



COURT MARTIAL

Citation: *R. v. Klein*, 2014 CM 4009

Date: 20140912

Docket: 201410

Standing Court Martial

Victoria Courtroom
Esquimalt, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant(N) G.M. Klein, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] The court has found Lieutenant(N) Klein guilty in respect of the first and only charge on the charge sheet under s. 130 of the *National Defence Act* for assault contrary to s. 266 of the *Criminal Code of Canada*.

[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 were revealed during the trial and the exhibits and authorities 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 means to enforce discipline in the Canadian 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 been long 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 morale among the Canadian Forces.

[5] As the Supreme Court of Canada recognized in *R v Généreux*, [1992] 1 S.C.R. 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, whether 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 "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 has 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] In agreement with the submissions made by both counsel, I came to the conclusion that in the particular circumstances of this case sentencing should place the focus on the objectives of denunciation and general deterrence. The sentence imposed should not only deter the offender but also others in a similar situation from engaging in the same prohibited conduct.

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

[11] Before the court is a 45 year old offender who joined the Regular Force in December 1991 and who has, since completing MARS training, been serving mainly on submarines or shore units related to submarine operations and support. He is now serving with the submarine HMCS CHICOUTIMI in Esquimalt. He has no conduct sheet. He is married and has two young children aged two and four.

[12] Lieutenant(N) Klein testified on sentencing that following his involvement in the incident which gave rise to the charge he was found guilty of, he received a Notice of Intent to be placed on Counselling and Probation. Following representations he made, the administrative procedure ultimately imposed was a Recorded Warning. He also took steps to address stress and anger management issues. He attended anger management training and obtained to be temporarily transferred to an alternate employment on base for some time.

[13] In arriving at evaluating what would be a fair and appropriate sentence the court has considered the objective seriousness of the offence which, as provided in s. 266 of the *Criminal Code* incorporated by s. 130 of the *National Defence Act*, is punishable by imprisonment for a term not exceeding five years or to less punishment.

[14] The circumstances of the offence of which Lieutenant(N) Klein was found guilty are as follows:

- (a) On the early morning of 10 October 2013, Lieutenant(N) Klein was on his bicycle stopped at the last intersection prior to entering HMC Dockyard at Canadian Forces Base Esquimalt where a four way stop regulates traffic and the right of way. When his turn came to proceed through the intersection, Lieutenant(N) Klein was signalled to stop by Commissionaire Gale who had moved from his post at a kiosk near the gate to take position near the centre of the intersection, blocking Lieutenant(N) Klein's progression and waving four pick-up trucks through from an adjacent parking lot so that they could proceed as a convoy.
- (b) Lieutenant(N) Klein uttered a profanity, asking why the "assholes" are let through and telling Commissionaire Gale that he would report him to the cops, apparently for his failure to recognize who has the right of way in a four way stop.
- (c) Lieutenant(N) Klein continued to be verbally confrontational as Commissionaire Gale waved the privileged traffic through while approaching close to Lieutenant(N) Klein and appearing to look him in the eye. Lieutenant(N) Klein believed that his ID had been checked and once the privileged traffic was through, he set out on his bicycle to proceed through the gate.
- (d) Commissionaire Gale was walking back on the left hand edge of the incoming roadway to regain his position at the kiosk. Being slightly faster than Commissionaire Gale on foot, Lieutenant(N) Klein was in the process of overtaking Commissionaire Gale and proceeding through the gate when Commissionaire Gale yelled "stop" three times. Lieutenant(N) Klein immediately applied both brakes on his bicycle.
- (e) Shortly before the bicycle came to a complete stop, a physical contact occurred between Commissionaire Gale's left hand or arm and Lieutenant(N) Klein's shoulder. Commissionaire Gale had placed his arm out while yelling "stop" to make Lieutenant(N) Klein stop. As Lieutenant(N) Klein ran into his hand, Commissionaire Gale pushed a little bit and immediately pulled his hand out.
- (f) Lieutenant(N) Klein then moved his left hand from the brake lever of his bicycle to Commissionaire Gale's right shoulder, giving a push or shove. Commissionaire Gale recoiled back but regained his balance immediately.
- (g) Commissionaire Gale was not injured in the incident.

[15] The court considers the following factors to be aggravating in the circumstances of this case:

- (a) The subjective seriousness of the offence committed in that it occurred in relation to a commissionaire performing security duties at the gate of HMC Dockyard at Canadian Forces Base Esquimalt, during morning rush hour, in view of a number of bystanders, two of whom having found the situation significant enough to report the conduct of Lieutenant(N) Klein to their superiors in their chain of command.
- (b) The duties of the victim as a commissionaire, entrusted by military authorities with enforcing security at military establishments across the country, a task which necessitates the cooperation and respect of every person coming about in these facilities, something that is not always afforded to them, as evidenced in these proceedings.
- (c) The rank, status and experience of the accused in the military and naval communities who, as an officer, is expected to give the example to subordinates as to the level of collaboration required with security guards and who, as a submariner, is expected to display more self-control under stress than what he displayed in this case.

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

- (a) The fact that the assault consisted of a single push that came immediately after an unwanted and unexpected touching and did not result in injuries to Commissionaire Gale.
- (b) The offender's coloration with the investigation in providing a statement and the audio-video recording of the incident in his possession which the court considers a sign that the offender was prepared to take responsibility for what he has done.
- (c) The steps that the offender has taken following the events to better control his anger and to reduce stress by a temporary change of assignment.
- (d) The offender's record of service with the Canadian Forces and the absence of conduct sheet. Although defence counsel decided not to provide evidence of performance evaluations the court takes from the decision of the chain of command post event to impose a Recorded Warning in lieu of the previously foreseen Counselling and Probation to be an indication of the potential of the offender to continue making a positive contribution to the Navy and the submarine service.

[17] In terms of the determination of an appropriate sentence, the prosecution asked this court to impose a sentence combining the punishments of a severe reprimand and a fine between \$1,000 and \$2,000. To support this submission the prosecutor provided the cases of *Corporal Wells*, 2007 CM 2006 and of *Lieutenant Hernandez*, 2009 CM 4003. Unfortunately the court finds that these cases are of very limited utility. Both cases are about drunken behaviour at the mess. The first involves a corporal whose sentence was ultimately significantly influenced by mental health issues, in part aggravated by a 21 month's delay between the offence and the trial. As for *Hernandez* the sentence is a result of a joint submission and as a consequence does not mention which objective or objectives specifically were at play in the sentencing decision and does not provide any kind of guidance as to what needs to be considered in choosing a type of punishment over another in trying to promote the objectives of denunciation and general deterrence that are particularly at play here.

[18] It is difficult for the court to believe that no case of assault involving a sober officer of the rank of captain could be found to constitute a precedent be presented to this court. It is downright impossible for the court to believe that no cases of minor assault of a security guard, policeman or other person in authority could be found in Canadian legal precedents to at least give this court an idea of a range of potential sentences in this case.

[19] In response to submissions by the prosecution, defence counsel argued that to meet the objectives of denunciation and general deterrence given the rank of the offender and the fact that he is an officer, an appropriate sentence in this case should include the punishment of a reprimand as a bottom line. Defence counsel added that this punishment could be combined with a fine between \$500 and \$1,000.

[20] Essentially then, both parties agreed that a punishment of a reprimand or severe reprimand is required in this case to express the required denunciation and general deterrence considering the rank of the accused. Both parties in their representations considered that the imposition of a punishment of a reprimand or severe reprimand could be accompanied by a fine. The court is of the view that a fine is required to achieve the objective of general deterrence. In terms of amount, the submissions of both parties join at the sum of \$1,000. Based on this position, it is the view of the court that it is the minimum amount that must be imposed to ensure that the sentence meets the objectives of denunciation and general deterrence submitted by the parties.

[21] The issue that remains is whether the main punishment that would combine with the fine should be a reprimand or a severe reprimand. The prosecution recommends the latter but as highlighted earlier has failed to provide helpful information on a range of potential sentences, leaving the court in the position of having no justification to impose the most severe punishment of a severe reprimand over the punishment of a reprimand proposed by defence. The court will not do that as it is bound to impose the minimum sentence necessary to maintain discipline. In the absence of any indication that a severe reprimand is required for that purpose, the court is left to decide whether to accept the

defence submission to the effect that a reprimand is indeed the minimum required to maintain discipline.

[22] As the prosecution specifically expressed the view that no ancillary orders were required in this case, none will be made.

[23] Lieutenant(N) Klein, the circumstances of the charges against you have been found guilty of reveal a behaviour that I consider to be highly unacceptable on the part of an officer in the Royal Canadian Navy. I believe you have come to this realization yourself a while ago. Yet, your chain of command has apparently expressed confidence in your abilities and capacity to continue maintaining a meaningful contribution to the submarine service and to your unit as it is preparing to get back to sea. In line with this, the court will impose a sentence that recognizes your capacity to make a positive contribution and limits financial consequences to you and your young family.

FOR THESE REASONS, THE COURT:

[24] **SENTENCES** you to a reprimand and a fine in the amount of \$1,000, payable in four monthly instalments of \$250, which must be fully paid at the latest on 1 March 2015.

Counsel:

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

Major L. Boutin, Directorate of Defence Counsel Services
Counsel for Lieutenant(N) Klein