COURT MARTIAL

Citation: *R. v. McKenzie*, 2014 CM 2017

Date: 20140923
Docket: 201354

Standing Court Martial

Canadian Forces Base Gagetown
Gagetown, New Brunswick, Canada

Between:

Her Majesty the Queen

- and -

Warrant Officer (Retired) D.P. McKenzie, Offender

Before: Colonel M.R. Gibson, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Warrant Officer (Retired) McKenzie, having accepted and recorded your plea of guilty to the third charge on the charge sheet, the court now finds you guilty on that charge. In addition, the Court has found you guilty of the second charge following a trial. It is now my duty to determine an appropriate, fair and just sentence.

[2] In doing so the Court has considered the principles of sentencing that apply in the military justice system, the facts of the case as disclosed by the evidence heard by the Court and the documents introduced in evidence, as well as the submissions of counsel for the prosecution and the defence.

[3] The fundamental purposes of sentencing by service tribunals in the military justice system, of which courts martial are one type, are to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale; and to contribute to respect for the law and the maintenance of a just, peaceful and safe society.

[4] The fundamental purposes are achieved by the imposition of just sanctions that have one or more of the following objectives: to promote a habit of obedience to lawful commands and orders; to maintain public trust in the Canadian Forces as a disciplined Armed Force; to denounce unlawful conduct; to deter offenders and other persons from committing offences; to assist in rehabilitating offenders; to assist in reintegrating offenders into military service; to separate offenders, if necessary, from other officers or non-commissioned members or from society generally; to provide reparations for harm done to victims or to the community; and to promote a sense of responsibility in offenders and an acknowledgement of the harm done to victims and to the community.

[5] The fundamental principle of sentencing is that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender.

[6] Other sentencing principles include: a sentence should be increased or reduced to account for any relevant aggravating or mitigating circumstances; a sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances; an offender should not be deprived of liberty by imprisonment or detention if less restrictive sanctions may be appropriate in the circumstances; a sentence should be the least severe sentence required to maintain discipline, efficiency and morale; and any indirect consequences of the finding of guilty or the sentence should be taken into consideration.

[7] In the case before the Court today, I must determine if the sentencing purposes and objectives would best be served by deterrence, denunciation, rehabilitation or a combination of these factors.

[8] The Court must impose a sentence that is of the minimum severity necessary to maintain discipline, efficiency and morale. Discipline is that quality that every Canadian Forces member must have that allows him or her to put the interests of Canada and the Canadian Forces before personal interests. This is necessary because members of the Canadian Forces must promptly and willingly obey lawful orders that may potentially have very significant personal consequences, up to injury or even death. Discipline is described as a quality because, ultimately, although it is something which is developed and encouraged for the Canadian Forces through instruction, training and practice, it is something that must be internalized as it is one of the fundamental prerequisites to operational effectiveness in any armed force.

[9] One of the most important components of discipline in the military context is self-discipline. The actions of Warrant Officer McKenzie demonstrate that this is an area in which he has been deficient. As I indicated in my reasons for finding, the conduct of Warrant Officer McKenzie through this period was obnoxious, unprofessional and foolish.

[10] The facts of this case were determined in the course of the evidence heard by the Court on the trial of the first and second charges. In brief, Warrant Officer McKenzie

had a consensual sexual relationship with Warrant Officer Christine Prudhomme for a period of some four years, in the form of an extra-marital affair. When that relationship deteriorated and ultimately ended in 2012, Warrant Officer McKenzie disobeyed a lawful command to refrain from contacting Warrant Officer Prudhomme and harassed her by repeated contact even after she clearly indicated that she did not want further contact. Some of the language of his emails could clearly be taken to constitute threatening behaviour.

[11] The Court considers that the aggravating factors in this case are the following:

(a) the objective gravity of the offences of which Warrant Officer McKenzie has been convicted. The offence of conduct to the prejudice of good order and discipline under section 129 of the *National Defence Act* is punishable by dismissal with disgrace from Her Majesty's service or to less punishment. The offence of disobedience of a lawful command under section 83 of the *National Defence Act* is punishable by imprisonment for life;

(b) the fact that Warrant Officer McKenzie's disobedience of a lawful command was premeditated and persisted over an extended period of time;

(c) the fact that Warrant Officer McKenzie engaged in this conduct notwithstanding that he had received significant training concerning harassment; and

(d) the fact that Warrant Officer McKenzie was a seasoned, mature, senior non-commissioned member who ought to have known better.

[12] The mitigating factors in this case include the following:

(a) first and foremost, that Warrant Officer McKenzie has pleaded guilty to the section 83 offence. This is always an important mitigating factor, reflecting that the offender has accepted responsibility for his actions;

(b) the absence of a conduct sheet or any other indication of prior convictions;

(c) the solid performance consistently demonstrated over a number of years by Warrant Officer McKenzie reflected in the five Performance Evaluation Reports entered into evidence at Exhibit 25;

(d) the positive letters of support for him and the various letters and emails at Exhibit 26; and

> (e) finally, the Court should also take into account any indirect consequences of the finding of guilty and of the sentence, which in this case as indicated in a letter from his current employer in evidence at Exhibit 26 include the likelihood that he would lose his current civilian employment should he be sentenced to a custodial punishment.

[13] The principles of sentencing that the Court considers should be emphasized in the present case are denunciation, and general and specific deterrence. Members of the Canadian Forces are rightly held to a very standard. The actions of Warrant Officer McKenzie constitute a significant derogation from those standards. He must never repeat these actions and other members of the Canadian Forces must also understand that such actions are simply not tolerable and be deterred from committing them.

[14] Harassment undermines the basics of military discipline and is highly prejudicial to morale, cohesion, and the operational effectiveness of any unit in which it occurs. As stated in Defence Administrative Orders and Directives 5012-0:

> The Canadian Forces and Department of National Defence affirm that a work environment that fosters teamwork and encourages individuals to contribute their best effort in order to achieve Canada's defence objectives is essential. Mutual trust, support and respect for the dignity and rights of every person are essential characteristics of this environment. Not only is harassment in certain forms against the law, but it erodes mutual confidence and respect for individuals and can lead to a poisoned work environment. As a result, operational effectiveness, productivity, team cohesion and morale are placed at risk.

[15] Disobedience of a lawful command is obviously one of the offences most corrosive to the maintenance of discipline and professionalism in our Armed Forces.

[16] The prosecution and defence have made a joint submission for a sentence comprising a severe reprimand plus a fine of $3,000, payable immediately.

[17] In the case of a joint submission, as reiterated by the Court Martial Appeal Court in the case of *R. v. Chadwick Taylor*, 2008 CMAC 1, the question that the Court must ask itself is not whether the proposed sentence is one that the Court would have awarded absent the joint submission; rather the Court is required to consider whether there are cogent reasons to depart from the joint submission; that is, whether the proposed sentence is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest.

[18] One consideration that should be addressed is whether, in circumstances such as the present case where offender has been released from the Canadian Forces prior to trial, the punishment of severe reprimand retains any meaning. I would agree in this respect with the observation made by the Chief Military Judge, Colonel Dutil, in *R v ex-Private Goulet*, 2010 CM 1017, at paragraph 16 of the case, where he said:

> The release of a member of the Canadian Forces prior to a Court Martial does not render certain sentences set out in section 139 of the *National Defence Act* moot. If that were the case, Parliament would have mentioned it expressly. It is reasonable to believe that certain sentences may be found to be inadequate whenever the offender has already been released from the Canadian Forces. However, these sentences are not inadequate in and of themselves. They are relevant if they pursue valid and justifiable objectives under the circumstances. Some may claim that a severe reprimand is pointless in the case of an offender who has already been released from the Canadian Forces prior to the trial. With respect, such an approach fails to take into account the objective that the severe reprimand achieves in the balancing exercise that is the determination of a just and appropriate sentence. In this case, the severe reprimand is meant to achieve the objectives of general deterrence and denunciation of the behaviour, to make members of the Canadian Forces understand that this type of offence is harmful to military discipline because it undermines the mutual trust that must exist between members of a military force.

[19] I have carefully canvassed all of the cases submitted to me by counsel as precedents for sentencing. The submissions of counsel in this case are broadly consistent with the range of those particular precedents.

[20] I would note that absent the joint submission the Court would have considered the imposition of a larger quantum for the fine. And had Warrant Officer McKenzie been convicted of the *Criminal Code* section 264, Criminal Harassment charge, a custodial sentence would have been actively considered.

[21] However, the Court does not consider that the proposed sentence on the basis of convictions for the second and third charges is unfit, unreasonable, would bring the administration of justice into disrepute or be contrary to the public interest. Thus the Court will accept the joint submission of counsel for the prosecution and defence as to sentence.

FOR THESE REASONS, THE COURT:

[22] **FINDS** you guilty of the second and third charges on the charge sheet.

[23] **SENTENCES** you to a severe reprimand and a fine of $3,000, payable immediately.

Counsel:

Lieutenant-Commander D.T. Reeves, Canadian Military Prosecution Service, Counsel for Her Majesty the Queen

Major S.L. Collins, Directorate of Defence Counsel Services, Counsel for Warrant Officer (Retired) D.P. McKenzie