



COURT MARTIAL

Citation: *R. v. Lundy*, 2019 CM 5005

Date: 20191104

Docket: 201946

Standing Court Martial

Canadian Forces Base Esquimalt
Victoria, British Columbia, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer B.J. Lundy, Offender

Before: Commander C.J. Deschênes, M.J.

REASONS FOR SENTENCE

(Orally)

[1] The Court has accepted and recorded Warrant Officer Lundy's plea of guilty to a charge under section 108 of the *National Defence Act (NDA)* for signing an inaccurate certificate in relation to an aircraft. The Court must now determine and impose a fair and fit sentence.

[2] Counsel are presenting the Court with a joint submission. In doing so, the prosecutor provided the Court with the Statement of Circumstances as well as the documentary evidence listed at article 111.17 of the *Queen's Regulations and Orders for the Canadian Forces*, as required at article 112.51.

[3] The Statement of Circumstances reads as follows:

“STATEMENT OF CIRCUMSTANCES

1. Sergeant B.J. Lundy (Sgt Lundy) initially enrolled in the Canadian Armed Forces (CAF) as a member of the Reserve Force on 29 March 1994 in the Military Occupation Classification (MOC) R181 BOSN. On 27 October 2005, Sgt Lundy transferred to the Regular Force in the Military Occupation Specification (MOS) of Aviation Technician (00135-01 AVN TECH). He has trained and worked in this MOS from his transfer to the present. On 30 June 2014, Sgt Lundy was promoted to the rank of Sergeant. On 1 July 2019, Sgt Lundy was promoted to the rank of Warrant Officer. However, as the charge before the court martial arose while he was a Sergeant, this statement will identify him by that rank.

2. From 8 August 2017 to 18 January 2018, Sgt Lundy was tasked and deployed on Operation REASSURANCE, as part of HMCS Charlottetown's Air Detachment.

3. On 13 January 2018, maintenance was conducted on the Intermediate Gear Box (IGB) and Tail Gear Box (TGB) of the Sea King Helicopter, CH12404 (CH12404). During the alignment procedures of the TGB, a locally manufactured device (LMD) was used by the technicians to secure the tail rotor connected to the TGB. Specifically, the LMD was used instead of the Rotary Rudder Control Blade Restrainer, special support equipment identified as tool T-10 in the Parts List – CH124A Sea King Helicopter Special Support Equipment, C-12-124-AK0/MY-000. The Rotary Rudder Control Blade Restrainer is often referred to, colloquially, as the 'milk stool'. It is an uncalibrated tool whose function is to secure the tail rotor during alignment, in order to take a measurement. Sgt Lundy was aware of the use of the LMD on CH12404. Other personnel involved with the maintenance and operation of the aircraft were also aware.

4. Following completion of this maintenance, Sgt Lundy signed a CF349, DYN 787, closing the maintenance process. Sgt Lundy was the Level C release authority whose duty was to review the CF 349, DYN 787. By signing the form, Sgt Lundy certified that the TGB was, "ALIGNED IAW C-12-124-AJ0/MF-000 PG 5-12".

5. Sgt Lundy signed an inaccurate certificate in relation to an aircraft contrary to section 108 of the National Defence Act in that he did not record the use of the LMD when the TGB was adjusted.

6. On 12 December 2018, Sgt Lundy was charged under the National Defence Act. He has accepted responsibility for the inaccuracy of the certificate in relation to CH12404. He is a professional and competent AVN TECH, who has since been promoted to the rank of Warrant Officer, and wishes to put this incident behind him. He was

awarded his CD on 30 March 2006 and the Bar to that decoration on 13 July 2016.”

Position of the parties

[4] In their submissions, both counsel spoke of the sentencing principles and presented their views regarding aggravating and mitigating circumstances of this case. With the support of the documents introduced as evidence and their submissions, both counsel recommend that the Court impose a sentence of a fine in the amount of \$600.

Prosecution

[5] The prosecutor contends that emphasis should be put on general deterrence for this sentence. In addition to the aggravating circumstances found in the Statement of Circumstances, the prosecution contends that the signature of the inaccurate certificate posed a safety risk to the pilot, the aircrew and the aircraft. Additionally, because there seems to be only one other case tried by court martial for this particular offence in *R. v. Gauthier*, 2019 CM 2022, the prosecutor provided a series of summary trial results pertaining to the same offence, along with case law regarding offences under section 125 of the *NDA*, which is a similar offence, to demonstrate that the joint submission meets the parity principle. He contends that the joint submission is in the public interest.

Defence

[6] Defence counsel generally agrees with the position of the prosecution; however, he expressed his disagreement regarding the consequence of the commission of the offence. He submits that, although errors or negligence may pose a certain level of risk, evidence should have been adduced in demonstrating that the signing of the inaccurate certificate by Warrant Officer Lundy posed a risk to the aircrew and the aircraft. He contends that the offence is simply an error in paperwork. He also alleges that summary trial results should not be relied upon since presiding officers are members of the executive and are generally not legally trained. Nevertheless, from his perspective, the joint submission meets the principles of sentencing and, therefore, would not bring the administration of justice into disrepute.

Analysis

[7] Joint submissions are quite common and, in fact, are essential in a justice system as they allow the system to function efficiently. Guilty pleas in exchange for a joint submission minimize the stress and legal costs associated with the conduct of a trial. The Supreme Court of Canada (SCC) in *R. v. Anthony-Cook*, 2016 SCC 43, in recognizing the benefits of joint submissions on sentence, imposes a very stringent test, a high threshold for departing from joint submissions. The SCC emphasized that judges are not to depart from a joint submission unless the mutually agreed recommended sentence would cause an informed and reasonable public to lose confidence in the institution of the courts or unless it would be contrary to the public interest. Therefore,

trial judges are required to apply the procedure as established by the SCC before rejecting a joint submission.

[8] This means that the Court must examine the joint submission and determine if it is contrary to the public interest, or whether it would cause an informed and reasonable public to lose confidence in the institution of the courts. If it is not contrary to the public interest, or if it would not bring the military justice system into disrepute, the Court cannot depart from it. As stated by Moldaver J. at paragraph 42 of *Anthony-Cook*, “[t]he public interest test ensures that these resolution agreements are afforded a high degree of certainty.” He also stated at paragraph 36 that “[a]ccused persons who plead guilty promptly are able to minimize the stress and legal costs associated with trials”. A guilty plea offers accused persons an opportunity to begin making amends, is an indication of remorse and shows that the offender is taking responsibility for his actions.

[9] Trial judges can rightfully assume that counsel took all relevant facts into consideration when mutually agreeing on an appropriate sentence. The Statement of Circumstances, which was read in court, generally provides the presiding military judge with the facts that guided counsel in coming to a joint submission.

[10] In reviewing the Statement of Circumstances, I accept defence’s submission that evidence should have been adduced with respect to possible risk to the aircrew and the aircraft caused by the signing of the inaccurate certificate. The presence of a risk to the aircrew and the aircraft, and the level of such risk caused by the signing of the inaccurate document, were not proven by the prosecution. Consequently, the Court gives little to no weight to this argument presented by the prosecution. The absence of evidence related to consequences from the signing of an inaccurate document leaves the Court with little to gauge the true effects of this offence on the unit, the Canadian Armed Forces (CAF) or society at large.

[11] I do not accept the defence’s view that the offence under section 108 of the *NDA* is merely an error in paperwork. Although it is true that the offence of wrongful acts in relation to aircraft or aircraft material under section 107 of the *NDA* is objectively more serious in certain circumstances, the commission of an offence under section 108 of the *NDA* is not a trivial matter and bears some important consequences. In fact, the natural consequence that flows for the aircrew and the chain of command, upon learning that the senior technician in charge of releasing the aircraft signed a certificate knowing that the work was not done in accordance with the applicable standards, may lead to uncertainty and loss of confidence in this technician and in the operability of the aircraft. This is not about safety issues and risk to the aircrew and to the aircraft that could have resulted by the commission of the offence, which would require evidence to be adduced in court as stated earlier. It is about the natural consequence that flows from knowing that those entrusted with the safety and proper functioning of the aircraft signed a form certifying that the standard to maintain or repair the aircraft was followed when it was not.

Parity - summary trial results at court martial

[12] Pursuant to section 203.3 of the NDA, the parity principle requires that the sentence being imposed be similar to sentences imposed for similar offences. The Court must now determine whether courts martial are bound by these summary trial results, or whether courts martial are required to consider such results and to what extent.

[13] In *R. v. Généreux*, [1992] 1 S.C.R. 259, Lamer C.J. explains the purpose of the military justice system in the following terms:

To maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently. 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.

[14] In *R. v. Stillman*, 2019 SCC 40, the SCC, referring to *Généreux*, reaffirms that the military justice system is designed to meet the unique needs of the military with respect to discipline, efficiency, and morale. The SCC also recognises the two-tier system of military justice and explains, at paragraphs 62 and 63 of its decision, the difference in proceedings between courts martial and summary trials. Adhering to SCC affirmation, trials and disciplinary proceedings within the military justice system ensure respect for the law while also maintaining discipline, efficiency and morale within the CAF.

[15] One decision specifically dealt with the question of summary trial results being presented at courts martial for sentencing purposes, in the context of the step principle. This principle was described by the presiding military judge in *R v Stull*, 2013 CM 2015 at paragraph 29: “The step principle of sentencing would normally require that the commission of a further similar offence by an offender would require a more severe sentence.” During the proceedings of the *Stull* court martial, counsel argued that the step principle did not apply when the previous conviction resulted from a summary trial because the punishment imposed by the presiding officer may have been unduly harsh. Rejecting this argument, the presiding judge stated at paragraph 32:

Commanding officers are responsible for the maintenance of discipline in their units and to dismiss the sentences awarded at summary trial as inapt without knowledge of the circumstances and facts of those convictions is unhelpful to the court.

As mentioned before, both courts martial and disciplinary proceedings at summary trials ensure respect of the law while also maintaining discipline, efficiency and morale within the CAF. Consequently, I concur with the approach adopted by the military judge in the *Stull* decision. Courts martial should not eagerly dismiss or ignore summary trial results, since they can serve as a guide for sentencing at courts martial regardless of whether the summary trial results pertain to the person being tried in application of the step principle, or whether these results pertain to other offenders in applying the parity principle.

[16] Furthermore, rule 16 of the *Military Rules of Evidence* allows courts martial to take judicial notice of records of findings made and sentences passed at courts martial

and summary trials. For these reasons, summary trial results may be taken into consideration by courts martial, specifically on sentencing.

[17] Nevertheless, courts martial are not bound by these results for several reasons. One of the reasons is confirmed by the SCC in *Stillman* when it states at paragraph 62 that there is no obligation for the presiding officer at summary trials to be legally trained. Also, as pointed out by the defence, presiding officers are members of the executive; they do not meet the principle of judicial independence. The Court also accepts that a Record of Disciplinary Proceedings provides insufficient information regarding the circumstances surrounding the commission of the offence and the situation of the offender. It is therefore challenging for counsel and for the Court to apply or distinguish a given case. On his own admission, however, defence counsel mentioned that the summary trial results provided by the prosecution were considered when arriving at a joint submission. The Court, therefore, accepts that summary trial results provide some guidance to the presiding military judge with respect to the range of punishments for a given offence, and they can be considered, with caution, for their limited value, particularly when the offence in question has not been, or has rarely been the subject of a judicial decision.

[18] The Court also accepts that the *Gauthier* court martial case would normally have little value for the application of the parity principle because it was the result of a joint submission; however, because Sergeant Gauthier was actually one of the individuals who was part of the same transaction as Warrant Officer Lundy, the sentence of a fine of \$600 in *Gauthier* can be used to guide this Court when considering the joint submission.

Situation of the offender

[19] Regarding the situation of the offender, Warrant Officer Lundy joined the regular force on 29 March 1994 and has been serving in the CAF since then. He has four previous convictions at summary trial. Given they are dated and unrelated to the offence to which he pleaded guilty, the Court gives little weight to these four convictions. The Member's Personnel Record Résumé shows that he was promoted acting/lacking after he was charged, on 1 July 2019. He also deployed twice and has a positive record of postings and training history. He is the recipient of the following military decorations: the General Campaign Star – South-West Asia; the Special Service Medal – North Atlantic Treaty Organization; and the Canadian Forces Decoration. The offender's career history is an indication of his character and of the confidence that his chain of command places in him. After being charged, he instructed his defence counsel to proceed with a guilty plea. By pleading guilty, he accepts responsibility for his action. This has an important and positive impact on the sentence.

Conclusion

[20] After having reviewed the documents provided by the prosecution, and after careful consideration of counsel's submissions, the Court accepts that counsel identified

and considered most of the relevant aggravating and mitigating factors surrounding the commission of the offence and with regard to the situation of the offender. Counsel also addressed the applicable principles and objectives of sentencing in this case. The Court is satisfied that the documents introduced as exhibits provided sufficient information regarding both the offence and the offender. The Court accepts that the need for general deterrence is met with the joint recommendation. This joint submission is in the public interest and does not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[21] **FINDS** Warrant Officer Lundy guilty of a charge under section 108 of the *NDA* for signing an inaccurate certificate in relation to an aircraft.

[22] **SENTENCES** the offender to a fine in the amount of \$600 payable forthwith.

Counsel:

The Director of Military Prosecutions as represented by Lieutenant-Commander D.R.J. Schroeder

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