COURT MARTIAL

Citation: *R. v. McEwan*, 2018 CM 4019

Date: 20180930
Docket: 201740

Standing Court Martial

4th Canadian Division Support Base Petawawa
Petawawa, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Corporal R.A. McEwan, Offender

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

SENTENCE

(Orally)

Introduction

[1] Corporal McEwan, having accepted and recorded your plea of guilty in respect of the only charge remaining on the charge sheet, the Court now finds you guilty of that charge under section 118.1 of the *National Defence Act* (*NDA*) for having failed to appear before a service tribunal, specifically a summary trial, when duly ordered.

A joint submission is being proposed

[2] I now need to impose the sentence. This is a case where a joint submission is made to the court. Both prosecution and defence counsel recommended that I impose a sentence of imprisonment for five days, which takes into consideration two days of pre-trial custody considered on a one-on-one basis.

[3] This recommendation from counsel severely limits my discretion in the determination of an appropriate sentence. I am not obliged to go along with whatever is being proposed. However, as any other trial judge, I may depart from a joint submission only if the proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest. This is the test promulgated by the Supreme Court of Canada in *R. v. Anthony-Cook*, 2016 SCC 43.

[4] While it is my duty to assess the acceptability of the joint submission being made, the threshold to depart from it is undeniably high as joint submissions respond to important public interest considerations. The prosecution agrees to recommend a sentence that the accused is prepared to accept, avoiding the stress of a trial and providing an opportunity for offenders who are remorseful to begin making amends. The benefits of joint submissions are not limited to the accused but extend to victims, witnesses, the prosecution and the administration of justice generally; by saving time, resources and expenses which can be channelled into other matters. Joint submissions bring certainty to all participants, especially to the accused, but also to the prosecution who obtains what a military prosecutor concludes is an appropriate resolution of the case in the public interest.

[5] Yet, even if certainty of outcome is important for the parties, it is not the ultimate goal of the sentencing process. I must also keep in mind the disciplinary purpose of the Code of Service Discipline and military tribunals in performing the sentencing function attributed to me as military judge. As noted by the Supreme Court of Canada in *R. v. Généreux*, [1992] 1 S.C.R. 259, the Code of Service Discipline is primarily concerned with maintaining discipline and integrity in the Canadian Armed Forces (CAF) but serves a public function as well by punishing specific conduct which threatens public order and welfare. Courts martial allow the military to enforce internal discipline effectively and efficiently. Punishment is the ultimate outcome once a breach of the Code of Service Discipline has been recognized following trial or a guilty plea. The sentencing usually takes place on a military establishment, in public, in the presence of members of the offender's unit, as evidenced in this case.

[6] The imposition of a sentence at court martial proceedings therefore performs an important disciplinary function, making this process different from the sentencing usually performed in civilian criminal justice courts. Even when a joint submission is made, the military judge imposing punishment should ensure, at a minimum, that the circumstances of the offence, the offender and the joint submission are not only considered, but also adequately laid out in the sentencing decision to an extent that may not always be necessary in other courts. Yet, the particular requirements of sentencing at courts martial do not detract from the guidance provided by the Supreme Court on joint submissions, as laid out at paragraph 54 of *Anthony-Cook*.

[7] New legislative provisions setting out the purposes and principles of sentencing by service tribunals have come into force on 1 September 2018. Without repeating the content of these dispositions, I wish to mention that the fundamental principle of sentencing found at section 203.2 of the *NDA* provides that a military judge shall

impose a sentence commensurate with the gravity of the offence and the degree of responsibility of the offender.

Matters considered

[8] In this case, the prosecutor read a Statement of Circumstances which was entered in evidence as exhibit, along with other documents provided by the prosecution as required at *Queen's Regulations and Orders for the Canadian Forces* 112.51. Defence counsel also entered as exhibit an Agreed Statement of Facts highlighting mitigating evidence on behalf of Corporal McEwan and a mental health assessment report providing context in relation to the offence.

[9] In addition to this evidence, the Court also benefitted from the submissions of counsel that support their joint position on sentence on the basis of the facts and considerations relevant to this case, as well as by comparison with judicial precedents in similar cases. These submissions and the evidence allow me to consider and apply the purposes and principles of sentencing to the circumstances of both the individual offender and the offence committed.

The offender and the offence

[10] Corporal McEwan is 47 years old. He was released from the CAF on 30 November 2016 on medical grounds, after over 20 years of continuous regular force service in the infantry, mainly with the 3rd Battalion, The Royal Canadian Regiment (3 RCR) here in Petawawa but also at the Canadian Parachute Centre for two years in Trenton. Corporal McEwan had served for six years in the reserve force prior to joining the regular force in 1996. During his career, he deployed on operations overseas with his regiment on three occasions, twice in support of the North Atlantic Treaty Organization (NATO) mission in Bosnia and once in Kabul, Afghanistan. Corporal McEwan's departure from the service was not conventional. His unit alleged that he had ceased to report for regular duty in August 2016, at a time that he was in the process of obtaining his release from the service. Corporal McEwan feels that his alleged absences were due to miscommunication and were part of what he perceives as harassment from his unit, which he has experienced for about four years prior to his release.

[11] The facts surrounding the commission of the offence in this case are disclosed in the Statement of Circumstances read by the prosecutor and formally admitted as accurate by Corporal McEwan. These circumstances can be summarized as follows:

(a) Corporal McEwan was charged by his unit, 3 RCR, with one count of absence without leave under section 90 *NDA* on 15 November 16.

(b) His summary trial was scheduled to occur on 17 November 2016. Corporal McEwan failed to appear to his summary trial on that day despite having been duly ordered.

(c) Attempts were made to reschedule the summary trial to the following day, 18 November 2016, as Corporal McEwan attended the unit for administrative matters pertaining to his pending release of the CAF. Corporal McEwan allegedly refused again to appear and walked out of the building after having been ordered to attend by his regimental sergeant major.

(d) Corporal McEwan was charged by his unit with one count of failure to appear under section 118.1 of the *NDA* on 14 December 2016. The charge was referred to the Director of Military Prosecutions (DMP) on 27 February 2017 and the DMP preferred against Corporal McEwan one count of absence without leave under section 90 of the *NDA* and one count of failure to appear before a service tribunal under section 118.1 of the *NDA* on 22 June 2017.

(e) Corporal McEwan was personally served by a process server with the charge sheet dated 22 June 2017 on 4 September 2017. However, he did not respond nor participate in any way in the scheduling and other administrative matters pertaining to the convening of his court martial.

(f) After an application by the DMP to schedule the trial had been granted, a Standing Court Martial (SCM) was convened for 16 July 2018 in Petawawa, Ontario. Despite the Convening Order having been served by a process server with Corporal McEwan's girlfriend at the residence where Corporal McEwan spends time, there was no response from Corporal McEwan and he did not appear before the SCM as ordered on 16 July 2018.

(g) Given the lack of evidence of personal service to Corporal McEwan presented at the time, as required in regulations, the SCM had to adjourn and issue an order on 17 July 2018 for Corporal McEwan to appear before it on 26 September 2018 in Petawawa, Ontario. Corporal McEwan was personally served by a process server on 27 July 2018 with a copy of that order.

(h) On 26 September 2018, Corporal McEwan did not appear before the SCM. A judicial arrest warrant was issued under section 249.23 of the *NDA* for the accused to be brought before the court. The SCM was adjourned until such time as this could be accomplished.

(i) On 3 October 2018 at 1153 hours, Corporal McEwan was placed in custody following execution of the judicial arrest warrant by the military police in Toronto. He was transported to Petawawa.

(j) The next day, 4 October 2018, Corporal McEwan was brought before the SCM in Gatineau, Quebec. He was ordered released from custody with

conditions at 1835 hours. The proceedings of the SCM continued and the first charge appearing on the Charge Sheet for absence without leave was withdrawn by the prosecution.

(k) Corporal McEwan spent a total of two days in pre-trial custody.

[12] Corporal McEwan is being tried by court martial despite his release from the regular force on 30 November 2016 by virtue of the fact that he would have committed the alleged offence while he was still a member of the regular force and therefore subject to the Code of Service Discipline by virtue of subsection 60(1) of the *NDA*. Subsection 60(2) of the *NDA* provides for continued jurisdiction in these words:

> Every person subject to the Code of Service Discipline under subsection (1) at the time of the alleged commission by the person of a service offence continues to be liable to be charged, dealt with and tried in respect of that offence under the Code of Service Discipline notwithstanding that the person may have, since the commission of that offence, ceased to be a person described in subsection (1).

Subsection 60(3) of the *NDA* provides that a person who has ceased to be covered under subsection (1):

> [S]hall for the purposes of the Code of Service Discipline be deemed, for the period during which under that Code he is liable to be charged, dealt with and tried, to have the same status and rank that he held immediately before so ceasing to be a person described in subsection (1).

That is why Corporal McEwan was brought before the SCM and why he is being mainly referred to as Corporal McEwan in these reasons.

[13] Since leaving the military, Corporal McEwan spends a lot of time at his girlfriend's place in Petawawa, Ontario. She has two children and runs a daycare. Corporal McEwan spends time assisting her with childcare. Corporal McEwan has two elderly parents who live in Toronto, Ontario. His mother has suffered two strokes and has many medical appointments. Corporal McEwan splits his time between Petawawa and Toronto so that he may assist in caring for his mother.

[14] Corporal McEwan is collecting a pension and is not currently employed. He recently completed a fine woodworking course at Rosewood Studios in Perth, Ontario in order to explore possible future employment.

[15] Corporal McEwan feels that the harassment he experienced at work from 2012 until his release in 2016 contributed to his decision not to appear to his court proceedings, as a manner of protest. He now recognizes that his decision which led to the offence before the Court today was not appropriate and is sorry for the trouble that his decisions have caused for the military justice system and CAF at large.

Admission of similar offences

[16] At the sentencing hearing, Corporal McEwan has admitted under section 194 of the *NDA* having committed service offences similar in character to the offence he stands charged for in this court martial, in relation to his failure to attend the proceedings of this SCM on 16 July and 26 September 2018. He has been charged for the two alleged offences and, at the time of this sentencing hearing, one charge had been preferred by a representative of the DMP in relation to the failure to appear on 16 July.

[17] Given the request of the defence and the discussions during submissions, as well as the context of a joint submission from counsel, I agree to take these alleged offences in consideration for the purposes of the sentence as if Corporal McEwan had been charged with, tried for and found guilty. However, this should not be construed as an agreement with the prosecution's position on the jurisdiction of a court martial to try offences committed by a person who was a civilian at the time.

Factors taken into consideration in assessing the offence

[18] To assess the acceptability of the joint submission, the Court has considered the objective seriousness of the offence as illustrated by the maximum punishment that can be imposed. Offences under section 118.1 of the *NDA* are punishable by imprisonment for less than two years or to less punishment.

[19] This court martial is dealing with an offender who has been a civilian for over two years in relation to an offence of absence from duty committed while he was in the process of leaving the military. Some may consider the efforts undertaken by military authorities to have Mr McEwan answer for his actions before a military tribunal as excessive in consideration of time that has elapsed and the need to employ limited resources for more severe infractions committed by personnel serving today. However, I believe administering justice in relation to Mr McEwan does have an impact on those serving today. The offences the Court is dealing with can very much be perceived by observers in the service to constitute an attempt by the offender at evading justice by taking advantage of this release from the CAF. Yet, the *NDA* provides an obligation on members of the CAF to serve and perform duty until lawfully released. This obligation is at the core of what it means to be in the military. Refraining from enforcing this obligation on a person simply because he or she is on the way out of the CAF would send a message of impunity which may undermine good order and discipline of those serving within the CAF.

Aggravating factors

[20] Specifically aggravating in this case is the significant efforts that had to be invested to bring Corporal McEwan to justice on the charge initially laid to be tried by summary trial and subsequently for trial by court martial on multiple occasions. Despite the frustrations experienced by Corporal McEwan and his feelings of having been harassed, I do not consider that his actions are in any way a valid way to protest. As a 45-year-old with 26 years of service, regular and reserve, Corporal McEwan should

have known better than to break the law. There were other avenues of complain opened to him.

Mitigating factors

[21] The Court also considered the arguments of counsel as to mitigating factors arising either from the circumstances of the offence or the offender in this case, including the following:

(a) First, Corporal McEwan's guilty plea, which avoided the expense of energy and costs of running a trial, which I consider as a clear indication that the offender is taking full responsibility for his actions, in this public trial in the presence of members of the military community.

(b) Second, the fact that Corporal McEwan has taken the opportunity to admit to other offences.

(c) Third, the fact that Corporal McEwan was under some stress and feelings of harassment which, although by no means proven, constituted a factor considered by the prosecution in deciding that there was no reasonable prospect of conviction and no public interest in proceeding with the initial charge of absence without leave initially appearing as charge 1 in these proceedings. I conclude that the difficult situation experienced by Corporal McEwan at the time limits his moral culpability to an extent.

(d) Finally, Corporal McEwan's service with the CAF for 26 years and his efforts to become a productive member of society since and into the future.

Objectives of sentencing to be emphasized in this case

[22] I agree with counsel that the circumstances of this case require that the focus be placed on the objectives of denunciation and deterrence in sentencing the offender. I do agree with the defence to the effect that any sentence imposed should not compromise the rehabilitation of Corporal McEwan.

Assessing the joint submission

[23] The submissions from the prosecution contained brief references to previous cases. Those assist me in assessing the joint submission and determine if it is acceptable. I may depart from the joint submission of counsel for imprisonment of five days only if I consider that this proposed sentence would bring the administration of justice into disrepute or is otherwise contrary to the public interest.

[24] The issue for me to assess as military judge is not whether I like the sentence being jointly proposed or whether I would have come up with something better. Indeed,

the threshold for departing from joint submissions is very high for good reasons. Any opinion I might have on an appropriate sentence is not sufficient to reverse the joint submission that was made to me. What I must consider is whether, despite the public interest considerations that support imposing it, the joint submission is so markedly out of line with the expectations of reasonable persons aware of the circumstances of the case that they would view it as a breakdown in the proper functioning of the military justice system.

[25] I do not believe that it is the case. A reasonable person aware of the circumstances of this case would expect that the offender, brought back to face military justice two years after his release from the CAF, would receive a sentence that both expresses disapprobation for the failure in discipline involved and has a personal impact on him. The period of imprisonment proposed is, in my view, aligned with these expectations.

[26] Considering the circumstances of the offence and of the offender, the applicable sentencing principles, the two offences admitted by Corporal McEwan and the aggravating and mitigating factors mentioned previously, I conclude that the sentence jointly proposed by counsel would not bring the administration of justice into disrepute or would otherwise be contrary to the public interest. The Court will, therefore, accept it.

[27] Corporal McEwan, it is unfortunate that you thought you could escape liability for your actions by your release from the CAF. In acting as you did, you have cast a shadow on what was a significant period of service in the Army, in Canada and overseas, for the benefit of your fellow citizens. I hope you have learned that you cannot escape justice as this is a lesson which may be useful as a civilian, too. Your plea today and the sentence you will serve will put an end to your obligations towards the military justice system. I encourage you to learn from this process and encourage you to respect the law in the future.

FOR THESE REASONS, THE COURT:

[28] **SENTENCES** you to imprisonment for a period of five days.

[29] The sentence of imprisonment was imposed at 1150 hours on 30 November 2018.

Counsel:

The Director of Military Prosecutions as represented by Major S. Poitras

Major F. Ferguson, Defence Counsel Services, Counsel for Corporal R.A. McEwan