COURT MARTIAL

Citation: *R. v. MacDonald*, 2018 CM 3011

Date: 20180801
Docket: 201726

Standing Court Martial

Canadian Forces Base Gagetown
Oromocto, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Private A.W. MacDonald, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Private MacDonald pleaded guilty to the third and fourth charge, which read as follows:

"THIRD CHARGE s. 114 NDA (Alternate to Second Charge)	STEALING *Particulars*: In that he, between 30 April 2015 and 4 August 2015, at Canadian Forces Base Gagetown, New Brunswick, stole public property, to wit, an Ariens snow blower.
FOURTH CHARGE s. 116(a) NDA	WILFULLY DAMAGED PUBLIC PROPERTY *Particulars*: In that he, between 30 April 2015 and 4 August 2015, at Canadian Forces Base Gagetown, New Brunswick, damaged public property, to wit, a storage shed by kicking the door."

[2] The Court, having accepted and recorded a plea of guilty in respect of both charges, now finds you guilty of these charges. Concerning the first and second charge, because the prosecutor decided to withdraw these charges before you entered your plea, the Court has no other charge to deal with.

[3] As the military judge presiding at this Standing Court Martial, it is now my duty to determine the sentence.

[4] 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 (CAF). The purpose of this system is to prevent misconduct or, in a more positive way, to 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.

[5] Now, about the sentence to be imposed, the prosecutor and the offender's defence counsel presented a different perspective to this Court. The prosecutor recommended that the court impose a sentence of imprisonment of 60 to 90 days, while counsel suggested that a severe reprimand and a fine in the amount of $2,000 would meet the legal requirements for sentencing.

[6] As a matter of evidence, I heard three witnesses, including the offender, and a number of documents were introduced before the Court in order to provide information on the offender's personal military career, his current financial situation and on his previous convictions. In addition, some pictures of the damage caused to a storage shed, and one with an orange snowblower in the offender's garage were presented to the Court.

[7] Through the two witnesses called by the prosecution, the Court learned that:

(a) the breach of trust is the most aggravating factor to be considered in a military working environment for the commission of the offence of stealing;

(b) at the time of the commission of the offences, there was some, but limited, impact on the confidence that kitchen workers had at Building H33 toward each other because everybody was suspected;

(c) once the author of the offences was identified by investigators, suspicion among workers at the kitchen decreased quickly and finally ceased;

(d) such incident had no impact on the operations of the kitchen;

(e) there was a great loss of trust toward Private MacDonald when it was known by some supervisors as being the one who allegedly committed the offences; and

(f) the offender's performance was good and stayed the same after he was identified as the author of the alleged offences.

[8] From the testimony made by the offender, the Court learned:

(a) he currently resides in Halifax, Nova Scotia in an apartment with a roommate, with whom he shares the rent;

(b) he has a full-time job in Halifax with a recycling company since April 2017, working 50 to 60 hours a week at a rate of $14 per hour. His net monthly pay is between $1,800 and $1,900. He has expenses for about $1,100 a month;

(c) his employer supports him and assured him that he will have a job, no matter what the consequences are coming from this court martial, because he is a good worker;

(d) he had a normal childhood, despite the fact that his mother separated twice, once from his biological father, and once from his first stepfather, and despite that he moved four times because of some family's military requirements;

(e) he left his community in Newfoundland to enroll with Canadian Armed Forces, among other things, to overcome a "soft" drug habit;

(f) further to his posting to Gagetown, being alone and keeping bad company, he started using cocaine. He said that it helped him to distract his mind from everything;

(g) he was on cocaine when he committed the offences and he was on a "high" at that time. He has stayed away from hard stuff since the incident in 2015;

(h) he still occasionally uses marijuana to deal with a knee pain injury;

(i) he expressed many times his regret for what he did and that he wants to move on from the past;

(j) he pleaded guilty on 12 May 2016 before a judge of the New Brunswick Provincial Court to the indictable offence of breaking and entering a business place between 31 July and 4 August 2015;

(k) his driver's licence was suspended in May 2018 for two years further to his conviction by a New Brunswick Provincial Court for the criminal offence of dangerous operation of a motor vehicle in August 2017; and

(l) he is currently under probation in order to pay to the New Brunswick Provincial Court, for the benefit of the business place, a fine in the amount of $1,500, because he failed to pay it further to his conviction for breaking and entering in May 2016. He is paying that fine in monthly instalments of $75 since May 2018.

[9] The circumstances surrounding both offences were explained through the Statement of Circumstances and it reads as follows:

"STATEMENT OF CIRCUMSTANCES

1. At all material times, Private MacDonald was a member of the Canadian Armed Forces Regular Force. He was posted to 5 Canadian Division Support Base Gagetown (5 CDSB), New Brunswick. His military trade was cook, and he was employed at the base kitchen, located at Building H33.

2. Located behind Building H33 are two sheds which are kept locked. The sheds are used for storage by the base kitchen, and are the property of the Canadian Armed Forces. Access was controlled via keys held by the chain of command within the base kitchen. They sheds are not often accessed by kitchen staff, as the contents are seasonal or surplus to daily operations.

3. Within one of the two sheds behind Building H33 was an orange, Ariens compact snow blower, model number 920021, serial number 094662, having a value of approximately $900.00. The snow blower was crown property. It was last seen in the shed in April 2015.

4. On 4 July 2015, at approximately 0130 hours, Private MacDonald drove from his home to the base. He drove to the locked sheds located behind Building H33. Private MacDonald forced entry into the two undamaged, locked sheds. Private MacDonald caused damage to the interior frame of the doors, the doors themselves, the strike plates attached to the frames of the doors, and the latch bolt plates of the doors.

5. After forcing the doors open, Private MacDonald entered the sheds. He found the snow blower, and moved it to his car. He placed it in his car and secured it with a strap. He then drove home. He moved the snow blower into his garage.

6. At no time, did Private MacDonald have authority of any kind to enter the sheds. At no time, did he have authority of any kind to remove the snow blower.

7. On, or about, 18 August 2015, a picture of Private MacDonald's garage was passed to the chain of command. It was then passed to the Military Police. The photo shows an orange snow blower, resembling the missing one, amongst the contents of Private MacDonald's garage.

8. On, or about, 18 August 2015, Private MacDonald learned that the Military Police had commenced an investigation into the missing snow blower. On, or about, the same day, he states that he disposed of the snow blower near the Burton Bridge, near Oromocto, New Brunswick.

9. On 18 September 2015, Private MacDonald voluntarily provided a confession to the Military Police. During the confession he admitted to forcing open the two sheds and stealing the snow blower.

10. On 20 September 2015, the Military Police, together with Private MacDonald, searched Private MacDonald's garage. They found the garage empty. Private MacDonald then took the Military Police to the location near the Burton Bridge where he stated he had disposed of the snow blower. No snow blower was found there."

[10] In addition, the parties agreed on some facts as follows: the parties agreed on some facts, which can be read as follows:

(a) On 3 June 2016, Private MacDonald was charged with offences under the *National Defence Act*. These charges were referred on the same day to a Referral Authority, Brigadier General C.J. Turenne, Commander 5th Canadian Division. This in turn was referred to the Director of Military Prosecutions on 24 January 2017.

(b) On 3 June 2016, the Commanding Officer of Personnel Support Services, 5th Canadian Division Support Base, signed a letter referring the charges against Private MacDonald. In it, he stated:

> "a. [The Record of Disciplinary Proceedings] shows that Private MacDonald took advantage of knowledge gained through his work at the H-33 Kitchen to steal a snow blower belonging to the CAF. It is critical to address this matter by disciplinary sanction because theft of CAF property is a serious offence. On 12 May 16, Private MacDonald was convicted of a similar offence and sentenced to four months in provincial custody for

stealing comparable property from a private business. In light of his conduct sheet, I do not feel that my powers of punishment are adequate.

b. Furthermore, I feel that unit members must be confident that any breach of discipline will be dealt with swiftly and effectively, even where members are released from the CAF. Stealing from the unit quickly erodes morale, and it limits members ability to trust each other and in the system. Pers Sp Svcs must continue to address these changer in spite of the members pending release from the CAF. Discipline is the backbone of the military and must be upheld. Unit members can be confident that any breach of discipline will be dealt with appropriately and swiftly. Nothing can erode morale in a unit as quickly as theft. Members must be able to trust each other and trust in the system to take action when events like these happen. The appropriate sentencing for the severity of these charges goes beyond what I as the Commanding Officer of Pers Sp Svcs can administer."

(c) On 24 January 2017, the Commander of 5th Canadian Division signed a letter referring the charges against Private MacDonald. In it, he stated:

"a. The seriousness of the current allegations against Private MacDonald and the gravity of his previously documented criminal behaviour cannot be overstated. Private MacDonald has continuously exhibited a blatant and total disregard for the law and those organizations who he victimizes with his criminal behaviour. Private MacDonald's actions undermine discipline, morale, unit cohesion and therefore, operational effectiveness. This behaviour must be dealt with in the most strident manner.

b. It is recommended that these charges proceed to Court Martial in order to:

(1) Publically condemn this behaviour;

(2) Address Private MacDonald's behaviour and specifically deter him from ever acting in this manner again;

(3) Provide a general deterrence to all other members of the CAF;

(4) Instill faith in the chain-of-command; and

(5) Restore morale and discipline in a unit negatively affected by Private MacDonald's conduct and behaviour."

a. On 17 March 2017 a charge sheet with four charges against Private MacDonald was signed. The charges were preferred on 30 March 2017.

b. On 31 March 2017, the charge sheet was personally served on Private MacDonald.

c. On 30 November 2017, a Standing Court Martial was scheduled for 30 April 2018 to 4 May 2018. The convening order was issued on 20 February 2018. The order was personally served on Private MacDonald on 29 March 2018.

d. On 20 April 2018, Major Boutin, counsel for the accused, made an application to withdraw as counsel to the accused. This order was granted on 30 April 2018, and new counsel was obtained by Private MacDonald. The trial was adjourned until 30 July 2018, for one week.

[11] The fundamental purpose of sentencing in a court martial is to ensure the maintenance of discipline and respect for the law 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.

[12] As it has always been the practice of this court and as mentioned by the Court Martial Appeal Court in *R. v. Tupper*, 2009 CMAC 5 at paragraph 30:

> [A] trial judge must consider the fundamental purposes and goals of sentencing as found in sections 718 and following of the *Criminal Code*.

[13] Keeping in mind this legal context, then 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 CAF;

(b) to denounce unlawful conduct;

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

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

(e) to rehabilitate and reform offenders.

[14] When imposing a 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) the 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 to the offender.

[15] As I have already mentioned in my decision of *R. v. Sorbie*, 2015 CM 3010, the Supreme Court of Canada has elevated the principle of proportionality in sentencing as a fundamental principle (see *R. v. Ipeelee*, 2012 SCC 13 at paragraph 37 and *R. v. Nur*, 2015 SCC 15 at paragraph 42-43), making the determination of a sentence by a judge, including a military judge, a highly individualized process.

[16] As LeBel J. expressed in *Ipeelee* at paragraph 37:

> Proportionality is the *sine qua non* of a just sanction. First, the principle ensures that a sentence reflects the gravity of the offence. This is closely tied to the objective of denunciation. It promotes justice for victims and ensures public confidence in the justice system. . . . Second, the principle of proportionality ensures that a sentence does not exceed what is appropriate, given the moral blameworthiness of the offender. In this sense, the principle serves a limiting or restraining function and ensures justice for the

> offender. In the Canadian criminal justice system, a just sanction is one that reflects both perspectives on proportionality and does not elevate one at the expense of the other.

[17] Then, the principle of proportionality shall reconcile those different goals and make the sentence imposed on the offender proportionate to the gravity of the offence and to the responsibility and previous character of the offender, as expressed at subparagraph 112.48(2)(b) of the *Queen's Regulations and Orders for the Canadian Forces*.

[18] As is often the situation, where an offence involves a serious breach of trust, as it is in this specific incident before the Court, I am of the opinion that sentencing in this case should focus on the objectives of, first, general deterrence, and second, denunciation. 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 deter others in similar situations from engaging in the same prohibited conduct. As stated by Létourneau J. at paragraph 22 of the Court Martial Appeal Court decision in *R. v. St. Jean*, CMAC-429:

> Military offenders convicted of fraud, and other military personnel who might be tempted to imitate them, should know that they expose themselves to a sanction that will unequivocally denounce their behaviour and their abuse of the faith and confidence vested in them by their employer as well as the public and that will discourage them from embarking upon this kind of conduct.

[19] Now I will elaborate on the relevant aggravating circumstances that should increase the sentence to be imposed by the court.

[20] First, there is the objective seriousness of the offences. The offences for which you were found guilty of by this Court are related to section 114 and paragraph 116(a) of the *National Defence Act*, for which the maximum punishment that can be imposed by the military judge is imprisonment for a term not exceeding seven years and two years respectively, or to less punishment.

[21] The prosecutor invited the Court to consider that these offences are related to the commission of the same incident and then, should be considered as a whole. He suggested that the court should infer from them that because of the context, that they are, from an objective seriousness perspective, the equivalent of a breaking and enter offence committed under section 348 of the *Criminal Code* from an.

[22] I have to disagree with this approach taken by the prosecutor. As a matter of fact, the offender was charged with breaking and entering, but the prosecutor made the decision to withdraw that charge in the context of the resolution of this matter.

[23] Clearly, the prosecutor ought to have known that by securing a conviction under different charges that were objectively less serious, it could not still allow him to claim before the Court that the current situation should be considered as an objectively more serious one, such as breaking and entering, which provides that a conviction under such offence is liable to imprisonment for a term not exceeding ten years.

[24] Consequently, the Court has to consider the objective seriousness of the offences for which a finding of guilt was made by this Court, further to the offender's guilty plea it accepted and recorded, which are stealing and wilfully damaged public property and nothing else.

[25] Second, there is the subjective seriousness of the offences committed, and for the court, these are:

(a) The breach of trust. You committed these offences on a defence establishment and you did not hesitate to damage and steal public property in your working environment. Your lack of integrity, honesty and loyalty was totally contrary to the obligations and principles of ethics you were taught as a soldier and a cook in the CAF and resulted in a permanent deprivation of a snowblower. You knew that by your actions, you were abusing the trust of your peers and your supervisors in the chain of command. You would not be surprised that they felt betrayed by what you did. The way you acted was disappointing for those who were part of your work environment and they had greater expectations from somebody like you, as it is for the public in general from their soldiers. Essentially, you did not hesitate to think of yourself before others.

(b) The degree of premeditation. You told the Court that you acted on the spur of the moment. However, as a matter of fact, it took some planning for accessing and stealing this public good. You had to drive to the kitchen, figure out how to access the shed, and take and store the snow blower. It took some degree of planning in order to commit these offences.

(c) The loss. Because of your actions, the snow blower was never found and you did not proceed with any reimbursement for its value, which is about $900. About the shed, because you pleaded guilty to a charge of wilfully damaging one storage shed, there is no evidence on the cost of repairing and replacing the items damaged. There are pictures illustrating the fact that damages where caused; however, it is difficult for the court to say to what degree things were destroyed or damaged without any other evidence.

(d) Post-conduct offence. The fact that this is not the offender's first encounter with the justice system, as it appears from your conduct sheet and other documents presented to the court. However, it is only relevant in the context that you continued to experience some difficulty with respect of the law after the incident for which you are before this court today.

[26] As a matter of mitigating factors, I identified the following ones:

(a) Your guilty plea. It demonstrates your acceptance of guilt, which is a sincere expression of remorse and the full acceptance of your responsibility. In addition, you expressed this remorse throughout your testimony at various occasions.

(b) The fact that you are a first offender. Because of the date of the commission of these offences, I have to consider that it is the very first time that you were caught, meaning that you were involved in such a situation. Other criminal matters for which you were convicted were for things that occurred after the incident before this Court. As such, the Court has to treat you accordingly.

(c) Your age and your career potential as a member of the Canadian community. Being now 23 years old, you have many years ahead to contribute positively to society in general.

(d) Since you were released from the CAF in January 2017, you managed to find a full-time job three months after, and a place to reside on your own. Basically, you started your life over and you are doing well, so far.

[27] Without being an aggravating or a mitigating factor to be considered by the court, it appreciated being made aware of your financial situation in the case where the court would consider a fine as a punishment to be imposed.

[28] There is a final mitigating factor that I would like to discuss and it is the delay in bringing the matter to this court martial. As a matter of coincidence, the offender committed similar offences during the same period of time in a civil business establishment. The matter was dealt with by civil authorities within nine months from the time of the incident. The offence of break and enter was committed between 31 July and 4 August 2015. The offender pleaded guilty before a New Brunswick Provincial Court judge on 12 May 2016 and he was sentenced to four months of jail and a fine in the amount of $1,500.

[29] As a matter of comparison, the current matter before this court occurred between 30 April and 4 August 2015. The offender confessed to the military police on 18 September 2015, about six weeks after the incident, that he committed the offences.

[30] Despite that, he was charged only on 3 June 2016. I note that, at the time he was charged by military authorities, the criminal court had already disposed of a similar offence involving the offender, which occurred on about the same time as the one before this court.

[31] Aware of that latter fact and worrying about the impact it could have on the confidence of his unit’s members about the manner in which disciplinary matters could

be dealt with by the military justice system, the commanding officer of the offender's unit referred the charges on the same day.

[32] It wasn't until six months later that the referral authority referred the matter to the Director of Military Prosecutions (DMP).

[33] The charges before the court were preferred on 30 March 2017. Counsel agreed on a date for trial on 30 November 2017 and the trial was scheduled to take place on 30 April 2018, which is 22 months after the offender was initially charged and 32 months after the incident.

[34] On 30 April 2018, I authorized Major Boutin, counsel for the accused, to withdraw from the case and he was replaced by the present defence counsel, Major Tremblay. However, considering the availability of everybody, I adjourned the case to 30 July 2018, the date on which I accepted and recorded the plea of guilty made by the offender on the third and fourth charge.

[35] Today, 26 months after the offender was initially charged and three years after the incident before the court occurred, I will impose a sentence on the offender.

[36] I just want to remind the audience and counsel that it took nine months for the criminal justice system to deal with a similar incident that occurred about the same time.

[37] Further to the offender's confession, it took nine months for military authorities to lay charges and another 22 months to bring the matter before a court martial. These delays raise some concerns and, in my opinion, must be considered as a mitigating factor on sentence.

[38] Civil authorities were able to deal with a similar matter while the offender was a member of the CAF and it is the very reason why he was released. Why the military justice system could not do the same? Certainly, I do not have all the facts, considering that I am not dealing with the issue of delay in the context of a *Charter* application, but I have enough information to conclude that the delay in dealing with the present matter found the military justice system to proceed with an offender who had time to clearly start his life over as a civilian and contribute positively to the Canadian society. This fact must be considered as mitigating in the circumstances.

[39] As I have often said in some of my previous decisions over the last 12 years, closer to the incident the disciplinary matter is dealt with, more relevant and efficient will be the punishment on the morale and the cohesion of the unit members, exactly what the former offender's commanding officer was worrying about. If "unit members must be confident that any breach of discipline will be dealt with swiftly and effectively" as the commanding officer said in his letter at the time, today he would probably wonder about the accuracy of that statement he made, considering the facts of this case. The time elapsed since the incident and the laying of charges initially raised

concerns about the necessity of a more serious punishment to be considered by the Court, in actual fact, it now calls for consideration to be given for a more lenient one to denounce such delay.

[40] It was suggested by the prosecutor to impose on the offender a sentence of imprisonment for a period of 60 to 90 days. The Supreme Court of Canada specified that incarceration under the form of imprisonment is adequate only when any other sanction or any combination of sanctions is not appropriate for the offence and the offender. The Court is of the opinion that those principles are relevant in a military justice context as it was confirmed in the decision of the Court Martial Appeal Court in *R. v. Baptista,* 2006 CMAC 1.

[41] Here in this case, considering the nature of the offences, the circumstances in which they were committed, the applicable sentencing principles, the aggravating and the mitigating factors mentioned above, I conclude that there is another sanction or combinations of sanctions other than incarceration that would appear as an appropriate punishment in this case.

[42] Finally, I reviewed case law submitted by counsel. I must say that considering what I mentioned previously on the objective seriousness of the offences, I disregarded the ones related to a sentence for breaking and entering because they do not have any application to this case.

[43] I agree with defence counsel that, in the situation where the offence of stealing under section 114 of the *National Defence Act* is at issue in combination with some other offences objectively less serious, usually the punishment imposed may vary from a reduction in rank combined with a severe reprimand and/or a fine, to a severe reprimand or a reprimand combined with a fine. Generally, the denunciation and the deterrence of this type of infraction does not require incarceration.

[44] In conclusion, I accept the suggestion made by defence counsel as being an appropriate and fit sentence in the circumstances of this case because it is adapted to the offender and constitutes the minimum necessary intervention.

FOR ALL THESE REASONS, THE COURT:

[45] **FINDS** Private MacDonald guilty of the third charge for stealing contrary to section 114 of the *National Defence Act* and of the fourth charge for willfully damaging public property contrary to paragraph 116(a) of the *National Defence Act*.

[46] **SENTENCES** Private MacDonald to a severe reprimand and a fine in the amount of $2,000, payable in monthly installments of $200 by the first day of each month, commencing today, 1 August 2018, and continuing each month until paid in full.

Counsel

The Director of Military Prosecutions as represented by Major G.J. Morehead

Major B. Tremblay, Defence Counsel Services, Counsel for Private A.W. MacDonald