COURT MARTIAL

Citation: *R. v. Heisler,* 2015 CM 4009

Date: 20150526
Docket: 201501

Standing Court Martial

Canadian Forces Base Shilo
Shilo, Manitoba, Canada

Between:

Her Majesty the Queen

- and -

Bombardier A.J. Heisler, Offender

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

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Bombardier Heisler, having accepted and recorded your plea of guilty in respect of the one charge on the charge sheet, the court now finds you guilty of that charge under section 129 of the *National Defence Act* (*NDA*) for conduct to the prejudice of good order and discipline, essentially for having obtained permission from your superior to be excused from work under false pretence.

[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 also 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, as well as testimony and the submissions of counsel, both for the prosecution and for the defence.

Objectives and principles of sentencing

[3] The military justice system constitutes the ultimate mean to enforce discipline in the Canadian Armed Forces (CAF), 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 successful missions in a trusting and reliable manner. 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] 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 offence;

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

(e) to rehabilitate and reform offenders.

[5] 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) all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[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. For a court martial, this means imposing a sentence composed of the

minimum punishment or combination of punishments necessary to maintain discipline as indeed, the sentence should aim at restoring discipline in the offender and in military society.

[7] The task of the sentencing judge is to "impose a sentence commensurate to the gravity of the offence and the previous character of the offender" as recognized in the Queen's Regulations and Orders for the Canadian Forces (QR&O). In other words, any sentence imposed must be adapted to the individual offender and the offence he or she committed. As well, the sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. This is not a result of slavish adherence to precedent, but because it appeals to our common sense of justice that like cases should be treated in similar ways.

The offender

[8] Before the court is a 28-year-old bombardier serving with the 1st Regiment Royal Canadian Horse Artillery (1 RCHA) here in Shilo. He has served continuously in the Regular Force since October 2008. Following basic and occupational training, he was posted to 1 RCHA in Shilo in August 2009. He is single and has an 8-year-old daughter who lives in nearby Winnipeg with her mother.

[9] I wish I could say more about the accused but the Court has been provided with very little information about Bombardier Heisler, besides what is found in the required documents presented by the prosecutor in application of QR&O 112.51. This includes the offender's conduct sheet revealing two military offences for absence without leave for which the offender was tried summarily and sentenced prior to committing the offence for which he has pleaded guilty today. The conduct sheet also shows two other military offences which occurred since and for which the offender was also tried by summary trial and sentenced in December 2014 and January 2015 respectively, that is, prior to this trial. The Court has been given no indication as to the continuation of the offender's career with the Canadian Armed Forces.

The offence

[10] In arriving at evaluating what would be a fair and appropriate sentence, the Court has considered the objective seriousness of the offence as illustrated by the maximum punishment that the Court could impose. Offences under section 129 of the *National Defence Act* are punishable by dismissal with disgrace from Her Majesty's service, or to less punishment.

[11] The circumstances of the offence were brought before the Court by means of a short statement of circumstances produced as Exhibit 7, read by the prosecutor and accepted as conclusive evidence by Bombardier Heisler. Those circumstances are as follows:

(a) On 3 June 2014, Bombardier Heisler was given a task by Sergeant Fleming to be performed the next day, 4 June, which would require that Bombardier Heisler cancel a scheduled appointment to get a tattoo at a cost of a deposit of $150;

(b) In taking that appointment, Bombardier Heisler had assumed that a sports afternoon would be scheduled at that time and that he would be permitted to leave the unit to meet the tattoo artist at the agreed time;

(c) 1 RCHA has an "Appointment Board" and requires soldiers who have received permission to leave their place of work to note the date, time and purpose of the appointment on that board. When Sergeant Fleming informed Bombardier Heisler of the task to be performed, Bombardier Heisler told Sergeant Fleming that he had an appointment for his dog and that he had put it on the Appointment Board;

(d) Bombardier Heisler then asked for permission to leave work on 4 June in order to take his dog to the veterinarian for a scheduled medical appointment. Bombardier Heisler kept the appointment at the tattoo parlour, got the tattoo and did not return to work that day;

(e) On 5 June 2014, Sergeant Fleming received information that Bombardier Heisler had lied about the veterinarian appointment. He phoned the veterinarian office and was informed that Bombardier Heisler had not been in the office on 4 June; Sergeant Fleming then confirmed that Bombardier Heisler had kept an appointment the previous day to obtain a tattoo;

(f) Bombardier Heisler made a voluntary statement in the course of the Unit Disciplinary Investigation admitting that he fabricated the story of a veterinarian appointment in an effort to avoid losing the deposit he paid for getting a tattoo.

[12] In addition to the statement of circumstances, the prosecution called one witness who testified as to the practice of placing appointments on the board, the importance for supervisors to know where their subordinates are at all times, especially given the operational status of 1 RCHA and the impact on good order and discipline when personnel mislead their superiors, including the need for others to fill in for an absent member.

[13] As for the offence, the circumstances outlined above demonstrate that I am dealing with behaviour of deception and dishonesty on the part of the offender in relation to his superiors and his duty as a member of his regiment and the army. Such behaviour can have the effect of eroding the trust and confidence that members of a combat arms unit must have towards each other to succeed. That is so even if the circumstances of this case are not the most egregiously prejudicial to good order and

discipline, given the absence of evidence that the offences had any operational impact on the unit at the time.

[14] Yet, it remains that any offence of this type, as evidenced by the steps that had to be taken by Sergeant Fleming in relation to these events, has an impact on units in terms of distraction and diversion of resources. Also aggravating is the previous record of the offender, who committed and was punished for two offences of absence without leave under section 90 of the *National Defence Act* prior to committing the offence to which he pleaded guilty today. Even if those offences were charged under different sections of the *NDA*, they reveal a pattern of behaviour similar to the conduct in this case, as in both cases, there is an absence from the unit, here under an authorization obtained under false pretence. The offender also has a record for impaired driving dating from 2011.

[15] The court also considered the following mitigating factors, as mentioned in submissions by defence counsel:

(a) First and foremost, the offender's guilty plea which the court considers as an indication that the offender is taking full responsibility for what he has done. This admission of responsibility occurred in a very formal and public forum of this court martial, in the presence of members of his unit and chain of command.

(b) The fact that the offender admitted his responsibility for the offence early, in the course of the unit's disciplinary investigation and communicated his intent to plead guilty early, thereby showing some sign of remorse.

(c) As mentioned above, the fact that the commission of the offence did not cause significant disturbance in terms of operations at the unit.

(d) The age and potential of Bombardier Heisler to make a positive contribution to his unit, the Canadian Armed Forces and, indeed, Canadian society in the future.

The submissions of the parties

[16] In terms of the determination of an appropriate sentence, the prosecution stressed the objectives of denunciation and deterrence, as well as rehabilitation, which the prosecution argues could be achieved by having the offender serve a sentence of detention for fourteen days. To support this submission, the prosecution brought the Court's attention to a number of courts martial cases, showing that custodial sentences of short duration are within the range of potentially appropriate sentences for offences committed in circumstances similar to those at play in this case.

[17] In response to submissions by the prosecution, defence counsel submitted that the prosecution is essentially inviting the Court to jump through many levels in the scale of punishments of section 139 of the *NDA* to punish a member whose last sentence combined a fine of $200 with minor punishments of confinement to barracks and stoppage of leave. Essentially, the defence argues that I should start by considering a higher fine, in the range of $1,000, and combine this punishment with a reprimand, to arrive at an appropriate sentence. Defence counsel also submitted a number of cases showing that the combination of the punishments of reprimand or severe reprimand with a fine was appropriate in circumstances such as these.

Objectives to be emphasized

[18] I came to the conclusion that, in the particular circumstances of this case, the focus in sentencing should be placed on the objectives of denunciation and deterrence, not only specific deterrence to ensure that the conduct of the offender is not repeated, but also general deterrence. Indeed, 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, as any sentence I impose should not have extensive detrimental effects on the efforts the offender will have to make to reintegrate as a productive member of his unit and the Canadian Armed Forces.

[19] It is an important principle that the court should impose the least severe punishment that will maintain discipline. The most severe punishment being proposed to the Court, based on the scale found at section 139 of the *NDA*, is the punishment of detention which the prosecution submits should be for a period of fourteen days. I will, therefore, use this punishment as a starting point for my analysis.

[20] The prosecution stressed the rehabilitative effect of a sentence of detention, particularly appropriate in circumstances where other punishments have appeared to be inefficient in correcting the behaviour of the offender. There is, indeed, an element of retraining in that punishment. However, the courts have ruled repeatedly that an offender should not be deprived of liberty if less restrictive sanctions may be appropriate. A sentence privative of liberty must be justifiable.

[21] Here, I am having difficulties justifying sentencing the accused to detention for two reasons: first, there are a number of punishments between a fine of $200 and detention which have not been tried on the accused and cannot be said to be inefficient deterrents to his conduct in relation to offences similar to the circumstances here. I must agree with defence counsel that what the prosecution asks this court to do is jump a number of steps. Secondly, the prosecution has not been able to present the court with cases similar to the situation here where sentences of detention were imposed. Indeed, the cases submitted are distinguishable on their facts as they typically involve more offences, in more serious or peculiar circumstances where, for instance, an accused is no longer serving at the time of sentencing. Many cases involve joint submissions, of limited jurisprudential value. The case closest to the circumstances here submitted by

the prosecution is the case of *R. v. Squires,* 2013 CM 2016 which involved an absence of one day by a corporal who had three prior convictions for absence without leave. The sentence imposed was a reduction in rank, a punishment not as severe as detention even if the offender's previous conviction for absence without leave was punished by detention for twenty days. In the case of corporal Squires, therefore, the military judge did not jump through many levels of punishment to arrive at a proper sentence, in fact, he came down one step.

[22] I agree that the offence here is serious and encroaches directly on discipline, the quality that every member of the Canadian Armed Forces must have that allows him or her to put the interests of Canada and of the service before personal interests. Yet, I must keep in mind that the sentence I impose must be of the minimum severity to maintain discipline, efficiency and morale. I have explained that a sentence of detention would not be supported on the basis of the precedents presented to me. It would not be justified either by any exceptional circumstance of this case. Therefore, I won't impose a sentence of detention.

[23] The next punishment in the scale is reduction in rank. This punishment is not suggested by the prosecution, on the basis that the impacts, mainly financial, would be too severe on the accused, a position shared by the defence who still argued it would be preferable to a sentence involving detention. I must decide if reduction in rank is the minimum punishment required to rehabilitate the offender. In doing so, the Court cannot make abstraction of the financial consequences on pay for the offender and for those such as his daughter that he may be supporting financially, at least in part. As mentioned by the prosecution, a reduction in rank could have effects for a long time and would constitute an extensive period of rehabilitation. It would be a punishment that the court considers to be disproportionate to the offence committed, in the circumstances in which it was committed, as evidenced once again by the case law submitted to the Court; the only sentence of reduction in rank shown to the Court was corporal Squires where the reduction was a step down from a previous punishment of detention.

[24] Going down the scale of punishments, the Court has no indication that forfeiture of seniority would have any significant effect and is, therefore, left considering severe reprimand and reprimand, combined with a fine. The case law submitted by defence counsel reveals that such combination of punishments is within the range of appropriate sentences. Defence counsel submitted that the sentence should combine the punishments of a reprimand and a fine of $1,000. Looking at the case law submitted, the Court is of the view that the cases of *R. v. Corporal M.J. Kemp,* 2004 CM 06 by Military Judge Carter and the case of *R. v. Private Stull,* 2013 CM 2015 rendered over nine years later by Military Judge Gibson are the most appropriate to define the appropriate range of sentence which would be applicable here. In both of these cases where junior members misled superiors, the resulting sentences were a severe reprimand and a fine of $1,000.

[25] I am aware that Judge Gibson expressed some reservations in imposing a severe reprimand to a member of the rank of private, yet his remarks did not apply to a

member of the rank of corporal or bombardier as we have here and, in any event, did not preclude him from accepting a joint submission and imposing that sentence on a member of the rank of private in *Stull*. The Court is of the view that a severe reprimand constitutes a punishment that is not insignificant, as it expresses adequately the required reprobation for the unacceptable act of dishonesty committed by the offender, to an extent that would not be as obvious with a simple reprimand. The Court will accompany this punishment with a fine as it is important that the sentence have a personal impact on the offender and be seen as such. The Court is of the view that the sum of $1,200 is the minimum required to maintain discipline in the circumstances of this case. The combination of those two punishments will, in my view, have a sufficiently deterrent effect on the offender and others.

[26] Bombardier Heisler, the circumstances of the charge you pleaded guilty to reveal a behaviour that is entirely incompatible with service in the Canadian Armed Forces. The behaviour you displayed is detrimental to the mutual confidence necessary to a productive relationship with your superiors in your unit. It can lead to a loss of respect for you and a poisoned work environment which threatens operational effectiveness, productivity, team cohesion and morale. I believe you have work to do to rehabilitate yourself within your unit and show you can become a productive member of the Canadian Armed Forces. Otherwise, you may find yourself on civilian streets where you will realize that lying to your boss to skip work does not advance you any further than it did in the army and, particularly, in this case.

FOR THESE REASONS, THE COURT:

[27] **SENTENCES** you to a severe reprimand and a fine of $1,200 payable at a rate of $400 per month. Should you be released from the Canadian Armed Forces before the full payment of the fine, any outstanding sum will be payable at the date of your release.

Counsel:

The Director of Military Prosecutions as represented by Major R.J. Rooney.

Major S.L. Collins, Defence Counsel Services, Counsel for Bombardier A.J. Heisler.