COURT MARTIAL

Citation: *R. v. Nicholle*, 2016 CM 3014

Date: 20160926
Docket: 201540

Standing Court Martial

Canadian Forces Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal D.T. Nicholle, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] The Court found Corporal Nicholle not guilty on the first charge and guilty on the second and third charges on the charge sheet. Considering the application on the rule against multiple convictions arising from the principle of *Kienapple*, the Court decided to stay the proceedings on the third charge.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence regarding that charge.

[3] 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 military activity in the Canadian Armed 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.

[4] Here, in this case, the prosecutor suggested the Court impose a reduction in rank as a sentence on the offender. The offender's defence counsel recommended to this Court to impose a fine in the amount of $500.

[5] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and the maintenance of discipline, and from a more general perspective, the maintenance of a just, peaceful and safe society. However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of the case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[6] When imposing sanctions, the court shall consider one or more of the following objectives:

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

(b) to denounce unlawful conduct;

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

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

(e) to rehabilitate and reform offenders.

[7] When imposing sentence, a military court must also take into consideration the following principles:

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

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

(c) the 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 and the Supreme Court of Canada decisions; and

(e) lastly, any sentence to be imposed by the court should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[8] Here, 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.

[9] The circumstances of this case may be summarized as follows:

(a) In January 2012, a snowblower was reported being missing at the offender's unit.

(b) During his interview by the military police on 16 November 2013, and as he admitted later, the snowblower was found in the backyard of Corporal Nicholle's residence, sometime after he helped Corporal Morden in January 2012 put a similar one in his jeep, was the one reported as being missing.

(c) Sometime after he helped Corporal Morden in January 2012, Corporal Nicholle inquired about who put the snowblower in his backyard he found and he was told by Corporal Morden that he was the one who did it.

(d) Corporal Nicholle was then in a position to conclude that the snowblower was taken from the unit with no intent to return it, which is, basically, to steal it from his unit, which is a service offence.

(e) The offender, being part of a small team for shovelling and blowing snow for buildings at 2 Service Battalion in Petawawa, was very aware that the snowblower marked as belonging to 1 Canadian Field Hospital should be returned promptly, but he deliberately decided not to make any further inquiries about the origin of that good despite the fact that he knew it was stolen. He clearly demonstrated wilful blindness.

(f) Corporal Nicholle consciously kept possession of the snowblower for a bit less than two years without making any attempt at any point to take it back or make his own unit aware of the circumstances. It was only once the situation was reported to authorities by two different outside sources that the good was taken back by the military police in November 2013 with his consent.

[10] In determining the sentence, the Court considered the following aggravating factors:

(a) The objective seriousness of the offence. The offence you were charged with was laid in accordance with section 115 of the *National Defence Act* and is punishable for a term not exceeding seven years or to less punishment.

(b) There is also, as raised by the prosecutor, the issue of trust. Corporal Nicholle, you have to understand that the tools belonging to the Canadian Armed Forces and the use of them rely mainly on the integrity and honesty of its members in order to ensure proper management of those tools. Obviously, you did not give much thought to the importance of the position you put yourself in, by keeping this good at your residence. You, basically, in a way, betrayed the trust of your peers and superiors at the time.

(c) There is the fact that you clearly showed wilful blindness and a lack of cooperation in order to settle this matter quickly. It took a long time before you recognized the fact that the snowblower in your backyard was the same as the one that disappeared at your unit and the fact that you did not take any steps in order to settle the matter properly.

(d) There is also your rank and experience. At the time in 2012, you had about seven years in the service. You were familiar with the procedures and also the honesty and integrity required by members of the Canadian Armed Forces with the training and experience you had. In these circumstances, your rank and experience are considered aggravating.

[11] There is also mitigating factors that the Court considered:

(a) Mainly, there is your personal health condition. For sure, I did not have detailed and articulated evidence regarding your condition, but I do understand that you are still coping with post-traumatic stress disorder (PTSD) issues, and this is not contested by the prosecution, and it comes directly from your service and I do consider that as mitigating.

(b) There is also the delay. And I am not pointing at anyone specifically because I think, as a matter of coincidence, it is a cumulative effect of how people handled this matter, more than being one person or one organization. As soon as you recognized in January 2014 that the snowblower in your backyard was the same as the one reported missing from your unit, it basically concluded the investigation as far as I am concerned and it took about nine months before anything happened in the file. For something that was missing since January 2012, this system ended up with laying charges in September knowing the situation for about nine months, so it took some time. More than usual, but too much, but more than usual for the chain of command to act in this matter. Same thing for the prosecution who got the file between November 2014 and

> June 2015. This delay was not explained to the court and there were no particularities in the file that would have made this matter complex, so there is a bit of delay, but not too much. But when you add one with the other, it does not help and, at the end, I understand that the impact is neutral in some way, considering that it took seven months for the judiciary to come back with a finding after four days of trial. When you look at the overall delay and the cumulative effect of it, I think that it is something that I should consider as a mitigating factor in the circumstance. You have to understand that the impact of sentencing is greater when you are closer to the time of the incident and later we are in the process, less it is relevant to have the sentence that would have been probably passed one or two years ago, considering being two or three years from the incident. Now it is four years, so I have to consider the delay as a mitigating factor.

[12] I would say that I disagree with the suggestion of the prosecution to impose a reduction in rank. A reduction in rank is a very specific tool as we were educated by the Court Martial Appeal Court. It may found application in circumstances where the position and actions put on somebody, and what occurred from the incident, leads all together the court to think that there is no more hope in the individual acting in a capacity in the same position, same rank. I would say it is not the case here. The issue of trust is there. As I mentioned, honesty and integrity from each member is necessary to operate within the organization, but you were not entrusted with keeping an eye on all those snowblowers or any other equipment. You were not from the quartermaster. You had special access, I do recognize that, but not to the point that it would mean, in the circumstances, that there is no hope in you that you are not reliable anymore. I am not at that point. Circumstances do not disclose that, so I don't see reduction in rank as applicable.

[13] However, in order to reflect some lack of trust, I would say that I also disagree with your counsel regarding the fact of imposing a fine only. I think the proper and the minimum necessary intervention by the Court would be most reflected by a combination of a reprimand and a fine. The reprimand reflecting the fact that there was a lack of trust demonstrated, but there is also hope that you may correct yourself and, basically, continue to carry on with your duties as a mobile support equipment operator (MSE Op) corporal in the Canadian Armed Forces. The fine would also reflect the denunciation principle that I referred to, and general deterrence, so the combination of both, a reprimand and a fine, would be in line with the application of those two principles, denunciation and general deterrence. I would, however, accept the suggestion of your counsel to put the fine in the amount of $500.

FOR THESE REASONS, THE COURT:

[14] **SENTENCES** you to a reprimand and a fine in the amount of $500. The fine is to be paid in monthly instalments of $100 commencing on 1 October 2016 and continuing for the four following months. In case you are released before the full amount of the fine

is paid, then the remaining amount should be paid before your release from the Canadian Armed Forces.

Counsel:

The Director of Military Prosecutions as represented by Captain M.L.P.P. Germain

Major D. Hodson and Captain P. Cloutier, Defence Counsel Services, Counsel for Corporal D.T. Nicholle