



COURT MARTIAL

Citation: *R. v. Harley* 2014 CM 2021

Date: 20141110

Docket: 201415

Standing Court Martial

Canadian Forces Base Petawawa
Ontario, Canada

Between:

Her Majesty the Queen

- and -

Sapper M. Harley, Offender

Before: Colonel M.R. Gibson, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Sapper Harley, having accepted and recorded your plea of guilty to the first and second charges on the charge sheet, the court now finds you guilty of those charges. These charges, laid under section 130 of the *National Defence Act*, are for possession of substances included in Schedule III of the *Controlled Drugs and Substances Act*, namely BZP and Psilocybin. It is now my duty to determine an appropriate, fair and just sentence.

[2] In doing so, the court has considered the principles of sentencing that apply in the military justice system, the facts of the case as disclosed in the documents introduced in evidence, as well as the submissions of counsel for the prosecution and the defence.

[3] The fundamental purposes of sentencing by service tribunals in the military justice system, of which courts martial are one type, are: to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[4] The fundamental purposes are achieved by the imposition of just sanctions that have one or more of the following objectives: to promote a habit of obedience to lawful commands and orders; to maintain public trust in the Canadian Forces as a disciplined armed force; to denounce unlawful conduct; to deter offenders and other persons from committing offences; to assist in rehabilitating offenders; to assist in reintegrating offenders into military service; to separate offenders, if necessary, from other officers or non-commissioned members or from society generally; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[5] The 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.

[6] Other sentencing principles include: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[7] In the case before the court today, I must determine if the sentencing purposes and objectives would best be served by deterrence, denunciation, rehabilitation, or a combination of these factors.

[8] The court must impose a sentence that is of the minimum severity necessary to maintain discipline, efficiency and morale. Discipline is that quality that every Canadian Forces member must have that allows him or her to put the interests of Canada and of the Canadian Forces before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because ultimately, although it is something which is developed and encouraged by the Canadian Forces through instruction, training and practice, it is something that must be internalized, as it is one of the fundamental prerequisites to operational effectiveness in any armed force. One of the most important components of discipline in the military context is self-discipline. This includes the self-discipline required to abstain from the possession or use of illegal drugs. Sapper Harley, your actions demonstrate that this is an area in which you have been deficient.

[9] The facts of this case are disclosed in the Statement of Circumstances entered into evidence. These indicate that:

- (a) At all material times, Sapper Harley was a member of the Regular Force, Canadian Forces and posted to 2 Combat Engineer Regiment at Canadian Forces Base Petawawa, Ontario.
- (b) In April 2012, military police received information that Sapper Harley was involved in drug activities, particularly MDMA and Psilocybin.
- (c) The Canadian Forces National Investigation Service, National Drug Enforcement Team took charge of the investigation and Sapper Harley was placed under surveillance through human and electronic means.
- (d) Between April 2012 and February 2013, successive production orders were authorized regarding text messages sent and received by Sapper Harley. Thousands of text messages were analysed by NDET investigators.
- (e) Numerous text messages exchanged with civilians and other service members referred to "mushrooms", "zooms", "zoomers" and "zoom zooms", as well as "mush", "fungi" and "do mush". All of these text messages were referring to Psilocybin, a substance listed in Schedule 3 to the *Controlled Drugs and Substances Act*.
- (f) Numerous text messages exchanged with civilians and other service members referred to "party favours", "M", "Molly", "tabs", "meow", "pills", "MDMA", and "shit is mdmazing" as well as "caps", "capped" and "uncapped". All of these text messages were referring to MDMA, a substance listed since March 2012 in Schedule 1 to the *Controlled Drugs and Substances Act*.
- (g) In February 2013, through surveillance, National Drug Enforcement Team investigators were lead to believe that Sapper Harley was going to Southern Ontario to obtain some drugs during the weekend of 23-24 February 2013. His movements were tracked. The military police set up a road block to intercept Sapper Harley on his return to Petawawa.
- (h) At approximately 2125 hours on 24 February 2013, Sapper Harley was arrested on Round Lake Road as he was driving toward CFB Petawawa. Upon being arrested, he admitted to the military police that he had some "shrooms" in the glove box of his car and "stuff" in his day bag on the back seat. When asked what he meant by "stuff," he said "MDMA".
- (i) Upon searching Sapper Harley's day bag, the military police found a Zip-loc bag containing 50 pills or capsules that proved to be 12 grams of

BZP, a substance listed in Schedule 3 to the *Controlled Drugs and Substances Act*.

- (j) In the glove box of Sapper Harley's vehicle, the military police found what proved to be 3 grams of Psilocybin, also known as magic mushrooms, a substance listed in Schedule 3 to the *Controlled Drugs and Substances Act*.
- (k) Sapper Harley had bought the 50 BZP capsules in Southern Ontario for \$320. Purchased in smaller quantity, 50 capsules may cost anywhere between \$500 to \$1,000, depending on the exact quantity purchased.
- (l) BZP is a stimulant that produces euphoria and cardiovascular effects similar to amphetamines. BZP tablets often are sold as MDMA or promoted as an alternative to MDMA.

[10] The court considers that the aggravating factors in this case are the following:

- (a) First, the objective gravity of the offences of which Sapper Harley has been convicted. The offence of possession of a substance included in Schedule III of the *Controlled Drugs and Substances Act* is, pursuant to section 4(6) of the *Controlled Drugs and Substances Act*, punishable by 3 years imprisonment.
- (b) The possession and use of illegal drugs by members of the Canadian Forces has always been, and continues to be, antithetical to the maintenance of discipline, efficiency and morale, and must be actively deterred.

[11] The mitigating factors in this case include the following:

- (a) First and foremost, that Sapper Harley has pleaded guilty to these offences. This is always an important mitigating factor, reflecting that the offender has accepted responsibility for his actions.
- (b) The absence of a conduct sheet or any other indication of prior convictions.
- (c) The indication in the admission made by the prosecution and entered in to evidence as Exhibit 10, that since his release from custody following arrest, Sapper Harley has been of good behaviour, and is considered by his chain of command to be a good soldier and a hard worker who has a lot of potential.
- (d) And the court should also take into account any indirect consequences of the finding of guilty, which in this case, given the Canadian Forces poli-

cy on use of illegal drugs, will include a mandatory administrative review regarding his retention in the Canadian Forces.

[12] The principles of sentencing that the court considers should be emphasized in the present case are denunciation, and general and specific deterrence. Confidence in the honesty, integrity, discipline, maturity and good judgment of members of the Canadian Forces, both by the general public, and other Canadian Forces members, is critical to the effectiveness of the Canadian Forces in the fulfilment of their important functions. Members of the Canadian Forces are rightly held to a very high standard. The actions of Sapper Harley constitute a significant derogation from those standards. He must never repeat these actions, and other members of the Canadian Forces must also understand that such actions are simply not tolerable, and be deterred from committing them.

[13] The prosecution and defence have made a joint submission for a sentence of detention for 21 days. In the case of a joint submission, as reiterated by the Court Martial Appeal Court in the case of *R. v. Private Chadwick Taylor*, 2008 CMAC 1, the question that the court must ask itself is not whether the proposed sentence is one that the court would have awarded absent the joint submission; rather, the court is required to consider whether there are cogent reasons to depart from the joint submission; that is, whether the proposed sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest.

[14] I was not provided by either counsel with any cases involving similar facts to assist the court in determining an appropriate range of sentence. However, I am satisfied that the minimum sentence required to maintain discipline, efficiency and morale on these facts involves a custodial sentence.

[15] The Court Martial Appeal Court has articulated clear reasons why the involvement with drugs in a military environment must be treated as a very serious matter. In its decision in *R v MacEachern*, (1986) 24 CCC (3d) 439, at page 444, the Court said:

Because of the particularly important and perilous tasks which the military may at any time, on short notice, be called upon to perform and because of the team work required in carrying out those tasks, which frequently involve the employment of highly technical and potentially dangerous instruments and weapons, there can be no doubt that military authorities are fully justified in attaching very great importance to the total elimination of the presence of and the use of any drugs in all military establishments or formations and aboard all naval vessels or aircraft. Their concern and interest in seeing that no member of the forces uses or distributes drugs and in ultimately eliminating its use, may be more pressing than that of civilian authorities.

[16] The vital importance of ensuring that no member of the Canadian Forces possesses or uses illegal drugs is further underlined by the purposes of the CF Drug Control Program set out at *QR&O* 20.03:

20.03 – PURPOSE

The purpose of the Canadian Forces Drug Control Program is the maintenance of:

- (a) the operational readiness of the Canadian Forces;
- (b) the safety of members of the Canadian Forces and the public;
- (c) the health of members of the Canadian Forces and the public;
- (d) the security of defence establishments, materiel and other public or private property;
- (e) the security of information classified in the national interest or otherwise protected by law;
- (f) discipline within the Canadian Forces;
- (g) the reliability of members of the Canadian Forces; and
- (h) cohesion and morale within the Canadian Forces.

[17] These purposes accord closely with the purposes of sentencing within the military justice system, and engage vital interests of the Canadian Forces in the maintenance of discipline, efficiency and morale.

[18] Although, on these facts, absent the joint submission, the court would have considered a custodial sentence of a longer duration. The court does not consider that the proposed sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest. Thus, the court will accept the joint submission of counsel for the prosecution and defence as to sentence.

[19] The reason that the court is willing to accept the submission for the punishment of detention rather than imprisonment is to keep open the possibility, given the indication in the evidence tendered by the prosecution that Sapper Harley's chain of command considers him to be a good soldier with a lot of potential, of his rehabilitation. It will be for the appropriate service authorities to determine, on their review of all the factors, whether following his sentence of detention Sapper Harley should be accorded the opportunity to continue to serve as a member of the Canadian Forces.

FOR THESE REASONS, THE COURT:

[20] **FINDS** you guilty of the first and second charges on the charge sheet.

[21] **SENTENCES** you to detention for 21 days.

Counsel:

Major E. Carrier, Canadian Military Prosecution Service
Counsel for Her Majesty the Queen

Mr D. Couture, Directorate of Defence Counsel Services
Counsel for Sapper Harley