



COURT MARTIAL

Citation: *R. v. Thies*, 2014 CM 3007

Date: 20140404

Docket: 201360

Standing Court Martial

Canadian Forces Base Halifax
Halifax, Nova Scotia, Canada

Between:

Her Majesty the Queen

- and -

Leading Seaman J.B. Thies, Offender

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

REASONS FOR SENTENCE

(Orally)

[1] Leading Seaman Thies, was found guilty by this court of two offences under section 130 of the *National Defence Act*; the first one for uttering threats pursuant to section 264.1 of the *Criminal Code* and the second one for mischief pursuant to subsection 430(4) of the *Criminal Code*.

[2] Those offences were committed in relation to two different incidents that occurred on the same day on the 24th January, 2013, after a shipmate was dismissed from the ship for allegedly sexually assaulting another sailor.

[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 the 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 and reliable manner successful missions. The military justice system also ensures that 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.

[5] It has been long 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.) The same court also recognized in the same decision at paragraph 31 that:

... 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....

[6] 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.

[7] Here in this case the prosecutor suggested to the court that it impose a sentence of imprisonment for a period of 30 to 60 days. On the other hand the defence counsel recommended to the court to impose a reprimand and a fine to the amount of \$1,000.

[8] Imposing a sentence is one of the most difficult tasks for a judge. As the Supreme Court of Canada recognized in *Généreux* at page 293, 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 emphasizes that in 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 the military court to impose a sentence that would be beyond what is required in the circumstances of a 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.

[9] 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 sentences a military court must also take into consideration the following principles:

- (a) the sentence must be proportionate to the gravity of the offence;
- (b) the sentence must be proportionate to the responsibility and previous character of the offender;
- (c) the 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 well 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.

[11] 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] Here the court is dealing with two offences which raise the issue of respect: respect of the law and respect of others. As mentioned by the prosecutor, living in a close environment with other shipmates is a challenge as any other environment in the Canadian Forces, and success of the mission depends on this factor as some others.

[13] Morale and cohesion among the ship or among the unit would be at its highest level if Canadian Forces members do recognize and respect others. By trying to intimidate one of your fellow sailors by threatening him and destroying his mattress you went far beyond a simple discussion to express your personal disapproval of the

situation. A trustworthy relationship that shall exist among sailors was put at stake by your actions.

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

[15] The court considers as aggravating:

- (a) the objective seriousness of the offences. You were found guilty by this court of two offences laid in accordance with section 130 of the *National Defence Act*; one for uttering threats contrary to section 264.1 of the *Criminal Code* for which it is punishable by imprisonment for a term not exceeding five years; and for mischief pursuant to subsection 430(4) of the *Criminal Code* which is punishable by imprisonment for a term not exceeding two years;
- (b) there is also the subjective seriousness of the offences.
 - i. there is the lack of respect you disclosed by your actions. You clearly let your emotions lead your judgement and alcohol is not an excuse in this type of circumstances. Respect for the dignity, the physical, and the psychological integrity of the people, including your fellow shipmates is important, not just on a ship but it's a principle in the Canadian society and it should be enforced. You failed clearly on that issue at that moment;
 - ii. as another factor, I considered your rank and experience. At that time, in 2013, you had about 12 years of experience in the Canadian Forces. Because of that, including the rank you had, you should have known better, and your actions should have reflected all that experience you had on a ship, and in your trade at the rank you had; and
 - iii. there is also your conduct sheet. As highlighted by both parties, there is no similar offence on that conduct sheet regarding those before this court, however, it discloses some difficulty in the recent years to go by the requirements for service.

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

- (a) your age and your career potential. According to the evidence, my understanding is that you are 31 years old. You have just started recently your life in the civilian world. You are trying to get organized and in fact you are reorganizing your own life and this is something that I have to consider. You have many things on your plate from a financial perspective, new relationship, a family to establish, a job you want to

take care of, you would like to improve your situation. I think your testimony was clear about that and it is a factor that this court has to consider; and

- (b) there is the fact that you had to face this court martial. It has already had some deterrent effect on you and also on others. The court is satisfied that you will get a message and others will get the message and it can be used as a deterrent factor to be considered by the court.

[17] Now, concerning the fact that this court impose a sentence of incarceration to Leading Seaman Thies, first I have to say that it was well established by the Supreme Court of Canada decision in *Gladue* [1999] 1 SCR 688 and the Court Martial Appeal Court in its decision of *Baptista* 2006 CMAC 1 that incarceration should be imposed as a last resort.

[18] Here in this case, I considered the nature of the offences, which are criminal offences *per se*. Also I consider the circumstances they were committed, the applicable sentencing principles including the aggravating and the mitigating factors I have just mentioned, the case law for similar offences as reflecting the principle of parity on sentence and I conclude that there is other sanctions or combination of sanctions other than incarceration that would appear as an appropriate punishment in this case. In clear, I do not think that incarceration has to be imposed as a last resort in the circumstances.

[19] I would say that I would agree with defence counsel that in such circumstances a reprimand and a fine appears as a fit and an appropriate sanction. Then I would accept the suggestion made by defence counsel to impose a reprimand and a fine as suggested.

[20] I gave some consideration for the weapons prohibition order requested by the prosecutor. 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, particularly considering that the level of violence was not very high, was used against a good not a person, is something from my perspective should be considered as out of character, it is not something that you have done previously, and considering all those circumstances I don't find it as an appropriate thing to do.

[21] From my perspective this trial put a final end with the Canadian Forces for you. For sure, you still have some links with Veterans Affairs, but it is a totally different matter, it's a personal matter, but your link with the Canadian Forces, you are done basically. I hope you will be able to turn a page and get on with your life. You put a lot of effort in order to reorganize your own life and the one of your family and I have seen among all those things that your intent is to be an example for the step-daughter you got by getting married and probably you should take it as a lesson more than anything else. There is many ways to pass from my perspective an opinion, you may disapprove some actions and some things that others do which is something that you are allowed to express, but the way to express it has a limit and threatening people and trying to intimidate and impress them, I don't think that's the way to do it and you may use this

experience to teach others that to do different than you did. And from that perspective I wish you that you continue with your life well, even you are not with the Canadian Forces anymore, but you are still a Canadian citizen and I hope your health will get better and your life will get better. You made a decision for yourself by taking your release and I think it's because you know what the best was for you at that time. So I wish you the best of luck in that way.

FOR THESE REASONS, THE COURT:

[22] **SENTENCES** you to a reprimand and a fine to the amount of \$1,000. The fine is to be paid in monthly instalments of \$500 each commencing on 1 May 2014 and continuing for the following month.

[23] **CONSIDERS** that because of the circumstances of the commission of the offences by the offender, it is not in the interests of his safety and of the one any other person that a prohibition order be issued in accordance with section 147.1 of the *National Defence Act*.

Counsel:

Major D. Reeves, Canadian Military Prosecution Services
Counsel for Her Majesty the Queen

Lieutenant-Commander B. Walden, Directorate of Defence Counsel Services
Counsel for Leading Seaman Thies