COURT MARTIAL

Citation: *R v Wilks*, 2014 CM 3008

Date: 20140428
Docket: 201251

Standing Court Martial

Asticou Courtroom
Gatineau, Quebec, Canada

Between:

Her Majesty the Queen

- and -

Petty Officer 2nd Class J.K. Wilks, Offender

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

RESTRICTION ON PUBLICATION

In accordance with the powers of the court martial listed at section 179 of the *National Defence Act*, this Court Martial hereby orders that pursuant to section 486.4 and 486.5 of the *Criminal Code of Canada*, any information that could identify the complainants and victims, namely, C.D., K.M., J.L., K.D., R.G., J.R., M.P., A.B., G.C., A.P., W.G., K.R., T.W., S.M., and A.W. shall not be published in any document or broadcast or transmitted in any way.

REASONS FOR SENTENCE

(Orally)

[1] Petty Officer 2nd Class Wilks was found guilty by this court on 15 November 2013 of ten service offences under section 130 of the *National Defence Act (NDA)* for sexual assault contrary to section 271 of the *Criminal Code*, and of fifteen service offences, also under section 130 of the *NDA* for breach of trust, contrary to section 122 of the *Criminal Code*.

[2] All offences were related to a number of incidents that occurred in Thunder Bay and London, Ontario, between 2003 and 2009 and involved 15 different complainants. On 24 and 25 February 2014, the court proceeded with the hearing for the determination of the sentence. During that phase of the trial, among other things, four complainants testified for a second time and seven victim impact statements were introduced by the prosecution with the consent of the defence counsel.

[3] As the military judge presiding at this Standing Court Martial, it is now my duty to determine the sentence.

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

[5] 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 respect of the Code of Service Discipline and the maintenance of efficiency and the morale among the Canadian Forces (see *R* v *Généreux* [1992] 1 SCR 259 at 293).

[6] The same court also recognized in the same decision at page 281, 282:

> Service tribunals thus serve the purpose of the ordinary criminal courts, that is, punishing wrongful conduct, in circumstances where the offence is committed by a member of the military or other person subject to the Code of Service Discipline.

[7] 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.

[8] As it has always been the practise of this court and as mentioned by the Court Martial Appeal Court in *R v Tupper*, 2009 CMAC 5 at paragraph 30:

> [30] When crafting a sentence, a trial judge must consider the fundamental purposes and goals of sentencing as found in sections 718 and following of the *Criminal Code* ....

[9] Keeping in mind this legal context, then 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.

[10] When imposing a sentence, 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, any sentence to be imposed by the court should be increased or reduced to account for any relevant aggravating or mitigating circumstances relating to the offence or the offender.

[11] As suggested by the prosecution, the court is of the opinion that sentencing in this case should focus on the objectives of denunciation and general deterrence. It is important to remember that the principle of general deterrence means that the sentence imposed should deter not only the offender from re-offending, but also deter others in similar situations from engaging in the same prohibited conduct.

[12] I am dealing with two different offences in this matter. Concerning the sexual assault offence, I would like to mention that in the Supreme Court of Canada decision of *R v Ewanchuk*, [1999] 1 SCR 330, Justice Major expressed the reasoning that supports the fact of criminalizing assault when he said at paragraph 28:

> The rationale underlying the criminalization of assault explains this. Society is committed to protecting the personal integrity, both physical and psychological, of every individual. Having control over who touches one's body, and how, lies at the core of human dignity and autonomy. The inclusion of assault and sexual assault in the *Code* expresses society's determination to protect the security of the person from any non-consensual contact or threats of force.

[13] Concerning the offence of breach of trust committed in the context of the conduct of a medical exam in the Canadian Forces, I would like to mention that this type of offence gives concrete expression to the commitment and duty of medical personnel in the Canadian Forces to use their authority for the good of military members. In a medical context, this duty is at the heart of the good administration of that medical system. I would say that it is more than essential for those providing medical services in the Canadian Forces at any level, especially in the context of the one disclosed before this court, to retain the confidence of its members and those who exercise control and authority while patients are so vulnerable.

[14] Like the civilian courts, military courts are sensitive to offences of this type relating to an abuse of trust or authority in the context of the conduct of a medical exam, especially when this abuse involves the physical and psychological integrity of a person. The privacy and dignity of the patient are essential and key components in the medical world, including in the Canadian Forces, and cannot suffer any exception. It goes also with the ethical commitment of each member of the Canadian Forces to respect the dignity of all persons. As a matter of conduct, military members are also committed to act with responsibility and integrity while performing their duties; any duties.

[15] In addition, to some extent, this type of abuse has an impact on the cohesion and morale of the Canadian Forces medical system. It may bring suspicion and mistrust that would impact on the personal medical condition of the military members because they would not tell everything to be known in order to be treated properly, but also jeopardize any mission to be accomplished if members are not at their best physically and mentally.

[16] Evidence heard at trial revealed that in 2001 Petty Officer 2nd Class Wilks was posted as a medical assistant to Canadian Forces Recruiting Center (CFRC) Detachment in Thunder Bay, province of Ontario, where he committed 15 out of the 26 charges of breach of trust and sexual assault on the charge sheet during a medical examination of nine of the complainants. In the summer of 2007 he would have been posted to 32 Canadian Force Health Service Centre Detachment in London, province of Ontario, also as a medical assistant, where he committed 10 of the 26 charges of breach of trust and sexual assault on the charge sheet during a medical examination of six of the complainants

[17] Essentially, in the course of an annual medical examination or a periodic health examination, Petty Officer 2nd Class Wilks conducted breast examinations on complainants by only visually examining, or visually examining and touching, the bare breasts of the complainants while he had no authority or any kind of medical requirement to do so. In order to proceed in that way, he made each of the complainants think that such an examination was mandatory in order for each of them to agree to show him their bare breasts, and, for some of them, to let him touch their bare breasts.

[18] In the Court of Appeal of Québec's decision in *R v L.(J.J.)*, 1998 CanLII 12722 (QC CA), at pages 4 to 7, Justice Otis, writing for the court, listed a series of factors characterizing the criminal responsibility of an offender with regard to passing sentence for sexual offences, including the following:

a) the nature and the intrinsic seriousness of the offences, which is affected by, in particular, use of threats, violence, psychological pressure and manipulation;

b) the frequency of the offences and the time period over which they were committed;

c) the abuse of the relationship of trust and authority between the offender and the victim;

d) the disorders underlying the commission of the offence: the offender's psychological difficulties, disorders and deviancy, intoxication, etc.;

e) the offender's prior convictions, their proximity in time to the alleged offence and the nature of the prior convictions;

f) the offender's behaviour after the commission of the offences: confessions, collaboration in the investigation, immediate involvement in a treatment program, potential for rehabilitation, financial assistance if necessary, compassion and empathy for the victims;

g) the time between the commission of the offences and the guilty verdict as a mitigating factor depending upon the offender's behaviour (the offender's age, social integration and employment, commission of other offences); and

h) the victim: gravity of the attack on his or her physical or psychological integrity reflected by, in particular, age, the nature and extent of the assault, the frequency and duration of the assault, the character of the victim, his or her vulnerability (mental or physical handicap), abuse of trust or authority, lingering effects.

[19] There are other factors that are not listed, such as the existence or absence of premeditation, the fact that there was consumption of alcohol; the delay to proceed with the charge. This is not a thorough list and some other factors may always be considered.

[20] In arriving at what it considers to be a fair and appropriate sentence, the court has considered the following aggravating factors and the mitigating factors.

[21] The court considers as aggravating:

a) The objective seriousness of the offence. You have been found guilty by this court of ten offences laid in accordance with section 130 of the *National Defence Act* for having committed a sexual assault contrary to section 271 of the *Criminal Code*. This offence is punishable by imprisonment for a term not exceeding 10 years. You were also found guilty of 15 offences punishable under section 130 of the *National Defence Act* for a breach of trust by a public officer, contrary to section 122 of the *Criminal Code*. This offence is punishable by imprisonment for a term not exceeding five years.

b) The subjective seriousness of the offences, which covers five different aspects:

i. First, the abuse of trust and authority. As an experienced medical technician in the rank and the trade you had, you took advantage of your position to manipulate the complainants to let them think that what happened was a mandatory requirement in the context of a medical exam, but it was clearly not. They all thought they had no choice but to participate in what you asked. One of the victims was 17 years old at the time of the commission of the offence, eleven others were between 18 and 22 years old and the three last were between 29 and 31 years old. Essentially, you were targeting many women who were psychologically vulnerable, considering their age. Also, because of your position of authority regarding the career of those victims, they were also depending on you to be able to start or continue their career with the Canadian Forces.

ii. The frequency and time period over which the offences were committed. Those offences were committed over a period of six years: once a year for the first three years and more often during the last three years of that period. In fact, you repeatedly committed the same type of offence 15 times over a period of six years.

iii. The gravity of the attacks on the psychological integrity of those victims. Your actions have had a significant detrimental effect on all the complainants. They experienced embarrassment and shame. They had, and some still have, difficulty to talk to others about this experience that most of them would like to forget. They clearly have a feeling of guilt about something they did not ask for. Most of them have now great difficulty to trust others, especially men, in order to enter into a personal relationship. For some of them, their hope to have a good career within the

military world has been irreparably impacted by not having now the same ability to do their job effectively and have confidence in their male colleagues.

iv. The facts clearly disclose premeditation. It was a planned and systematic behaviour while you were aware of the applicable policies. You deceived the complainants with your repeated conduct and did not care about the dignity or the physical and psychological integrity of those patients by taking advantage of your position. Each time it was not accidental or mere inadvertence, but something you thought about in advance for your own gratification.

v. Even though your previous conviction cannot be considered by this court as a criminal record because the offences occurred after those before the court, it still tells the court about your behaviour and attitude after those incidents, and tells the court that you continued to act as you did for some time.

[22] Other than your age, which is 54 years old, your number of years of service in the Canadian Forces, which is 27 years, the court does not know many things that can be considered as mitigating. It is true that through some Performance Evaluation Reports, the court was told that you performed well within the military; however, it was before it was found out and known about the reasons why you are here today before this court. You expressed no remorse toward what you did. You did not tell the court that you accepted any responsibility for what you did. Nothing was adduced by you as evidence in order for me to have any idea of your potential to reoffend or not in any other context than the one in the military. Despite being aware of some media interest through some requests that were made, no evidence was put forward by you in order to establish the existence and impact of any media coverage. In that context, it is difficult for the court to find any evidence that would mitigate the sentence.

[23] Concerning the fact for this court to impose a sentence of incarceration to Petty Officer 2nd Class Wilks, it has been well established by the Supreme Court of Canada decision in *R. v. Gladue*, [1999] 1 SCR 688, as reiterated by the Court Martial Appeal Court in its decision of *R v Baptista,* 2006 CMAC 1, that incarceration should be used as a sanction of last resort. The Supreme Court of Canada specified that incarceration is adequate only when any other sanction or combination of sanctions is not appropriate for the offence and the offender. This court is of the opinion that those principles are relevant in the military justice context, taking into account the main differences between the regimes for punishment imposed by a civilian tribunal sitting in a criminal matter and the one set up in the *National Defence Act* for service tribunals.

[24] Here, in this case, considering the nature of the offences which are criminal offences *per se*, the circumstances in which they were committed, the applicable sentencing principles, the aggravating and the mitigating factors mentioned above, and

as a matter of parity on sentence, the decisions submitted to the court by the parties, I conclude, as counsel did and suggested, that there is no other sanction or combinations of sanctions other than incarceration that would appear as an appropriate punishment in this case.

[25] Now, what would be the appropriate type of incarceration in the circumstances of this case? The military justice system has disciplinary tools, such as detention, which seeks to rehabilitated service detainees and re-instil in them the habit of obedience in a military framework organized around the values and skills unique to members of the Canadian Forces. When the act as charged goes beyond the disciplinary framework and constitutes a strictly criminal activity, it is necessary to examine the offence not only in the light of the particular values and skills of members of the Canadian Forces, but also from the perspective of the exercise of criminal jurisdiction.

[26] It seems clear to this court that incarceration in the form of imprisonment is the only appropriate sanction in the circumstances and that there is no other sanction or combination of sanctions that is appropriate for the offences and the offender; therefore, the court considers that a sentence of imprisonment is necessary to protect the public and maintain discipline. Accordingly, the court will accept the recommendation made by counsel to sentence you to imprisonment.

[27] The question now is what should be the duration of such a sentence of imprisonment in order to protect the public and maintain discipline. The prosecutor suggests three years while the defence counsel recommended two years. There are only few case law where similar offences involving a similar context were sanctioned by a criminal tribunal. I would say that the case of *HMTQ v. Chen*, 2003 BCSC 1363 in Can LII is probably the closest. In that case the offender was sentenced to 30 months imprisonment. I would conclude that going through those cases submitted to the court, the range would be something between two and three years' imprisonment for a situation such as the one before this court.

[28] Considering the nature of the offences; the fact that this court shall treat them even more seriously, considering the military context, and the nature of the offender's position in which the abuse took place; the applicable sentencing principles, including sentences imposed on similar offenders for similar offences committed in similar circumstances by military and civil tribunals; the aggravating and mitigating factors mentioned above, I conclude that imprisonment for a period of 30 months would appear as the appropriate and necessary minimum punishment in this case.

[29] In accordance with section 196.14 of the *National Defence Act*, considering that the offence of sexual assault for which I have passed sentence is a primary designated offence within the meaning of section 196.11 of the *National Defence Act*, I order, as indicated on the attached prescribed form, that the number of samples of bodily substances that is reasonably required be taken from Petty Officer 2nd Class Wilks for the purpose of forensic DNA analysis.

[30] In accordance with section 227.01 of the *National Defence Act*, in considering that the offence of sexual assault for which I have passed sentence is a designated offence within the meaning of section 227 of the *National Defence Act* and considering that such an order was made previously under the same section of the *National Defence Act*, I order you, as it appears from the attached prescribed form, to comply with the *Sex Offender Information Registration Act* for life.

[31] I have also considered whether this is an appropriate case for a weapons prohibition order as stipulated under section 147.1 of the *National Defence Act*. In my opinion, such an order is neither desirable nor necessary for the safety of the offender or any other person in the circumstances of this trial and I will not make an order to that effect.

FOR THESE REASONS, THE COURT:

[32] **SENTENCES** you to imprisonment for a term of 30 months.

[33] **ORDERS** that the number of samples of bodily substances that is reasonably required be taken from Petty Officer Second Class Wilks for the purpose of forensic DNA analysis.

[34] **ORDERS** you to comply with the *Sex Offender Information Registration Act* for life.

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