



COURT MARTIAL

Citation: *R. v. Remington*, 2022 CM 5006

Date: 20220422

Docket: 202047

Standing Court Martial

Halifax Courtroom, Suite 505
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Naval Cadet L.R. Remington, Offender

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

Pursuant to section 179 of the *National Defence Act* and section 486.4 of the *Criminal Code*, the Court directs that any information that could disclose the identity of the person described in these proceedings as the complainant or the victim, including the person referred to in the charge sheet as “T.T.”, shall not be published in any document or broadcast or transmitted in any way.

SENTENCE

(Orally)

Introduction

[1] Naval Cadet Remington was charged with one offence punishable under section 130 of the *National Defence Act* (NDA); that is to say, sexual assault contrary to section 271 of the *Criminal Code*, alleging that he sexually assaulted T.T., on or about 3 November 2018, at or near Saint-Jean-sur-Richelieu, Quebec. After preliminary application hearings were completed, both parties presented their evidence and submissions during a five-day trial. The trial took place in Halifax, Nova Scotia, as a result of an order the Court had previously issued, changing the venue from Saint-Jean-

sur-Richelieu, Quebec to Halifax following a joint request by counsel to this effect, primarily based on the fact that both the offender and the victim had been released from the Canadian Armed Forces (CAF) and were now residing in Halifax or in relative proximity to the Halifax region. On 8 September 2021, Naval Cadet Remington was found guilty of the charge (see *R. v. Remington*, 2021 CM 5025).

[2] Following the guilty finding, at the defence's request, the Court granted adjournments to allow for the preparation of a psychologist's report. The sentencing hearing commenced on 20 April 2022. Having considered the evidence presented and counsel's submissions, I must now determine and impose a fair and fit sentence that is proportional to the gravity of the offence and the degree of responsibility of the offender.

Circumstances of the offence

Background

[3] In 2018, the offender and the victim met when they both enrolled in the CAF. Naval Cadet Remington developed a friendship with the victim during the summer of that year at the Royal Military College (RMC) campus in Saint-Jean-sur-Richelieu, Quebec (campus), where eventually they mutually considered each other best friends. As such, they spent time together, taking walks, watching anime, eating out at local restaurants and attending the mess on campus frequented by RMC students, St-Maurice Mess.

The evening of the sexual assault

[4] On 3 November 2018, knowing that he was permanently leaving campus the following week because he was being released from the CAF, had turned over his military equipment and was scheduled to return his uniform in the next few days, Naval Cadet Remington went with the victim to a local restaurant for dinner as it would be their last time together before his departure from the region.

Alcohol consumption

[5] With her meal, the victim drank one bottle of Smirnoff Ice. Forty-five to sixty minutes after their arrival, they had finished their dinner and walked together to St-Maurice Mess. Upon arrival, the offender went directly to the bar to purchase several shots of vodka as well as shots of a drink called, "Sour Puss" for himself and the victim. A more senior cadet approached Naval Cadet Remington to remind him of the victim's alcohol poisoning incident two weeks prior, where the victim had a near-death experience. He asked the offender to ensure the victim would drink responsibly. While at the mess, Naval Cadet Remington and the victim consumed their respective shots within minutes, with the victim consuming at least four shots of vodka at that moment. After spending approximately forty minutes at St-Maurice Mess, they walked to the offender's quarters to watch a television show in his room.

The sexual acts in the offender's room

[6] Once in his room, Naval Cadet Remington gave the victim a 473-millimetre can of Smirnoff Ice. Because she was unable to open the can, the offender took it and opened the can for her. She drank at least a quarter of its content. As it was hot in the room, the victim removed her hoodie and laid on the bed while the offender had left the room for a short moment. Naval Cadet Remington testified that when they returned to his room, between approximately 2230 hours, 3 November 2018 and 0200 hours 4 November, he engaged in various sexual acts with the victim, which included digital penetration of her vagina, fellatio, vaginal penetration with his penis, and placing his hands around the victim's neck.

The next day

[7] Around 0200 hours on 4 November 2018, the victim awoke and quickly got dressed to go back to her quarters, inadvertently leaving behind a sock and her underwear. She immediately went to her friend's room and relayed her allegations against the offender to her two friends, collapsing in the doorway of the room. The victim was described at the time as being initially incoherent, crying, not understanding simple questions and requiring assistance to shower and comfort to fall asleep. The two friends who testified both noticed marks around the victim's neck when she appeared in the room that morning. The victim stayed in her friend's room for one month.

[8] Later the same day, the victim, accompanied by a friend and escorted by the military police (MP), attended the Haut-Richelieu Hospital where she underwent a sexual assault evidence kit, which later revealed that the vaginal swab collected from her contained a small quantity of semen with the offender's DNA.

Voluntary statement

[9] The same day, the offender was interviewed by MP investigators. He made a voluntary statement, telling the MP, amongst other things, that the victim was highly intoxicated during the sexual activity, and that she was not only a willing participant, but she pestered him into engaging in sexual activities with him.

Summary of finding

[10] The Court did not believe the offender's testimony to the effect that not only was the victim consenting to the sexual activity, but that it was his consent that was at play, because there were multiple internal inconsistencies in his testimony and discrepancies with the evidence accepted at trial, particularly where he admitted several times in his statement to the investigators that the victim was highly intoxicated. While testifying, Naval Cadet Remington constantly denied observing signs of intoxication, implying that the victim was not intoxicated. The offender changed his testimony at least three times when asked to explain why he told the MP the victim was intoxicated. Some of his evidence was also found to be illogical, in particular, when confronted with the fact that he also was highly intoxicated that evening, to the point of vomiting, and asserted that his

memory improves as his impairment increases. Having rejected his testimony in relation to material facts, the Court also found that his evidence did not leave a reasonable doubt. The Court found credible that the victim was incapacitated by her high level of intoxication, and believed her when she said that she remembered she was not consenting to the sexual activity. The offender was found guilty of committing the offence of sexual assault on T.T.

Evidence to prove harm in the absence of a victim impact statement (VIS)

[11] During the sentencing hearing, the prosecution informed the Court that the victim did not want to provide a VIS. Counsel for the prosecution explained that after she was excused from the court following the completion of her testimony, the victim informed them that she did not want to hear about the case, specifically refusing to be informed of the verdict. On several occasions after the finding of guilt, the prosecution, through E.H., the aunt of the victim, informed the victim that she could provide a VIS, but T.T. refused. Therefore, the prosecution called E.H. as a witness to provide evidence about the harm the victim suffered as a result of the sexual assault.

Testimony of E.H. (victim's aunt)

[12] E.H. testified that the victim is the daughter of E.H.'s younger sister. She explained that the victim moved back to New Brunswick after her release from the CAF and attended community college in Saint-Andrews in the electrical program where, on occasion, the victim would stay with her for days or weeks at the time. During this period E.H. observed that the victim's mental health plummeted; she testified that the victim was suicidal. After the victim subsequently moved back with her parents who live a two-and-a-half-hour drive away, E.H. discovered from the victim's parents that T.T. did not finish the year at college. This resulted in her grandparents losing approximately \$10,000 from the Registered Education Savings Plan they had invested into, which they used to pay for the victim's college tuition.

[13] E.H. also testified that following the verdict in September 2018, the victim stayed with her for about three weeks. E.H. explained that she has not seen T.T. since then, but they communicate via messages on a weekly basis. She shared that T.T. had eventually found employment.

[14] She confirmed that the victim found out about the guilty verdict only a few days ago. The witness believes that the victim refuses to talk about the proceedings because she does not want to think about the sexual assault. E.H. told the Court she believes the victim has been in a dark place lately, in particular because T.T. mentioned several times last November that she would kill herself.

[15] She also testified that she is aware the victim received counselling with a psychiatrist, which was a service arranged by the Department of National Defence (DND). The victim's parents also arranged separately for counselling, a service which

took some time to obtain. She explained that there are some challenges for the victim to physically attend some of the counselling sessions.

[16] Although she did not clearly state that the change in the victim's behaviour was a consequence of the sexual assault, her testimony implied that this was the case. She explained that when the victim was a child, she was a "fireball, full of energy". As a teen, she was "fun and silly". T.T. had projects and dreams, which included traveling to Africa. She testified that the victim's current life is a stark contrast to what it used to be. T.T. has been experiencing significant challenges leaving her bedroom, the only place she feels safe. The witness clarified that for the victim, leaving her bedroom is in fact a stressful event, while leaving her house is an "impossible task". T.T.'s female friend had to take exceptional measures to get her to leave the house.

[17] This situation is also affecting the victim's prospect of employment. The witness explained that when T.T. is able to find employment, she is unable to keep it. For example, she occupied a manufacturing position for only two weeks. When the victim was employed for a short period at Sobey's, she could function in the confines of the store, but could not walk the three minutes to return home because she was too afraid. The victim lives in constant fear and needs guidance to take care of basic hygiene needs.

[18] She added that the victim has a small social circle, limited to a handful of individuals, which includes her grandparents and her gaming friends, who she only socializes with virtually.

[19] E.H. became emotional during her testimony, explaining that the victim's career goal was to "fix airplanes", and she is now unable to function even in more accessible employments such as at Sobey's. She views the offender's actions the night of 3 November 2018, as a "professional robbery" and feels that he did not only take the victim's body that night, he took her soul. E.H. further testified that she observed the victim's body tremble and shake when speaking about the proceedings. She confirmed that she informed the victim she could provide a VIS, but the victim refused.

Defence argument asking the Court to disregard the testimony of Mrs. E.H.

[20] The defence contended that E.H.'s testimony is not compliant with the *Military Rules of Evidence (MRE)*, which should be rigidly applied, because her evidence is generally based on hearsay, since she was told about the victim dropping out of college, the loss of money that this incurred and the emotional harm amongst other things. She has not seen the victim since September or October 2021.

Rules of evidence at sentencing hearing

[21] While it is true that the witness's evidence was generally based on information communicated to her by the victim, and in some instances by the victim's parents or grandparents, it is generally recognized that rules of evidence are applied with more flexibility at sentencing because the purpose of this phase of the trial is not aimed at

determining guilt or innocence. Its purpose is to determine a fair and fit sentence. In this context, the offender no longer benefits from the presumption of innocence.

[22] Unfortunately in the military justice system, there are no clear provisions that crystallizes this approach. MRE 25 does provide that:

25 When there has been a finding of guilty and the trial continues to determine the appropriate sentence, evidence may be submitted in accordance with paragraphs 20 and 21 of QR 112.05, QR 112.47 and QR 113.13.

[23] The *Queen's Regulations and Orders for the Canadian Forces* (QR&O) articles or paragraphs referred to in this *MRE* have been either repealed or modified. Paragraph 112.05(20) currently deals with verdict of not guilty while 112.05(21) deals with general procedure after finding and does not address rules of evidence. Likewise, QR&O 112.47, deals with the definition of victim and QR&O 113.13 deals with the appearance by technological means for an application to vary or substitute conditions of suspension order. Thus, the QR&O articles or paragraphs referred to in this *MRE* clearly no longer constitute relevant rules to apply when adducing evidence at the sentencing stage.

[24] Additionally, article 112.51, "Sentencing Procedure", only provides the process for this stage of the trial; it does not provide rules of evidence during the sentence phase.

[25] Turning to the *Criminal Code*, subsection 723(5) expressly state that hearsay evidence is admissible at the sentencing stage. It also confirms the discretionary authority, if the Court considers it to be in the interests of justice, to compel a person to testify, where the person:

- (a) has personal knowledge of the matter;
- (b) is reasonably available; and
- (c) is a compellable witness.

[26] In the circumstances of this case, I do not consider it to be in the interests of justice to compel T.T. to testify, particularly where she is a victim of a major sexual assault and has verbalized directly to counsel for the prosecution and to her aunt that she no longer wishes to participate in these proceedings. Additionally, the victim's expression of suicidal ideation and her fears were shared with E.H. who had an opportunity to observe the victim and saw her anguish in relation to these trial proceedings. Therefore, the evidence of E.H. was not solely based on hearsay. She did observe the victim shake and tremble when the topic of these proceedings came up, a topic which would naturally serve as a reminder of the sexual assault she endured. E.H. also observed the victim's behaviour, particularly her refusal to leave the house, when the latter stayed at her place after her release from the CAF, and prior to September 2021. The defence also had the opportunity to, and indeed did, test the evidence of E.H. by cross-examining her.

[27] Evidence concerning the impact on a victim is not restricted to impact statements. Victim impact can be proven through the testimony of individuals, like E.H., who observed the harm suffered by the victim resulting from the commission of the offence. She also heard the victim's expression of suicidal ideation. Victim impact may also be a conclusion drawn from the circumstances of the offence or findings at trial. In other words, the evidence of E.H. is part of a broader picture drawn by the record and by the facts proven as part of the main trial that allow the Court to draw an inference of the harm the victim suffered from being sexually assaulted by Naval Cadet Remington. Indeed, similarly to subsection 722(3) of the *Criminal Code*, which gives court discretion to consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed, subsection 203.6(4) of the *NDA* provides:

(4) Whether or not a statement has been prepared and submitted, the court martial may consider any other evidence concerning any victim of the offence for the purpose of determining the sentence to be imposed on the offender ...

[28] Furthermore, courts have recognized that the absence of evidence of harm does not mean that there is evidence of no harm. In one case, it was established that the sexual nature of the offence, along with other considerations, was such that an inference of harm should be drawn (see *R. v. D. (G.)*, [2017] O.J. No. 2308 at paragraph 25).

[29] In *R. v. Merrick*, 2012 ABCA 319, in the context of determining whether the offence amounted to a major sexual assault in the absence of any evidence that the victim of the case suffered any negative consequences from the repeated fondling, the appeal court stated at paragraph 12 that:

Direct evidence of harm is not a prerequisite to establishing a serious sexual assault. Rather ... what is required is a finding of contemptuous disregard for the feelings and personal integrity of the victim, sexual activity of a sort or intensity such that a reasonable person would know beforehand that the victim likely would suffer lasting emotional or psychological injury, and that the victim has suffered notable psychological or emotional harm which may be inferred from the very nature of the assault.

[Emphasis added]

[30] In the case at bar, T.T. was very young, she had turned eighteen years old two weeks prior to the sexual assault. The prosecution proved beyond a reasonable doubt that the victim was incapacitated by her high degree of intoxication and suffered blackouts during the sexual assault. In my finding, I accepted that the victim did remember being vaginally penetrated by the offender's fingers then with his penis; that she was dragged from the bed and she was on her knees, then on her buttocks on the cold floor while he had her perform fellatio; that she accidentally urinated on the floor; and, that during the sexual assault, Naval Cadet Remington squeezed her neck with his hands, exerting enough pressure to interfere with T.T.'s breathing.

[31] There was also undisputed evidence that the victim left the room in a hurry, inadvertently leaving clothing behind and going directly to her friends' room, collapsing in the doorway when she reported the sexual assault to her two friends. The two friends provided evidence of the victim's despair when she arrived in the room at around 2 a.m.

T.T. did not comprehend what was asked of her, was crying and having difficulties speaking. They observed that she had marks or an irritation around her neck and was missing pieces of clothing. She needed assistance to shower and she clutched to one of her friends as she tried to fall asleep. The victim stayed in their room for one month after the sexual assault.

[32] The sexual nature of the offence, the series of sexual acts the offender forced onto the victim including the application of force used when he choked her, the observation of her friends the morning after and during the month that followed, along with E.H.'s testimony, is largely sufficient for me to conclude that T.T. suffered the emotional trauma described by E.H, with the consequential professional and academic downfalls that followed as a result of the sexual assault.

Circumstances of the offender

Service in the CAF

[33] With respect to the circumstances of the offender, the documentary evidence listed at article 111.17 of the QR&O were provided in accordance with article 112.51 of the QR&O. The Statement as to Particulars of Service of the Accused signed by Colonel Pilon, in French, dated 29 September 2020; the Member's Personnel Record Resume with an attached certificate of service; and a CAF Pay Guide, provide some relevant but limited information about the offender's situation, in light of his very short time serving in the CAF.

[34] Naval Cadet Remington is 21 year old. He enrolled in the CAF on 25 June 2018 and was posted to the Canadian Forces Leadership and Recruit School, Saint-Jean-sur-Richelieu, Quebec. The evidence at trial showed that the offender did not complete Module 1. When his anxiety issues came to light during his training, it was discovered that he had omitted to disclose these issues when he was being processed for enrolment. He was therefore released on 17 December 2018 under QR&O article 15.01, item 5(e), irregular enrolment.

Criminal Record

[35] The Court was informed that the offender has no conduct sheet.

Current family, academic and employment circumstances

[36] The offender is single and has no dependents. He is studying at the Nova Scotia Community college (NSCC).

Attitude to the offence/efforts towards rehabilitation

[37] The defence introduced a letter from Kathleen Allen, Principal at Ivany Campus, dated 22 September 2021, which explains that since Naval Cadet Remington had

voluntarily disclosed that he had been recently convicted of a criminal offence, he was in a breach of the college's sexual violence policy. The letter also informs that, as a result, the matter was brought to the attention of the Sexual Violence Response Team (SVRT) which is the committee convened by the college when it is deemed necessary by Human Rights, Equity and Inclusion to address reports of sexual violence. After reviewing the matter, the SVRT has recommended that Naval Cadet Remington may continue his program at NSCC under the condition that he abide by the listed interim measures, one of which included completing an on-line "NSCC&Me" Student Module and provide proof of completion.

[38] The defence also provided an email titled, "Letter" from Gola Taraschi-Carr, Sexual Violence Prevention & Response Lead, Human Rights, Equity and Inclusion, from the NSCC Institute of Technology Campus, who wrote on 22 September 2021 that Naval Cadet Remington was a student of NSCC and that in September 2021 he voluntarily disclosed his involvement in the justice system. They also wrote that during his time as a student, Naval Cadet Remington has met all obligations and responsibilities outlined in the Student Code of Conduct, Respectful Community Policy and Sexual Violence Policy. He has willingly and fully completed all requirements of the college in terms of extra education in human rights and has also met with the author of the email and with student services advisors to process those learnings.

[39] On 9 November 2021, Naval Cadet Remington completed a program called, "Supporting Survivors of Sexual Violence", from the Nova Scotia Department of Community Service, an on-line course composed of eight modules and received a certificate of completion dated 9 November 2021.

[40] On 4 April 2022, Naval Cadet Remington received two letters from the John Howard Society of Nova Scotia. One of the letters is signed by Joshua Spencer, Community Programs Facilitator, informing Naval Cadet Remington that he was placed on the waiting list for the Healthy Relations Program offered by the John Howard Society of Nova Scotia. The Healthy Relations Program is designed to educate participants about different types of relationships as well as to give them the skills required to maintain and form healthy and fulfilling relationships with others. The second letter provides general information about the John Howard Society program.

[41] When offered an opportunity to address the Court before closing to determine sentence, Naval Cadet Remington began his statement by explaining how these proceedings have impacted his future aspiration and his studies. Eventually, he did apologize for the harm done. Although the apology may come late in the context of these proceedings, it may constitute an indication that the offender is making efforts towards rehabilitation.

Expert report prepared by Dr Kelln, PhD NS Reg, clinical and forensic psychologist

Field of expertise

[42] In the context of the sentencing phase, at the request of the defence, a report was prepared by Dr Kelln, forensic psychologist. The prosecution agreed that Dr Kelln's field of expertise and vast experience met the legal threshold as developed by the Supreme Court of Canada (SCC) for this witness to be qualified as an expert. Dr Kelln was qualified as an expert in the field of sex offending, risk of reoffending and steps to reduce the likelihood of reoffending. A 17-page psychosexual risk assessment report dated 12 March 2022 and signed by Dr Kelln as well as his curriculum vitae were introduced as exhibits.

Methodology

[43] Dr Kelln testified that, in order to assess the offender, he gathered information during a period of approximately seven hours in March 2022, which included meeting the offender for three to four hours during clinical interviews, conducting psychological testing and validating some information with the offender's father and his cousin.

Offender's admission of guilt during clinical interview

[44] Dr Kelln explained that it is very rare that an offender would admit committing the offence they were convicted of. He testified that during a clinical interview, Naval Cadet Remington adamantly insisted on his innocence, stating that the whole case against him was a huge misunderstanding and that he was found guilty "because of the way the laws are written". Dr Kelln further testified that after some discussion where the offender's version was challenged, and letting silence set in-between the two of them, he observed Naval Cadet Remington break down in a fit of sobbing and admitting he sexually assaulted the victim. He observed the offender crying so forcefully that it was difficult to understand him but ultimately he admitted that he had been lying for over three years and felt horrible. Naval Cadet Remington also stated to him at that time that he knew the victim was quite intoxicated and he made the choice to "try something" with her, even though he knew he did not have her consent. Dr Kelln explained that he viewed the offender's recanting as genuine, particularly in light of the strong emotions he observed when Naval Cadet Remington admitted his guilt.

Assessment of the offender

[45] Dr Kelln told the Court that the offender also admitted to almost daily internet porn (IP) use and masturbation since about the age of twelve. Naval Cadet Remington framed his use more as a habit intended to help him relax prior to going to sleep. Dr Kelln found that with Naval Cadet Remington's upbringing and unsupervised daily access to internet since the age of four, the issue of IP is very relevant to the offender's trajectory. Subconsciously, he crafted this persona of being asexual years ago because of his insecurities and low self-esteem. In reality, Naval Cadet Remington was training his brain to respond strongly to IP material at the expense of other interests and relationships. The expert witness also mentioned that further exploration was required to determine the extent of the damages caused by IP. As a result, intervention to address these damages is required.

[46] He also explained that Naval Cadet Remington's risk of reoffending is determined by collapsing all the information he collected. He assessed that the offender is not psychopathic; he is not a sexual predator and no serious psychiatric issue was identified. He assessed that the offender presents a low to moderate risk of recidivism. He concluded that Naval Cadet Remington does not present a significant threat and immediate counselling is not required.

[47] Although there is some level of risks, these risks can be further reduced with counselling and the implementation of the Good Life Model. He explained that any offender can significantly reduce their risk of reoffending if they adopt the Good Life Model, which includes being employed or attending school, having a social network and family contact and practicing hobbies.

[48] He also testified that, with the advancement of internet technology, IP addiction, which falls into his field of expertise, impacted society in a significant way. He explained that more than fifty per cent of boys aged ten to twelve years old surf hard core porn. In the case of Naval Cadet Remington, his responses on the scale he used reflect his increasing awareness of his problematic relationship with IP which caused the damage to his brain. However, these damages are reversible. The expert concluded that if Naval Cadet Remington resumes drinking, he should make himself aware of the risks to reoffend.

Possible treatments

[49] Dr Kelln mentioned that a Dr Connor offers a relevant program to address Naval Cadet Remington's issues that is run by the Justice and the Health Department. He also mentioned that he does not believe that correctional facilities offers programs of that sort. He explained that the Dorchester Petitionary has some programs and that IP is a different issue than other sexual offending issues and that only a handful of professionals offer the relevant treatment Naval Cadet Remington needs.

Other mental health issues

[50] In his report, the expert also concluded, based on the Naval Cadet Remington's response, that there are potential difficulties in a number of areas including depression, anxiety, eating-disorder, attention deficit and somatic disorders. In his final comment of the report, Dr Kelln stated that the offender is not a deviant sexual offender; he is, rather, an immature, sexually misguided, young opportunist raised on IP since a very early age.

Weight given to the expert's evidence

[51] I have given considerable weight to this expert evidence. Dr Kelln's answers were straightforward, clear and concise. His conclusions, to the effect that the offender suffers from addiction to IP and that this addiction has caused some damage to his brain, since prolonged IP use has the effect of desensitizing an individual to all manner of sexual material, are logical. These conclusions seem consistent with the way in which the

offender committed the sexual assault: despite his sexual immaturity, he engaged in a series of sexual acts with an incapacitated victim with an eagerness to explore a fetish or deviance he had witnessed, likely countless times, during hours of viewing IP. This does not, in any way, negate or reduce the offender's blameworthy state of mind, but it does provide some context to the actions of the offender when he committed the offence. It also provides a fulsome picture of the offender's situation. It is however unclear to the Court whether damages caused by IP constitute a recognized mental health issue; in fact, the expert did explain that specialized treatment to address these issues is not currently provided at public expense. Nevertheless, the Court accepts that the offender does need specialised treatment to address the damages caused by IP use.

Position of the parties

Prosecution

[52] The prosecution recommended that the Court imposes a sentence of twenty-four months' imprisonment to be served at a federal facility where Naval Cadet Remington would receive the counselling he requires to treat his addiction, with the mandatory ancillary orders to be imposed for a sexual assault conviction. The prosecution is of the view that a weapon prohibition order is not required in this case.

[53] The prosecution affirmed that the fundamental purposes shall be achieved by imposing a sanction that has for its objectives in this specific case, to deter Naval Cadet Remington and others from adopting the same conduct and to denounce unlawful conduct. The prosecutor contended that the range of punishment for this offence is fourteen months to four and a half years, as established in cases such as *R. v. Cooper*, 2018 CM 2014, *R v Rivas*, 2011 CM 2012, *R. v. Royes*, 2013 CM 4034, *R. c. Thibault*, 2021 CM 5016 and *R. v. McGregor*, 2019 CM 4016, with the latter case having a lot of similarities, where the offender was sentenced to imprisonment for a period of thirty-six months. He submitted that he considered the objective gravity of this offence, which carries a maximum punishment of ten years' imprisonment.

[54] Counsel for the prosecution considered the following aggravating factors: the circumstances of the offence established that the sexual assault constitutes a major sex assault. Additionally, the victim was incapacitated by alcohol, therefore, she was particularly vulnerable at the material time. Naval Cadet Remington adopted a predatory behaviour by encouraging the victim to consume alcohol. Also aggravating is that the sexual assault happened in the seclusion of the offender's room. The offender applied a high level of force during the sexual assault and no condom was used as there was semen found in victim's vaginal swab. The victim was a friend, a sister in arms, resulting in an abuse of trust. Finally, the prosecution considered the life-long emotional and financial impact on the victim, as time has not helped T.T. overcome the challenges she experiences as a result of the sexual assault.

[55] In submitting the recommendation of a twenty-four-month period of imprisonment, the prosecution also considered that Naval Cadet Remington is young and

is a first-time offender, however, his admission of guilt to the forensic psychologist was not considered mitigating because it happened too late in the process, specifically after the verdict of guilt, where the victim had to testify in a contested trial. In addition, the prosecution contended that the Court should be mindful of the offender's demonstrated capacity to lie and how the recantation is convenient in the context of sentencing; therefore, little weight should be given to his recantation. The expert's conclusion that Naval Cadet Remington suffers from an IP addiction was accepted by the prosecution, but it was noted that the offender did nothing to address his addiction.

Defence

[56] The defence contended that, since the pamphlet from Correctional Service Canada provided by the prosecution is very Ontario-centric, it has little relevance to the case at bar. He stated that no evidence was provided regarding whether federal facilities here in the Halifax region offer the required services.

[57] He explained that Naval Cadet Remington is a student at the NSCC and voluntarily disclosed to the relevant authority that he had been recently convicted of a sexual offence. Restrictions were imposed on him by the college as a result. Despite his disclosure, the NSCC decided to allow him to pursue his studies. Further, Naval Cadet Remington took the initiative to register for the John Howard program and received a letter of support from a representative of the society.

[58] The defence contended that the forensic psychologist's assessment of Naval Cadet Remington's recantation being genuine and easy to obtain, shows that the offender would be ready for treatment. In this regard, the focus should not be on institutionalizing him; rather, Naval Cadet Remington's treatment, which is only available in private practice, should be the focus of the punishment.

[59] Relying on the *Thibault* case, a case defence counsel views as subjectively more serious, he also contended that the range of punishment for such an offence is lower than what the prosecution claimed, and recommended that the Court impose a period of incarceration of between twelve to fifteen months, with an order suspending the imprisonment.

[60] He considered as aggravating, the high level of intoxication involved and the application of force, although he argued that the offender's act of placing his hands on the victim's neck is not an aggravating factor, because the offender had previously discussed erotic asphyxiation with the victim and also because, otherwise, another charge should have been laid.

[61] In mitigation, he contended that Naval Cadet Remington is young. The sexual assault occurred during the first time he was away from home. He is a first-time offender. He requires support for his rehabilitation and to mitigate his risk of reoffending. He needs counselling. Since he has admitted to committing the sexual assault, he has taken a first step on the road to recovery.

[62] He agreed that denunciation and general deterrence should be the primary objectives of the punishment, but contended that should the Court impose a suspension, it may impose conditions that would include abstaining from IP and engaging in mental health counselling. Should he be in breach of these conditions, the sentence would be executed; thus, Naval Cadet Remington would have to serve the full length of the period of imprisonment imposed by the Court. He concluded by saying that an increase in mental health issues and awareness in society highlight the fact that incarceration is not a viable solution to resolve these issues. Defence also took no issue with the mandatory orders to be imposed.

The analysis

Sentencing principles of the military justice system

[63] When determining a sentence, the Court must be guided by the sentencing principles contained in the *NDA*. Subsection 203.1(1) enunciates the fundamental purposes of sentencing, which are:

- (a) to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and
- (b) to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[64] The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the objectives listed at subsection 203.1(2) of the *NDA*, such as to promote a habit of obedience to lawful commands and orders, to maintain public trust in the CAF as a disciplined armed force, or to assist in rehabilitating offenders. The objectives of the sentence are dictated by the particularity of the case and of the offender.

[65] Finally, section 203.2 of the *NDA* provides for the fundamental principle of sentencing, “A sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.”

The gravity of the offence

[66] The maximum punishment provided for in the legislation indicates the objective gravity of the offence. A sexual assault is a serious offence. Everyone who commits a sexual assault is liable to imprisonment for a term of not more than ten years. Regardless of the level of force used, a sexual assault is a violent act. When committed on a female victim, the SCC has established at paragraph 69 of *R. v. Ewanchuk*, [1999] 1 S.C.R. 330 that:

Violence against women is as much a matter of equality as it is an offence against human dignity and a violation of human rights. As Cory J. wrote in *Osolin*, *supra*, at p. 669, sexual assault “is an assault upon human dignity and constitutes a denial of any concept of equality for women.”

[67] The *NDA* also provides the definition of a serious offence at section 2 of the *NDA*. It means, “an offence under this Act or an indictable offence under any other Act of Parliament, for which the maximum punishment is imprisonment for five years or more, or an offence that is prescribed by regulation under subsection 467.1(4) of the *Criminal Code*”.

[68] In addition to the objective gravity of the offence that I, as the sentencing judge, must take into consideration, the circumstances surrounding the commission of the offence as well as the situation of the offender are factors that shall also influence my decision. In this regard, the Quebec Court of Appeal in *R. c. L.(J.J.)*, [1998] RJQ 971 has provided a list of factors that often play a significant role in ascertaining the gravity of sexual offences and the degree of responsibility of the offender:

- (a) the nature and intrinsic seriousness of the offences;
- (b) the frequency of the offences and the time period over which they were committed;
- (c) the relationship between the offender and the victim, considering in particular whether the offences involved an abuse of trust or authority, or the exploitation of a vulnerable victim;
- (d) other circumstances surrounding the commission of the offences (e.g., the use of threats, weapons, violence, manipulation, grooming and so on);
- (e) the impact of the offences on the victim;
- (f) the offender's previous criminal record, particularly for similar types of offences;
- (g) the presence of an underlying sexual pathology or other contributing condition (e.g., alcohol or drug abuse) and its amenability to treatment;
- (h) the offender's response to the charge or to the conviction: his admission or acceptance of responsibility, his remorse, his insight into the wrongfulness of his conduct and the harm it caused, his prospects for treatment and rehabilitation, and so on, and;
- (i) the passage of time between the commission of the offence and the guilty verdict, which can be a mitigating factor depending on the offender's behaviour during that time.

Aggravating factors

[69] The Court has therefore considered the aggravating factors specific to this case:

- (a) Seriousness of the offence: Legal precedents have established that a sexual assault is categorized as major where it is of such a nature that a reasonable person could foresee that it is likely to cause serious psychological or emotional harm, whether or not physical injury is caused. It includes, but is not limited to, non-consensual vaginal intercourse. This categorization was accepted by courts martial (see *Rivas, Royes, Cooper, and Thibault*). A major sexual assault normally calls for a more severe sentence, with some provinces establishing a departure mark at three years' incarceration for such an offence. As explained earlier in the context of the harm caused to the victim, the sexual assault of the case at bar constitutes a major sexual assault.
- (b) The vulnerability of the victim, the offender's contribution to the victim's vulnerability and the breach of trust that ensued: The Court also considered the vulnerability of the victim that evening and the significant breach of trust of someone who considered Naval Cadet Remington to be her best friend. She was his sister in arms and he used her body during her incapacity with total disregard for her life and safety in order to achieve sexual gratification and to appease his curiosity. Naval Cadet Remington knew she was especially vulnerable when she consumed alcohol as a result of her lack of awareness of an appropriate limit to ensure drinking a quantity safe for her. He knew that two weeks prior, when she turned eighteen, she had a near-death experience due to an over-consumption of alcohol, yet the offender set the stage to render her more vulnerable by funding her alcohol consumption that contained a high concentration of alcohol served in glasses designed to be consumed speedily. She found herself alone with him in his room, trusting him and believing that he would ensure her safety at a time when she was sick, distressed and incapacitated.
- (c) The application of force used and the series of sexual acts that the victim was subjected to. The victim endured a series of sexual acts during her ordeal, from forced vaginal penetration with Naval Cadet Remington's fingers and penis, to being pulled from the bed in order to perform fellatio while she was on her knees, then on her buttocks on the cold floor while she was sick from over consumption of alcohol. She recalled during the material time urinating on the floor, vomiting and being ferried to the washroom by the offender. Naval Cadet Remington admitted choking her, first saying he was just resting his hand on her neck, then saying he squeezed but released the pressure to ensure she could breathe. The Court rejects the defence's contention that the choking should not be considered aggravating. The fact that the offender previously mentioned to the victim his interest for erotic asphyxiation does not, in any way, nullify the high degree of force used when the offender choked the victim. Further, prosecutorial discretion dictates that charges that meet the legal threshold

may be laid, and this discretion extends to the decision to lay a less serious charge, or to lay only one charge when more charges could be laid, as the case may be. In this case, the prosecution proved beyond a reasonable doubt that the offender pressed his hands around the victim's neck during the sexual assault in a way that interfered with her breathing. This aspect is another circumstance surrounding the commission of the offence that I should take into consideration. Therefore, I accept that the act of choking constitutes an aggravating factor.

- (d) Warnings being ignored: Naval Cadet Remington had several warnings that night that he completely ignored. While at St-Maurice Mess, a senior student approached Naval Cadet Remington to warn him about the victim's recent health-related incident caused by alcohol consumption, asking him to ensure that the victim would drink alcohol in moderation.
- (e) Connection to the service: The offence took place in military facilities.
- (f) Omission to use condom: The forensic evidence showed the presence of semen in the victim's vaginal swab, consistent with a sexual activity occurring without the use of a condom. The omission to use a condom has been recognized by the jurisprudence as being an aggravating factor.
- (g) Evidence of impact on the victim: I have accepted the evidence of E.H., combined with the record and the evidence accepted at the trial. Consequently, I find that the victim has suffered, and continues to suffer emotionally from being subjected to a major sexual assault. This has had an impact on her health, quality of life, social life and on financial, professional and academic endeavours.

Mitigating factors

[70] The Court also accepted counsel's submissions regarding mitigating circumstances and took into consideration that Naval Cadet Remington has no prior criminal convictions; is a first-offender and is young.

Parity

[71] Having considered the circumstances surrounding the commission of the offence and the offender's personal situation, the Court examined precedents for similar offences to determine whether the submission is similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. Sentences imposed by military tribunals in previous cases are useful to appreciate the kind of punishment that would be appropriate in this case.

[72] The Court was informed of court martial cases similar to the circumstances of this case. While the cases submitted by counsel were generally relevant, the case of *Thibault*

is easily distinguishable because of the presence of compelling mitigating factors present in that case that are inexistent here. Additionally, I considered more recent cases such as *R. v. Stewart*, a very similar case, with the difference that after a contested trial, counsel submitted a joint submission for a twenty-four-months' imprisonment. The joint submission was accepted by the Court.

[73] After a review of these precedents, the Court concludes that defence proposed sentence is at the very low end on the range of punishment. In fact, for major sexual offences, such as in this case, the range is more toward twenty-four to thirty-six months' imprisonment.

Principles of sentencing deserving greatest emphasis

[74] In light of the offence to which Naval Cadet Remington was found guilty and in light of the circumstances of its commission, the fundamental purposes of sentencing shall be achieved by imposing a sanction that has the objectives of deterring the offender and others from adopting the same conduct and to denounce unlawful conduct. When the objectives of sentencing deserving greatest emphasis are denunciation and deterrence, a more severe sentence is warranted. That said, the offender's youth, his ongoing academic studies and his voluntary disclosure of the finding of guilt to the college, his apology in Court, and more importantly, his breaking down and admission of guilt to Dr Kelln, are positive signs toward rehabilitation.

[75] Therefore, while the emphasis of Naval Cadet Remington's sentence must be placed on general and specific deterrence as well as denunciation, I must ensure that the sentence will still allow him the chance to be rehabilitated. Consequently, in light of the evidence before me, including the aggravating and mitigating factors as well as the personal situation of the offender, and considering the appropriate range of punishment for a major sexual assault, a period of twenty-four months' imprisonment is the least severe sentence required to maintain the discipline, efficiency and morale of the CAF. I am also satisfied that Correctional Service Canada offers services that will help Naval Cadet Remington on his path to rehabilitation. But for his apology in Court and his recanting to the forensic psychologist, which are indication of steps toward rehabilitation, I would have imposed a lengthier period of incarceration.

Suspension:

The suspension of the punishment of imprisonment

[76] The defence submitted that the punishment of imprisonment that I may impose, should be suspended. Subsection 215(1) of the *NDA* provides that:

If an offender is sentenced to imprisonment or detention, the execution of the punishment may be suspended by the service tribunal that imposes the punishment or, if the offender's sentence is affirmed or substituted on appeal, by the Court Martial Appeal Court.

[77] This provision applies only if the sentencing judge has determined that the offender is to be sentenced to a punishment of imprisonment or detention, after having applied the proper sentencing principles appropriate in the circumstances of the offence and the offender.

[78] In the absence of legislated criteria for suspension, military judges sentencing offenders at courts martial have developed over time and applied two requirements which must be met (see *R. v. Boire*, 2015 CM 4010, *R. v. Paradis*, 2010 CM 3025, *R. v. Masserey*, 2012 CM 3004). More recently, it was found that the test has not been affected by legislative changes. (See also *R. v. Cadieux*, 2019 CM 2019 and *R. v. Lévesque* 2020 CM 5014).

[79] To obtain the suspension of a sentence of imprisonment or detention, the offender must demonstrate, on a balance of probabilities, that his or her particular circumstances justify a suspension of the punishment of imprisonment or detention. If the offender has met this burden, the court must consider whether a suspension of the punishment of imprisonment or detention would undermine the public trust in the military justice system in regard to the circumstances of the offence and the offender including, but not limited to, the particular circumstances justifying a suspension.

Should the punishment of imprisonment be suspended?

[80] In this case, Naval Cadet Remington submitted that his current condition, which requires a specialized treatment not funded by the province, would justify suspending the sentence of imprisonment. In support of this submission, defence counsel referred to the expert opinion of Dr Kelln, who believes that Naval Cadet Remington requires five to eight sessions of treatment on a weekly basis, with an additional eight sessions for follow-up at his own expense for a total of six to fifteen months.

[81] The Court noted that Dr Kelln did not state that the offender cannot be sentenced to imprisonment. Naval Cadet Remington is not in a situation where his continuing mental condition may create a situation in which a term of imprisonment is more severe for him than it would be for an offender without mental health difficulties. The expert also did not say that it is pressing or urgent that Naval Cadet Remington start these treatments, or that imprisonment would jeopardize his chances for rehabilitation. The expert's opinion on that issue is oriented towards an eventual need for specialized treatment for the offender and a requirement to investigate other, less alarming psychological issues. He spoke about the offender being at the lower end of the moderate risk of reoffending, and how he can manage and reduce these risks of reoffending by adapting the Good Lives Model and by obtaining the specialized treatments. Dr Kelln also stated that he was unaware or unsure whether the specialised treatments in relation to IP use were available to the offender at correctional facilities.

[82] The Court also noted that, not only has Naval Cadet Remington not begun any treatment, he has not taken serious steps to find a specialist who offers the required specialized treatment. The steps the offender took to attend the Healthy Relations

Program offered by the John Howard Society of Nova Scotia which led to his name being added to the waiting list, are positive steps for his rehabilitation, but they are not sufficient to justify the suspension of his sentence of imprisonment, particularly in light of the expert's testimony that this program is not suitable to Naval Cadet Remington because the offender has never been in an intimate relationship. Therefore, absent evidence that the offender requires immediate treatments, and that such treatments are unavailable in federal facilities, he has not demonstrated, on a balance of probabilities, that his particular circumstances justify a suspension of the punishment of imprisonment.

[83] Even if I had come to a different conclusion on the first criterion, a suspension of the punishment of imprisonment in this case, in light of the gravity of the offence and of the circumstances in which it was committed, and the harmful, both short and long term effects inflicted on the victim, would undermine the public trust in the military justice system. Consequently, the carrying into effect of the punishment of imprisonment will not be suspended.

Ancillary orders

[84] Subsection 227.01(1) of the *NDA* provides that when a court martial imposes a sentence on a person for an offence referred to in paragraph (a) or (c) of the definition of a designated offence in section 227, it shall make an order requiring the person to comply with the *Sex Offender Information Registration Act (SOIRA)* for the applicable period specified in section 227.02. The purpose of that order is to make available information of convicted sexual offenders in order to help police investigate other offences.

[85] A sexual assault under section 271 of the *Criminal Code* is an offence within the meaning of paragraph (a) of the definition of "designated offence" in subsection 490.011(1) of the *Criminal Code* that is punishable under section 130 of the *NDA*. Because courts martial proceed by indictment only, the duration of that *SOIRA* order must be for no less than twenty years since section 271 of the *Criminal Code* provides for a maximum imprisonment of no more than ten years (see subsection 227.02(2) of the *NDA*; *R. v. Dixon*, 2005 CMAC 2 at paragraph 23; *R v. Nguyen*, 2011 CM 4020 at paragraph 25, *R. v. J.L.*, 2021 CM 2004). The Court therefore makes an order requiring Naval Cadet Remington to comply with the *SOIRA*.

[86] Further, because the offender was convicted of a primary designated offence pursuant to section 487.04 of the *Criminal Code*, the Court makes an order authorizing the taking from the offender of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis, pursuant to section 196.14 of the *NDA*.

[87] Finally, I have also considered whether this is an appropriate case for a weapons prohibition order, as stipulated under section 147.1 of the *NDA*. In this case, the prosecution has taken the position that a weapon prohibition order was not required. In consideration of Naval Cadet Remington's particular situation and of the circumstances of the commission of the offence, such an order is neither desirable nor necessary. Even

though the offence of sexual assault constitutes a crime involving violence against another person, in the case before the Court, violence with a weapon against the victim was not used, threatened or attempted. I will therefore not make an order to that effect.

Conclusion

[88] The need for general and specific deterrence as well as denunciation can only be met with a sentence of imprisonment for twenty-four months. This punishment is the least severe that would achieve discipline and morale in the CAF.

[89] Naval Cadet Remington's actions on the evening of 3 November 2018, are repugnant. He provided alcohol to a sister in arms who he knew was particularly vulnerable to over-consumption of alcohol. He took advantage of a highly intoxicated fellow soldier who considered him her best friend and used her body for his own pleasure and sexual curiosity, with complete disregard to her safety and well-being. His punishment must reflect these troubling aspects of this case while not negating his chances for rehabilitation in light of the steps he took toward it. Indeed, he is young, later admitted his culpability, acknowledged his personal challenges, apologized and disclosed his situation to the college he attended. But for these steps he took toward rehabilitation, the Court would have considered imposing a longer period of incarceration.

FOR THESE REASONS, THE COURT

[90] **SENTENCES** Naval Cadet Remington to imprisonment for a period of two years.

[91] **ORDERS** Naval Cadet Remington to comply with the *Sex Offender Information Registration Act*.

[92] **ORDERS** the taking of the number of samples of bodily substances that is reasonably required for the purpose of forensic DNA analysis.

[93] This sentence was passed at 1537 hours, 22 April 2022.

Counsel:

The Director of Military Prosecutions as represented by Major J.D.H. Bernatchez, Lieutenant-Colonel M. Pecknold and Captain M.G. Gouthro

Lieutenant(N) B. Wentzell and Lieutenant-Colonel A. Bolik, and Lieutenant-Commander F. Gonsalves, Defence Counsel Services, Counsel for Naval Cadet L.R. Remington