COURT MARTIAL

Citation: *R v Royes,* 2013 CM 4034

Date: 20131214
Docket: 201339

Standing Court Martial

Canadian Forces Base Wainwright
Denwood, Alberta, Canada

Between:

Her Majesty the Queen

- and -

Master Corporal D.D. Royes, Offender

Presiding: Lieutenant-Colonel J.G. Perron, M.J.

RESTRICTION ON PUBLICATION

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that could disclose the identity of the person described in this judgment as the complainant or any other witness shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] Master Corporal Royes, the court has found you guilty of one charge of sexual assault at the conclusion of a full trial. The court must now impose a fit and just sentence.

[2] You were found guilty of a sexual assault on a female private in your room at the Yukon Lodge at Canadian Forces Base (CFB) Wainwright on 12 February 2012. You left JD's, a bar in the city of Wainwright, at approximately 0200 hours on 12

February with N.K., the victim, and two corporals to return to the base by car. The court found that N.K. was intoxicated to the point of vomiting, was not responding to questions and had trouble walking when she left the car and you took her to your room. She was extremely drunk. You described two separate consensual sexual activities; firstly sexual intercourse lasting approx twenty minutes and, approximately two hours later, the touching of her breasts. N.K. testified her last memory in the early hours of 12 February at JD's was going to her table and having a drink. She then remembered feeling your penis in her vagina and seeing you ejaculate on her stomach and wipe the semen with a towel. She thought she asked, "What is going on," and then her next memory is feeling you massaging her breasts. The court did not believe you. The court found the victim was inebriated and unconscious and did not have the capacity to consent to the sexual activity.

General Principles of Sentencing

[3] As indicated by the Court Martial Appeal Court (CMAC), sentencing is a fundamentally subjective and individualized process where the trial judge has the advantage of having seen and heard all of the witnesses and it is one of the most difficult tasks confronting a trial judge (see *R. v. Tupper* 2009 CMAC 5 paragraph 13).

[4] The CMAC also clearly stated in *Tupper* at paragraph 30 that the fundamental purposes and goals of sentencing as found in the *Criminal Code of Canada* apply in the context of the military justice system and a military judge must consider these purposes and goals when determining a sentence. Section 718 of the *Criminal Code* 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 denounce unlawful conduct;

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

(c) to separate offenders from society, where necessary;

(d) to assist in rehabilitating offenders;

(e) to provide reparations for harm done to victims or to the community; and

(f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[5] The sentencing provisions of the *Criminal Code*, sections 718 to 718.2, provide for an individualized sentencing process in which the court must take into account not only the circumstances of the offence, but also the specific circumstances of the offender (see *R. v. Angelillo* 2006 SCC 55, at paragraph 22). A sentence must also be similar to other sentences imposed in similar circumstances (see *R. v. L.M.* 2008 SCC

31, at paragraph 17). The principle of proportionality is at the heart of any sentencing (see *R. v. Nasogaluak*, 2010 SCC 6, at paragraph 41). Proportionality means a sentence must not exceed what is just and appropriate in light of the moral blameworthiness of the offender and the gravity of the offence. But a sentence is also a "form of judicial and social censure". A proportionate sentence may express, to some extent, society's shared values and concerns.

[6] A judge must weigh the objectives of sentencing that reflect the specific circumstances of the case. It is up to the sentencing judge to decide which objective or objectives deserve the greatest weight. The importance given to mitigating or aggravating factors will move the sentence along the scale of appropriate sentences for similar offences (see *Nasogaluak*, paragraph 43 and 44). The court is also guided by the provisions of sections 130 and 139 of the *NDA*, and section 271 of the *Criminal Code of Canada* in its determination of the lawfully permissible sentence in this case.

[7] I will repeat certain portions of my sentencing decision in the *R. v. Corporal T. LeBlanc* 2010 CM 4002 since I consider them appropriate in the circumstances of this sentencing decision. In *R. v. L.M.* 2008 SCC 31, the Supreme Court of Canada states at paragraph 17:

> [17] Far from being an exact science or an inflexible predetermined procedure, sentencing is primarily a matter for the trial judge's competence and expertise. The trial judge enjoys considerable discretion because of the individualized nature of the process [I will not indicate the references] To arrive at an appropriate sentence in light of the complexity of the factors related to the nature of the offence and the personal characteristics of the offender, the judge must weigh the normative principles set out by Parliament in the *Criminal Code*:
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> - the objectives of denunciation, deterrence, separation of offenders from society, rehabilitation of offenders, and acknowledgment of and reparations for the harm they have done ...
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> - the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender ... , and
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> - the principles that a sentence should be increased or reduced to account for aggravating or mitigating circumstances, that a sentence should be similar to other sentences imposed in similar circumstances, that the least restrictive sanctions should be identified and that available sanctions other than imprisonment should be considered ....

[8] The Quebec Court of Appeal decision in *R. v. L. (J.J.)* [1998] R.J.Q. 971, 126 C.C.C.(3rd) 235 provides a list of factors to be considered when determining a sentence in a sexual assault case. They are:

(a) the nature and intrinsic gravity of the offence which is affected by threats, violence and manipulation;

(b) the frequency of the offences and the time period over which they were committed;

(c) the abuse of trust and the abuse of authority which are involved in the relationship between the offender and the victim;

(d) the disorders underlying the commission of the offences: the offender psychological difficulties, disorders and deviancy, intoxication;

(e) the offender's previous convictions, the proximity in time to the offence charged and the nature of the previous offences;

(f) The offender's behaviour after the commission of the offence, confessions, collaboration in the investigation, immediate involvement in treatment programme, potential for rehabilitation, financial assistance if necessary, compassion and empathy for the victim (remorse, regret);

(g) the time between the commission of the offence and the guilty verdict as a mitigating factor depending upon the offender's behaviour (the offender's age, social integration and employment, commission of other offences, etc);

(h) the victim: the gravity of the attack on his or her physical and psychological integrity reflected by, in particular, age, the nature and extent of the assault, the frequency and duration of the assault.

[9] This list is not exhaustive and other factors may also be considered in sentencing.

[10] I am quite aware that an offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances and that all available sanctions other than imprisonment that are reasonable in the circumstances should be considered for all offenders. (*Criminal Code* s. 718.2 (d) and (e)).

[11] The prosecutor has proposed a sentence of imprisonment for a period of 36 months. The prosecutor has requested that an order under section 196.14 of the *National Defence Act* for the taking of DNA samples of the offender. The prosecutor has also requested the court make an order requiring Master Corporal Royes to comply with the *Sex Offender Information Registration Act.* The prosecutor has not requested the court make a weapons prohibition order in the present case. Your defence counsel suggests that a sentence of imprisonment for a period of 24 months is the appropriate sentence. I agree with the prosecutor that the principles of denunciation and deterrence are the most important sentencing principles in the present case.

[12] I will firstly examine the mitigating factors. You do not have a conduct sheet or any criminal convictions; therefore, you are a first time offender. You were 38 years old at the time of the offence. You had joined the Canadian Forces in June 1997 and had served for 14 years in the Canadian Army. You were promoted to the rank of

corporal in 2001 and appointed Master Corporal in 2009. You have served two tours of duty in Bosnia and Herzegovina in 2000 and 2002 and two tours in Afghanistan in 2006 and 2008.

[13] I have reviewed one Personnel Evaluation Report (PER) found at Exhibit 6. The PER is for the period 01-04-12 to 31-03-13. It is an excellent PER that rates your overall performance as mastered and your potential as outstanding as well as recommending an immediate promotion to sergeant. I have also reviewed Exhibits 7 and 8, character reference letters written by two captains with whom you served in Afghanistan. You were the loader in their tank crew. They speak glowingly of your leadership, performance and your personal attributes in both tours.

[14] I will now address the aggravating factors of this case. Sexual assault is a serious offence. The Parliament of Canada has decided that a sentence of 10 years' imprisonment is the appropriate maximum sentence for this offence when charged as an indictable offence. In *R. v. Osolin* [1993] 4 S.C.R. 595, Cory J commented on the special nature of this offence as follows:

> 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.
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> 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.

[15] In *R. v. Ewanchuk* [1999] 1 S.C.R. 330 at paragraph 28, Major J expanded on the notion of the security of one's integrity when he stated:

> 28 The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force. The common law has recognized for centuries that the individual's right to physical integrity is a fundamental principle, "every man's person being sacred, and no other having a right to meddle with it, in any the slightest manner" .... It follows that any intentional but unwanted touching is criminal.

[16] The ON CA has commented on the effect of intercourse in sentencing in *R. v. F.P.* (2005) 198 C.C.C.(3rd) 289 at paragraph 52 as follows:

> However, where intercourse does occur, as it did in *D.(D.)*, it is characterized as aggravating. It is so characterized because it likely results in additional physical and psychological trauma, and because it heightens the risks of disease and, where girls are victims, pregnancy.

Although the victims in that case were young girls, I find this guidance can also be applied to our case.
[17] The Alberta Court of Appeal in *R. v. Arcand* 2010 ABCA 363 defined a major sexual assault at paragraph 171 as follows:

> A sexual assault is a major sexual assault where the sexual assault is of a nature or character such that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury occurs. The harm might come from the force threatened or used or from the sexual aspect of the situation or from any combination of the two. A major sexual assault includes but is not limited to non-consensual vaginal intercourse, anal intercourse, fellatio and cunnilingus. We are satisfied that assessing whether a sexual assault is a major sexual assault is well within the capacity of sentencing judges.

[18] Subjectively, it a very serious offence. You had sexual intercourse with an unconscious female private in your room on base. She was intoxicated and could only mumble incoherent answers when she was asked her room number. You brought her to your room and you took advantage of her while she was defenceless.

[19] The prosecutor requested the permission to read a victim impact statement written by N.K. You did not object to this and the court granted the request. N.K.'s life has been transformed by this sexual assault. She explained in a detailed manner how she suffers psychologically and emotionally since 12 February 2012. I will not recite in detail what was read to the court but it is clear that the depression, anxiety, sleeping problems, panic attacks when being close to a person, be it a member of her immediate family or a stranger, have taken a toll on her life. She must take medications to treat her depression and anxiety and the side effects of those medications also cause her health problems. She cannot join the Regular Force as she was intending to do in 2012 because of the medical issues which affect her daily life. She also cannot work at the moment since she cannot sleep properly and cannot yet feel secure near people.

[20] Your defence counsel stated that your acceptance to have this statement read in the court allowed N.K. to inform the court without having to travel from Newfoundland to testify and be cross-examined thus saving her that hardship and sparing her a cross-examination and emotional difficulties, as well as saving money for the prosecution. While I accept that submission, I also note she has already testified and was cross-examined during the trial. I will accept your counsel's submission as a mitigating factor, i.e., your acquiescence to this request, but one this is nonetheless overtaken by the immense negative impact this sexual assault has had on N.K.

[21] The prosecutor indicated the length of time of the assaults and the difference in age are aggravating factors. Although you testified the sexual intercourse would have lasted approximately twenty minutes and that you would have touched her breasts for a few moments, the court does not have any other information concerning the sexual activities. Therefore, the court will not consider the length of time as an aggravating factor that should be given much consideration.

[22] N.K. was 26 years old at the time of the assault. While the court does not consider the difference in age as an aggravating factor in the present case, it does consider the difference between her rank and your appointment as master corporal to be an aggravating factor. Any sexual assault is illegal and inexcusable, but a sexual assault by a superior on a subordinate is not just criminal but it is contrary to our duty of promoting the welfare of our subordinates (see *QR&O* articles 4.02(1)(c) and 5.01(c)).

[23] You exercised your right to plead not guilty. You were found guilty by this court at the end of a complete trial. This exercise of your right cannot be viewed in a negative manner and it cannot be considered as an aggravating factor. Canadian jurisprudence generally considers an early plea of guilty and cooperation with the police as tangible signs that the offender feels remorse for his or her actions and that he or she takes responsibility for the illegal actions and the harm done as a consequence of these actions. Therefore, such cooperation with the police and an early plea of guilty will usually be considered as mitigating factors.

[24] This approach is generally not seen as a contradiction of the right to silence and of the right to have the prosecution prove beyond a reasonable doubt the charges laid against the accused but is seen as a means for the courts to impose a more lenient sentence because the plea of guilty usually means that witnesses do not have to testify and that it greatly reduces the costs associated with the judicial proceeding. It is also usually interpreted to mean that the accused wants to take responsibility for his or her unlawful actions.

[25] An accused that pleads not guilty cannot hope to receive the same consideration from the judicial process. This does not mean that the sentence is increased because the accused has been found guilty after pleading not guilty; it only means that his or her sentence will not be affected by the mitigating factor of the remorse demonstrated by the offender.

[26] I have reviewed the cases presented by the prosecutor as well as other Canadian cases of sexual assault involving sexual intercourse. This review indicates that imprisonment is the norm but that the period of imprisonment varies greatly depending on the circumstances surrounding the commission of the offence and the circumstances of the offender. While some of the cases presented do contain similar facts to our case and are helpful, I must determine a sentence based on the specific circumstances of the offence and of the offender.

[27] Defence Administrative Orders and Directives (DAOD) 5019-5, Sexual Misconduct and Sexual Disorders, defines sexual misconduct as one or more acts that: are either sexual in nature or committed with the intent to commit an act or acts that are sexual in nature; and constitutes an offence under the *Criminal Code* or Code of Service Discipline (CSD).

[28] This DAOD states that, "Sexual misconduct destroys basic social and military values and undermines security, morale, discipline and cohesion in the CF." Judicial notice of the contents of this DAOD has been taken under MRE 15.

[29] Sexual assaults involving sexual intercourse must be denounced. As stated by the Supreme Court of Canada in *R v. Stone* [1999] 2 S.C.R. 290 at paragraph 239:

> 239 It is incumbent on the judiciary to bring the law into harmony with prevailing social values. This is also true with regard to sentencing. To this end, in *M. (C.A.)*, *supra*, Lamer C.J. stated, at para. 81:
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> > The objective of denunciation mandates that a sentence should also communicate society's condemnation of that particular offender's conduct. In short, a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our society's basic code of values as enshrined within our substantive criminal law. ... Our criminal law is also a system of values. A sentence which expresses denunciation is simply the means by which these values are communicated. In short, in addition to attaching negative consequences to undesirable behaviour, judicial sentences should also be imposed in a manner which positively instills the basic set of communal values shared by all Canadians as expressed by the *Criminal Code*. [Emphasis in original.]

[30] Earlier in the trial, I quoted a passage from Chief Justice Lamer's decision in *R v Généreux* [1992] 1 SCR 259 when I rendered my decision on an application presented by your counsel. I will again refer to that passage found at paragraph 31 of *Généreux* because it is quite relevant to your sentencing. Chief Justice Lamer addressed the dual purposes of the Code of Service Discipline as follows:

> Although the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces, it does not serve merely to regulate conduct that undermines such discipline and integrity. The Code serves a public function as well by punishing specific conduct which threatens public order and welfare....Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline.

[31] He also had this to say concerning the special disciplinary standards in the military at paragraph 60:

> I agree, in this regard, with the comments of Cattanach J. in *MacKay v. Rippon*, [1978] 1 F.C. 233 (T.D.), at pp. 235-36:
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> > Without a code of service discipline the armed forces could not discharge the function for which they were created. In all likelihood those who join the armed forces do so in time of war from motives of patriotism and in time of peace against the eventuality of war. To function efficiently as a force there must be prompt obedience to all lawful orders of superiors, concern, support for and concerted action with their comrades and a reverence for and a pride in the traditions of

> the service. All members embark upon rigorous training to fit themselves physically and mentally for the fulfilment of the role they have chosen and paramount in that there must be rigid adherence to discipline.
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> Many offences which are punishable under civil law take on a much more serious connotation as a service offence and as such warrant more severe punishment. Examples of such are manifold such as theft from a comrade. In the service that is more reprehensible since it detracts from the essential *esprit de corps*, mutual respect and trust in comrades and the exigencies of the barrack room life style. Again for a citizen to strike another a blow is assault punishable as such but for a soldier to strike a superior officer is much more serious detracting from discipline and in some circumstances may amount to mutiny. The converse, that is for an officer to strike a soldier is also a serious service offence.

[32] There was evidence presented at trial that indicated there are few women soldiers at CFB Wainwright. Women represent a small minority in a predominately male garrison. Although the court has not taken judicial notice of this fact, it is well known that men greatly outnumber women in the Canadian Armed Forces. Women must feel they are treated as equals and that they are safe. You did not help a drunken fellow soldier; you took advantage of a drunken female soldier.

[33] A sexual assault such as the one you committed is a repulsive crime in Canadian society, but committing a sexual assault such as you did is a most heinous crime in the military context and it is far from being a simple breach of discipline. It is both a crime against the physical, psychological and emotional integrity of the victim and against the dignity of the victim as well as a significant attack on our values of respect and trust between fellow service members.

[34] Without minimizing the effects of a sexual assault on any victim, the court finds that a sexual assault in a military context is much more serious than a similar sexual assault in a civilian context because of the impact this sexual assault has on the fundamental principles of cohesion, trust and respect that are needed to ensure a strong and disciplined military force. Simply said, this type of conduct hurts the victim and degrades our operational capability.

[35] The Court Martial Appeal Court also indicated that the particular context of military justice may, in appropriate circumstances, justify and, at times, require a sentence which will promote military objectives (see *Tupper* 2009 CMAC 5 paragraph 34). While the ultimate aim of sentencing in the military context is the restoration of discipline in the offender and in the military society, the court must also consider its other role of punishing specific conduct which threatens public order and welfare when sentencing you. The court must impose a sentence that should be the minimum necessary sentence to maintain discipline and achieve the goals of sentencing.

[36] As I stated in the *Leblanc* General Court Martial, having considered the view of the Supreme Court and appellate courts on the offence of sexual assault as well as the contents of DAOD 5019-5, I find that members of the Canadian Forces must be made

aware that they will face a considerable sentence of incarceration, except in rare cases of extremely mitigating circumstances, if they commit sexual assaults involving sexual intercourse. Canadian Forces members must be able to feel that they are safe from any attack on the physical and sexual integrity of their person when they are with other Canadian Forces members and even more so when they are on a defence establishment.

[37] This court was presented with few mitigating factors. The aggravating factors, the circumstances surrounding the commission of the offence and the moral blameworthiness of the offender lead me to believe that the court must impose a sentence that will strongly denounce your conduct and that will assist you in taking responsibility for this offence.

[38] Master Corporal Royes, after reviewing the totality of the evidence, the case law and the representations made by the prosecutor and your defence counsel, I have come to the conclusion that the appropriate sentence in this case is imprisonment for a period of 36 months.

[39] I have reviewed the provisions of sections 196.11 and 196.14 of the *National Defence Act*. I make an order for the taking of DNA samples of the offender. I have also reviewed the provisions of sections 227, 227.01 227.02 of the National Defence Act. I make an order requiring Master Corporal Royes to comply with the *Sex Offender Information Registration Act* for a period of 20 years.

[40] I have reviewed the provisions of section 147.1 of the *National Defence Act*. Having considered the nature of the present offence and circumstances of its commission, I have come to the conclusion that an order prohibiting you from possessing any firearm, crossbow, prohibited weapon, restricted weapon, prohibited device, ammunition, prohibited ammunition or explosive substance or all such things is not required in the interests of the safety of any person. This sentence was passed at 0952 hours on 14 December 2013.

Counsel:

Lieutenant-Commander S. Torani, Canadian Military Prosecution Services
Major R.J. Rooney, Canadian Military Prosecution Services
Counsel for Her Majesty

Major D. Hodson, Directorate of Defence Counsel Services
Major E. Thomas, Directorate of Defence Counsel Services
Counsel for the Master Corporal Royes