COURT MARTIAL

Citation: *R v Foley*, 2014 CM 3013

Date: 20140819
Docket: 201388

Standing Court Martial

Canadian Forces Base Cold Lake
Cold Lake, Alberta, Canada

Between:

Corporal L.F.J. Foley, Offender

- and -

Her Majesty the Queen

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

(Orally)

[1] Corporal Foley, having accepted and recorded your plea of guilty in respect of the first and the fourth charge on the charge sheet, the court now finds you guilty of those charges, and I also direct a stay of proceeding concerning the second charge considering that this charge is alternate to the first charge.

[2] In the particular context of an armed force, the military justice system constitutes the ultimate means of enforcing discipline, which is a fundamental element of the military activity in the Canadian Forces. The purpose of this system is to prevent misconduct or in a more positive way promote good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. The military justice system also ensures that public order

is maintained and that those subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[3] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the Armed Forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and the morale among the Canadian Forces, see *R* v *Généreux* [1992] 1 SCR 259 at 281-282. The Supreme Court of Canada in the same decision recognized at paragraph 31 that:

> 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.

[4] That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[5] Here in this case the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentence you to detention for a period of 15 days. In addition, your defence counsel suggested to the court that the court suspends the sentence in accordance with section 215 of the *National Defence Act*.

[6] Although this court is not bound by this joint recommendation, it is generally accepted that a sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons mean where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute or would be contrary to public interest (see *R. v. Taylor*, 2008 CMAC 1, at paragraph 21).

[7] In this case, the circumstances refer to some ethical principles such as respect and three such obligations such as integrity, loyalty and responsibility, and it makes, as mentioned by the prosecutor, the offences very serious to which you have pleaded guilty.

[8] My understanding of the circumstances is that you had a meeting on 18 January 2013 at the canteen of your unit with some other people. At the meeting, you were loud and interrupting some of your fellow corporals. You left the meeting and you went home, but you decided to go back to that meeting that was not done and you displayed disruptive conduct, throwing things around the place, and you finally struck your sergeant three times in the face.

[9] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Forces;

(b) to denounce unlawful conduct;

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

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

(e) to rehabilitate and reform offenders.

[10] When imposing sentences a military court must also take into consideration the following principles:

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

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

(c) a 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 applicable in the circumstances, 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 it was established by the Court Martial Appeal Court of Canada and the Supreme Court of Canada decisions; and

(e) lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offences or the offender.

[11] As suggested by counsel, the court is of the opinion that sentencing in this case should focus on the objectives of denunciation and general deterrence. It is important to remember that the principle of general deterrence means that the sentence should deter not only the offender from reoffending, but also to deter others in similar situations from engaging in the same prohibited conduct.

[12] In arriving at what the court considers a fair and an appropriate sentence, the court has considered the mitigating and aggravating factors. The court considers as aggravating:

(a) the objective seriousness of the offences. The offences you were charged with were laid in accordance with sections 84 and 129 of the *National Defence Act*. Section 84 is an offence punishable by

imprisonment for life or less punishment; and section 129 of the *National Defence Act* is punishable by dismissal with disgrace from Her Majesty's service or to less punishment;

(b) I have considered the subjective seriousness of the offences and, for the court, this covers three aspects:

(i) the lack of respect for the people and the rank structure in the military. You had a total disregard in the circumstances for the people involved and to a superior officer. Your rank and experience, at that time, should have told you that such conduct was totally inappropriate. Unfortunately, it looks like it was something you forgot at the time;

(ii) there is also the use of force. You wanted to probably make a point and be heard, but the use of force, in order to argue with people, especially with those who are on the same side, is totally inappropriate and useless. You have to use words and you know as well as I do that it's more proper to act like this. At this time, you let your fists talk basically; and

(iii) also I have to consider some premeditation. Circumstances revealed that it was not on the spur of the moment that you had this behaviour. You went back home, you had some time to think about it, and you made a decision. You came back and you never changed your mind about what you intended to do; maybe you didn't have on your mind that you would hit somebody, but it turned out that way and you wanted to make your point.

Those are the aggravating factors I keep in my mind in order to decide.

[13] There are also factors that the court considers as mitigating:

(a) there is your guilty plea. You expressed remorse; you did it by an apology you made to the people. You reflected that by the fact that you pleaded guilty at your summary trial that occurred at least a year from now, and you clearly expressed your intent to plead guilty very early on in the procedure, so all this has to be considered as a mitigating factor;

(b) there is the fact also that you had to face this court martial. A court martial is a rare event in the military and on a base, and from my perspective, when such a thing happens, as you can see, people are interested in it. They come to and attend the court. From my perspective, this court that was announced in public may have had a very significant deterrent effect on you, but also on others. I am not sure that there are many people who would like to sit where you are today for what

happened, and from that perspective it has some deterrent effect. And as you've heard, from my perspective, it is a principle that I have to keep on my mind. I mentioned denunciation and general deterrence, so facing this court martial goes directly to deterrence and general deterrence;

(c) your career in the military so far has been good despite the fact that you did not know that you may have some mental disorder issues. You have performed well and I have to consider this as a mitigating factor;

(d) also it is an isolated incident. I do not have any evidence before me that this is the kind of character you have expressed during most of your career; to the contrary, it is something out of character in some way, so I have to consider this too; and

(e) there is your mental health illness. Further to the incident, you sought treatment and you probably got an explanation from the doctor or the physician that may explain your behaviour on 18 January. You still have a close follow-up by doctors to which you are complying without any problem; same thing for medication, you are complying with that. And also you had to experience a change in your medical category because of that, and I have to consider this as a mitigating factor too.

[14] Concerning the fact that this court imposes a sentence of incarceration as suggested by both counsel, I look at the nature and seriousness of the offences. I consider the aggravating and mitigating factors that I have just mentioned and, also, I considered case law put before me. Decisions in *R.* v. *Moreau*, 2010 CM 1019, *R.* v. *Blouin*, 2004 CM 25 and *R. v*. *Vanson*, 2001 CM 09 involve similar offences, similar circumstances in some ways, similar type of offenders who had some problems and, from my perspective, incarceration is appropriate in the circumstances and seems reasonable to me as suggested.

[15] Now, the type of incarceration. As you may know, the military justice system has disciplinary tools such as detention, which seeks to rehabilitate service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. There is also imprisonment, and when it sometimes constitutes strictly criminal activity, or if it is really serious, then imprisonment may be considered.

[16] From my perspective, detention as suggested by both counsel is appropriate. I haven't seen or heard anybody suggesting that you don't have a place in the military or in the Canadian Forces, to the contrary, and a lot has to do with your mental health issues. So from my perspective, detention is appropriate.

[17] Now, the duration. I agree with counsel that a short duration is appropriate, so 15 days. When you keep in mind that the maximum punishment for striking a superior officer is life imprisonment, when you put it on the scale, 15 days is short, and the same

thing for section 129 of the *National Defence Act*, conduct to the prejudice of good order and discipline, the maximum punishment is very high. So 15 days appears reasonable in the circumstances.

[18] In consequence, the court will accept the joint submission made by counsel to sentence you to detention for a period of 15 days considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

[19] Now, you heard me asking counsel about the necessity for the court to make a weapons prohibition order in accordance with section 147.1 of the *National Defence Act*. I have to consider this because of the circumstances. As I have expressed to counsel a few minutes ago, medical evidence imposed limitations on you regarding handling personal weapons. It does not allow you to use any weapons; I don't know how it will affect your military career, but from my perspective, you have already limitations from a medical perspective. Also, as I mentioned, it is an isolated incident, not involving any weapons, so circumstances do not support that such an order should be made. I considered the testimony of Dr Rees. She mentioned that up until April of this year you were stable, taking your medication. I don't have any indication that you are doing something to the contrary, so for me I don't have any issues with your safety or the safety of others, so I will not issue such an order.

[20] Now, the last question I have to discuss is the suspension of the sentence. Section 215 of the *National Defence Act* reads as follows:

> Where an offender has been sentenced to imprisonment or detention, the carrying into effect of the punishment may be suspended by the service tribunal that imposed the punishment.

As it was discussed and when you look at this provision, there are no particular criteria in order for an authority, such as me, to assess and decide if it is appropriate or not to make such an order.

[21] I articulated my approach on this specific matter in a variety of decisions since 2010 such as *R.* v. *Paradis*, 2010 CM 3025, *R.* v. *Zammitti*, 2010 CM 3024, *R.* v. *Wilcox*, 2011 CM 3012, *R.* v. *Masserey*, 2012 CM 3004, *R.* v. *Vezina*, 2013 CM 3015 and more recently in *R.* v. *Lévesque*, 2014 CM 3012. I had a constant approach to it because, essentially what I said is, if the offender demonstrates on a balance of probabilities that his particular circumstances or the operational requirements of the Canadian Forces justified the necessity of suspending the sentence of imprisonment or detention, the court will make such an order. So, it belongs to you, on a balance of probabilities, to prove such a thing. However, before doing so, the court must consider once it has found that such an order is appropriate, whether or not a suspension of that sentence would undermine the public trust in the military justice system as part of the Canadian justice system in general. So that's the second part of it, but first I have to decide in this case if you proved on a balance of probabilities exceptional

circumstances. My understanding is there is no evidence of an operational requirement that was put before me and mainly the evidence was your medical condition.

[22] You were diagnosed with a bipolar disorder in 2013, which got you through different steps from a medical perspective and from an administrative perspective. I clearly heard the testimony of Dr Rees and your counsel clearly established to me that she was requesting that you do not serve the sentence of detention for a period of 15 days in order to prevent your medical condition to get worse. I would say that the evidence I heard did not disclose such a situation.

[23] Dr Rees was unable to tell the court if it would make it worse or if it would change anything. In fact, she was not in a position of having assessed you recently and how it would impact on you. And she said that it may cause stress, but she was not clear if it would impact or not on your condition. Basically, she said it could go one way or another; it may change nothing or it may change something and she could not say.

[24] On the other hand, the Commanding Officer of the Canadian Forces Service Prison and Detention Barracks clearly mentioned that his unit has a duty to adapt to the people sent there; that people with some conditions have a close follow-up and, for sure, they are observed; they respect medication, people, such as you, have access to medical personnel including specialists and Dr Rees may be called to meet you at some point in Edmonton if the situation requires it. So the personnel on site have some training in order to detect any situation that may bring you on the wrong way from a mental health perspective. They are not trained to intervene and correct the situation, but they are able to recognize and they have the duty to make sure that he won't get worse.

[25] So, from my perspective, it has not been demonstrated on a balance of probabilities that those circumstances are exceptional circumstances that would justify the court to suspend the sentence. I want you to understand that I am sensitive to what you brought to the court as evidence. It is not because I do not believe that you have a condition; I understand that, but, from my perspective, it is not exceptional circumstances. And those people over there have the duty to make sure you're doing fine because it is detention. The purpose is to re-instil and rehabilitate habits and it is also for a short period of time, so I don't have any indication that this short period may impact in one way or another. So, from my perspective, you did not meet the burden.

FOR THESE REASONS, THE COURT:

[26] **FINDS** you guilty of the first and fourth charge on the charge sheet;

[27] **DIRECTS** a stay of proceedings on the second charge.

[27] **SENTENCES** you to detention for a period of 15 days.

Counsel:

Major R.J. Rooney, Canadian Military Prosecutions Services
Counsel for Her Majesty the Queen

Lieutenant-Commander D. Liang, Directorate of Defence Counsel Services
Counsel for Corporal L.F.J. Foley