed to arrive at a joint submission that reflects the interests of the public, the CAF and the accused. By coming to a meaningful resolution in this particular case, both the prosecution and defence counsel ensured that the victim was not required to appear before the court martial. This is a pivotal factor in this particular case.

[20] The prosecutor who proposes the sentence will have been in contact with the victim's family as well as the offender's chain of command. He is aware of the needs of the military and its surrounding community and is responsible for representing those interests. Defence counsel acts exclusively in the accused's best interest, including ensuring that the accused's plea is a voluntary and informed choice and unequivocally acknowledges his guilt. As members of the legal profession and accountable to their respective law societies, the court relies heavily on their professionalism and judgement in proposing a joint submission for the court's consideration.

Assessing the joint submission

[21] Although defence counsel pointed out that the *Cr. C.* provisions on sentencing do not directly apply to the military justice system, they are significant guiding principles. In fact, the Court Martial Appeal Court (CMAC) stated in *R. v. Tupper*, 2009 CMAC 5, that the fundamental purposes and goals of sentencing as found in the *Cr. C.* do apply in the context of the military justice system and a military judge must consider these purposes and goals when determining sentence.

[22] In short, while the case of *Anthony-Cook* encourages counsel to work together to resolve matters and make joint submissions, it still requires that the submission comply with the sentencing principles set out in the *Cr. C*. Hence, it is my duty to examine the evidence in light of the applicable principles and objectives of sentencing, including those set out in sections 718, 718.1, 718.2 of the *Cr. C.*, as far as they are compatible with the sentencing regime provided under the *NDA*.

Objectives and principles of sentencing

[23] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and the maintenance of discipline and, from a more general perspective, the maintenance of a just, peaceful and safe society. Moderation is a core principle of sentencing in Canada and does not allow a military court to impose a sentence beyond that required in the circumstances of the case.

[24] QR&O article 112.48 (2) requires a military judge imposing a sentence at a court martial to consider "any indirect consequence of the finding or of the sentence [. . .] and impose a sentence commensurate with the gravity of the offence and the previous character of the offender." The sentence imposed must be adapted to the individual offender and the offence he committed.

[25] Sentencing is an individualized process and in considering a joint submission, pursuant to the CMAC direction in *Tupper*, I must assess the proposed sentence against the application of section 718 sentencing principles to ensure that a sentencing range is generally respected. This engages the parity principle and involves looking at similar cases, where I may see what types of sentences were imposed on similarly situated offenders in similar circumstances.

[26] Section 718 of the *Cr. C.* provides that the fundamental purpose of sentencing is to contribute to "respect for the law and the maintenance of a just, peaceful and safe society by imposing just sanctions" that have one or more of the following objectives:

(a) to protect the public, which includes the CAF;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing offences;

(d) to separate offenders from society, where necessary; and

(e) to rehabilitate and reform offenders.

[27] When imposing sentence, a military court must consider the following principles:

(a) the sentence must be proportionate to the gravity of the offence;

(b) the sentence must be proportionate to the responsibility and previous character of the offender;

(c) the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

(d) an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances; in short, the court should impose a sentence of imprisonment or detention only as a last resort as established by the CMAC and the SCC decisions; and

(e) lastly, any sentence to be imposed by the court should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

Objectives of sentencing to be emphasized in this case

[28] The prosecution has emphasized that, in their negotiations, both he and defence counsel closely considered the objectives of sentencing. On the facts of this case, both the prosecution and defence stated that the objectives they considered most important

are those of deterrence and denunciation which, on the facts before the court, I agree with.

[29] Further, section 718.01 stipulates that where a court imposes a sentence for an offence that involved the abuse of a person under the age of eighteen years, it shall give primary consideration to the objectives of denunciation and deterrence.

[30] A fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The principle of proportionality lies at the heart of sentencing and a sentence imposed must be relative to the gravity of the offence.

Gravity of the offence

[31] The Alberta Court of Appeal, in the case of *R. v. Arcand*, 2010 ABCA 363, 499 AR 1, referenced in *R v WEM*, 2014 ABQB 10, provides a helpful description of what is meant by "gravity of the offence":

> What is meant by "gravity of the offence"? This concept is directed to what the offender did wrong. It includes two components: (1) the harm or likely harm to the victim; and (2) the harm or likely harm to society and its values. What influences that analysis apart from the degree of injuriousness inherent in the crime itself? The answer lies in s. 718.2.

Degree of responsibility of the offender

[32] Similarly, the Alberta Court of Appeal in *Arcand*, defines the degree of responsibility of the offender as follows:

> The "degree of responsibility of the offender" as used in s. 718.1 certainly includes the *mens rea* level of intent, recklessness or wilful blindness associated with the *actus reus* of the crime committed. For this assessment, courts are able to draw extensively on criminal justice principles. The greater the harm intended or the greater the degree of recklessness or wilful blindness, the greater the moral culpability. However, the reference in s. 718.1 is not simply to the "*mens rea* degree of responsibility of the offender" at the time of commission of the crime. Parliament evidently intended "degree of responsibility of the offender" to include other factors affecting culpability. These might relate, for example, to the offender's personal circumstances, mental capacity or motive for committing the crime. Where else does the *Code* provide for an offender's degree of responsibility generally to be taken into account? Here, too, the answer takes us to s. 718.2.
> [footnote omitted]

Parity

[33] Under the principles of sentencing, the law requires that the sentence imposed be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[34] An offence of sexual assault where the victim is under the age of 16 years, carries a minimum sentence of one year imprisonment and a maximum of 14 years. In making the joint submission on sentence, the prosecution relied upon a significant number of precedents that the court reviewed.

Sentence of imprisonment

[35] Based on the case law relied upon by counsel, the range of sentences seems to extend from 15 months to 4 years:

(a) *R. v. M.G.F.*, 2010 ABCA 102 – Accused sexually touched his ten-year-old stepdaughter by rubbing her vagina over her pants while in presence of other children, in the home and repeated conduct later the same day. Accused was charged with two counts of sexual interference and admitted to other incidents. Accused pleaded guilty. Trial judge sentenced accused to global sentence of 90 days' imprisonment due to accused's lack of criminal record and considering that the offence was at lower end of scale. On appeal, sentence was varied to 15 months' imprisonment. Trial judge failed to identify accused's position of trust, victim's age and place of assault as aggravating factors and erred by imposing sentence that was disproportionate to gravity of offences and moral blameworthiness of accused.

(b) *R. v. M.M.*, 2017 ONCJ 733 – When accused's stepdaughter was between ages of 13 and 17, accused gave her massages and, when she fell asleep, touched her genital areas and took photographs while doing so. The accused's computer revealed 958 images of child pornography, 894 of which were images of complainant. Accused downloaded child pornography from internet chat room and uploaded onto site child pornography images of complainant, including images where her face was visible. Accused was 41 years old and had no prior criminal record. Accused pleaded guilty to making available child pornography, possessing child pornography, making child pornography, sexual assault, and sexual exploitation. Accused abused his position of trust as father figure and groomed complainant from early age. Incidents were not momentary or isolated and accused's possession of child pornography occurred over many months. Accused's moral culpability was significant. The judged awarded a global sentence of four and a half years where 18 months was apportioned to the offence of sexual assault which was to be served concurrent to count 6 for sexual exploitation.

(c) *HMTQ v. J.D.M.*, 2001 BCSC 563 – The sexual assaults by the accused, who was acting as a stepfather to the complainant occurred when the complainant was between the ages of 6 and 11. According to the complainant, these assaults took the form of touching her vagina and what she referred to as her "boobs". The complainant testified that this

touching took place underneath her clothing and above her clothing. The inappropriate touching progressed from just touching her vagina and her "boobs" to digital penetration and took place on numerous occasions at various locations where they lived as father and daughter and on other occasions when her mother and the accused had separated and were living separate and apart. The respondent abused the trust of a very young child. He remained unrepentant and continued to deny that the offences took place. Accused had a significant criminal record. Judge sentenced the accused to two years less one day and ordered that on his release the accused be placed on probation for a period of two years under a number of conditions;

(d) In *R. v. D.B.A.*, 2007 NSSC 324, the accused pleaded guilty to charges of sexual touching and invitation to touch. The accused was a relative of the complainant. The incidents involved mutual masturbation. The Crown was seeking a 20-month custodial sentence and two years' probation. The accused was seeking a conditional sentence. The sentencing judge imposed a conditional sentence of 20 months.

(e) *R. v. G.W.H.*, 2004 ABPC 241 involved a case where the accused was the uncle of a seven-year-old female complainant. The accused visited the complainant and on several occasions digitally penetrated her anus and on one occasion touched her vagina while she was in the bath. The accused pleaded guilty to sexual assault and sexual interference. After conducting a thorough survey of the cases involving sexual assault and sexual interference, Allen J sentenced the accused to a custodial sentence of 18 months, followed by a three-year probation, and a number of ancillary orders. The Crown was seeking a custodial sentence of three to four years and the accused was seeking a "lengthy conditional sentence order." Justice Allen weighed the aggravating circumstances, being the digital penetration, and the invitation to have the child touch his penis, against the mitigating circumstances, being the guilty plea and the accused's genuine expression of remorse.

(f) In *R. v. S.P.C.*, 2008 ABPC 85, the mother of the seven-year-old victim found the accused and the victim under a blanket on the sofa. Lifting the blanket, she found that the victim was wearing no pants or underwear and the accused was sexually aroused. A medical examination showed that the victim's vagina was red and tender. The accused had digitally penetrated her. The accused had also asked the victim to touch his penis. The accused pled guilty to one count of sexual assault and one count of touching for a sexual purpose. The sentencing judge found as mitigating factors that the accused was 27 years old, had familial support and had pled guilty. The sentencing judge found as aggravating factors the opportunistic nature of the crime, the accused's minimization of his responsibility, his lack of co-operation with the Forensic Assessment &

Outpatient Service physician, the fact that he was found to be in a position of trust and the effect on the victim.

The Crown appealed the sentencing judge's sentence of nine months' imprisonment for the sexual assault and three months' imprisonment for the invitation, both sentences to be served concurrently. In *R. v. S.P.C.*, 2008 ABCA 280, the Alberta Court of Appeal allowed the appeal and imposed a sentence of 18 months plus two years' probation for the sexual assault, and upheld the three-month sentence for invitation to sexual touching.

(g) In *R. v. Innerebner*, 2010 ABQB 188, Read J was dealing with a number of charges involving different complainants at different times. The one that is most relevant to the case at bar was Count 5, which involved the accused placing his hands inside the 12-year-old complainant's pants and inserting his thumb inside her vagina. The offences occurred in the accused's home while the complainant was performing chores for him. Justice Read, as well, conducted a survey of cases that dealt with the issue of digital penetration and concluded that for that specific offence, being Count 5, the accused should be sentenced to a four-year custodial sentence. Justice Read found, at paragraph 97, "[t]here are no mitigating factors, such as a guilty plea, amenability to counselling or expression of remorse." She did find, however, many aggravating factors, being *Cr. C.* section 718.2(a)(iii), repeated incidents, planning and deliberation, the accused's position of trust and the accused's blaming of the complainant.

(h) *R v WEM*, 2014 ABQB 10 – Accused was married to 13-year-old victim's mother He was victim's stepfather and in position of trust and authority towards her. Accused digitally penetrated complainant's vagina and his sperm was found on her buttock. Accused was convicted of sexual interference and sexual assault. Sexual assault conviction was stayed and accused sentenced to three and a half years' imprisonment, less credit of 11 months' for time served. The accused ordered to provide DNA sample for forensic analysis, to comply with sex offender registry for 20 years and to pay $200 victim fine surcharge. Aggravating factors included skin-to-skin contact, fact that complainant was sleeping when accused commenced assault, planning and deliberation, and fact that assault took place in family home. Accused, aged 39, did not have criminal record, was in British military and was employed. Mitigating factors included letters of support from accused's family, co-workers and fellow military personnel which indicated that he had familial and other support. Accused's past record was exemplary given his military decorations. Offence had serious impact on complainant and family.

(i) *R. v. K. (K. M.)* 2005 NBQB 414– The victim was the stepdaughter of the accused. She was sexually abused by him between the ages of 10 and

> 13. It occurred in the family home for approximately three years. He was caught by the mother of the victim in the bedroom of the victim in the family home. It started by touching in the area of her vagina, touching of her breasts and then on to include digital penetration of her vagina, two or three incidents of fellatio, at least two incidents of oral sex being committed on the victim by the accused and two incidents of sexual intercourse. The first occurred when the victim was 12 years of age and another time when she was 13. Judge sentenced accused to three years plus a number of ancillary orders. Judge stated that if it were not for the fact that accused had taken positive steps towards his rehabilitation, he would have imposed a sentence more in the range of four years.

Dismissal with disgrace and reduction in rank

[36] Section 139 of the *NDA* includes a number of purely military sanctions. In addition to the period of 18 months' imprisonment, counsel recommend that the offender be sentenced to dismissal with disgrace from Her Majesty's service and a reduction in rank to that of private. Section 141(1) of the *NDA* provides that dismissal with disgrace may be imposed in addition to a punishment of imprisonment for less than two years and there is no legal impediment to adding reduction in rank to the sentence. As Dutil CMJ found in the case of *R. v. Ayers*, 2017 CM 1012, some of these punishments have no equivalence or resemblance in the civilian context, but the court is aware of their significance within the military community.

[37] Dismissal with disgrace from Her Majesty's service is an exceptional form of punishment imposed when the nature and circumstances of the offence make a sentence of dismissal inadequate to reflect the displeasure with which the court regards the offender's conduct. It is the highest sentence of a military nature that can be awarded and its use for denunciation and deterrence is consistent with the objective of sentencing identified in the facts of this case. As Dutil CMJ recognized:

> [T]he punishment of dismissal sends a serious message to the military community in promoting the sentencing objectives of general deterrence and denunciation of the conduct.

[38] Further, as defence counsel explained in his submissions, it is noteworthy to highlight the particular consequences and financial effect that such a serious punishment entails. This punishment is not only severe, being situated at the third level of seriousness in the scale of punishments set out at section 139(1) of the *NDA*, but it imposes lifelong consequences that serve as a reminder for the rest of one's life of the impact of this breach of trust.

[39] Military Judge Perron in *R. v. Semrau*, 2010 CM 4010 stated:

> [50] Dismissal with disgrace from Her Majesty's service is a most severe punishment. A punishment of dismissal with disgrace from Her Majesty's service means you are not eligible to serve Her Majesty again in any military or civil capacity

> unless there is an emergency or the punishment is set aside or altered. It also affects some of the benefits you could receive upon release from the CF.

[40] Not only does such a sentence send a clear message of denunciation that this type of conduct is incompatible with military service, but it also reflects a complete disdain for it. Master Corproal T.S.W. will never again be able to serve Her Majesty in any military or civilian capacity. His record of service will be annotated with this punishment making it difficult for him to escape it and put it behind him.

[41] The financial consequences are such that he will have no entitlement for severance pay or rehabilitation leave, unemployment benefits, benefits on release or post-retirement coverage under the Public Service Health Care Plan.

[42] Further, pursuant to article 18.27 of the QR&O, he must forfeit his decorations and medals awarded for long service and good conduct.

Reduction in rank

[43] In addition to the military punishment of dismissal with disgrace, counsel have recommended that the court impose a reduction in rank. In the case of *Ayers*, the Chief Military Judge addressed the propriety of adding both reduction in rank with that of dismissal to a term of imprisonment. He stated that:

> [17] In my view, the availability of the punishments listed in section 139 (1) of the *NDA* is only restricted by the relevant specific provisions of the Act and the regulations, including where subsections 60(2) and (3) apply. For example, no officer may be sentenced to detention (see section 142(1)(b)), and the authority of a service tribunal to impose punishments may be limited in accordance with regulations made by the Governor in Council (see section 147). It is understood that notes to QR&O, including note B to article 104.04 or note A to 104.09, are useful guidance, but they shall not be interpreted as reflecting a legally binding proposition.

[44] In *R v Moriarity*, 2012 CM 3022, d'Auteuil MJ had this to say regarding a reduction in rank:

> [37] In the Court Martial Appeal Court decision of *R v Fitzpatrick*, [1995] C.M.A.J. No. 9, Judge Goodfellow described at paragraph 31 the nature of such a sentence:
>
> > The sentence of reduction in rank is a serious sentence. It carries with it career implications, considerable financial loss, plus social and professional standing loss within the services. It is a truism that rank has its privileges, and to reduce one to the lowest rank is a giant step backwards which undoubtedly serves not only as a deterrent to the individual but also a very visible and pronounced deterrent to others. There are occasions when a sentence in the military context justifiably departs from the uniform range in civic street and certainly the reduction in rank is a purely military sentence.
>
> [38] Justice Bennett also expressed clearly the meaning of such a sentence, when she said in the Court Martial Appeal Court decision of *Reid v. R.; Sinclair v. R.*, 2010 CMAC 4, at paragraph 39:

> A reduction in rank is an important tool in the sentencing kit of the military judge. It signifies more effectively than any fine or reprimand that can be imposed the military's loss of trust in the offending member. That loss of trust is expressed in this case through demotion to a position in which the offenders have lost their supervisory capacity.

[45] Military Judge d'Auteuil concluded at paragraph 39 of *Moriarity*:

> [R]eduction in rank is a purely military sentence that reflects the loss of trust in the offending member. As indicated at section 140.2 of the *National Defence Act*, it can be imposed as an accompanying punishment to the one of imprisonment.

[46] Counsel submit that the coupling of the most severe military sanctions with a substantial period of imprisonment sends a strong message of denunciation and deterrence to both the public and the CAF of the consequences of such a significant breach of trust.

Mitigating and aggravating factors

[47] In the military justice system, as well as under section 718.2(a) of the *Cr. C.*, the principles of sentencing require that a sentence be increased or reduced to account for any aggravating or mitigating circumstances relating to the offence and the offender. In making the joint submission, counsel advised the court that they weighed all relevant aggravating and mitigating factors. As highlighted by prosecution, section 718.2(a) statutorily deems aggravating circumstances to include any evidence that:

> (ii.1) evidence that the offender, in committing the offence, abused a person under the age of eighteen years,
>
> (iii) the offender, in committing the offence, abused a position of trust or authority in relation to the victim, or
>
> (iii.1) evidence that the offence had a significant impact on the victim, considering their age and other personal circumstances, including their health and financial situation.

Aggravating factors

[48] After hearing the submissions of both counsel, the Court highlights the following aggravating factors for the record:

(a) Victim's age. The victim was 12 years old when the offender exploited her to satisfy his sexual compulsion and deviancy. Young persons of this age are in their formative years and vulnerable to emotional scarring as is evident in reviewing J.K.'s victim impact statement. It is for this reason Parliament enacted 718.1 of the *Cr. C.* to send a clear message that offenders who criminally abuse young people are deserving of society's denunciation.

(b) Offender's abuse of position of trust. As a stepfather, Master Corporal T.S.W. held a position of trust over J.K. and he abused that trust. He is individually responsible for this assault and is morally culpable.

(c) Place of the assault. Assaults took place while Master Corporal T.S.W. was exercising custodial rights and while the victim was asleep. As the court found in *R. v. Church*, [2005] A.J. No. 985, it was an aggravating factor that the complainant was sleeping when the accused commenced his assault on her. Similarly, in this case, the accused perpetrated these offences when he thought that no one was aware.

(d) Abuse was recorded. The fact that he recorded this abuse and stored it on his computer is even more disturbing. The recording of the assault itself denotes some degree of deliberation and each time it is viewed, it revictimizes J.K.

(e) Impact on victim. In addition to the diagnosis of J.K. by Dr Corrigan referred to above, the court received and considered many victim impact statements, highlighting the significant mental suffering that this incident has had on the victim. The events leading to these charges have had a traumatic effect on J.K., her family, as well as everyone involved.

J.K. states in her victim impact statement, "I have depression and I cut because I'm angry. I'm always angry. Cutting is a substitute for not hurting others." She says, "I don't sleep at night, for all I know, there's someone in my room. When I'm tired, I can't focus long enough at school to write, 'two halves make a whole'." Her grandmother writes, "J. will never know what it's like to be a normal teenager." Her aunt writes, "Not only has her personality changed, but her physical wellbeing is also constantly under attack as she's never able to fully relax. Any unexpected noise – be it a friend saying hello or sales associate offering assistance – J. gasps and leaps ten feet in the air. Always. She literally reacts like someone who is shell-shocked."

(f) Impact on family members. This incident has brought turmoil and distress to everyone affected. A.K., the victim's mother, expressed her immeasurable pain. "I would do anything to take her suffering away. I am afraid for her, that her adolescent mind will not be able to find a way to cope, and that her urge to run away will overwhelm her . . . Our family will never be the same again – because of what he has done." A.K. suffers guilt and shame. "I know that I am not responsible for his actions, but still I feel ashamed, guilty, and angry because I afforded him the time, space and opportunity to commit his crimes. Ultimately, I am simply devastated and emotionally exhausted." She states, "I struggle to

> keep my head above water for the sake of my kids, but on the inside I often feel like I'm drowning."
>
> Further, A.K.'s spouse stated, "A once silly, vibrant and imaginative little girl, during the most difficult ages, feels she is left going it alone and has turned inward and reclusive. Not only are we left with that damage your decision has created, but also the financial strain of A.K.'s worsened mental health and reduced income, leaving us on the verge of Bankruptcy."

Mitigating factors

[49] The court states the following mitigating factors for the record:

(a) Guilty plea. Your plea of guilty for the offence as described in the Statement of Circumstances, must be given its full weight. Your guilty plea has spared J.K. from testifying. You genuinely show remorse and your courage in accepting responsibility early in the process cannot go unnoticed by the court. As both counsel submitted, your plea has saved the court considerable time.

(b) Previous good conduct. The Court recognizes that you have no previous record. In *R. v. B.S.M.*, 2011 ABCA 105 at paragraph 16, 502 AR 253, the Alberta Court of Appeal (as referred to in *WEM*) said that:

> any history of prior good character means little for persons who engage in child sex offences. It went on to say that the absence of a criminal record should not reduce a sentence for a child sexual offence "... much below the starting point ..." or "... significantly reduce what would otherwise be a higher sentence.

However, in *R. v. B.L.*, 2011 ABCA 375, at paragraph 20, 519 AR 181, the Alberta Court of Appeal said:

> If an accused person can demonstrate an exemplary prior character, beyond just "staying out of trouble", that can be a further mitigating factor.

In the case at bar, Master Corporal T.S.W. has served his country well and served tours in Afghanistan, Bosnia, Cyprus and was serving in Ukraine when the offence was discovered. He has familial and other support. As well, given his military decorations, including the NATO Non-Article 5 Service Medal, Canadian Peacekeeping Service Medal, General Campaign Star – South West Asia and his 1st Rotation Bar to GCS, his past record has been exemplary.

(c) Willingness to undergo treatment. Upon his return from Ukraine, Master Corporal T.S.W. voluntarily sought professional help, undergoing extensive therapy and treatment while purging negative influences from his life, i.e. pornography. He regularly attended group sessions to support his recovery from any dependency of a sexual nature and on 31 May 2017, he was officially discharged from further addictions counselling as his counsellor, Mr Jeremy Myers, felt it was no longer necessary. He sought the assistance of a psychologist, Dr David Simourd who has provided him care since 6 October 2015. Dr Simourd states that in his professional opinion, Master Corporal T.S.W.'s sexual functioning has normalized and maintains the opinion that Master Corporal T.S.W.'s motivation for ongoing self-improvement is strong. Dr Eccles, who is a highly respected psychologist who has worked with sexual offenders for years, states that given the nature of the allegations, his score places him in the low risk category for a future sexual offence.

(d) Delay and pre-charge prejudice. The impact statement of A.M., the common law partner of Master Corporal T.S.W., outlined the turmoil that the two years of restrictive conditions have caused their family, including the prejudicial impact on D.W, J.K.'s brother and the biological son of Master Corporal T.S.W. She personally has had to make significant sacrifices to accommodate the restrictive conditions and the strain has impacted her career advancement at work. She harbours significant resentment regarding the CAF's treatment of Master Corporal T.S.W. through the investigative process and feels that the CAF failed him.

In his earlier application, the offender argued that due to the exceptional pre-charge sanction power available within the military justice system, there should be a mechanism whereby the prejudice flowing from pre-charge delay may be considered. Since September 2015, Master Corporal T.S.W. has been subjected to restrictive sanctions that have significantly prejudiced his custodial arrangements with his son. Although, this Court did not permit the consideration of the pre-charge delay to be imported into his section 11(*b*) *Jordan* application, it did recognize that there is no legal impediment to considering this pre-charge delay in a section 7 application. In effect, based on the cases relied upon by counsel during that application, there is legal precedent where pre-charge delay in the military context was considered under section 7 of the *Canadian Charter of Rights and Freedoms*, when the rights of the accused were breached contrary to the principles of fundamental justice. Within the military justice system, Létourneau JA in *R. v. Larocque*, 2001 CMAC 2 at paragraph 17 described the principle of fundamental justice in a manner which is highly relevant to the case at bar:

[TRANSLATION]

> [A] person who is arrested without a warrant because the authorities have reasonable grounds to believe he has committed an offence, whether that person is detained or released, shall be charged as soon as materially possible and without unreasonable delay unless, in the exercise of their discretion, the authorities decide not to prosecute.

It follows that pre-charge delay in the military justice system is a factor in considering whether there has been a breakdown in a principle of fundamental justice under section 7 of the *Charter* and as such may be considered in reducing the sentence in order to take account of a *Charter* violation. In light of the accused's decision to abandon the additional *Charter* applications and to plead to the charge of sexual assault, the court was not presented with sufficient evidence to determine if there was in fact a breach of the accused's section 7 rights and to what extent it might reduce the sentence. However, the court is mindful that this may have been a factor considered in the plea bargaining process and the joint submission before the court.

Conclusion

[50] After considering counsel's submissions in their entirety and considering all the evidence before the Court, I must ask myself whether the acceptance of the proposed sentence would cause the CAF community and its members to lose confidence in the military justice system.

[51] *Anthony-Cook* says that I may not reject a joint submission simply because I conclude that the sentence being proposed is outside the appropriate range, or unfit, or even demonstrably unfit. At paragraph 34 of *Anthony-Cook*, Moldaver J said that, in order to reject a joint submission, a sentencing judge must conclude that the sentence being proposed is:

> so unhinged from the circumstances of the offence and the offender that its acceptance would lead reasonable and informed persons, aware of all the relevant circumstances, including the importance of promoting certainty in resolution discussions, to believe that the proper functioning of the justice system had broken down.

[52] In short, the joint submission before the court is greater than the mandatory minimum sentence of imprisonment for one year and falls within an acceptable range of precedents provided to the court, particularly in light of the balancing of all the aggravating and mitigating factors. The combined effect of imprisonment with dismissal with disgrace from Her Majesty's service and reduction in rank sends a strong message of deterrence and denunciation to both military and civilian communities that such conduct is abhorrent. The court considers the proposed sentence does not bring the administration of justice into disrepute and is consistent with the public interest. As such it must remain as-is and I am not permitted to tinker with or tweak the recommendation.

DNA

[53] In accordance with section 196.14 of the *NDA*, considering that the offence for which I have passed sentence is a primary designated offence within the meaning of section 196.11 of the *NDA*, I order, as indicated on the attached prescribed form, that the number of samples of bodily substances that is reasonably required be taken from Master Corporal T.S.W. for the purpose of forensic DNA analysis.

Sex offender registry

[54] In accordance with section 227.01 of the *NDA*, and considering that the offence for which I have passed sentence is a designated offence within the meaning of section 227 of the *NDA*, I order Master Corporal T.S.W. as per the attached regulation form, to comply with the *Sex Offender Information Registration Act* for 20 years.

Weapons prohibition order

[55] Based on the submissions of counsel, I have also considered whether this is an appropriate case for a weapons prohibition order, as stipulated under section 147.1 of the *NDA*. In my opinion, such an order is neither desirable nor necessary for the safety of the offender or of any other person in the circumstances of this trial, particularly in light of the criteria applicable under section 109 of the *Cr. C.* in the context of an offence of sexual assault. Even though the offence in the case at bar carries a 14 year maximum sentence of imprisonment and the charge itself constitutes a violent offence, I am of the opinion that in the commission of that offence, violence with a weapon against a person was not used, threatened or attempted and I will not make an order to that effect.

FOR THESE REASONS, THE COURT:

[56] **FINDS** you guilty of an offence under section 130 of the *NDA*, that is to say, sexual assault, contrary to section 271 of the *Cr. C.*

[57] **SENTENCES** you to 18 months' imprisonment, dismissal with disgrace from Her Majesty's service and a reduction in rank to that of private.

[58] **ORDERS**, pursuant to *NDA*, section 196.14, that the number of samples of bodily substances that is reasonably required be taken from Master Corporal T.S.W. for the purpose of forensic DNA analysis.

[59] **ORDERS**, pursuant to *NDA*, section 227.01, Master Corporal T.S.W. to comply with the *Sex Offender Information Registration Act* for 20 years.

Counsel:

The Director of Military Prosecutions as represented by Major C. Walsh, Counsel for Her Majesty the Queen

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