COURT MARTIAL

Citation: *R v Hirji*, 2011 CM 3010

Date: 20111024
Docket: 201053

Standing Court Martial

Canadian Forces College
Toronto, Ontario, Canada

Between:

Her Majesty the Queen

- and -

Lieutenant-Colonel A. Hirji, Offender

Before: Lieutenant-Colonel L.-V. d'Auteuil, M.J.

REASONS FOR SENTENCE

(Orally)

[1] Lieutenant-Colonel Hirji, having accepted and recorded a plea of guilty in respect of the second charge on the charge sheet, the court now finds you guilty of this charge. Considering that the first charge is alternative to the second charge, then in accordance with subparagraph 112.05(8)(a) of the *Queen's Regulations and Orders for the Canadian Forces*, (QR&O), the court directs that the proceedings be stayed on the first charge.

[2] It is now my duty as the military judge who is presiding at this Standing Court Martial to determine the sentence.

[3] The military justice system constitutes the ultimate means to enforce discipline in the Canadian Forces, which is a fundamental element of the military activity. The purpose of this system is to prevent misconduct or, in a more positive way, see the promotion of good conduct. It is through discipline that an armed force ensures that its members will accomplish, in a trusting and reliable manner, successful missions. It also ensures that the public order is maintained and that those who are subject to the Code of Service Discipline are punished in the same way as any other person living in Canada.

[4] It has long been recognized that the purpose of a separate system of military justice or tribunal is to allow the armed forces to deal with matters that pertain to the re-

spect of the Code of Service Discipline and the maintenance of efficiency of the morale among the Canadian Forces, (See *R v Généreux*, [1992] 1 SCR 259 at 293). That being said, the punishment imposed by any tribunal, military or civilian, should constitute the minimum necessary intervention that is adequate in the particular circumstances.

[5] Here, in this case, the prosecutor and the offender's defence counsel made a joint submission on sentence to be imposed by the court. They recommended that this court sentence you to a reprimand and a fine in the amount of $2,000 in order to meet justice requirements. Although this court is not bound by this joint recommendation, it is generally accepted that the sentencing judge should depart from the joint submission only when there are cogent reasons for doing so. Cogent reasons mean, where the sentence is unfit, unreasonable, would bring the administration of justice into disrepute, or be contrary to the public interest, (See *R v Taylor* 2008, CMAC 1 at para 21).

[6] Imposing a sentence is one of the most difficult tasks for a judge. As the Supreme Court of Canada recognized in *Généreux*, in order "to maintain the Armed Forces in a state of readiness, the military must be in a position to enforce internal discipline effectively and efficiently." It emphasized that in the particular context of military justice, "breaches of military discipline must be dealt with speedily and, frequently, punished more severely than would be the case if a civilian engaged in such conduct." However, the law does not allow a military court to impose a sentence that would be beyond what is required in the circumstances of the case. In other words, any sentence imposed by a court must be adapted to the individual offender and constitute the minimum necessary intervention since moderation is the bedrock principle of the modern theory of sentencing in Canada.

[7] The fundamental purpose of sentencing in a court martial is to ensure respect for the law and maintenance of discipline by imposing sanctions that have one or more of the following objectives:

(a) to protect the public, which includes the Canadian Forces;

(b) to denounce unlawful conduct;

(c) to deter the offender and other persons from committing the same offences;

(d) to separate offenders from society where necessary; and,

(e) to rehabilitate and reform offenders.

[8] When imposing sentences, a military court must also take into consideration the following principles:

(a) a sentence must be proportionate to the gravity of the offence;

(b) a sentence must be proportionate to the responsibility and previous character of the offender;

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

(d) an offender should not be deprived of liberty, if applicable in the circumstances, if less restrictive sanctions may be appropriate in the circumstances. In short, the court should impose a sentence of imprisonment or detention only as a last resort as it was established by the Court Martial Appeal Court and the Supreme Court of Canada decisions; and,

(e) lastly, all sentences should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[9] I came to the conclusion that in the particular circumstances of this case, sentencing should place the focus on the objectives of denunciation and general deterrence.

[10] Here the court is dealing with a military offence about submitting a plagiarized essay for an official Canadian Forces course. Lieutenant-Colonel Hirji is a health care administrator in the Reserve Force. He was employed on Class B service with the Canadian Forces College in Toronto from August 2008 until March 2010. During the relevant time period he was also a student on the Joint Command and Staff Programme Distributed Learning Phase 2.

[11] In order to fulfill the Global Vortex paper requirement of this course, Lieutenant-Colonel Hirji was responsible to write and submit and essay which was due on 27 January 2010. One of the requirements of this assignment was that the paper be submitted to an online verification programme known as Turnitin. This programme compares the student's submission with those of previous students and produces a statistic which measures commonality between papers. Lieutenant-Colonel Hirji submitted the paper that was not his final paper to that system in order to familiarize himself. On 28 January 2010, having not submitted his paper yet, he received an email from his directing staff to find out what happened. He emailed his paper, but the attachment could not be opened by the instructor. Thus he resubmitted the paper, but he indicated that he couldn't submit it to Turnitin because he thought that he did that with another paper earlier and he couldn't use the system. He finally submitted his paper on 2 February 2010. The Turnitin programme found a high degree of commonality to other sources. The course staff tracked down a similar paper and they were compared. The conclusion was that there were a lot of similarities and essentially they were substantially identical. As a consequence, Lieutenant-Colonel Hirji received a mark of 0 per cent, and was removed from the course.

[12] This type of offence is directly related to some Canadian Forces members' ethical obligations such as integrity, loyalty, and honesty. For an officer, being trustworthy

and reliable at all times is more than essential for the accomplishment of any task or mission in an armed force, whatever is the function or the role you have to perform.

[13] In arriving at what the court considers a fair and appropriate sentence, the court has considered the following mitigating and aggravating factors:

(a) The court considers as aggravating the objective seriousness of the offence. The offence you were charged with was laid in accordance with paragraph 129 of the *National Defence Act* for submitting a plagiarized essay, which is punishable by dismissal with disgrace from Her Majesty's service or to less punishment.

(b) Secondly, the subjective seriousness of the offence. And that, for the court, it covers three aspects:

(i) The first aggravating factors from a subjective perspective is the lack of integrity you disclosed by your actions. From somebody at your rank and with your extensive experience; you have been in your military life exposed to various situations, such as a commanding officer, that should have told you to do better. As you know, at your rank expectations are very high, and when somebody like you does such things, disappointment is also very high.

(ii) The second aggravating factor is the premeditation attached to those circumstances. You had some time to think about how you will proceed. It is not a situation where you had a few seconds to think about it. You had an opportunity to plan and to figure how to cover-up your illegal actions and you did so.

(iii) Third, your rank and experience, specifically, should have told you better, but you decided not to listen to them and you clearly minimized and disregarded the consequences it could have while knowing them. Basically you took a chance and you missed it.

[14] There are also mitigating factors that I considered:

(a) First, there is your guilty plea. Through the facts presented to this court, the court must consider your guilty plea as a clear, genuine sign of remorse and that you are very sincere in your pursuit of staying a valued asset to the Canadian Forces, and it also disclosed the fact that you are taking full responsibility for what you did.

(b) The absence of any annotation on your conduct sheet. So there is no indication of the commission of any similar offence, military offence or criminal offence, in relation or not to what happened.

(c) Your performance in your military service. Clearly you deserve respect for what you did in your military career so far. Your records of service and your personnel evaluation reports for the last five years clearly reflect that, and it is something that a court must consider.

(d) The fact that you had to face this court martial. And I am sure it has already had some deterring effect on you, but also on others.

(e) The fact that it is an isolated incident, out of character from somebody like you as expressed by both counsel.

(f) Administrative action cannot be considered as a punishment by the court, but the fact that you were removed from the course and still unemployed since the incident, must be considered as a mitigating factor by the court because such a decision has a deterrent effect on you and also on others that could consider adopting such conduct in the future.

[15] The court must also recognize that, as a matter of parity on sentence as suggested by the prosecutor, case law indicates clearly that for such offence, it goes from a severe reprimand to a reprimand and a fine or only a fine. In these circumstances, the joint submission clearly falls in that range.

[16] Also, if the court accepts the suggestion by counsel, this punishment will remain on your conduct sheet unless you get a pardon for the criminal record you are getting today. The reality is that your conviction will carry out a consequence that is often overlooked which is that you will now have a criminal record and it is not insignificant.

[17] In consequence, the court will accept the joint submission made by counsel to sentence you to a reprimand and a fine in amount of $2,000, considering that it is not contrary to the public interest and will not bring the administration of justice into disrepute.

FOR THESE REASONS, THE COURT:

[18] **FINDS** you guilty of second charge for an offence under section 129 of the *National Defence Act*.

[19] **DIRECTS** that the proceedings be stayed on the first charge.

[20] **SENTENCES** you to a reprimand and a fine in the amount of $2,000. The fine is to be paid in monthly instalments of $200 commencing on the 1st of November, 2011, and continuing for the following nine months.

Counsel:

Major Kerr, Canadian Military Prosecutions Service
Counsel for Her Majesty the Queen

Major E. Thomas, Directorate of Defence Counsel Services
Counsel for Lieutenant Colonel A. Hirji