COURT MARTIAL

Citation: *R. v. Keeping*, 2014 CM 4010

Date: 20140924
Docket: 201442

Standing Court Martial

Halifax Courtroom
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Able Seaman K.J. Keeping, Offender

Before: Commander J.B.M. Pelletier, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Able Seaman Keeping, having accepted and recorded your pleas of guilty in respect of the 15 charges remaining on the charge sheet, the court now finds you guilty of those charges under sections 83, 90, 101.1 and 129 of the *National Defence Act*, respectively for Disobedience of a Lawful Command of a Superior Officer, for Absence Without Leave, for Failure to Comply with a Condition Imposed under Division 3 and for Conduct to the Prejudice of Good Order and Discipline.

[2] It is now my duty as the Military Judge presiding at this Standing Court Martial to determine the sentence. 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 relevant to this case as disclosed in the Statement of Circumstances and the material submitted during the course of the sentencing hearing. I have also considered the submissions of counsel, both for the prosecution and for the defence.

[3] The military justice system constitutes the ultimate mean to enforce discipline in the Canadian Armed Forces, and a fundamental element of the military activity. The purpose of this system is the promotion of good conduct by allowing the proper sanction of misconduct. It is through discipline that an armed force ensures that its members will accomplish in a trusting and reliable manner successful missions. In doing so, it also ensures that the public interest in promoting respect for the laws of Canada is served by punishment of persons subject to the Code of Service Discipline.

[4] It has long been recognized that the purpose of a separate system of military justice or tribunals is to allow the Canadian Armed Forces to deal with matters that pertain to the respect of the Code of Service Discipline and the maintenance of efficiency and morale.

[5] As the Supreme Court of Canada recognized in *R v Généreux*, [1992] 3 SCC 259 at page 293:

> ... To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. ...

At the same page, it emphasized that in the particular context of military justice:

> ... Breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct....

[6] That being said, punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances. Indeed, moderation is the bedrock principle of the modern theory of sentencing in Canada. What a sentencing judge must do is to "impose a sentence commensurate to the gravity of the offence and the previous character of the offender" as stated in the Queen's Regulations and Orders. In other words, any sentence imposed must be adapted to the individual offender and the offence he or she committed.

[7] 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.

[8] When imposing sentences, a sentencing judge 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; and

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

[9] I came to the conclusion that in the particular circumstances of this case sentencing should place the focus on the objectives of denunciation and deterrence, both specific and general as the sentence imposed should not only deter the offender but also others in a similar situation from engaging in the same prohibited conduct. I also believe that the objective of rehabilitation is important in this case, even if the offender will not, in all likelihood, pursue his service with the Canadian Armed Forces for much longer. Indeed, in circumstances where an offender will be heading for civilian streets, any sentence imposed by a military tribunal should not have extensive detrimental effects on the efforts the offender will have to make to reintegrate into Canadian society and make a positive contribution in his or her new community.

[10] As mentioned above, a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances.

[11] First, the offender. Before the court is a 23 year old sailor who started basic training with the Canadian Armed Forces in January 2010. He completed training as a junior electrician and served on Her Majesty's Ships on the east coast as of December 2011, mainly as a member of the ship's company of Her Majesty's Canadian Ship (HMCS) CHARLOTTETOWN, with whom he was deployed on OP ARTEMIS between May and August 2012. He is single.

[12] The evaluation reports produced as Exhibit 8 reveal that Able Seaman Keeping succeeded in his training and initial employment as an electrician on-board ships, proving himself as a dependable and valued member of the electrical section and the Maritime Systems Engineering Department on-board. His performance on deployment was qualified as outstanding. However, starting in November 2013, Able Seaman Keeping has been having significant problems with the law. As far as the military is

concerned, those difficulties relate to respect of orders requiring his presence at a specific place on a specific time. His conduct sheet produced as Exhibit 5 reveals that as a member of HMCS CHARLOTTETOWN, he was sentenced by the Executive Officer on 23 May 2014 for two offences of absence without leave and once again sentenced by his Commanding Officer on 24 July 2014 for three further offences of absence without leave.

[13] As a result of repeated absent without leave offences and incidents which led to the sentence imposed on 23 May 2014, Able Seaman Keeping was placed on Counselling and Probation on 5 May 2014. The conditions of this Counselling and Probation were breached between May and August 2014. Able Seaman Keeping's Commanding Officer recommended his release from the Canadian Armed Forces for misconduct, however, the decision of the Director Military Careers Administration rendered on 11 September 2014 was to the effect that Able Seaman Keeping was to be released medically under item 3(b) on 9 March 2015 or sooner, as evidenced by the Decision Letter and Release Instructions Message produced as Exhibits 6 and 7 respectively. Representations were made to the court to the effect that Able Seaman Keeping's unit would entertain a release as soon as possible and that at the time of trial Able Seaman Keeping was agreeable to release from the Canadian Armed Forces as soon as possible.

[14] Turning now to the offences. In arriving at evaluating what would be a fair and appropriate sentence the court has considered the objective seriousness of the offences as illustrated by the maximum punishment that the court could impose for each. The section 83 offence is objectively very serious as it is punishable by imprisonment for life, the sections 90 and 101.1 offences are punishable by imprisonment for less than two years and the section 129 offence is punishable by Dismissal with Disgrace from Her Majesty's Service.

[15] The circumstances of these offences were brought before the court by means of an extensive statement of circumstances produced as Exhibit 9, read by the prosecutor and accepted as conclusive evidence by Able Seaman Keeping. For ease of comprehension those circumstances will be detailed in relation to the four groups of offences to which the offender admitted his guilt, covering the fifteen counts for which he is being sentenced today.

[16] In relation to the two counts of Disobedience of a Lawful Command of a Superior Officer to which the offender pleaded guilty, the circumstances are as follows:

(a) The offence at charge 1 was committed in relation to a direct and explicit order given to Able Seaman Keeping to the effect that he would be on duty as a roundsman on-board HMCS CHARLOTTETOWN during the night of 26 June 2014 until relieved the next morning at 0800 hours. Yet, Able Seaman Keeping left the ship at 1545 hours on 26 June 2014, only to come back on 27 June 2014 at 0740 hours.

(b) The second offence occurred on 4 July 2014 when Able Seaman Keeping was serving a sentence of 21 days confinement to ship following his conviction by Summary Trial on 26 June 2014. As his ship had no hot water Able Seaman Keeping was exceptionally authorized by his coxswain to go over to another ship to take a shower and do his laundry and come back immediately thereafter. Upon crossing the brow Able Seaman Keeping was stopped by Lieutenant(N) Kendell who asked where he was going given that he was serving a sentence of confinement. Able Seaman Keeping informed the officer of the permission he got as his behaviour had been good. He then proceeded ashore but never went to the other ship as ordered and did not come back to HMCS CHARLOTTETOWN on 4 July 2014. On 5 July 2014 a warrant was issued for his arrest. Able Seaman Keeping was arrested by the military police on 6 July 2014 and was released soon after to continue serving his sentence of confinement to ship.

[17] In relation to the six counts of Absence Without Leave to which the offender pleaded guilty, the circumstances are as follows:

(a) As for the third charge, Able Seaman Keeping had indicated that he had a medical appointment on 12 June 2014. He was specifically requested to report to work directly after, yet he came back to the ship only at 0800 hours on 13 June 2014. It was later confirmed that he had no appointment and was not present at medical facilities at any time on 12 June 2014.

(b) The offence in the fourth charge was committed on Monday, 23 June 2014, when Able Seaman Keeping failed to report to the ship at leave expiry at 0800 hours. Attempts to locate him were unsuccessful and he remained absent on 24 and 25 June. He was found at his residence the next day and agreed to voluntarily proceed to HMCS CHARLOTTETOWN where he arrived at 1050 hours on 26 June 2014.

(c) The offence in the sixth charge was committed in the circumstances described at sub-paragraph 16(b) above when on 4 July Able Seaman Keeping proceeded home instead of going to another ship to take a shower and do his laundry.

(d) The offence in the seventh charge occurred on Wednesday, 20 August, at 0800 hours, when Able Seaman Keeping was noticed absent on-board HMCS CHARLOTTETOWN. Attempts were made to contact him by phone, a visit was made to his residence and the base medical facility was contacted without success. On 22 August 2014 an arrest warrant was issued. Able Seaman Keeping was arrested on 25 August 2014 at 1555 hours. Able Seaman Keeping later admitted that at leave expiry at 0750 hours on 20 August 2014 he was at his residence.

(e) As for the eighth charge, the offence occurred on 30 August 2014, at 1700 hours, when Able Seaman Keeping failed to report to HMCS CHARLOTTETOWN brow as it was his duty to do so pursuant to the undertaking he signed on his release from custody by a Military Judge on 28 August 2014. Attempts were made to call Able Seaman Keeping via phone and three local hospitals were contacted without success. An arrest warrant was issued on 3 September 2014 and Able Seaman Keeping was arrested by the Ontario Provincial Police near Morrisburg, Ontario, returning from his parent's home in Mississauga, Ontario to Halifax.

[18] In relation to the seven counts of Failure to Comply with a Condition Imposed under Division 3, the circumstances are as follows:

(a) The ninth and tenth charges both related to conditions imposed on Able Seaman Keeping pursuant to Division 3 of the *National Defence Act* on 22 May 2014 when he was released from custody by a Custody Review Officer. One of these conditions was to report at 0750 hours to either one of four superior officers named in the "Direction on Release from Custody" signed by the offender. Able Seaman Keeping failed to report on 12 June 2014, the ninth charge, and on each of the four occasions between 23 and 26 June 2014, the tenth charge.

(b) The eleventh and twelfth charges both relate to conditions imposed on Able Seaman Keeping pursuant to Division 3 of the *National Defence Act* on 6 July 2014 when he was released from custody by a Custody Review Officer. The conditions imposed on him included the obligation to attend medical appointments and to report at 0750 hours to either one of four superior officers named in the "Direction on Release from Custody" signed by the offender on 6 July 2014. Able Seaman Keeping failed to attend to a medical appointment on 20 August, the eleventh charge, and failed to report to either one of the superior officers on 20, 21, 22 and 25 August 2014, the twelfth charge.

(c) The thirteenth, fourteenth and fifteenth charges relate to conditions imposed on Able Seaman Keeping by a Military Judge pursuant to section 159.4(1) of the *National Defence Act* when he was again released from custody following a Show Cause Hearing held on 28 August 2014. The conditions imposed on him were specified in an undertaking signed by the offender and included the obligation to report on HMCS CHARLOTTEOWN and to remain within the confines of Halifax Regional Municipality unless authorized by his commanding officer. Able Seaman Keeping failed to report between 30 August and 1 September, the thirteenth charge, and between 2 and 4 September, the fourteenth charge. He also failed to abide by the condition to remain

within the confines of Halifax Regional Municipality between 30 August and 4 September when he was arrested in Ontario, the fifteenth charge.

[19] Finally, the offender pleaded guilty to one charge under section 129 of the *National Defence Act* for use of cannabis contrary to article 20.04 of *the Queen's Regulations and Orders for the Canadian Forces*. This sixteenth charge relates to the fact that on 4 September 2014 Able Seaman Keeping admitted during a cautioned interview that since his enrolment in the Canadian Armed Forces he has consumed cannabis on multiple occasions knowing that this was prohibited by regulations.

[20] Having summarized the circumstances of the offences as described in essential facts contained in the Statement of Circumstances read by the prosecutor and accepted as conclusive evidence by Able Seaman Keeping, the court makes the following conclusions on the subjective gravity of the offences in the circumstances of this case:

(a) The two offences of disobedience, while objectively serious, were not committed in operational circumstances, in the sense that they did not prevent a military task from being accomplished. It is noted however that Leading Seaman Ripley had to perform the duties of roundsman on his own on 26 – 27 June. Furthermore, the execution of the sentence of confinement to ship was frustrated by the departure without authority of Able Seaman Keeping on 4 July 2014, an offence committed in troubling circumstances given that it represents a violation of the trust conferred by key members of the chain of command in allowing Able Seaman Keeping to leave the ship for a shower and laundry.

(b) The offences of Absence Without Leave did not result in the offender missing a sailing or other operational tasking for his ship, although their commission caused significant work on the part of certain members of the chain of command who tried to locate Able Seaman Keeping repeatedly and had to issue a number of arrest warrants. Those had to be executed by members of the military police as Able Seaman Keeping failed to return to his ship on his own.

(c) The offences of failure to comply with conditions of undertaking are as serious as they get, given the repeated violations of conditions imposed not only by successive Custody Review Officers but also by a Military Judge.

(d) Finally, the offence under section 129 is significant given the fact that the prohibition on the use of drugs is well known and an important tenet of service in the Canadian Forces.

[21] The court considers aggravating, in the circumstances of this case, the following elements underlined by the prosecution and described above in illustrating the subjective seriousness of the offence. Indeed, despite their limited impact on operations

the offences show a blatant disregard to authority and have caused more than insignificant disruptions to the unit. Able Seaman Keeping has failed to take advantage of the numerous occasions given to him by Custody Review Officers and one Military Judge but also and especially by key members of the chain of command who have made obvious efforts to accompany him and assist in providing direction necessary to his success as a member of his ship's company and his navy. His conduct shows a total lack of respect for these people. Also aggravating is the conduct sheet of the offender showing a pattern of misbehaviour which only continues with these proceedings.

[22] The court also considered the following mitigating factors as mentioned in submissions by counsel and demonstrated by the evidence presented in mitigation, especially by defence counsel:

(a) the offender's guilty plea which the court considers as a genuine sign of remorse and an indication that the offender is taking full responsibility for what he has done. The offender collaborated with the investigators and communicated his plea early, thereby avoiding the expense of a trial. This admission of responsibility occurred in a very formal and public forum of this court martial, in the presence of key members of his chain of command;

(b) the fact that Able Seaman Keeping is about to be medically released from the Canadian Forces and suffers from a mental condition which played a role in first offending on 16 November 2013;

(c) the offender's record of service with the Canadian Forces. Before incidents of November 2013 the offender was considered an asset for the Canadian Forces and the Navy as evidenced by the evaluation reports produced as Exhibit 8 before the court; and

(d) the age and potential of the offender to make a positive contribution to Canadian society in the future, even if his career in the Navy and the Canadian Armed Forces is coming to an end.

[23] The prosecutor and defence counsel made a joint submission on the sentence to be imposed by this court. They recommend that I impose a sentence of imprisonment for a period of 30 days, minus those days already spent in pre-trial custody and that I accompany this sentence of imprisonment with a severe reprimand in order to meet justice requirements. Although this court is not bound by this joint recommendation, it has been determined by the Court Martial Appeal Court in *R v Taylor*, 2008 CMAC 1 at paragraph 21, that the sentencing judge cannot depart from a joint submission unless 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 be contrary to the public interest. As a Military Judge, I may not like the sentence being jointly proposed and I may think that I would have come up with something better, yet, any

such opinion I may have is not sufficient to reverse the joint submission that was made to me.

[24] In the course of the sentencing hearing both counsel presented the court with numerous cases which may be considered as useful precedents to assist in determining the range of punishments which may be relevant to the imposition of a proper sentence in this case. This assistance is most welcome as the court has the obligation to determine if the proposed sentence is unfit. Sentences imposed by military tribunals in previous cases are useful to appreciate the kind of punishments that would be appropriate in this case. That being said, every case is different in its circumstances. I don't see the need to go over the cases submitted to me in detail in these reasons. Suffice to say that those cases show that the proposed sentence corresponds to punishment imposed in the past for similar offences. That it is sufficient to allow the court to conclude that the proposed sentence is not unfit.

[25] Considering the nature of the offences, the circumstances in which they were committed, the applicable sentencing principles and the aggravating and mitigating factors mentioned previously, I am of the view that the punishments of imprisonment for a period of 30 days and a severe reprimand jointly proposed by counsel is within the range of appropriate sentences in this case. The joint submission made by counsel is not contrary to the public interest and will not bring the administration of justice into disrepute. The court will therefore accept it.

[26] Able Seamen Keeping, the circumstances of the charges you have pleaded guilty to reveal a behaviour that's entirely incompatible with service in the Navy and the Canadian Armed Forces. You clearly don't have a future with the military as evidenced by the results of and the content of the Administrative Review relevant to your career. A lot of energy was spent trying to bring you back on line for success or at least ensuring that you were treated fairly when you offended and needed to be arrested, detained or brought before justice. Nevertheless you reoffended repeatedly and let a number of persons down. I am told you have concluded that to release from the military as soon as possible would be the best course of action to adopt upon being released from imprisonment in approximately a week's time. I invite you to reflect on the negative impact of the offences you committed had on yourself and your unit and I hope that you will endeavor to leave the Canadian Forces with your head up and move forward rapidly to a new life in civilian streets without reoffending.

FOR THESE REASONS, THE COURT:

[27] **FINDS YOU GUILTY** of charges, 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15 and 16 on the charge sheet at Exhibit 2.

[28] **SENTENCES** you to imprisonment for a period of 7 days, corresponding to 30 days minus the 23 days that you have served in pre-trial custody, and to a severe reprimand.

Counsel:

Major D.G.J. Martin, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Lieutenant-Commander B. Walden, Directorate of Defence Counsel Services
Counsel for Able Seaman Keeping