COURT MARTIAL

Citation: *R. v. Turner*, 2022 CM 4002

Date: 20220128
Docket: 202053

Standing Court Martial

Canadian Forces Base Kingston
Kingston, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer V.N.E. Turner, Offender

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

Restriction on publication: Pursuant to section 179 of the *National Defence Act* (*NDA*), the Court directs that any information obtained in relation to the proceedings of the Standing Court Martial of Warrant Officer Turner which could identify anyone as a victim or complainant, including the person referred to in the charge sheet as "C.H.", shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] Warrant Officer Turner was found guilty of one charge of sexual assault following a trial by Standing Court Martial where I found that in August or September 2001, he intruded in the bed occupied by the complainant, identified as C.H. on the charge sheet, who had agreed to stay in his room on base following a night out in town. In the early morning, as she was sleeping, he sneaked under the sheets at the foot of the bed, restrained her legs, removed her undergarments and performed cunnilingus without her consent, despite her pleas for him to stop and her initial physical resistance.

[2] It is now my duty to impose an appropriate and fair sentence, on the basis of the evidence, precedents and arguments submitted by counsel for both parties in the course of the trial and the sentencing hearing.

Position of the parties

Prosecution

[3] The prosecution submits that Warrant Officer Turner should be sentenced to imprisonment for a period of eighteen months, as it is the punishment most likely to contribute to the maintenance of discipline, efficiency and morale in the Canadian Armed Forces (CAF) in the circumstances of this case and of this offender.

Defence

[4] The defence submits that Warrant Officer Turner should be sentenced to imprisonment for four to six months, combined with a reduction in rank to sergeant and a fine corresponding to one month's pay, in the amount of $7,417. The defence submits that the execution of the sentence of imprisonment be suspended in Warrant Officer Turner's circumstances and, in the alternative, should the Court find it cannot suspend the imprisonment, it should instead impose sixty days of detention. This, in the view of defence counsel, is the minimum sentence which should be imposed given the circumstances of the offence and of the offender, especially in consideration of the time that has passed since the offence.

Evidence

[5] The facts revealing the circumstances of the offence were heard in the course of the trial. In addition, evidence going to the character of the offender was also elicited from witnesses, including seven character witnesses called by the defence at trial.

[6] In the course of the sentencing hearing, the victim courageously read her impact statement which was entered as an exhibit. The prosecution did not call any further evidence and only introduced as exhibits the service records and pay information required in the application of the *Queen's Regulations and Orders for the Canadian Forces* (QR&O) paragraph 112.51(3).

[7] For its part, the defence called one witness, Ms Serena Manson, a social worker who has been providing mental health support to Warrant Officer Turner since October 2020. She provided information on the mental condition of the offender and on the next steps in obtaining a more precise assessment by medical professionals.

[8] In addition, two character reference letters from former and current colleagues and friends of Warrant Officer Turner were introduced as exhibits by the defence.

Facts

The circumstances of the offence

[9] The following facts, which I have accepted, are in my view sufficient to describe the circumstances of the offence:

(a) in August 2001, C.H. was a reservist with the Royal Winnipeg Rifles at the rank of corporal. She had just returned from a period of full-time training at Canadian Forces Base (CFB) Wainwright. Warrant Officer Turner was a regular force infantry master corporal posted with the 2nd Battalion of Princess Patricia's Canadian Light Infantry (2 PPCLI) and had been employed as an instructor on a course at the Minto Armouries in Winnipeg. C.H. had friends on that course but had no professional interaction with Warrant Officer Turner prior to or at the time of the offence;

(b) one evening in August or September 2001, C.H. met Warrant Officer Turner at a bar in Winnipeg where she had gone with a friend. She engaged in conversation with Warrant Officer Turner throughout the evening. Near closing time, she accepted an invitation from Warrant Officer Turner and his friend Mr Baker to go back to the Kapyong barracks at CFB Winnipeg for drinks, a place she had gone to before and knew well as she was a reservist and had many friends residing there at the time. Upon arriving at the barracks, the three proceeded to Warrant Officer Turner's room and shortly others turned out for an after-party;

(c) the people present mingled and drank for a while before eventually petering out, retiring back to their respective rooms to go to bed. Throughout that time C.H. was observed getting along very well with Warrant Officer Turner, chatting and laughing as she had done previously at the bar, in what was qualified as "a group within the group". At one point, Mr Baker was the only person present with them and the situation was such that it became clear that C.H. would be spending the night in Warrant Officer Turner's room. It was not unusual for guests to stay over, as there was a couch in most rooms, in part, for that purpose. Mr Baker announced that he would retire to his room for the night;

(d) C.H. agreed to stay overnight in Warrant Officer Turner's room, having obtained assurances from him that she would be fine. She agreed to wear a T-shirt and probably shorts given to her by Warrant Officer Turner so she would be more comfortable. She also agreed to sleep in Warrant Officer Turner's bed given his insistence as she was the guest. After some banter back and forth, they went to sleep; she in the bed and him on the couch;

(e) a few hours later, early in the morning, C.H. was awakened by Warrant Officer Turner sneaking in under the sheets at the foot of the bed, touching and restraining her legs. In a serious tone, she asked what he was doing. He replied that he was "looking for the little man in the canoe" an expression which she found disgusting. She protested, trying to push him away and protect her vaginal area but he overpowered her, removed her underwear and shorts and started performing cunnilingus on her. She froze. C.H. testified that, after a while, probably realizing that she was not playing "hard to get" and sensing that she was not into it, Warrant Officer Turner stopped and got away from her. She immediately got up, dressed and asked to be driven back to the bar to recover her vehicle. Warrant Officer Turner obliged; and

(f) C.H. testified that she did not see Warrant Officer Turner again in Winnipeg or anywhere else until 2017, after she was posted to CFB Kingston to work in financial administration, including the settlement of travel and relocation claims for CAF members. Early in her tenure, she was invited by her boss to meet someone she would have to work with from time to time in relation to claims. She said she stepped in an office and was introduced to Warrant Officer Turner. She was shocked to see him, even more so that he claimed not to remember her. Every time she would cross paths with him she became anxious and had flashbacks from their negative interaction of 2001. In 2019, she complained to police, eventually leading to this trial.

[10] It must be noted that Warrant Officer Turner claims having no recollection of the events that were just described or of C.H. This summary of the circumstances of the offence is therefore based on what the Court accepts from the testimony of C.H. and on the testimony of Mr Baker who was, by all accounts, an entirely credible witness.

The circumstances of the offender

[11] Warrant Officer Turner is a fifty-year-old signal technician. In less than two months, Warrant Officer Turner will have served twenty-eight years in the CAF. He enrolled in the infantry in March 1994. Following basic and battle school infantry training, he joined the 2 PPCLI in Winnipeg. Two years later, he was training for his first deployment to a conflict zone, deploying to Bosnia for a six-month tour in January 1997. He would serve again in that country from 5 September 2000 to 7 April 2001. Upon returning from his second Bosnian deployment, Warrant Officer Turner was appointed master corporal and was residing on base at Kapyong barracks on CFB Winnipeg until the fall of 2001. It is during that period that the offence was committed.

[12] Less than a year after returning from Bosnia, in the aftermath of the tragic events of 11 September 2001, Warrant Officer Turner was deployed again, this time in Afghanistan as a member of the first Canadian infantry battle group deployed in that challenging theatre. During his tour of duty, Warrant Officer Turner was actively

engaged in combat operations against hostile forces in extremely difficult conditions in a leadership role. Shortly after his return from that deployment, Warrant Officer Turner reoriented his career to the Communications Branch, attending the Canadian Forces School of Communications and Electronics (CFSCE) in October 2003. This led to a first posting to the headquarters and signals squadron in Edmonton in 2004, where he would serve for the next ten years in various units and positions, including a fourth extended deployment to Afghanistan in 2006. Warrant Officer Turner has been posted to Kingston since 2014. He was promoted to sergeant in 2015 and to his current rank in July of 2021.

[13] The evidence from character witnesses and letters reveal that Warrant Officer Turner's conduct and performance was entirely satisfactory throughout his long career. He rose steadily through the ranks and accepted increased responsibilities commensurate with each position he held and the experience he gained in demanding occupations and environments. A shy and socially reserved person, Warrant Officer Turner nevertheless led, trained and guided many soldiers, men and women in a professional fashion, domestically and on four occasions abroad. His career profile may not be the most flashy I have seen but it reveals an unfaltering loyalty to service and the CAF, selfless dedication to his duties, his subordinates and his colleagues at, no doubt, some costs to himself. I believe Master Warrant Officer Campbell's words are fitting: Warrant Officer Turner is an excellent soldier who has given the best years of his life to his country and asked for nothing in return.

[14] The evidence reveals that the charge and the proceedings of this court martial have imposed a toll on Warrant Officer Turner's mental health. He has been seeing a social worker since October 2020, shortly after the charge was laid. The social worker who testified for the defence explained that her role has been to offer psychosocial support, a solution-oriented process aimed at offering tools to assist persons experiencing difficulties with stressors in their life. It is understandable that the guilty verdict did not help the stress that Warrant Officer Turner experiences. In the course of a meeting with Warrant Officer Turner just over a week prior to the sentencing hearing, the social worker recommended that Warrant Officer Turner be seen for a medical assessment in general mental health with a view to determine his needs for mental health diagnosis and treatment.

[15] There is significant uncertainty as it pertains to Warrant Officer Turner's future as a member of the CAF. His conviction and the completion of these proceedings, regardless of the sentence imposed, will lead to an administrative review of his career status which could result in Warrant Officer Turner being compulsorily released from the CAF. Having minimal education, it is submitted that his future employment prospects are limited. At the same time, his length of service makes him eligible for an immediate annuity.

The impact of the offence

[16] The particularity of this case is that the offence occurred over twenty years ago. This length of time cannot be ignored. On the one hand it is important to recognize that, in those twenty-some years, the offender has made a significant contribution to society and the CAF without committing any offence. On the other hand, it is impossible to ignore the suffering that the offence inflicted upon the victim throughout those years.

[17] The Victim Impact Statement that C.H. courageously read at the hearing reveals the severe and lasting impact that the offence had on her and those close to her for many years:

(a) the initial shock and disbelief;

(b) the self-blaming for having allowed herself to be assaulted;

(c) the reasons she thought she would not be believed;

(d) the unsuccessful attempts to forget about the assault which never prevented the anguish to periodically resurface and impede the relationships she had;

(e) the shock of seeing Warrant Officer Turner again in 2017 and the ensuing impact on her mental health and marriage;

(f) the challenges brought by the requirements of the justice system; and

(g) finally, some hope that maybe the road to healing has opened up.

This summary does not do justice to the statement read in court. I will touch on the impact of the offence further in these reasons but, before turning to the analysis of the law, I wanted to state my admiration for C.H.'s courage and resilience, especially throughout the trial process, which she attended in its entirety.

Analysis

The purpose and objectives of sentencing

[18] The purpose, objectives and principles applicable to sentencing by service tribunals are found at sections 203.1 to 203.4 of the *NDA*, reproduced at QR&O article 104.14. As provided at section 203.1 of the *NDA*:

> **203.1 (1)** The fundamental purposes of sentencing 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.

> **(2)** The fundamental purposes shall be achieved by imposing just sanctions that have one or more of the following objectives:
>
> **(a)** to promote a habit of obedience to lawful commands and orders;
>
> **(b)** to maintain public trust in the Canadian Forces as a disciplined armed force;
>
> **(c)** to denounce unlawful conduct;
>
> **(d)** to deter offenders and other persons from committing offences;
>
> **(e)** to assist in rehabilitating offenders;
>
> **(f)** to assist in reintegrating offenders into military service;
>
> **(g)** to separate offenders, if necessary, from other officers or non-commissioned members or from society generally;
>
> **(h)** to provide reparations for harm done to victims or to the community; and
>
> **(i)** to promote a sense of responsibility in offenders, and an acknowledgment of the harm done to victims and to the community.

[19] As can be seen, the fundamental purposes of sentencing are twofold, recognizing the dual nature of the Code of Service Discipline which, as specified by the Supreme Court of Canada (SCC), not only serves to regulate conduct that undermines discipline and integrity in the CAF, but also serves a public function by punishing specific conduct which threatens public order and welfare (*R. v. Généreux,* [1992] 1 S.C.R. 259 at page 281).

[20] Also, the objectives that a just sanction must try to achieve are mainly associated with the CAF, but also include considerations reaching outside the bounds of the military. For instance, the maintenance of public trust and acknowledgement of the harm done to victims who may belong to the larger civilian community.

Objectives to be applied in this case

[21] I agree with the prosecution that the circumstances of this case require that the focus be primarily placed on the objectives of denunciation and general deterrence in sentencing the offender.

[22] Indeed, the offence in this case involves a violent act which, regardless of the fact that it was committed over twenty years ago, calls for denunciation. Sexual assaults are crimes that must be denounced and must be addressed by a sentence that communicates society's condemnation of the offender's conduct, in both its civilian and military components. As Lamer C.J. wrote in *R. v. Proulx,* 2000 SCC 5 at paragraph 102, "a sentence with a denunciatory element represents a symbolic, collective statement that the offender's conduct should be punished for encroaching on our

society's basic code of values". This is particularly applicable here. It is also important that the sentence serves as a deterrent to others who may be tempted to engage in the same type of conduct.

[23] That being said, the unusual feature of this case is that it involves an offender who has made a positive crime-free contribution to the CAF and Canadian society for over twenty years since the offence. The need for specific deterrence in these circumstances is decreased and, in light of the character evidence that has been introduced at trial and in the course of the sentencing hearing, is estimated as being minimal.

[24] As for most cases, the objective of rehabilitation remains important. As stated in my findings, the offender is not a monster. Over twenty years ago, a no doubt different Warrant Officer Turner made a significant and consequential error in his interaction with C.H. one night. The sentence must not be so excessive as to create additional barriers to the rehabilitation of this first-time offender who still has the potential to make a positive contribution to society. The prosecution concedes that a discount may need to be applied to respect the principle of rehabilitation but not at the detriment of the other principles of sentencing that must be addressed. A meaningful sentence needs to be imposed in light of the serious crime committed. Therefore, this case calls for a delicate balancing of the sentencing objectives at play.

[25] Having established the objectives to be pursued, it is important to discuss the principles to be considered in arriving at a just and appropriate sentence.

Main principle of sentencing: proportionality

[26] The most important of these principles is proportionality. Section 203.2 of the *NDA* provides that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. In conferring proportionality such a privileged position in the sentencing scheme, Parliament acknowledges the jurisprudence of the SCC which has elevated the principle of proportionality in sentencing as a fundamental principle in cases such as *R. v. Ipeelee*, 2012 SCC 13. At paragraph 37 of *Ipeelee*, LeBel J. explains the importance of proportionality in these words:

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

[27] The principle of proportionality thus obliges a judge imposing sentence to balance the gravity of the offence with the degree of responsibility of the offender.

Respect for the principle of proportionality requires that the determination of a sentence by a judge, including a military judge, be a highly individualized process.

Other principles

[28] Having reviewed the circumstances directly relevant to the principle of proportionality, I now need to discuss other principles relevant to the determination of the sentence, which are listed as the paragraphs of section 203.3 of the *NDA* as follows:

> (a) a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender . . .

A number of aggravating circumstances are listed in this section, none of them being applicable here.

> (b) a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;

That is known as the principle of parity.

> (c) an offender should not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances;
>
> (c.1) all available punishments, other than imprisonment and detention that are reasonable in the circumstances and consistent with the harm done to victims or to the community should be considered for all offenders, with particular attention to the circumstances of Aboriginal offenders;
>
> (d) a sentence should be the least severe sentence required to maintain discipline, efficiency and morale of the Canadian Forces;

Those paragraphs embody the principle of restraint, especially for Aboriginal offenders; and, finally,

> (e) any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[29] I will now go over some of these factors in light of the circumstances of this case.

Aggravating and mitigating factors

[30] As provided in the enumeration of principles of sentencing, a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating either to the offence or the offender. That being said, one aggravating or mitigating factor, in isolation, cannot operate to increase or decrease the sentence to a level that would take it outside of the range of what would be an adequate sentence. In taking these factors into consideration, the Court must keep in mind the objective gravity of the offences. The offender was found guilty of sexual assault under

section 271 of the *Criminal Code*, which brings a maximum punishment of imprisonment for ten years. Objectively, it is a very serious offence.

[31] The circumstances of the offence and the offender in this case reveal three aggravating factors as follows:

(a) the circumstances of the offence reveal the use of a certain amount of violence to overcome the physical resistance of the victim and disregard of her verbal objections;

(b) the offence occurred when the victim was asleep and vulnerable, in a place where she should have been safe, in the company of another CAF member on a military establishment; and

(c) the profound impact that the offence had on C.H., as evidenced by her Victim Impact Statement to which I alluded before. This is not unforeseeable harm. Orders and Directives on sexual misconduct have for years and still describe the negative impact of this type of conduct on security, morale, discipline and cohesion in the CAF. In simple terms, these behaviours weaken the CAF as it has been amply demonstrated in this case given the harm caused to the victim and her operational effectiveness as a contributing member of our defence team.

[32] The Court also considered the following as mitigating factors arising either from the circumstances of the offence or the offender:

(a) first, the fact that Warrant Officer Turner is a first-time offender, the character evidence heard at trial and on sentencing demonstrating that the offence was out of character for him and reveals that he made the significant mistake of grossly miscalculating how his bold actions would be received by the victim, asleep at the time of the unwanted sexual touching;

(b) second, the period of over twenty years that has elapsed since the commission of the offence, during which Warrant Officer Turner not only did not commit any further offence but also performed admirably as a soldier, contributing significantly to the CAF in two important deployments to Afghanistan, one of which in an active combat role;

(c) the indirect consequences of the offence and the conviction which include the challenge that Warrant Officer Turner faces in overcoming the stigma attached to being identified as a convicted sex offender, mostly within the military environment where he continues to serve, the uncertainty that he faces as it pertains to the future of his military career and his ongoing challenges dealing with stressors and a potential mental health diagnosis and treatment. These factors will make rehabilitation

more difficult in his unique circumstances, especially as he is facing a potential transition to civilian life; and

(d) the significant contribution made by Warrant Officer Turner to the CAF for almost twenty-eight years which needs to be considered separately and globally given that the dedication to service it exemplifies demonstrates Warrant Officer Turner's potential to make a positive contribution to Canadian society in the future.

[33] I recognize that this list of aggravating and mitigating factors does not exactly correspond to what was argued by counsel. They are the factors that the Court accepts in the way in which I have decided to list them, often combining different factors listed by counsel in one factor. I have not accepted all factors that were proposed by the defence, as some constitute core characteristics of the offence and others absence of aggravating factors. Finally, some have not been substantiated. This includes collaboration with police by giving a statement. If that is the case, which is not in evidence, it would likely be to state a version which was reproduced in testimony of the offender at trial, which I rejected. Respectfully, I fail to see how a previous iteration of a version that has not been believed could mitigate the sentence.

Parity and sentencing range

[34] The next principle to be taken into account is the principle of parity. The parties have brought a number of cases to my attention in attempting to demonstrate an appropriate range of sentences imposed in the past for similar offences and to show how their respective submissions are reasonable in relation to that range, distinguishing them from the facts in this case. Unsurprisingly, the prosecution mentioned what it perceives to be the aggravating features of this case while the defence instead focused on the mitigating features.

[35] The baseline for the determination of an appropriate sentence must, in my opinion, be grounded in the offence or offences for which the offender was found guilty. Amongst other things, it is the statute that creates the offence which provides the range of punishments available, hence providing the sentencing judge with arcs of legality of a sentence while also providing Parliament's view on the objective gravity of the offence. The maximum punishment for sexual assault is ten-year's imprisonment with no minimum.

[36] The challenge with the offence of sexual assault is that it encompasses a broad range of actions, from unwanted touching of a sexual nature to rape. This, of course, leads to a broad range of sentences being imposed and, at times, criticism of disparity in sentencing between judges both within and between various jurisdictions. I am aware of the decision of the Alberta Court of Appeal in *R. v. Arcand*, 2010 ABCA 363, which includes a deep and thorough analysis of sexual assault offences and their sub-categorization associated with starting points for sentencing. The prosecution concedes that the categorization of offences with a starting point for sentencing is not applicable

to the military justice system, but stressed the significant harm caused by sexual assaults, hence the need for punishment through imprisonment.

[37] Indeed, the circumstances of this case reveal an intrusion in the bed in which the victim was sleeping, forced removal of her underwear and performance of forced cunnilingus over her objections for a short period of time. It is a comparatively serious sexual assault. It is an act of violence, involving force applied without consent. That kind of conduct carries inherent harm not only to the victim but also to society. It is a serious violation of a person's bodily integrity and an equally serious violation of their sexual autonomy and freedom of choice. These breaches of one's physical integrity and privacy are indisputable and undeniable. The harm caused by sexual assault includes the likelihood of serious psychological or emotional harm, which indeed materialized in this case.

[38] As both counsel have stated, there is no precedent exactly on point in comparison with the circumstances of the offence and of the offender in this case.

[39] A number of military precedents were produced. At the outset, I must state that I considered the cases of *R. v. Royes*, 2013 CM 4034, *R. v. Beaudry*, 2016 CM 4011 and *R. v. McGregor*, 2019 CM 4016 in my deliberations but found that the circumstances of the offences in these cases to be far more serious than what we have here so as to be unhelpful.

[40] The relevant military cases in my view are :

(a) *R. v. Cooper*, 2018 CM 2014, where the panel of a General Court Martial returned a verdict of guilty on two charges, sexual assault and ill-treatment of subordinate, finding that Master Seaman Cooper had gone into the bunk of a sleeping subordinate on ship and performed fellatio on him without his consent after encouraging his victim's previous intoxication. A joint submission was accepted by the sentencing military judge who imposed imprisonment for a period of twenty-two months, dismissal and a reduction in rank to ordinary seaman;

(b) *R. v. Rivas*, 2011 CM 2012, where a corporal was found guilty by the panel of a General Court Martial of sexual assault and drunkenness for having intruded into the room of a female colleague and engage in an act of cunnilingus while she was asleep. The military judge rejected a joint submission of counsel for a sentence of ninety days' detention and a fine of $2,000, instead imposing a sentence of imprisonment for a period of nine months. The verdict was quashed on appeal (*R. v. Rivas*, 2012 CMAC 1). In its reasons, the appeal court made the point of stating that its reasons should not be understood as endorsing the sentence imposed by the military judge. This remark may well have been made in relation to the process by which the joint submission was disregarded at trial, specifically the failure of the military judge to advise counsel that he was

considering not accepting the joint recommendation and providing an opportunity to justify the proposal, on the basis of the law previously set by the Court Martial Appeal Court (CMAC) in *R. v. Taylor*, 2008 CMAC 1, at paragraph 25;

(c) *R. v. Cadieux*, 2019 CM 2019, where a punishment of sixty days' detention, suspended, was imposed along with a severe reprimand, following a conviction for sexual assault involving forced kissing initiated by the victim after the offender had approached the bed she was sleeping in, in a tent reserved for female members, in the course of a deployment to Jamaica. The offender was also found guilty of one charge of drunkenness; and

(d) *R. v. Brooks*, 1998 CM 30, where Corporal Brooks was found guilty of having entered the bed of a sleeping colleague, while they were both on a rest and relaxation break in Budapest in the course of a deployment to Bosnia. The victim was intoxicated at that time, a fact known to the offender, who climbed on top of her and woke her up by requesting fellatio. After she refused, he digitally penetrated her and had sexual intercourse without asserting whether she consented. He was sentenced to eight months of imprisonment for sexual assault.

[41] These cases show a range of sentences from a high of twenty-two months' imprisonment in *Cooper*, combined with dismissal and a reduction in rank to sixty days of detention, suspended, combined with a severe reprimand in *Cadieux*.

[42] The prosecution submits that *Cadieux* relates to a very minor sexual assault, hence be considered below the normal range. Yet, the prosecution did not consider the case to be so insignificant at the time of sentencing, as it was requesting a term of imprisonment of nine to fourteen months combined with dismissal from the CAF, essentially a more significant punishment than what is being requested here. Of course, the defence relies on *Cadieux* as a precedent representing the low end of the spectrum which justifies its recommendation for a similar sentence. I do believe that *Cadieux* is an anomaly but I cannot deny that it is there and that the defence may legitimately argue that it corresponds to the lower end of the range. That said, the circumstances in *Cadieux* are very different than this case and, as such, it does not constitute a determining precedent.

[43] On the other hand, the case that the prosecution relies on for the upper range, namely *Cooper*, also offers difficulties as a precedent given that the twenty-two months of imprisonment, dismissal and reduction in rank imposed was the result of a joint submission. It is well known that a number of matters may be appropriately considered by counsel engaging in negotiations to craft a joint submission on sentence and that the judge may not be privy to all of those details, as long as no misleading statements are offered. What the approval of a joint submission means is simply that the judge considers that the proposed sentence would not bring the administration of justice into

disrepute and would not be otherwise contrary to the public interest (*R. v. Anthony-Cook*, 2016 SCC 43). No more can be taken from such an approval, regardless of what comment a judge may make in his or her decision. The circumstances in *Cooper* are in many ways more severe than what we have here, especially the breach of trust involved and the assault on ship and on a subordinate, with operational consequences. The significant period of imprisonment proposed by counsel may well be the result of a number of unknown considerations which I will not speculate on, besides stating that there may have been a lot more in the conduct of Master Seaman Cooper than meets the eye.

[44] Counsel also offered a number of civilian precedents showing sentences for sexual assault. I do acknowledge the cases of *R. v. Alvarenga-Alas*, 2014 ONSC 4725 and *R. v. Shah*, 1996 CarswellOnt 2061, [1996] O.J. No. 2148. However, both of these cases reveal extraordinary circumstances which warranted exceptionally lenient sentences of fines for sexual assault convictions in circumstances arguably more severe than the circumstances here. It is argued that these sentences make the sentence imposed in *Cadieux* more reasonable than described by the prosecution. While it may be so, the exceptional circumstances of those two cases place them in the same category of *Cadieux*, namely anomalies. Those precedents, although part of the significant range of sentences for sexual assault, should generally have little influence on other sentences.

[45] More interesting is the case submitted by the defence in *R. v. M.D.*, 2018 ONSC 2792 where the manager of a nightclub was sentenced to nine months in jail followed by eighteen months of probation in relation to a sex act with a recently hired employee who was training as a bartender. Justice MacLeod describes the offence as follows:

> [5] The act took place in a secluded washroom on the second floor of the bar. The defendant admitted performing cunilingus [*sic*] on the complainant and to brief digital penetration of her vagina.
>
> [6] The complainant did not consent to this activity. She was too intoxicated to consent in any event and the defendant knew or ought to have known of her level of intoxication. Shortly after commencing the act, the defendant stopped what he was doing, took the complainant's underwear with him and left the washroom.
>
> [7] . . . This was not a case involving a prolonged assault, forcible confinement, extreme aggression, threats or coercion. It was a case of non-consensual sexual activity which is by definition an assault and an act of violence.
>
> [8] It was also an incident which took place in the workplace, committed by the complainant's supervisor in circumstances where she was highly vulnerable.

[46] As one would anticipate from an authority offered by the defence, this case in my view represents a sentence towards the bottom of the range, although it is well-reasoned and an inspiring precedent should I decide to be lenient.

[47] Acknowledging that the determination of a sentence, including the length of any sentence of incarceration is not a scientific exercise, it appears well set that, in relation to the principle of parity, the vast majority of sentences for sexual assault involve

imposition of sentences of imprisonment, with the exception of *Cadieux* which still involved a sentence of incarceration in the form of detention, albeit suspended. The proposition of the parties is in the range as they both propose imprisonment as main punishments. Therefore, I am concluding that a sentence of imprisonment is required in this case. I realize the significance of choosing a sentence resulting in the restriction of the liberty of Warrant Officer Turner, but in my opinion it is required in the circumstances of this case.

[48] There remains the question of the length of the period of imprisonment, on which I will comment shortly. Before doing so, it is appropriate to comment on the principle of restraint.

The principle of restraint

[49] The principle of restraint obliges me to sentence the offender with the least severe sentence required to maintain discipline, efficiency and morale in the CAF. In this case, I must consider all available punishments, paying particular attention to the circumstances of Warrant Officer Turner.

[50] As indicated previously, I am cognizant of the fact that in sentencing a first-time offender who is a productive member of society and for whom the events in question appear to be an anomaly, rehabilitation is important and the need for individual deterrence reduced. The principle of restraint requires that the court consider the least restrictive sanctions that are appropriate in the circumstances.

[51] The prosecution acknowledge that its submission on the length of the period of imprisonment took into consideration a “discount” for the rare circumstances of this offence, where the offender has led a law-abiding and productive life for over twenty years since the offence. Indeed, the man before the Court today is not the same as the man who committed the crime. The question is how much, if any, weight ought to be given to the lapse of time in crafting a fit sentence.

[52] The leading case on the treatment of time lapse in sentencing is *R. v. Spence* (1992), 78 C.C.C. (3d) 451 (Alta. C.A.), adopted by Juriansz J.A. for the Ontario Court of Appeal in *R. v. W.W.M*. (2006), 205 C.C.C. (3d) 410 (Ont. C.A). In *Spence*, at pages 454-456, the Court held that the only sentencing principles which may be affected by the lapse of time are those of individual deterrence and rehabilitation. Yet, the lapse of time does not in any way render inapplicable the principles of general deterrence and denunciation nor lessen their relevance. The Court in *Spence* dealt with sexual offences involving children, cases where there is typically significant periods of time that elapsed between the offences and their reporting to authorities, given the inherent vulnerability of children and the fact that their aggressors are often persons in authority. The situation is slightly different here, yet the nature of sexual offences and the trauma that they cause can arguably have similar effects on adults as they do on children. In any event, the Court in *Spence* had this to say about a potential “discount” of punishment at page 456:

> If the accused, during the intervening years, has led an exemplary life in all respects, including non-repetition of sexual offences, and upon the matter ultimately being reported to the authorities and during the resulting investigation and prosecution he is remorseful, then the principles of individual deterrence and rehabilitation may arguably, by themselves, not justify a stern sentence of the kind which would have been obligatory many years earlier. It will be noted, however, that if, despite having led an exemplary life, the offender lacks remorse, any potential discount must be less than it otherwise would have been.

[53] In this case, the accused has not shown remorse, a fact which, although not aggravating, minimizes the mitigating impact of the passage of time on the sentence to be ultimately imposed, including the duration of incarceration.

[54] It is important also to keep in mind that the mitigating factors relating to the passage of time as well as the character of the offender and his contribution to the CAF over the years cannot operate to take over the sentencing process at the detriment of other sentencing objectives, even in consideration of the principle of restraint. Indeed, the principles of denunciation and general deterrence require a punishment that is perceived as significant, even for an offender who has otherwise behaved admirably, given the circumstances of the offence.

[55] In that sense, I have to dismiss outright the alternative suggestion of the defence to impose a sentence of detention for sixty days if I am not to suspend the sentence of imprisonment as requested. First, this suggestion ignores the fact that suspension is a consideration which applies after the determination of a proper duration of a sentence of incarceration has been made. Second, detention for sixty days would in my view be too lenient a sentence to meet the objectives of denunciation and general deterrence at play here, even if combined with a significant fine and a reduction in rank.

[56] That said, I have also concluded that the principle of restraint can be applied to exclude the possibility of imposing the punishment of imprisonment for eighteen months recommended by the prosecution. That proposal appears to be based on the case of *Cooper*, which involved a joint submission following a guilty finding on two offences. Even if the sexual assault in that case was arguably less severe as to the force used, there were a number of significant aggravating factors, including up to three of the mandatory aggravating factors found at paragraph 203.3(a) of the *NDA*, namely the abuse of a position of trust, the harm to the conduct of operations and the fact that the offence was committed on a deployed ship in foreign waters.

[57] Recognizing that the principle of restraint demands that an offender not be deprived of liberty by imprisonment or detention if less restrictive punishments may be appropriate in the circumstances, its careful consideration mandates that I also consider what alternative punishments may be applicable, especially that alternatives may operate to decrease the required duration of any punishment of imprisonment.

[58] The sentence proposed by the defence requires that I consider the alternatives of reduction in rank and fine. I do not believe a fine to be an appropriate punishment for an offence against a person of the gravity that we have here. The reduction in rank

however may be appropriate, especially that the offender is still actively serving and has appeared in uniform throughout his trial. Reduction in rank is a visible expression of the disapprobation of the conduct of an offender and a recognition of the gravity of the offence committed, especially given the importance of rank in the military. Members of the military train and work hard to advance in rank, they can feel how painful it might be for an offender to have lost this visible indicia of status as a result of a conviction before a court martial. In that sense, a reduction in rank is an effective way to meet the objectives of denunciation and deterrence, general and specific. A reduction in rank also has an important indirect consequence of a reduction of the monthly pay of the offender so reduced, hence operating in a manner similar to a fine. As recognized by the CMAC in the case of *R. v. Reid and Sinclair,* 2010 CMAC 4, at paragraph 39, a reduction in rank is an important tool in the sentencing kit of the military judge even if, in this case, rank was not a factor in the commission of the offence.

[59] I wish to note that I am cognizant of the fact that a reduction in rank may be, in effect, of a limited duration if the offender is to undergo imprisonment and is released from the CAF on short notice, as is probable in this case. Nevertheless, the impact of an offender leaving this trial reduced in rank and having retired in the reduced rank is not insignificant.

Choosing a fit sentence

[60] I have determined that a sentence of imprisonment is required in this case and that it could be paired with a reduction in rank to take into consideration some of the mitigating factors and reduce the duration of imprisonment required.

[61] In determining the length of the sentence of imprisonment, I must settle on the minimum sentence necessary to maintain discipline, efficiency and morale of the CAF.

[62] I do believe that a period of twelve months of imprisonment is the minimum appropriate baseline to sanction the behaviour of Warrant Officer Turner given the significant gravity of the offence in the circumstances and the impact on the victim. That is if imprisonment were the only punishment imposed.

[63] This duration of twelve months would also be justifiable even in consideration of some of the mitigating factors I have identified above, specifically the good character and contribution of Warrant Officer Turner to the CAF and Canadian society

[64] Now, in consideration of the possibility of combining the punishment of imprisonment with a reduction in rank to achieve the objectives of sentencing, and in consideration of the significant and exceptional period of time that has passed since the offence, I believe it is appropriate to reduce the length of the sentence of imprisonment to nine months. That reduction also takes into consideration the rehabilitative needs of Warrant Officer Turner, especially in light of the mental health stressors that he needs to address, according to the evidence from his social worker.

[65] The period of imprisonment so reduced still meets the needs for denunciation and general deterrence, even if it is lenient, given the circumstances of the offence and the offender. The duration of the imprisonment is in the same zone than the military precedents of *Rivas* and *Brooks* which included an accompanying offence to sexual assault. It is also in the same zone as the civilian precedent of *M.D.*, a case where the offender was also recognized as a productive and law-abiding first offender who consequently benefitted from a measure of leniency. I am making these references to other cases to illustrate my view that the duration of imprisonment will likely be perceived as reasonable, hence will meet the objectives of denunciation and deterrence. I recognize, of course, that no two cases are exactly the same.

[66] I wish to stress that I have considered imposing a lesser period of imprisonment but I am incapable of imagining how a sentence of imprisonment for less than nine months could meet the objectives of denunciation and general deterrence that must be met to adequately sanction what is, in effect, a serious sexual assault which has had significant consequences on another member of the CAF team. I am arriving at this length of imprisonment in full consideration of the exceptional service rendered by Warrant Officer Turner over the years, but in the end, even in the throes of exemplary service, members can make mistakes and mistakes of the gravity we have here must be addressed by adequate punishment.

Suspension of the sentence of imprisonment

[67] The defence submits that the sentence should be suspended in consideration of the specific situation of Warrant Officer Turner, specifically his mental health challenges. Indeed, the carrying into effect of the punishment of imprisonment can be suspended under the authority of section 215 of the *NDA* which provides as follows, in its relevant portion:

> 215 (1) 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.

[68] I believe this provision makes it clear that the issue of suspension of a sentence of incarceration does not arise unless, and until, the sentencing judge has determined that the offender is to be sentenced to imprisonment or detention, after having applied the proper sentencing principles appropriate in the circumstances of the offence and the offender. We are at that stage now.

[69] The question of whether a custodial sentence should be suspended can be answered by the application of the two-step test first enunciated by d'Auteuil M.J. in *R. v. Paradis*, 2010 CM 3025, at paragraphs 74 to 89, which I accepted and outlined in *R. v. Boire*, 2015 CM 4010 at paragraph 23. This test is still valid despite the significant changes to section 215 of the *NDA* on 1 September 2018 which brought into play mandatory conditions to be imposed on an offender who benefits from the suspension

of a sentence of incarceration. Two requirements must be met for the suspension of a sentence of incarceration:

> (a) the offender must demonstrate, on the balance of probabilities, that his or her particular circumstances justify a suspension of the punishment of imprisonment or detention; and
>
> (b) 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 the circumstances of the offences and the offender including, but not limited to, the particular circumstances justifying a suspension.

[70] Counsel for Warrant Officer Turner submits that the offender's circumstances justify suspending the imprisonment on the basis that the mental health challenges he is suffering from would not improve if he were to be incarcerated. This submission is based on the testimony of the social worker who has seen Warrant Officer Turner for approximately ten one-hour sessions since October 2020. Yet the extent of the testimony of Ms Manson on this issue was that imprisonment would constitute a stressor on anyone. She was obviously not in a position to make a more precise assessment. That being said, she did recommend that Warrant Officer Turner be assessed medically following a meeting with him after he had been convicted. The fact is, however, that Warrant Officer Turner has not been diagnosed with a mental illness and he is not currently under any treatment or plan which would be jeopardized by his incarceration. He has simply been consulting a social worker to obtain assistance and tools given the difficulties he has been experiencing in dealing with stressors in his life, not the least of which was the charge he was facing.

[71] In fairness to the defence, I have refused to delay this sentencing hearing for an indeterminate period of time to allow Warrant Officer Turner to see a medical officer in order to be potentially referred to a psychiatrist for eventually getting diagnosed with a mental condition, or not. Part of the reason for not acceding to the request from the defence is that I believe allowing an offender to delay his or her sentencing indefinitely to allow medical consultations post-conviction to take place in the hope of maybe being diagnosed with a condition likely to reduce a potential sentence would likely bring the administration of military justice into disrepute. I believe the same considerations apply to the request for suspension of a custodial sentence in the absence of a current medical condition which would be aggravated should the execution of the sentence not be suspended. Warrant Officer Turner simply does not meet the first prong of the test. He has not demonstrated, on the balance of probabilities, that his particular circumstances justify a suspension of the punishment of imprisonment.

[72] As Warrant Officer Turner does not meet the first part of the test, I do not need to assess the second part. The request for the suspension of the execution of the punishment of imprisonment cannot be granted.

Orders which may be imposed

DNA

[73] In accordance with section 196.14 of the *NDA*, considering that the offence for which I have passed sentence is a primary designated offence within the meaning of section 196.11 of the *NDA*, I order, as indicated on the attached prescribed form, that the number of samples of bodily substances that is reasonably required be taken from Warrant Officer Turner for the purpose of forensic DNA analysis.

Sex offender registry

[74] In accordance with section 227.01 of the *NDA*, and considering that the offence for which I have passed sentence is a designated offence within the meaning of section 227 of the *NDA*, I order Warrant Officer Turner, as per the attached regulation form, to comply with the *Sex Offender Information Registration Act* for twenty years.

Consideration of weapons prohibition order

[75] Pursuant to paragraph 147.1(1)(a) of the *NDA*, since Warrant Officer Turner was found guilty of sexual assault which carries a ten-year maximum sentence of imprisonment and the charge itself constitutes a violent offence, this Court must consider whether it is desirable, in the interests of the safety of the person or of any other person, to make a weapons prohibition order. Based on the position taken by the prosecution and the time that has elapsed since the commission of the offence, I have concluded that it is not appropriate to impose a weapons prohibition order because such an order is neither desirable nor necessary for the safety of the offender or of any other person in the circumstances.

Conclusion and disposition

[76] As recognized by the SCC, the imposition of a sentence by a judge is not an entirely precise process. Guided by the principle of proportionality, I have done my very best to exercise judgment and arrive at a sentence that constitutes the absolute minimum to meet the requirement of justice in the circumstances of both the offence and the offender in this case, while impeding as little as possible the rehabilitation of Warrant Officer Turner. I am confident I have been able to strike the appropriate balance.

FOR THESE REASONS, THE COURT:

[77] **SENTENCES** Warrant Officer Turner to imprisonment for a period of nine months and to a reduction in rank to the rank of sergeant.

[78] **ORDERS**, pursuant to section 196.14 of the *NDA*, that the number of samples of bodily substances that is reasonably required be taken from Warrant Officer Turner for the purpose of forensic DNA analysis.

[79] **ORDERS** Warrant Officer Turner, pursuant to section 227.01 of the *NDA*, to comply with the *Sex Offender Information Registration Act* for twenty years.

Counsel:

The Director of Military Prosecutions as represented by Major A. Dhillon and Lieutenant(N) A. Keaveny

Captain D. Sommers, Defence Counsel Services, Counsel for Warrant Officer V.N.E. Turner