



COURT MARTIAL

Citation: *R. v. McKie*, 2023 CM 2012

Date: 20230512

Docket: 202217

Standing Court Martial

3rd Canadian Division Support Base Edmonton
Edmonton, Alberta, Canada

Between:

His Majesty the King

- and -

Warrant Officer B.A. McKie (retired), Offender

Before: Commander S.M. Sukstorf, M.J.

REASONS FOR SENTENCE

(Orally)

Introduction

[1] On 11 May 2023, at a Standing Court Martial (SCM), Warrant Officer (WO) McKie was convicted of the possession of prohibited devices, contrary to subsection 91(2) of the *Criminal Code*. The facts related to the case are set out in my decision on finding at *R. v. McKie*, 2022 CM 2011.

[2] The charge reads as follows:

FOURTH CHARGE

Section 130 of the
National Defence Act

**AN OFFENCE PUNISHABLE
UNDER SECTION 130 OF THE
NATIONAL DEFENCE ACT, THAT
IS TO SAY, POSSESSION OF A
PROHIBITED DEVICE, CONTRARY
TO SECTION 91(2) OF THE
CRIMINAL CODE**

Particulars: In that he, on or about 18 May 2021, at or near Edmonton, Alberta, did possess prohibited devices, to wit: six 30 round magazines.

Positions on sentencing

Prosecution

[3] The prosecution suggested that the Court should impose a fine in the amount of \$4,000 accompanied by a weapons prohibition order for ten years.

Defence

[4] The defence submits that based on the circumstances of this case, a just and appropriate sentence is that of an absolute discharge.

Circumstances of the offender

[5] WO McKie is forty-seven years old. He enrolled in the Canadian Armed Forces (CAF) in 1995, serving with the CAF until 29 January 2022, a period of twenty-seven years. While serving, he deployed to Bosnia Herzegovina on two separate occasions and deployed twice to Afghanistan. He is a recipient of the North Atlantic Treaty Organization (NATO) Medal for Former Yugoslavia, Canadian Peacekeeping Service Medal, NATO Medal for Operations in the Balkans, General Campaign Star (GWS) – SOUTH-WEST ASIA (SWA), GCS-SWA+1, Queen’s Diamond Jubilee Medal and Canadian Forces’ Decoration 1. He recently retired on a medical pension and is awaiting a determination on the limitations of his future employment.

[6] He was a mechanic by trade and retired as a Land Engineering Equipment Technologist. WO McKie is currently separated and is a single parent to one child while supporting several other children that split their time between himself and their mom. As a result of a very acrimonious separation, he is financially strained.

[7] During their marriage, he and his wife were foster parents and over the years fostered at least fourteen children. One of their daughters was adopted after being fostered by them for almost five years. She has an indigenous background, and WO McKie spends a great deal of time ensuring that she has exposure to her indigenous heritage.

[8] He is an avid hunter and having learned from his father, he has taught his son and has also exposed his daughter to the sport.

Purpose, objectives and principles of sentencing to be emphasized in this case

[9] When crafting a sentence, I must first consider the fundamental purpose and goal of sentencing which is to maintain the discipline, efficiency, and morale of the CAF. The fundamental purpose of sentencing is achieved by imposing a just punishment that meets one or more of objectives codified in the *National Defence Act (NDA)*. The objectives set out in the *NDA* are consistent with Canadian values and modelled upon similar provisions in the *Criminal Code* but adapted to the special circumstances associated with the military service in the CAF.

[10] The principle of proportionality has long been central to Canadian sentencing. The *NDA* codifies this “fundamental principle” at section 203.2.

[11] A just sentence is one which reflects the seriousness of the crime and fits the individual circumstances of the accused. Sentences must be imposed in accordance with the principles set out at section 203.3 of the *NDA*.

[12] The prosecution emphasized that those objectives of sentencing that the Court must consider are denunciation and deterrence.

[13] It is important to begin my analysis by laying out the different principles being advocated by counsel, as they set the framework for the crafting of an appropriate sentence.

Analysis

[14] In its recent decision in *R. v. Parranto*, 2021 SCC 46, the Supreme Court of Canada described sentencing as “one of the most delicate stages of the criminal justice process. It requires judges to consider and balance a multiplicity of factors and it remains a discretionary exercise.”

[15] The nine objectives of sentencing provided by Parliament guide military judges in the sentencing process. Military judges have discretion over which sentencing objectives to prioritize, and how much weight to afford to the secondary sentencing principles that are also set out therein.

Denunciation - denounce unlawful conduct (NDA 203.1(2)(c))

[16] One of the objectives of sentencing is to denounce unlawful conduct and the harm caused to victims or to the community. In courts martial, the sentence represents the judicial condemnation of the sanctioned conduct to the affected CAF community. Consequently, judicial sentences should be imposed in a manner that positively enforces the communal values of all serving CAF members as expressed by the *NDA*.

Deter offenders and other persons from committing offences (NDA 203.1(2)(d))

[17] Where the purpose of the sentence is to deter others who may be inclined to engage in similar conduct, then the Court must carefully consider the sentence from an

objective perspective based on the facts and the context of the offence. I must consider the gravity of the offence, the number of incidents of this type of offence within the military community, the harm caused by it, with respect to the individuals directly affected, the military community and the reputation of the CAF at large.

Rehabilitation

[18] In addition, I find that in the current case, the objective of rehabilitation is of paramount importance as WO McKie has transitioned into the civilian sector. The unique challenges faced by veterans during their service, including physical and mental injuries, can impact their ability to adjust to civilian life. By prioritizing rehabilitation as an objective of sentencing in his case, the Court recognizes WO McKie's service and can shape a sentence that helps him to move forward with a fulfilling life after military service.

Priority of objectives

[19] Based on the facts of this case, and after considering the context of what unfolded, I find that the objectives of sentencing that must be given the highest priority are general deterrence and denunciation, but not to the detriment of rehabilitation, which I find is very important in this case. In hoping to achieve the purpose of deterring others, the challenge lies in reconciling what is needed to deter others from committing something similar, while still ensuring that WO McKie has the best possibility of success in his transition to the civilian sector.

Gravity of offence and degree of responsibility

[20] As explained above, it is a fundamental principle of sentencing that the military judge must impose a proportionate sentence by reasonably appreciating the gravity of the offence and the degree of responsibility of the offender in the specific circumstances of the case.

[21] During his court martial and during sentencing, WO McKie consistently took responsibility for his actions. He greatly regrets not being more proactive and ensuring that the C7 magazines were returned to the base after he discovered them upon his return from Afghanistan. There is no evidence to suggest that his possession of these magazines was linked to any nefarious activity or purpose.

[22] Importantly, unlike other circumstances where offenders have been convicted with having a prohibited device, there was no other concerning criminal conduct that was linked to his possession of the devices.

Parity

[23] In assessing the type of sentence that is appropriate for WO McKie, based on the facts before the Court, I must first determine the appropriate range of sentence for an

offence of this type. The inquiry here is objective. The appropriate range is based on the general characteristics of the typical offence and on the assumption that the accused is a person of good character with no criminal record.

[24] The sentencing process requires military judges to closely analyze the established precedents and assess the facts of the case against the backdrop of similar facts. It is important for the maintenance of discipline in the military context that similar conduct be treated with parity.

[25] The prosecution relied upon four precedents from the military justice system and two from the civilian courts in arguing that a sentence of a fine of \$4,000 and a weapons prohibition are merited on the facts of this case:

- (a) *R. v. Fizell*, 2012 BCCA 240. Mr Fizell was seen by police swinging a set of nunchaku sticks, which are prohibited weapons. When arrested, Mr Fizell was found in possession of two laptop computers, including one that had been stolen about forty minutes earlier from an automobile. He was released on bail and shortly thereafter was found with pay stubs stolen from a vehicle and a bag of automobile breaking instruments. He was sentenced to four months' imprisonment on the 19 January 2012 counts and eight months consecutive on the 6 February 2012 counts, for a total of twelve months;
- (b) *R. v. Lui*, 2005 CMAC 3. Trooper Lui pleaded guilty to the following charges: drew a weapon against a superior officer, contrary to section 84 of the *NDA*, unauthorized possession of a prohibited weapon, contrary to section 130 of the *NDA* and subsection 91(2) of the *Criminal Code*, and used insulting language to a superior officer, contrary to section 85 of the *NDA*. All the charges resulted from a single incident. At court martial, he was sentenced to imprisonment for a period of forty-five days, an order authorizing the taking of DNA samples, and a prohibition order for a period of ten years. The prohibition was extended against possession of weapons to the appellant's military duty which, for all practical purposes, made his release from the CAF inevitable. On appeal, the Court Martial Appeal Court (CMAC) substituted detention for imprisonment, reduced the duration of the weapons prohibition order to two years from the date the order was imposed by the military judge, and varied the weapons prohibition order to eliminate its application to the appellant's military duties;
- (c) *R. v. Faucher*, 2022 QCCQ 2635. After a contested trial for one count of possession of a restricted weapon, with munitions near by and a large capacity magazine, Mr. Faucher was sentenced to a ten-year weapon prohibition, a probation order and community service. Facts: The police found a 9-millimetre unregistered pistol with loaded magazines. The

accused was holding the pistol for his brother-in-law who had moved to the United States;

- (d) *R. v. Paradis*, 2015 CM 1002. Corporal Paradis was found guilty on six charges for unauthorized possession of a prohibited device, contrary to subsection 91(2) of the *Criminal Code*; one charge of careless storage of ammunition, contrary to subsection 86(1) of the *Criminal Code*; three charges of contravening a regulation made under paragraph 117(h) of the *Firearms Act* respecting the storage, handling, transportation, shipping, display, advertising and mail-order sales of firearms and restricted weapons, contrary to subsection 86(2) of the *Criminal Code*; and, finally, one charge, being the holder of an authorization or a licence for a restricted weapon, of possessing a semiautomatic handgun at a place that is other than a place indicated on the authorization or licence as being a place where he may possess it, or other than a place where it may be possessed under the *Firearms Act*, under subsection 93(1) of the *Criminal Code*. During this search, the police officers found (a) a dozen (12) prohibited cartridge magazines; (b) 2,174 bullets of various calibres (described in Schedule A to the charge sheet); (c) one (1) restricted semiautomatic handgun, namely, a Berreta PX4 Storm SD, loaded; (d) one restricted semiautomatic firearm, namely, a Sabre Defense Industries XR 15, loaded. (e) one (1) firearm, namely, a Benelli Super Nova tactical rifle, loaded; and (f) numerous other weapons of various types. Ex-Corporal Paradis did not hold licences to possess the twelve cartridge magazines found in his home. The offender was sentenced to imprisonment for a term of four months and a fine of \$1,000 payable in ten consecutive equal instalments starting from the date of this sentence;
- (e) *R v Cyr*, 2012 CM 3015. Charge 1: S. 114 *NDA*, stealing. Charge 2: S. 125(a) *NDA*, willfully made a false statement in a document made by him that was required for official purpose. Charge 3: S. 116(a) *NDA*, sold improperly public property. Charge 4: S. 130 *NDA*, possession of a prohibited device (s. 92(2) CCC). Sentenced Sergeant Cyr to a reduction in rank to corporal and a \$2,000 fine; and
- (f) *R v Speirs*, 2013 CM 1003. Master Sailor Speirs admitted his guilt on four counts, namely, one count of having in his possession property obtained by crime, contrary to section 354 of the *Criminal Code*; one count of possession of a prohibited device, contrary to section 91 of the *Criminal Code*; one count of stealing within the meaning of section 114 of the *NDA*; and finally, one count of willfully selling public property, contrary to paragraph 116(a) of the *NDA*. The sentence was a joint submission and the punishment imposed was a severe reprimand and a fine of \$3,000 payable in fifteen equal monthly instalments of \$200 a month, with no weapons prohibition order.

[26] The defence provided the following precedents to support his position on sentencing:

- (a) *R. v. Wauer*, 2014 ABCA 270. The accused pleaded guilty to possessing a prohibited weapon (brass knuckles) and to possessing weapons (machete and bear spray) for a purpose dangerous to the public peace contrary to sections 92(2) and 88(1) of the *Criminal Code*. Counsel presented a joint submission for a twelve-month conditional discharge, accompanied by 100 hours of community service, which the sentencing judge accepted. The Crown also requested a weapons prohibition pursuant to section 110 of the *Criminal Code* which was awarded, but the Court of Appeal ruled that it was not proportional and needed to be significantly reduced;
- (b) *R v Charron*, 2022 CM 5016. Sergeant Charron pleaded guilty to a charge of stealing; an offence punishable under section 114 of the *NDA*. He stole various items with an approximate value of \$40 from Loblaws Companies Limited. The prosecution sought a reprimand and a fine in the amount of \$200 while the defence sought an absolute discharge. An absolute discharge was imposed as the punishment;
- (c) *R v Speirs*, 2013 CM 1003 - referred to above;
- (d) *R v Leblond*, 2015 CM 4002. Corporal Leblond pleaded guilty to two charges under section 130 of the *NDA* for possession of a substance, contrary to section 4(1) of the *Controlled Drugs and Substances Act* and for possession of a prohibited weapon, contrary to subsection 91(2) of the *Criminal Code*. The member was sentenced to a severe reprimand and a fine in the amount of \$1,000, payable in five equal payments of \$200 each; and
- (e) *R. v. Lui*, 2005 CMAc 3- referred to above.

[27] I reviewed all the case law presented by both the prosecution and defence. I appreciate that the prosecution attempted to provide a wide range of conduct to establish a range, but I wish to highlight that the cases on the upper end are not even comparable, as they involve much more concerning criminal conduct which is simply absent in this case.

[28] Based on my review of the case law, I find that the range for this type of a one-charge conviction that is not linked to any other nefarious conduct ranges from an absolute discharge to a reprimand and a fine.

Accounting for relevant aggravating or mitigating circumstances

[29] Using the above range of sentences as a starting point, the second step of a judge's role involves adjusting the sentence upward or downward based on aggravating or mitigating factors. The judge must consider factors personal to the accused and the victim, and the actual consequences of the offence.

Aggravating factors

[30] After hearing the submissions of counsel, the Court notes the following aggravating factors that should be considered:

- (a) senior rank. The offender was a WO and was highly capable in his trade and had proven himself. As a senior Non-commissioned officer, he was the first contact point for officers joining their units. He was expected to lead by example and be accountable. Lieutenant-Colonel Boland wrote that "a Non-commissioned officer must meet the highest standards of professionalism and demonstrate a full understanding of the legitimacy of the profession of arms in Canada." In short, he failed to live up to the expectations associated with his rank;
- (b) trust. As General Fletcher wrote in his referral of the charges, "the nature of the items found in the possession of the member, at their personal residence not only poses a significant breach, the concepts of trust within the profession of arms, but creates a credible threat to the Canadian public";
- (c) liability for the Crown. No facts have been presented that he intended to use the magazines for a nefarious purpose, but there was always a risk that they could have ended up in the wrong hands and the CAF would be liable; and
- (d) a possession and acquisition license requires training and so he would have known how to handle these weapons.

Mitigating factors

[31] After hearing the submissions of counsel, the Court has determined that the following mitigating factors must be considered:

- (a) WO McKie does not have a criminal record or a relevant conduct sheet and is considered a first-time offender;
- (b) length of military service. He has served honourably in the CAF for over twenty-seven years which included multiple military operations deployed abroad; and
- (c) possession and acquisition license. He is trained to understand the importance of handling weapons and their component parts.

Determination of sentence

[32] It is noteworthy that WO McKie is currently retired, and this is an important factor to be considered in the determination of a meaningful sentence. I am also mindful of the facts that underlaid the arguments in the various applications. Although the applications did not lead to any relief, the underlying facts are considered in the assessment of whether reasonable doubt existed but most particularly in the assessment of sentence.

[33] Defence counsel has presented strong arguments to support why WO McKie is deserving of an absolute discharge. He is still a young man who has demonstrated excellent engagement with his community as a volunteer as evidenced with his work with the local military vehicles' museum. He is very engaged with his family and his children, particularly with his son who has followed in his footsteps as a mechanic. Defence counsel argued that he could significantly benefit from an absolute discharge as he moves forward in his civilian life.

[34] In courts martial jurisprudence, in the cases of *R. v. Cadieux*, 2019 CM 2019 and *R. v. D'Amico*, 2020 CM 2004 at paragraphs 37 and 38, the Court set out the test to be applied when considering whether an absolute discharge is appropriate. In both *Cadieux* and *D'Amico*, the Court adopted the judicial test set out by the British Columbia Court of Appeal in *R. v. Fallofield*, [1973] BCJ No 559 (QL) to guide judges in considering whether the imposition of an absolute discharge is appropriate.

[35] The first condition requires that a discharge only be granted where it is in the best interests of the accused. This presupposes that the accused is a person of good character, without previous convictions, that it is not necessary to enter a conviction against the accused to deter him from future offences or to rehabilitate him, and that the entry of a conviction against him may have significant adverse repercussions. WO McKie provided evidence of the problems and obstacles that he has faced and overcome in the last year. He is nearing the end of his two-year medical release buffer and hopes to be in a position where he can gain meaningful work moving forward.

[36] It is no secret that having a criminal record can significantly impact a veteran's ability to successfully transition to civilian life. It can limit job opportunities and restrict access to certain resources and benefits. Additionally, it can negatively impact a veteran's mental health and social connections, further complicating the transition process. Veterans who do not have a criminal record are in a much better position to navigate the challenges of civilian life and take advantage of the opportunities available to them. They are more likely to be able to find stable employment and build healthy relationships with their community.

[37] Based on the evidence before the Court, WO McKie meets this first condition, and it is clearly in his best interests for the Court to consider an absolute discharge.

[38] The second condition requires the Court to consider whether the granting of a discharge is in the public interest. In determining this question, the Court must examine the nature of the offence; the prevalence of the offence within the CAF community and whether the circumstances of the offence are something that should be a matter of public record.

[39] I have considered the nature of the charge, and the fact that the CAF must meet the highest standards of integrity and stewardship in the performance of their duties. As General Fletcher wrote in his referral letter, “Not only are we charged with being good stewards of Canadian resources, but we are called upon to undertake missions for the protection of Canada and Canadians, which includes the security and safeguarding of our weapons systems and material.”

[40] The fact that WO McKie was found guilty of this offence sends a message of deterrence and denunciation to all serving CAF members to be mindful and attentive to their kit and to safeguard those items associated with their weapons. However, it is also important to ensure that those situations where there is no other criminal behaviour accompanying the offences are treated according to their severity. Based on the case law and considering that WO McKie has retired and transitioned to the civilian sector, I find that if he had been tried within the civilian system, he would be awarded an absolute discharge.

[41] Consequently, I find it is imperative to acknowledge within the military justice system that individuals who have been found guilty of having committed a lone offence have the potential to be rehabilitated and in this unique situation, successfully integrated into the civilian sector. He deserves nothing less. By providing a second chance and not burdening these members with a criminal record, they are more likely to lead productive and law-abiding lives and contribute to society in a positive way.

[42] In this case, WO McKie who has been a long-serving member, having served his country on four operational missions abroad, can maintain his dignity and reputation, which will positively affect his ability to gain employment, rental housing, and other resources. Ultimately, in cases such as this it is also important to send a message that the punishment imposed does fits the crime and it allows individuals to move forward with their lives. When this occurs, it leads to a greater respect for the military justice system at large.

[43] Considering the facts of this case, if Warrant Officer McKie received a sentence which is disproportionate to the allegations before the Court, I find it would run contrary to the public interest.

[44] Consequently, I find that by directing that WO McKie be absolutely discharged, it is not simply in his best interests, but it is also in the public interest.

Weapons prohibition order

[45] The offence before the Court falls within one of the statutory situations set out at paragraph 147.1(1)(b) of the *NDA* requiring the discretionary consideration of a weapon's prohibition order. In this case, even though I consider an absolute discharge to be appropriate, it is still mandatory for me to consider whether it is desirable to make a weapons prohibition order. An order shall only be issued if I decide that it is desirable to do so.

[46] The prosecution has requested that the Court impose a weapons prohibition order for a period of ten years to send a strong message of deterrence. A weapons prohibition is part of an offender's sentence and is a consequence which attaches to the criminal conduct. However, it does not just serve a punitive purpose as there is a protective aspect that underlies it.

[47] In considering whether a weapons prohibition should be ordered, the Court must exercise its discretion judicially. This means I must consider public safety and any reasons that would cause one to believe that safety and or security is a concern.

[48] When exercising my discretion, I am required to give reasons for my decision. These are my reasons for not imposing a prohibition ban in the case before me:

- (a) WO McKie came into possession of the C7 magazines as a result of his military service and there is no nefarious activity associated with his possession;
- (b) he admitted that when he discovered that he had the magazines in his possession, he should have returned them immediately, but he did not and he deeply regrets that;
- (c) the C7 magazines were empty, stored in a cabinet and were not even in close proximity to any weapons;
- (d) while they were at his residence, there is no evidence that the magazines were ever used or even threatened to be used;
- (e) sentencing principles, such as proportionality, apply to weapons prohibition orders where the imposition of the maximum duration should be reserved for the most serious cases and worst offenders, and I find that his case is situated at the lowest level possible (see *R. v. Lui*, 2005 CMAC 3);
- (f) the offence before the Court is not a crime of violence, nor was it linked to such a crime or to any terrorist or drug activity;
- (g) the evidence shows that the offender has consistently remained disciplined, composed, and responsible even during the most trying circumstances; and
- (h) he has shown respect for the law, authority, and those around him.

[49] In short, I am not satisfied there is a safety concern that justifies the imposition of a prohibition order in this case. There must be some evidence or reason to believe that someone or something needs protection, or safety and/or security is a concern. I find that there is nothing in the evidence before me that could or would justify the imposition of a discretionary prohibition order.

FOR THESE REASONS, THE COURT:

[50] **DIRECTS** WO McKie be discharged absolutely on the fourth charge before the Court.

Counsel:

The Director of Military Prosecutions as represented by Major B.J. Richard

Major E. Carrier, Defence Counsel Services, Counsel for WO B.A. McKie