COURT MARTIAL

Citation: *R v Rivas,* 2011 CM 2012

Date: 20110527
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.

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Code*, information that could disclose the identity of the person described in this judgment as the complainant shall not be published in any document or broadcast or transmitted in any way.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 SENTENCE

[1] Corporal Rivas, in accordance with the findings of the panel of this General Court Martial, you have been found guilty contrary to your pleas of two charges laid under the *National Defence Act* - in the first charge, an offence of sexual assault contrary to section 271 of the *Criminal Code,* and in the third charge, an offence of drunkenness contrary to section 97 of the *National Defence Act*. The second charge, one of disgraceful behaviour contrary to section 93 of the *National Defence Act*, was charged in the alternative to the first charge and is the subject of a stay of proceedings.

[2] It now falls to me to determine and to pass a sentence upon you. In so doing, I have considered the principles of sentencing that apply in the ordinary courts of criminal jurisdiction in Canada and at courts martial. I have as well considered the facts of the case as disclosed in the evidence heard during this trial and the other evidence and

materials submitted during the course of the sentencing hearing, as well as the submissions of counsel, both for the prosecution and for the defence.

[3] The principles of sentencing guide the court in the exercise of its discretion in determining a fit and proper sentence in each individual case. The sentence should be broadly commensurate with the gravity of the offence and the blameworthiness or degree of responsibility and character of the offender. The court is guided by the sentences imposed by other courts in previous similar cases, not out of a slavish adherence to precedent, but because it appeals to our common sense of justice that similar cases should be treated in similar ways. Nevertheless, in imposing sentence the court takes account of the many factors that distinguish the particular case it is dealing with; both the aggravating circumstances that may call for a more severe punishment and the mitigating circumstances that may reduce a sentence.

[4] The goals and objectives of sentencing have been expressed in different ways in many previous cases. Generally they relate to the protection of society, of which of course the Canadian Forces is a part, by fostering and maintaining a just, a peaceful, a safe, and a law-abiding community. Importantly, in the context of the Canadian Forces, these objectives include the maintenance of discipline, that habit of obedience which is so necessary to the effectiveness of an armed force. The goals and objectives also include deterrence of the individual so that the conduct of the offender is not repeated, and general deterrence so that others will not be led to follow the example of the offender. Other goals include the rehabilitation of the offender, the promotion of a sense of responsibility in the offender, and the denunciation of unlawful behaviour. One or more of these objectives will inevitably predominate in crafting a fit sentence in an individual case, yet it should not be lost sight of that each of these goals calls for the attention of the sentencing court, and a fit sentence should reflect a wise blending of these goals, tailored to the particular circumstances of the case.

[5] Section 139 of the *National Defence Act* prescribes the possible punishments that may be imposed at courts martial. Those possible punishments are limited by the provision of the law which creates the offence and provides for a maximum punishment. Only one sentence is imposed upon an offender whether the offender is found guilty of one or more different offences, but the sentence may consist of more than one punishment. It is an important principle that the court should impose the least severe punishment that will maintain discipline.

[6] In arriving at the sentence in this case, I have considered the direct and indirect consequences for the offender of the findings of guilt and the sentence I am about to pronounce.

[7] The facts relating to the offences emerged in the evidence heard at trial. In the course of my instructions to the panel following the addresses of counsel, I summed up the evidence of the complainant, as follows:

> The complainant testified that on 15 July 2010 after an evening of studying in her room, number 312 in the quarters known as the shacks, building A-148, she retired to bed about 2200 hours. She was awoken by the sound of her door slamming. She became aware that someone was lying on her bed with her with their arm across her chest. She noticed the time from the cell phone beside her bed as one minute after midnight. She pointed to the accused in court as being the person on her bed. She knew him as another soldier she had seen from time to time on parade and when he was working in the canteen. There was a short conversation and he asked her if she wanted him to leave and she said yes. He headed for the door and she went back to sleep. She awoke later because of a large bang or thump, and noticed the accused in her room with his pants off masturbating. He stood up and she saw his penis. Her night clothing was pulled down to her ankle and she felt extremely wet in the area of her pubic region. She told him to get out and he kept telling her to shut up. He smelled of vodka. He left and she followed him out of her room into the hallway and gave him his cell phone. Then she went to the bathroom to check on her own condition. The wetness was the texture of saliva. She showered, went back to her room and locked the door. The next day after lunch she went to the canteen, found the accused and told him if he did that again she would smash his head. He said he was sorry, he didn't know if it was true, and said he thought he had had too much to drink, or words to that effect. A day or so later she told her friend Private Walsh what had happened, and within a week brought the matter to the attention of the MPs.

[8] It is clear that the panel accepted the evidence of the complainant and was satisfied beyond a reasonable doubt that the elements of the offence of sexual assault were established to their satisfaction. It follows that the panel rejected the denials of the offender and his evidence that he was elsewhere at the time of the offences.

[9] Counsel before me jointly recommend a sentence of 90 days detention and a fine of $2000. As well, both counsel suggest that orders for DNA samples and Sex Offender Registration are called for in this case.

[10] The sentence to be pronounced is, of course, a matter for the court, but where, as in this case, both parties agree on a recommended disposition, that recommendation carries considerable weight with the court. The courts of appeal across Canada, including the Court Martial Appeal Court in the case of *Private Chadwick Taylor*[1] have held that the joint submission of counsel as to sentence should be accepted by the court unless the recommended sentence would bring the administration of justice into disrepute, or is otherwise contrary to the public interest.

[11] Although counsel are agreed on the recommended sentence, they apparently disagree as to the factual basis that subsumes the finding of guilty of sexual assault, and upon which the court should impose sentence. The prosecution submits that the evidence of the complainant supports the inference that while she was asleep the offender

[1] *Private C. Taylor*, 2008 CMAC 1

engaged in an act of cunnilingus. Defence counsel submits that the finding of the panel of guilty of sexual assault rests upon the incident in which he lay on her bed while she was asleep with his arm over her chest.

[12] In the case of *R v Wilcox*[2], I stated at paragraph 13 and I quote:

> In a case such as this one where the findings of guilty are made by the panel of a General Court Martial, the trial judge, whose responsibility it is to arrive at a fit sentence, does not have the benefit of explicit findings of fact upon which the finding or verdict of the panel rests. Like a jury in any criminal case, the panel does not give reasons for its findings, nor does it make special findings on discrete factual issues. On what factual basis, therefore, is the court to arrive at a proper sentence?

In the *Wilcox* case I referred to the guidance of the Supreme Court of Canada found in the judgment of the court in *R v Ferguson*[3], at paragraph 17 where the court dealt with the correct sentencing approach in cases where the factual implications of a jury's verdict are ambiguous.

[13] In addition, Queen's Regulations and Orders article 112.54 provides:

> In the case of a General Court Martial, the court:
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> > (*a*) shall accept as proven all facts, express or implied, that are essential to the court martial panel's finding of guilty; and
> >
> > (*b*) may find any other relevant fact that was disclosed by evidence at the trial to be proven, or hear evidence presented by either party with respect to that fact.

[14] The complainant testified that when she awoke the second time her night attire was down around her ankle and her pubic area was wet with a substance with the consistency of saliva. There is no reason to suppose that the panel rejected the part of her evidence describing her condition upon awakening. I accept her evidence as to the condition she was in, and on the basis of that evidence, and pursuant to QR&O 112.54(*b*), I am satisfied beyond a reasonable doubt that the offender did indeed engage in an act of cunnilingus while the complainant was asleep. In the context of all the evidence, this is really the only reasonable conclusion to be drawn from this evidence.

[15] I do not accept the submission of the defence that if two versions of the facts are available on the evidence then the version that favours the offender is to be adopted for sentencing purposes. While a similar principle may apply to assist a court faced with an issue of statutory construction where there is ambiguity, I am not aware of any such principle when dealing with ambiguous jury verdicts. In any case, such a principle does not accord with the clear direction in QR&O article 112.54.

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[2] *R v Wilcox, 2009 CM 2014*
[3] *R v Ferguson*, 2008 1 S.C.R. 96

[16] Sexual assault is punishable by a maximum of 10 years imprisonment when prosecuted by indictment under the *Criminal Code*, and is always a serious criminal offence. In the case of *Corporal T. Leblanc*[4] decided 8 January 2010, Military Judge Perron quoted the judgment of Mr Justice Cory of the Supreme Court of Canada in *R v Osolin*[5] as follows, paragraphs 165 and 166:

> .... It cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women.
>
> The reality of the situation can be seen from the statistics which demonstrate that 99 percent of the offenders in sexual assault cases are men and 90 percent of the victims are women.

[17] But within the description of the offence there is obviously a range of seriousness. In the case of *R v Sandercock*[6] , the Alberta Court of Appeal noted the range of criminal behaviour within the terms of this offence at paragraph 11:

> ... The crime of sexual assault covers the huge spectrum of cases from a stolen kiss to the worst forms of human degradation.

and went on to set out guidelines for sentencing courts of that province in cases of what the court called "major sexual assault". Justice Kerans on behalf of the court wrote at paragraph 13:

> One archetypical case of sexual assault is where a person, by violence or threat of violence, forces an adult victim to submit to sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, whether or not physical injury occurs. The injury might come from the sexual aspect of the situation or from the violence used or from any combination of the two. This category which we would describe as major sexual assault, includes not only what we suspect will continue to be called rape, but obviously also many cases of attempted rape, fellatio, cunnilingus, and buggery where the foreseeable major harm which we later describe more fully is present.

[18] In the present case, I have found that the gravamen of the sexual assault was an act of cunnilingus, and the victim has testified as to the serious consequences for her of the actions of the offender. I accept her evidence, given on the sentencing hearing, as to her experiencing social withdrawal, feelings of insecurity, disturbed sleep and inability to concentrate, and I consider that a reasonable person in the circumstances of the offender would know that his actions in entering the private accommodation of the victim in the middle of the night and performing an act of cunnilingus as she slept would

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[4] *Corporal T. LeBlanc*, 2010CM4002 (Publication Ban)
[5] *R v Osolin*, 1993 4 S.C.R. 595 (Publication Ban)
[6] *R v Sandercock*, 1985 22 C.C.C. (3d) 79

likely cause lasting emotional or psychological injury. I find therefore that the present case is a case of a very serious sexual assault.

[19] In my view, this conclusion of fact takes the case well beyond the range of sentencing discussed in the authorities that were referred to by counsel in their addresses. Both the case of *R v Mosher*[7] and the case of *Leading Seaman Ritchie*[8] were referred to in the course of the addresses. These decisions of the Court Martial Appeal Court dealt with fact patterns that I find to be much less serious than the facts of the present case. In *Mosher* the court dealt with a case of touching the breasts of the complainant, apparently over her clothing, on two occasions. The trial judge considered the offence to be "a low-level sexual assault in the civil context" but went on to impose a sentence of four months imprisonment, and the sentence was upheld by the Court Martial Appeal Court. The details of the circumstances of the offence in *Ritchie* were not put before me, but the sentencing judge described the case as being "towards the lower end of the range or scale" of sexual assault and the sentence of 60 days imprisonment was varied by the CMAC to one of 60 days detention.

[20] No such characterization can be made of the offence committed in this case. These case authorities I find to be of very little assistance in dealing with a case of a sexual assault that is as serious as the offence before the court. Indeed, I consider that the sentence proposed jointly by counsel is so far from an acceptable range that it would bring the administration of justice into disrepute to accede to it. I do not accept the joint submission.

[21] I consider that although this is a very serious sexual assault, the offence did not involve actual penetration of the body of the victim. And while the victim has suffered the consequences she testified about, the symptoms she experienced seem to be attenuating over the time period since these offences were committed.

[22] I am mindful of the personal circumstances of the offender. He is 25 years of age and single with financial responsibilities to his mother. He is apparently well thought of by his military superiors. After several years of Reserve Force service he joined the Regular Force less than three months before he committed the offences under consideration. His conduct sheet discloses three previous convictions for offences dating back to 2005. While I do not consider the record to be seriously aggravating, the nature of the offences, the evidence heard during the trial, and the materials filed by the defence on the sentencing hearing, all lend support to the suggestion that the offender may have serious difficulties with the consumption of intoxicants.

[23] I agree with the submission of both counsel that this is a proper case for the taking of suitable DNA samples under section 196.14 of the *National Defence Act* as sexual assault is a primary designated offence. I also agree that an order should be made to comply with Sex Offender Registration given the nature of the offence and the application by the prosecutor. I order accordingly.

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[7] *R v Mosher,* 1996 CMAC 392
[8] *Leading Seaman Ritchie,* 1999 CMAC 419

FOR THESE REASONS, THE COURT:

[24] **FINDS** you guilty of the first charge, for an offence under section 130 of the *National Defence Act*, contrary to section 271 of the *Criminal Code of Canada*; stay of proceedings on the second charge, for an offence under section 93 of the *National Defence Act*; and, guilty of the third charge, for an offence under section 97 of the *National Defence Act.*

[25] **SENTENCES** you to imprisonment for a period of nine months.

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